

*India – Additional and Extra-Additional Duties  
on Imports from the United States*

(AB-2008-7 / DS360)

**APPELLANT SUBMISSION  
OF THE UNITED STATES OF AMERICA**

**August 8, 2008**

*India – Additional and Extra-Additional Duties  
on Imports from the United States*

(AB-2008-7 / DS360)

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) prohibits Members from levying “ordinary customs duties” or “other duties or charges of any kind imposed on or in connection with importation” in excess of the rates established in Members’ Schedule (bound rates) and Article II:1(a) prohibits Members from affording less favorable treatment to imports than provided for in their respective Schedules.

2. This dispute concerns two customs duties that India imposes in breach of these obligations: the additional customs duty (AD) on imports of alcoholic beverages and extra-additional customs duty (EAD) on imports of alcoholic beverages and other products.

3. India imposes the AD through various provisions of its Customs Act and Customs Tariff Act as well as Customs Notification (CN) 32/2003.<sup>1</sup> The AD applies to imports of alcoholic beverages in addition to and on top of India’s basic customs duty (BCD). The rate of AD is set out as a combination of *ad valorem* and specific rates, ranging from 20 to 150 for the *ad valorem* rates. India imposes the EAD through various provisions of its Customs Act and Customs Tariff Act as well as CN 19/2006.<sup>2</sup> The EAD applies to imports of alcoholic beverages and other products in addition to and on top of the AD and the BCD. The rate of EAD is four percent *ad valorem*.

4. In its WTO Schedule,<sup>3</sup> 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, through imposition of the AD and the EAD has imposed ordinary customs duties on imports of alcoholic beverages that result in ordinary customs duties

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<sup>1</sup> Customs Act, Section 12, Exhibit US-2; Customs Tariff Act, Section 3(1), (2), (7), Exhibit US-3A; Customs Notification 32/2003 (March 1, 2003), Exhibit US-6. After the Panel’s establishment, India issued a customs notification (CN 82/2007) on July 3, 2007, exempting alcoholic beverages from the rates of additional customs duty set forth in Customs Notification 32/2003. The Panel found that CN 82/2007 was not in the Panel’s terms of reference. Panel Report, para. 7.70. Before the Panel India emphasized its discretion to revoke the exemption at any time. *See* India Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 40.c.2-40.c.4; *see also* India First Written Submission, para. 27-28, 30 (emphasizing the Central Government’s “complete discretion” with respect to the AD). Before the Panel India also stated that it contemplates that “subsequent to the removal of the AD,” the Indian states will impose measures similar to the AD. India First Written Submission, para. 44; *see also* Government of India, Press Release: “Withdrawal of the Additional Duty of Customs (In Lieu of State Excise on Wines, Spirits and Liquors) on Wine, Spirits and Liquors,” Exhibit US-10.

<sup>2</sup> Customs Act, Section 12, Exhibit US-2; Customs Tariff Act, Section 3(5), (6), (7), Exhibit US-3A; Customs Notification 19/2006 (March 1, 2006), Exhibit US-7. After the Panel’s establishment India issued Customs Notification 102/2007 on September 14, 2007, which India characterizes as establishing a “credit mechanism [that] effectively addresses the issue of double taxation” with respect to the EAD. India Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 40.b.1; India First Written Submission, para. 17. The Panel found that CN 102/2007 was not in the Panel’s terms of reference. Panel Report, para. 7.99.

<sup>3</sup> 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.

in excess of on these imports as high as 550 percent. In its WTO Schedule, India also committed that ordinary customs duties would not exceed specified rates on other products and that it would not impose other duties or charges on imports of those products. India, however, through imposition of the AD and the EAD has imposed ordinary customs duties on these products (examples of which are shown in Exhibit US-1) in excess of its bound rates.

5. Because the AD and the EAD each result in ordinary customs duties in excess of India's bound rates they are each inconsistent with Article II:1(a) and (b) of the GATT 1994.

6. Despite the straight-forwardness of the U.S. claims, and India's rebuttal that the AD and the EAD are not inconsistent with Article II:1(a) and (b) because they constitute charges permitted under Article II:2(a), the Panel develops and applies an interpretation of these provisions that leads to a series of erroneous and unprecedented findings. In particular, despite the unambiguous language of Article II:1(b) prohibiting "ordinary customs duties" and "all other duties or charges of any kind imposed on or in connection with importation" in excess of those set out in Members' respective Schedules, the Panel reads Article II:1(b) to apply only to certain kinds of duties or charges imposed on or in connection with importation: those that "inherently discriminate against imports." The Panel's finding is based on the Panel's perception as to the "rationale" behind Article II:1 and II:2. The Panel thus replaces the plain text, negotiated and agreed by Members, with the Panel's own views on what the negotiators intended. Not only is this inconsistent with customary rules of interpretation of public international law, it is simply inaccurate and unfounded. The Panel's own subjective views of the purposes behind a provision cannot serve to override the language of that provision.

7. Although the Panel is unable to define the meaning of a duty that "inherently discriminates against imports," it finds that the duties and charges described in Article II:2 of the GATT 1994 do not "inherently discriminate against imports" and therefore that a necessary but insufficient element of establishing a *prima facie* case that a duty or charge falls within the scope of Article II:1(b) is establishing that the duty or charge falls outside the scope of Article II:2.

8. One of the duties or charges described in Article II:2 is a "charge equivalent to an internal tax imposed consistently with" Article III:2. In interpreting this provision, however, the Panel finds that a charge "equivalent" to an internal tax means one that serves the same function (in the sense of purpose) and that a charge equivalent to an internal tax that is *inconsistent* with Article III:2 would nonetheless be permitted under Article II:2(a) and therefore outside the scope of Article II:1(b). The Panel arrives at the latter finding by finding that a border charge equivalent to an internal tax – while not itself being an internal tax nor a measure described in the Ad Note to Article III:2 – is itself subject to Article III:2, even though Article III:2 on its face explicitly applies only to *internal taxes*. Continuing down this path, the Panel then finds that in the case of a border charge "equivalent" to an internal tax in function but that applies to imports at a higher rate (and thus still permitted under Article II:2(a)), it would be necessary for a complaining party to bring and establish an independent Article III:2 claim against the measure.

9. The Panel thus begins from a false premise and goes more and more astray, departing from the agreed text of the GATT 1994 in numerous ways. The Panel then compounds these legal errors in the manner in which it approached the facts. For example, the Panel did not require India to support any of its assertions that the AD or the EAD constitute charges equivalent to internal taxes imposed consistently with Article III:2. And the Panel accepts these unsupported assertions despite the fact that India conceded that in some cases the AD and the EAD may result in charges on imports in excess of those on like domestic products.

10. The errors in the Panel’s finding are numerous and raise serious systemic concerns about fundamental WTO obligations. In particular the Panel erred in finding that:

- (1) Article II:1(b) applies only to duties or charges that “inherently discriminate against imports”;
- (2) the duties and charges described in Article II:2 fall outside the scope of Article II:1(b);
- (3) establishing a *prima facie* case that a duty or charge falls within the scope of Article II:1(b) requires demonstrating that the duty or charge inherently discriminates against imports including by demonstrating that the duty or charge falls outside the scope of Article II:2;
- (4) a charge equivalent to an internal tax falls within the scope of Article II:2(a) regardless of whether the internal tax to which it is supposed to be “equivalent” is imposed consistently with Article III:2;
- (5) a border charge is subject to Article III:2;
- (6) to establish that a measure is not a charge equivalent to an internal tax “imposed consistently with [Article III:2]” the complaining party must bring an independent claim under Article III:2;
- (7) “equivalent” means serving the same function and does not relate to the amount or effect of the charge;
- (8) a responding party is not required to support its assertions that a measure falls within the scope of Article II:2(a) and can refuse to provide information requested by a panel;
- (9) the United States failed to establish that the AD on alcoholic beverages and the EAD fall outside the scope of Article II:2(a);
- (10) the United States is not challenging the Customs Act and the Custom Tariff Act

with respect to the AD on alcoholic beverages and the EAD;

- (11) the United States failed to establish that the AD on alcoholic beverages is inconsistent with Article II:1(a) and (b); and
- (12) the United States failed to establish that the EAD is inconsistent with Article II:1(a) and (b).

11. In reaching these erroneous findings the Panel also failed to undertake an objective assessment of the matter in accordance with its obligations under Article 11 of the DSU, including by:

- (1) not requiring India to support its assertions that AD offsets or counterbalances, or is “equivalent” to, excise duties imposed internally by the various India states on domestic alcoholic beverages and that the EAD offsets or counterbalances, or is “equivalent” to, VATs, sales taxes and other local taxes collected or imposed by the various Indian states;
- (2) making inferences that are not supported by evidence before the Panel about the existence and operation of Indian state-level excise taxes and the AD on alcoholic beverages;
- (3) disregarding evidence before the Panel that Indian state-level VATs, sales taxes, and other local taxes apply to imported products; and
- (4) making inferences that are not supported by evidence before the Panel about the existence and operation of Indian state-level VATs, sales taxes and other local taxes and the EAD.

12. In light of these errors and the Panel’s failure to undertake an objective assessment of the matter, we respectfully request that the Appellate Body reverse the Panel’s findings, apply the correct interpretations of Articles II:1, II:2 and III:2, and find that:

- (1) the AD is inconsistent with Article II:1(b) and II:1(a) and not justified under Article II:2(a); and
- (2) the EAD is inconsistent with Article II:1(b) and II:1(a) and not justified under Article II:2(a).

## II. ARGUMENT

### A. The Panel Erred in Its Interpretation of Articles II:1(b), II:2 and III:2 of the GATT 1994

**1. The Panel Erred in Finding that Article II:1(b) Applies Only to Duties or Charges that “Inherently Discriminate Against Imports”**

13. The Panel found that Article II:1(b) only applies to duties or charges that “inherently discriminate against imports”<sup>4</sup> and, therefore, that a complaining party must establish that the duty or charge “inherently discriminates against imports” to establish that the duty or charge falls within the scope of Article II:1(b).<sup>5</sup> The Panel’s finding is in error.<sup>6</sup>

14. The Panel’s finding is in error foremost because it fails to adhere to the relevant rule of interpretation of public international law reflected in Article 31 of the Vienna Convention, which directs a treaty interpreter to interpret the terms of a treaty in accordance with their ordinary meaning in their context and in light of the treaty’s object and purpose.<sup>7</sup> Article II:1(b) provides:

(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.<sup>8</sup>

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<sup>4</sup> Panel Report, paras. 7.141, 7.156; *see also* 7.128-7.164.

<sup>5</sup> Panel Report, para. 7.156. The Panel’s finding applies both to the first and second sentence of Article II:1(b), that is, to constitute an “ordinary customs duty” or an “other duty or charge of any kind” within the meaning of Article II:1(b), the duty or charge must “inherently discriminate against imports.” Panel Report, para. 7.156; *see also* paras. 7.297-7.298, 7.392-7.393 (finding that because the United States had not shown that the AD and the EAD inherently discriminates against imports, the United States could not show that they were an ordinary customs duty or other duty or charge within the meaning of Article II:1(b)).

<sup>6</sup> This Section addresses the Panel’s finding that Article II:1(b) applies only to duties or charges that “inherently discriminate against imports.” Section II.A.3 addresses the Panel’s finding that establishing a *prima facie* case under Article II:1(b) requires the United States to establish that the AD and the EAD inherently discriminate against imports.

<sup>7</sup> *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.”) (hereinafter “relevant rule of interpretation”).

<sup>8</sup> GATT 1994. The Understanding on the Interpretation of Article II:1(b) of the GATT 1994, which is an integral part of the GATT 1994 (*see* GATT 1994, para. 1(c)(i)), 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. *See* Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade, 1994, paras. 1-2.



As evident from the text of Article II:1(b), it concerns “ordinary customs duties” and “all other duties or charges of any kind” imposed on or in connection with importation and prohibits both in excess of those set forth in a Member’s Schedule.

15. Although the Panel acknowledges that based on its text, Article II:1(b) applies to “all” duties or charges “of any kind” imposed on or in connection with importation, the Panel nevertheless finds that Article II:1(b) in fact applies only to ordinary customs duties and other duties or charges of a certain kind, specifically those that inherently discriminate against imports.<sup>9</sup> The Panel’s finding is in error.

16. First, the Panel ignores the words “all” and “of any kind” in the text of Article II:1(b). As noted, Article II:1(b) refers to “ordinary customs duties” (first sentence) and “*all* other duties or charges of *any kind*” imposed on or in connection with importation (second sentence). Because the first sentence of Article II:1(b) refers to “ordinary customs duties,” the words “all other” in the second sentence indicates that it concerns a residual category of duties, encompassing “all” duties or charges “of any kind” other than “ordinary customs duties.” This means that a duty or charge imposed on or in connection with importation is either an ordinary customs duty or “other duties or charges of any kind.” There is no third category: Article II:1(b) applies to *all* duties or charges of *any kind* imposed on or in connection with importation and prohibits all such duties or charges in excess of those set out in the relevant Member’s Schedule.<sup>10</sup>

17. Second, the Panel reads a limitation into Article II:1(b) that does not appear in its text. Nothing in the text of Article II:1(b) limits its scope to duties or charges of the kind that “inherently discriminate against imports,” and in turn nothing in the text of Article II:1(b) indicates that establishing that a duty or charge falls within the scope of Article II:1(b) requires establishing that the duty or charge “inherently discriminates against imports.” The Panel’s finding thus reads words, and in turn a limitation, into the text of Article II:1(b) that is not there, contrary to the relevant rule of treaty interpretation.<sup>11</sup>

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<sup>9</sup> Panel Report, para. 7.141; *see also* paras. 7.156, 7.159.

<sup>10</sup> As explained below, the fact that the duties and charges described in Article II:2 are permitted stems from the fact that Article II:2 expressly states that they are; not because Article II:1(b) excludes them from its scope.

<sup>11</sup> As the Appellate Body has indicated on several occasions, the relevant rule of interpretation neither requires nor condones the imputation into the agreement of words that are not there. Appellate Body Report, *India – Patents*, para. 45 (“The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the interpretation into a treaty of concepts that were not intended.”); *see also* Appellate Body Report, *United States – Line Pipe*, para. 250; Appellate Body Report, *India – BOPs (QRs)*, para. 94; Appellate Body Report, *EC – Hormones*, para. 181; Appellate Body Report, *EC – Bed Linen*, para. 83; Appellate Body Report, *EC – Computer Equipment*, para. 83; Appellate Body Report, *EC – Poultry*, para. 146.

18. Third, the Panel incorrectly interprets the word “other” in the text of Article II:1(b). In particular, the Panel finds that because, in its view, ordinary customs duties includes only those duties that “inherently discriminate against imports,” the phrase “other duties or charges of any kind” in the second sentence of Article II:1(b) must also only concern those duties that “inherently discriminate against imports.” The word “other” in the second sentence of Article II:1(b), however, refers to all duties or charges of any kind that are not ordinary customs duties. Therefore, even if an ordinary customs duty were defined in relation to whether it “inherently discriminates against imports,” the word “other” coupled with the words “all” and “of any kind” in the phrase “all other duties or charges of any kind” would indicate that the second sentence covers all duties or charges of any kind other than ordinary customs duties, even those duties or charges that do not “inherently discriminate against imports.” In this regard, the Panel’s citation of the “well-established” canon of construction *ejusdem generis* is misplaced.<sup>12</sup> Contrary to the Panel’s suggestion, nothing in the text of Article II:1(b) indicates that the first and second sentences concern the duties and charges “of the same kind.” In fact, the text of the second sentence of Article II:1(b) indicates precisely the opposite: it states that it concerns duties or charges “other” than ordinary customs duties, and in that regard, it concerns “all” duties or charges “of any kind” other than ordinary customs duties, not merely those that are “of the same kind” as ordinary customs duties.

19. Because the Panel cannot find support in the text of Article II:1(b) for its finding that Article II:1(b) applies only to duties or charges that inherently discriminate against imports, the Panel turns to its view of the “readily apparent rationale” for Article II:1(b).<sup>13</sup> The Panel’s approach has numerous flaws. *First*, the customary rules of interpretation states that the terms of a treaty shall be interpreted in accordance with their ordinary meaning in their context and in light of the treaty’s object and purpose. The customary rules of interpretation do not countenance a treaty interpreter applying the “readily apparent rationale” for a provision (as divined by a panel) in place of the provision’s terms. This, however, is precisely what the Panel in this dispute did by using its view of the “readily apparent rationale” for Article II:1(b) to override the ordinary meaning of its text.

20. *Second*, the Panel suggests that its finding is based on reading the phrase “all other duties or charges of any kind” in its immediate context – namely the first sentence to Article II:1(b). The Panel’s analysis is mistaken: while the immediate context of the second sentence of Article II:1(b) is the first sentence of Article II:1(b), that context does not support the Panel’s finding. As context for the second sentence, the first sentence clarifies that the word “other” refers to duties or charges *other* than ordinary customs duties. Moreover, while the Panel says that ordinary customs duties are “typically applied so as to afford protection to domestic

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<sup>12</sup> Panel Report, para. 7.141.

<sup>13</sup> Panel Report, para. 7.131; *see also* 7.137-7.140.

production,”<sup>14</sup> in fact the first sentence does not indicate the rationale for prohibiting ordinary customs duties in excess of those set out in a Member’s Schedule. In any event, WTO Members may have other purposes for imposing tariffs, including for some Members revenue-raising purposes, and it is clear that Members are permitted to impose tariffs on products for which there is no domestic production to protect.<sup>15</sup>

21. In addition, in its musings on the “rationale” behind Article II:1(b), the Panel fails to grasp the role of tariff negotiations in the WTO (and in its predecessor, the GATT 1947). The preamble to the WTO Agreement provides that “entering into reciprocal and mutually advantageous arrangements directed to the substantive reduction of tariffs” is a means of “contributing to [the] objectives” identified earlier in the preamble.<sup>16</sup> Moreover, Article XXVIIIbis of the GATT 1994 makes clear: “The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports ... are of great importance to the expansion of international trade.”<sup>17</sup> Tariff negotiations on a mutually agreed basis are thus themselves a goal of the GATT. The results of such negotiations are embodied in Schedules of Concessions, as contemplated by the first sentence of Article II:1(b). As the Panel said, the second sentence of Article II:1(b) serves an anti-circumvention function; however, it serves to prevent circumvention of the results of tariff negotiations, regardless of whether those have been conducted to reduce discrimination or to contribute to the other objectives of the WTO Agreement. In that context, limiting the scope of the second sentence of Article II:1(b) to those other duties and charges that are inherently discriminatory makes no sense: If Article II:1(b) applies only to those duties or charges that “inherently discriminate against imports,” then Members would be free to impose other duties or charges (*i.e.*, those that do not “inherently discriminate against imports”) in excess of the negotiated rates set out and bound in their respective Schedules, thus circumventing the goal of “substantially reducing tariffs” and the outcomes of the negotiations conducted under Article XXVIIIbis.

22. The Panel’s finding is also in error because it leads to absurd results. In particular, the Panel found that Article II:1(b) applies only to duties or charges imposed on or in connection

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<sup>14</sup> Panel Report, para. 7.129.

<sup>15</sup> The Panel is also mistaken that if Article II:1(b) applied to all duties or charges, including those described in Article II:2, this would prohibit a Member from imposing any duty or charge described in Article II:2 if the Member had not set out that duty or charge in its Schedule. Panel Report, para. 7.138. As also elaborated below, the duties and charges described in Article II:2 are permitted, not because they fall outside the scope of Article II:1(b), but because Article II:2 expressly permits them. *See* Section II.A.2.b.

<sup>16</sup> Marrakesh Agreement Establishing the World Trade Organization, preamble; *see also* GATT 1994, preamble (containing substantially the same language as the Marrakesh Agreement)

<sup>17</sup> GATT 1994, Article XXVIIIbis:1.

with importation that “*inherently* discriminate against imports”; implicit in this finding is the Panel’s view that duties or charges that discriminate against imports, but just not *inherently* so, fall outside the scope of Article II:1(b). This leads to the absurd result that a duty or charge that *discriminates* against imports and that is imposed on importation in excess of the duties or charges set out in a Member’s Schedule would not breach Article II:1(b). That this is the consequence of the Panel’s finding is made clear when considered together with its finding that a border charge equivalent to an internal tax imposed *inconsistently* with Article III:2 is not subject to Article II:1(b).<sup>18</sup> Although the Panel attempts to rescue itself from this outcome by suggesting that Article III:2 would apply in such a case, as elaborated below, such a charge would in fact not be subject to Article III:2, because Article III:2 concerns internal taxes not charges imposed on the importation of a product. Therefore, under the Panel’s findings, the charge would appear to go undisciplined under the WTO Agreement.

23. The Panel’s finding that a duty or charge must “*inherently* discriminate against imports” to fall within the scope of Article II:1(b) also creates considerable uncertainty as to what must be established to prove that a duty or charge breaches Article II:1(b). While the Panel faults the United States for not developing a “general test” for determining whether a duty or charge “*inherently* discriminates against imports,” the Panel itself does not offer one. Instead, the Panel proposes that the complaining party could seek to establish that the duty or charge *inherently* discriminates against imports by establishing that it falls outside the scope of Article II:2, but continues to find that that alone would be insufficient to establish that the duty or charge is *inherently* discriminatory,<sup>19</sup> as would demonstrating that the duty or charge in fact (as opposed to “*inherently*”) discriminates against imports, as noted above. The Panel offers no indication of what would be sufficient, leaving Members to guess about what may be sufficient to demonstrate that a duty or charge falls within the scope of Article II:1(b). This uncertainty has considerable implications not only in the context of dispute settlement but more broadly in terms of the value of Members’ tariff commitments. If Article II:1(b) only applies to duties or charges that “*inherently* discriminate against imports” – the meaning of which remains to be determined – what exactly did Members agreed to bind in their Schedules?

24. An additional concern with the Panel’s approach arises from the fact that the MFN provision of GATT Article I:1 uses words very similar to that in Article II:1(b): With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation ...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” The Panel’s approach would seem to imply that the MFN obligation does not in fact apply literally to “customs duties and charges *of any kind*.” While Article I:1 is not

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<sup>18</sup> See Panel Report, para. 7.209.

<sup>19</sup> Panel Report, paras. 7.159-7.161.

before the Appellate Body in this dispute, the implications of the Panel’s reasoning are troubling.

25. In conclusion, it is noteworthy that the Panel cites no prior WTO panel or Appellate Body reports, nor any panel reports from the GATT 1947 system, in support of its finding that Article II:1(b) applies only to duties that “inherently discriminate against imports,” and that to establish that a duty or charge falls within the scope of Article II:1(b) the complaining party must establish that the duty or charge at issue “inherently discriminates against imports.” This is not surprising as there are none that support the Panel’s very surprising interpretation of Article II:1(b). It is particularly notable that, despite the over fifty years in which Article II:1 has been in force and the number of panel and Appellate Body reports<sup>20</sup> analyzing claims that a measure is inconsistent with Article II:1, no panel or Appellate Body report has ever found that the scope of Article II:1 or Article II:1(b) is limited to duties or charges of the kind that “inherently discriminate against imports” or that establishing a breach of Article II:1(b) requires the complaining party to prove that the measure “inherently discriminates against imports.”

**2. The Panel Erred in Finding that the Duties and Charges Described in Article II:2 Fall Outside the Scope of Article II:1(b)**

26. In reaching its erroneous finding that Article II:1(b) applies only to duties or charges of a certain kind (*i.e.*, those that “inherently discriminate against imports”), the Panel finds that the duties and charges described in Article II:2 fall outside the scope of Article II:1(b).<sup>21</sup> This finding is also in error. In particular, as elaborated below, the Panel wrongly focuses on its view of the “readily apparent rationale” for Article II:1(b), ignoring the text of both Article II:1(b) and II:2 and the relationship between the two provisions.

*a. The Phrase “All Other Duties or Charges of Any Kind” in Article II:1(b) Includes the Duties and Charges Described in Article II:2*

27. As elaborated above, the text of Article II:1(b) prohibits “ordinary customs duties” and “*all other duties or charges of any kind*” imposed on or in connection with importation. Article II:2 provides:

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<sup>20</sup> GATT Panel, *United States – Sugar*; Panel Report, *Argentina – Textiles*; Panel Report, *Canada – Dairy*; Panel Report, *Chile – Price Bands System*; Panel Report (Article 21.5), *Chile – Price Bands System*; Panel Report, *Dominican Republic – Cigarettes*; Panel Report (Second Article 21.5), *EC – Bananas (Complaint by Ecuador)*; Panel Report, *EC – Chicken Cuts*; Panel Report *EC – Computer Equipment*; Panel Report, *Korea – Beef*; Panel Report, *United States – Certain EC Products*; Panel Report, *US – Customs Bonding (India)*; GATT Panel, *Canada – Alcoholic Beverages*; GATT Panel, *EEC – Minimum Import Prices*; GATT Panel, *EEC – Parts and Components*; GATT Panel, *Norway – Trondheim*; Appellate Body Report, *Argentina – Textiles*; Appellate Body Report, *Canada – Dairy*; Appellate Body Report, *Chile – Price Bands System*; Appellate Body Report (Article 21.5), *Chile – Price Bands System*; Appellate Body Report, *EC – Chicken Cuts*; Appellate Body Report, *EC – Computer Equipment*; Appellate Body Report, *US – Certain EC Products*.

<sup>21</sup> Panel Report, 7.141.

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

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

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

(c) fees or other charges commensurate with the cost of services rendered.<sup>22</sup>

Accordingly, by their terms, both Article II:1(b) and II:2 refer to “duties” or “charges” “imposed on importation.” Article II:1(b) refers to “all” duties or charges “of any kind” imposed on or in connection with importation; whereas Article II:2 refers to a Member’s “imposing ... on the importation” of any product certain kinds of “dut[ies]” or “charges” (e.g., charges equivalent to an internal tax imposed consistently with Article III:2). Therefore, the duties or charges described in Article II:2(a) as certain kinds of duties or charges imposed on importation, fall within the meaning of the phrase “all other duties or charges of any kind imposed on or in connection with importation” and thus within the scope of Article II:1(b). As discussed above, Article II:1(b) is all-inclusive, comprising ordinary customs duties and the residual category of *all* other duties or charge of *any kind* imposed on or in connection with importation.

*b. Article II:2 is An Exception to Article II:1(b) (Not a Limitation on the Scope of Article II:1(b))*<sup>23</sup>

28. The texts of Article II:1(b) and Article II:2 also address the relationship between the two provisions. Article II:1(b) prohibits all duties or charges of any kind imposed on or in connection with importation; it does not indicate that any kinds of duties or charges are excluded from its scope. Article II:2 provides that “[n]othing in this Article shall prevent any contracting party from imposing” on the importation of a product the duties or charges specified in subparagraphs (a) through (c). Thus, while Article II:1(b) prohibits all duties or charges of any kind imposed on

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<sup>22</sup> Article II:2 of the GATT 1994 (emphasis added).

<sup>23</sup> As explained below and in the U.S. Answer to Question 44, although Article II:2 is an exception to the prohibition on duties or charges in excess of those set out in a Member’s Schedule, it is not an affirmative defense under which the responding party bears the burden of proof. *See infra* Sections II.A.2.b and II.A.8; U.S. Answer to Panel Question 44, paras. 6-11; *see also* Appellate Body Report, *EC – Hormones*, paras. 270-272 (explaining that merely maintaining that a treaty provision is an exception does not, on its own, allocate the burden of proof to the respondent).

or in connection with importation, Article II:2 provides that certain duties shall nonetheless be permitted. In other words, Article II:1(b) establishes a rule, and Article II:2 establishes an exception to that rule.<sup>24</sup> This relationship is important because, as an exception, Article II:2 is not itself a limitation on the scope of Article II:1(b). The scope of Article II:1(b) remains all-inclusive, covering all duties or charges of any kind. Article II:2 instead permits something that Article II:1(b) would otherwise prohibit, specifically certain duties or charges imposed on importation that are not set out in a Member's Schedule.

29. In considering Article II:2(c) of the GATT, the GATT panel in *United States – Customs User Fee* explained:

[Article II:2(c)'s] function is to permit the imposition of certain non-tariff border charges on products which are subject to a bound tariff. Paragraph 1(b) of Article II establishes a general ceiling on the charges that can be levied on a product whose tariff is bound; it requires that the product be exempt from all tariffs in excess of the bound rate, and from all other charges in excess of those (i) in force on the date of the tariff concession, or (ii) directly and mandatorily required by legislation in force on that date. Article II:2 permits governments to impose, above this ceiling, three types of non-tariff charges, of which the third, permitted by sub-paragraph (c), is “fees or other charges commensurate with the cost of services rendered.”<sup>25</sup>

In *EEC – Minimum Import Prices*, a GATT panel considered certain interest charges and costs imposed on imports in connection with the lodging of a security associated with the EEC's minimum import price regime for tomato concentrates and other specified products. The GATT panel found that (i) the charges and costs imposed on imports of tomato concentrates exceeded the bound rate and therefore were inconsistent with Article II:1(b) and (ii) the charges and costs imposed on other specified imports were not inconsistent with Article II:1(b) because, although they exceeded bound rates, they were commensurate with the cost of services rendered within the meaning of Article II:2 of the GATT 1947.<sup>26</sup> Consistent with the relationship between Article II:1(b) and II:2 elaborated above, the GATT panels in *Customs User Fee* and *Minimum Import Prices* both considered Article II:1(b) to cover all duties and charges imposed on or in connection with importation but that some of these duties or charges may be imposed in excess of bound rates because Article II:2 so permits.

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<sup>24</sup> At least outside this dispute, India appears to agree that Article II:2 is an exception to Article II:1(b). See Panel Report, *US – Customs Bonding (India)*, Annex B-2, para. 43 (India's Executive Summary of its Second Written Submission).

<sup>25</sup> GATT Panel Report, *United States – Customs User Fee*, para. 70.

<sup>26</sup> GATT Panel Report, *EEC – Minimum Import Prices*, paras. 4.6, 4.15.

30. The relationship between Articles II:1(b) and II:2 is analogous to the relationship between Article 3.1(a) and the fifth sentence of footnote 59 of the SCM Agreement, an issue the Appellate Body addressed in *United States – FSC*. Article 3.1(a) prohibits “subsidies contingent ... upon export performance, including those illustrated in Annex I”; Annex I sets forth an illustrative list of export subsidies, including under item (e), the “full or partial exemption remission...of direct taxes”; and the fifth sentence of footnote 59 provides that “[p]aragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of other Members.”<sup>27</sup> In examining this relationship, the Appellate Body addressed whether the fifth sentence of footnote 59 determined the proper scope of the obligations under Article 3.1(a) of the SCM Agreement, or whether it provided an exception for a measure that was otherwise an export contingent subsidy. The Appellate Body found:

[W]e do not see the fifth sentence of footnote 59 as altering the scope of the definition of a “subsidy” in Article 1.1 of the SCM Agreement, we do not see it as altering either the scope of item (e) of the Illustrative List or the meaning to be given to the term “subsidies contingent ... upon export performance” in Article 3.1(a) of the SCM Agreement. Thus, measures falling within the scope of this sentence of footnote 59 may continue to be export subsidies, much as they may continue to be subsidies under Article 1.1 of the SCM Agreement.

The import of the fifth sentence of footnote 59 is that Members are entitled to “take”, or “adopt” measures to avoid double taxation of foreign-source income, notwithstanding that they may be, in principle, export subsidies within the meaning of Article 3.1(a). The fifth sentence of footnote 59, therefore, constitutes an exception to the legal regime applicable to export subsidies under Article 3.1(a) by explicitly providing that when a measure is taken to avoid the double taxation of foreign-source income, a Member is entitled to adopt it.<sup>28</sup>

31. Similarly, in *EC – GSP* the Appellate Body examined the relationship between Article I:1 and the Enabling Clause.<sup>29</sup> The Appellate Body rejected the Panel’s finding that Article I:1 was

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<sup>27</sup> Agreement on Subsidies and Countervailing Measures, Art. 31.(a) and Annex 1, footnote 59.

<sup>28</sup> Appellate Body Report (Article 21.5), *United States – FSC*, paras.131-132; see also Appellate Body Report, *US – FSC*, para. 93. In the *FSC* dispute, the Appellate Body considered footnote 59 an affirmative defense. As noted above, we do not consider Article II:2 to be an affirmative defense in the sense that the responding party bears the burden of proof with respect to the provision. This is not to suggest that Article II:2 is not an exception to Article II:1(b), or as the Panel finds that Article II:2 may not be invoked to justify a breach of Article II:1(b). Instead, the issue goes to which party bears the burden of proof. As the Appellate Body explained in the *EC – Hormones* report, merely maintaining that a treaty provision is an exception does not, on its own, allocate the burden of proof to the responding party. Appellate Body Report, *EC – Hormones*, paras. 270-272.

<sup>29</sup> Appellate Body Report, *EC – GSP*, paras. 89-99.



inapplicable to measures falling within the scope of the Enabling Clause, finding instead that while Article I:1 applied to measures falling within the scope of the Enabling Clause, measures falling within the Enabling Clause were not inconsistent with Article I:1 because the Enabling Clause constitutes an exception to that provision.<sup>30</sup>

*c. The Panel Incorrectly Found that the Duties and Charges Described in Article II:2 Fall Outside the Scope of Article II:1(b)*

32. The Panel, however, ignores the text of Articles II:1(b) and II:2 and the relationship between the two provisions and finds that the duties and charges described in Article II:2 fall outside the scope of Article II:1(b). To arrive at this finding, rather than rely on the relevant customary rules of treaty interpretation, the Panel focuses on whether it could perceive a “readily apparent rationale” for reading the phrase “all duties or charges of any kind” to include the duties or charges described in Article II:2.<sup>31</sup> On account of its failure to perceive a readily apparent rationale, the Panel found that notwithstanding the text of Article II:1(b), the duties and charges described in Article II:2 are not duties or charges within the meaning of the phrase “all other duties or charges of any kind” and fall outside the scope of Article II:1(b).<sup>32</sup> The Panel’s failure to find a rationale is based, in part,<sup>33</sup> on its false assumption that if the phrase “all other duties or charges of any kind” captures the duties and charges described in Article II:2 this would prohibit a Member from imposing any duty or charge described in Article II:2 if the Member had not set out that duty or charge in its Schedule.<sup>34</sup> This of course would not be the case, and the Panel’s assumption otherwise only demonstrates its fundamental misconception of the relationship between Article II:1(b) and Article II:2. As explained above, the duties or charges described in Article II:2 fall within the meaning of the phrase “all other duties or charges of any kind” and thus within the scope of Article II:1(b), yet a Member is permitted to impose them at any time, despite their not being set out in the Member’s Schedule, because Article II:2 expressly states that the Member is permitted to do so.

33. In addition to being inconsistent with the text of Article II:1(b) and Article II:2, the Panel’s finding also risks rendering Article II:2 redundant. If, as the Panel contends, the duties and charges described in Article II:2 do not fall within the scope of Article II:1(b) and, thus,

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<sup>30</sup> Appellate Body Report, *EC – GSP*, paras. 90, 99.

<sup>31</sup> Panel Report, paras. 7.137-7.140.

<sup>32</sup> Panel Report, paras. 7.131-7.141.

<sup>33</sup> The Panel’s failure is also based on its erroneous finding that Article II:1(b) applies only to duties or charges that “inherently discriminate against imports” and that the duties and charges described in Article II:2 do not inherently discriminate against imports. As elaborated above, there is no basis for the Panel’s finding that Article II:1(b) applies only to duties or charges that “inherently discriminate against imports”.

<sup>34</sup> Panel Report, para. 7.138.

Article II:1(b) does not prohibit them, there would be no need for the drafters to have expressly permitted them under Article II:2. Presumably recognizing this itself, the Panel offers that Article II:2 serves as “clarification” or “reassurance” of something already apparent from the text of Article II:1(b),<sup>35</sup> implicitly conceding that it was not necessary for drafters to have included Article II:2. As the Appellate Body has stated, however, the terms of a treaty should not ordinarily be read in a way that renders its terms redundant or *inutile*.<sup>36</sup> In considering Article II:2 as merely a reassurance that Members may impose the duties or charges described in Article II:2 since those duties are not in the first instance covered by Article II:1(b), the Panel renders Article II:2 redundant.

34. In support of its flawed analysis, the Panel cites a 1955 Working Party Report, a 1980 GATT Council Decision, and the Appellate Body report in *Chile – PBS*.<sup>37</sup> None of these documents support the Panel’s finding.

35. Starting with the Working Party Report, it is unclear why the Panel thinks this supports its finding that the duties and charges described in Article II:2 fall outside the scope of Article II:1(b), as the passage the Panel quotes states that “the language of this sentence [second sentence of Article II:1(b) and (c)] is all-inclusive for it speaks of ‘...all other duties or charges of any kind imposed on or in connection with importation.’” Moreover, read in context, the passage suggests that, because of the second sentence’s “all-inclusive” nature, an amendment to clarify that sentence covers international transfers for payment of imports may not be necessary. However, to “remove any possibility of misunderstanding,” the Working Party recommended amending Article II:1(b) and (c) to read “all other duties or charges of any kind imposed on or in connection with importation, including the international transfers for payment of imports, in excess...”<sup>38</sup> Contrary to the Panel’s interpretation of it, the passage from the Working Party indicates that the reference in Article II:1(b) to “all other duties or charges of any kind” is all-inclusive such that clarifying that it includes any particular kind of duty or charge is unnecessary; the Working Party recommendation would have confirmed that reference to “all other duties or charges” already *includes* international transfers on payment of imports.

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<sup>35</sup> Panel Report, para. 7.148.

<sup>36</sup> Appellate Body Report, *US – Section 211*, para. 338 (citing *Gasoline*); Appellate Body Report, *US – Gasoline*, p. 23 (“One of the corollaries of the ‘general rule of interpretation’ in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”)

<sup>37</sup> Panel Report, paras. 7.143-7.147.

<sup>38</sup> GATT document L/329, adopted on 26 February 1955, BISD 3S/205, 209, para. 7 & Annex I, para. C. Although the Contracting Parties adopted the Working Party Report, they did so with the understanding that they would not be obligated to vote in favor of the amendment when the time came. See Summary of the Record of the Thirty-Sixth Meeting of the Contracting Parties Held on 26 February 1955, SR.9/36 (March 4, 1955), p. 4. The recommended amendments to Article II were not ultimately adopted.

36. While, as the Panel notes, this passage also states that “special charges” set out in Article II:2 “do not fall under paragraph 1,” this statement does not indicate why the “special charges” set out in Article II:2 do not fall under paragraph 1. The Panel assumes it is because the phrase “all other duties or charges of any kind” in Article II:1(b) does not include the duties and charges described in Article II:2. However, the Working Party’s statement could equally mean that the “special charges” do not fall under paragraph 1 because contracting parties are not prohibited from imposing them despite the fact that such charges are not set out in their respective Schedules, which would be consistent with the proper interpretation of Articles II:1(b) and II:2 elaborated above. It should also be noted that the Working Party’s focus was on whether contracting parties were permitted to impose international transfers for payment of imports in addition to or in excess of those set out in their respective Schedules.<sup>39</sup> Accordingly, it would be more accurate to the report’s reference to the charges described in Article II:2 not falling under Article II:1(b) as simply meaning that such charges are not prohibited.

37. Similarly, the 1980 GATT Council Decision does not support the Panel’s finding. The passage quoted by the Panel concerns “such ‘duties or charges’” that needed to be “bound” for purposes of Article II:1(b) since the question presented was which “other duties or charges” were “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.” In that sense, the 1980 Council Decision addresses the same issue as the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*. Pursuant to paragraph 1 of the Understanding, “the nature and level of any ‘other duties or charges’ levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply.” However, the Understanding is not to be read as requiring the recording in a Member’s Schedule of the other duties or charges described in GATT Article II:2 since those duties or charges will vary over time and would not be amenable to scheduling. This is one of the main values of Article II:2. Again, this is similar to the cited paragraph of the 1980 Council Decision when it provides that “such ‘other duties or charges’” do not concern the duties or charges described in paragraphs (a) through (c) of GATT Article II:2.

A similar question arises with respect to the date of application to each concession for the purpose of Article II:1(b) of the General Agreement. It has been agreed that the date, as of which “other duties or charges” on importation are bound, applicable to any concession in a consolidated schedule should be, for the purposes of Article II, the date of the instrument by which the concession on any particular item was first incorporated into the General Agreement (cf. BISD 7S/115-116). In order to draw full advantage of the loose-leaf system by making it as transparent as possible as to the status of all concessions, I propose that the instrument by which the concession was first incorporated into a GATT Schedule

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<sup>39</sup> GATT document L/329, adopted on 24 February 1955, BISD 3S/205, 209, para. 7.

be indicated in a special column (column 6 of the proposed format in the annex to document L/4821/Add.1) of the loose-leaf schedules. I wish to point out in this connexion that *such* “other duties or charges” are in principle only those that discriminate against imports. As can be seen from Article II:2 of the General Agreement, *such* “other duties or charges” concern neither charges equivalent to internal taxes, nor anti-dumping or countervailing duties, nor fees or other charges commensurate with the cost of services rendered.<sup>40</sup>

The cited paragraph of the 1980 Council Decision, in referring to “such” other duties or charges, thus is referring to a particular subset of other duties or charges – those that were limited to the amount contracting parties had “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” and that therefore, for the sake of transparency, should be scheduled. By contrast, because GATT Article II:2 permits the other duties or charges described in paragraphs (a) through (c) of GATT Article II:2 to be imposed “at any time,” Members can impose them without including them in their GATT schedules. Accordingly, it would be inaccurate to read the cited paragraph of the Council Decision as the Panel does as pronouncing that the duties or charges described in paragraph (a) through (c) of GATT Article II:2 are not “other duties or charges.”

38. The Panel’s citation to a passage from the Appellate Body report in *Chile – PBS* also does not support the Panel’s finding that the duties and charges described in Article II:2 fall outside the scope of Article II:1(b). That passage concerns the correct interpretation of the words “ordinary customs duty” in Article 4.2 of the Agreement on Agriculture and the question of whether the form a duty takes (whether *ad valorem* or specific) is a sufficient basis on which to consider the duty an “ordinary customs duty.”<sup>41</sup> The Appellate Body answers the question in the negative and then notes in the quoted passage that the duties or charges described in Article II:2 may also take the form of an *ad valorem* or specific duty yet “do not qualify as either ‘ordinary customs duties’ or ‘other duties or charges.’”<sup>42</sup> While noting that the duties or charges described in Article II:2 are not ordinary customs duties despite taking the same form as ordinary customs duties appears relevant to the question of whether the form of a duty takes is an insufficient basis on which to consider it an “ordinary customs duty,” noting that the duties or charges described in Article II:2 are not “other duties or charges” appears irrelevant to that question. Thus, the Appellate Body’s reference to “other duties or charges” appears to have been made only in passing and, as the Panel acknowledges, one the Appellate Body made without any explanation. It was also not made in connection with an examination of either Article II:1(b) or II:2 and, in

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<sup>40</sup> C/107/Rev.1, adopted on 26 March 1980, BISD 27S/22, 24, para. 9 (underlining in original; italics added).

<sup>41</sup> Appellate Body Report, *Chile – Price Bands System*, paras. 269-278.

<sup>42</sup> *Id.*, para. 276.

particular, was not made in the context of examining the particular language common to the two provisions. It therefore cannot reasonably be read as an Appellate Body interpretation of the scope of either provision.

**3. The Panel Erred in Finding that Establishing a *Prima Facie* Case that a Duty or Charge Falls within the Scope of Article II:1(b) Requires Demonstrating that the Duty or Charge Inherently Discriminates Against Imports, Including By Demonstrating that the Duty or Charge Falls Outside the Scope of Article II:2**

39. Building on its erroneous finding that Article II:1(b) applies only to duties or charges that “inherently discriminate against imports” and that the duties and charges described in Article II:2 fall outside the scope of Article II:1(b), the Panel finds that in order to establish a *prima facie* case that the AD and the EAD are inconsistent with Article II:1(b) the United States must establish that the AD and the EAD “inherently discriminate against imports,” including by demonstrating that the AD and the EAD fall outside the scope of Article II:2.<sup>43</sup> In particular, the Panel finds that “if the United States as the complaining party cannot establish that a charge which meets the elements of its definition of ‘ordinary customs duties’ falls outside the scope of Article II:2(a), it cannot successfully establish that the charge is in the nature of an ordinary customs duty (or an ‘other duty or charge’ imposed on the importation of a good),” adding that even if the United States demonstrates this, it would need to “raise a presumption” that the charge in question is not some other charge (whether or not identified in Article II:2) that does not inherently discriminate against imports.<sup>44</sup> The Panel’s finding is in error.

40. As detailed above, the scope of Article II:1(b) is not limited to duties or charges that “inherently discriminate against imports” and, because Article II:1(b) concerns “all” duties or charges “of any kind” imposed on or in connection with importation, it includes the certain kinds of “duties” or “charges” imposed on importation and described in Article II:2.<sup>45</sup> Accordingly, there is no basis for the Panel’s finding that to establish a *prima facie* case that the AD and the EAD fall within the scope of Article II:1(b), the United States must demonstrate that either duty

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<sup>43</sup> Panel Report, paras. 7.156, 7.159-7.160; *see also, e.g.*, paras. 7.297-7.299, 7.392-7.394.

<sup>44</sup> Panel Report, para. 7.159; *see also* para. 7.160 (“it is incumbent upon the United States to make a *prima facie* case that the measures at issue fall outside the scope of Article II:2(a)”). Thus, although the Panel’s findings focus on Article II:2(a), the Panel makes clear that even if the United States established that the duty or charge fell outside the scope of Article II:2(a) it would then need to establish that it did not fall under Article II:2(b) or (c) and is not some other duty or charge that does not inherently discriminate against imports. *Id.*

<sup>45</sup> As also noted above, the duties or charges described in Article II:2 are permitted not because they fall outside the scope of Article II:1(b) but because Article II:2 expressly states that they are permitted

“inherently discriminates against imports” or falls outside the scope of Article II:2.<sup>46</sup>

41. Prior reports addressing Article II:1(b) claims confirm that the Panel erred in finding that establishing a *prima facie* case under Article II:1(b) requires the United States to demonstrate that the AD and the EAD “inherently discriminate against imports,” including by demonstrating that the measures fall outside the scope of Article II:2. For example, in *Argentina – Textiles*, the Appellate Body found the measure in dispute inconsistent with Article II:1(b). Neither party discussed whether the measure “inherently discriminated against imports” or raised Article II:2, yet the Appellate Body nonetheless found the United States had established a *prima facie* case that the measure was inconsistent with Article II:1(b).<sup>47</sup> Similarly, in *United States – Certain EC Products*, the EC claimed the measure in dispute was inconsistent with Article II:1(b). In response, the United States asserted that the measure was justified under Article II:2(c). The panel rejected the U.S. defense (finding that the U.S. had not established the measure was commensurate with the cost of services rendered), and found the measure inconsistent with Article II:1(b).<sup>48</sup> The panel did not require the EC to establish as part of its *prima facie* case that the measure fell outside the scope of Article II:2(c) to establish that the measure fell within the scope of Article II:1(b). As recalled above, of the number of GATT and WTO panel and Appellate Body reports addressing claims under Article II:1 since the provision’s entry into force, none other than the Panel’s report in this dispute, have required the complaining party to establish that.<sup>49</sup>

42. It is also important to remember that under the Panel’s finding, it is not enough for the complaining party to establish that the measure falls outside the particular subparagraph of Article II:2 that may have been raised by the responding party. Instead, what the Panel finds is that the complaining party must establish that the measure falls outside the scope of any of the subparagraphs of Article II:2, and regardless of whether the responding party even raises Article II:2. This means, that in order to establish a *prima facie* case that the duty or charge is an “ordinary customs duty” or “other duty or charge of any kind” within the scope of Article II:1(b), the complaining party<sup>50</sup> must affirmatively establish that the duty or charge is not (a) a charge equivalent to an internal tax imposed consistently with Article III:2 in respect of the like

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<sup>46</sup> See also *infra* Section II.E (discussing the elements of establishing a *prima facie* case that a measure is inconsistent with Article II:1(b) and the requirements for raising and establishing a measure falls within the scope of Article II:2).

<sup>47</sup> Appellate Body Report, *Argentina – Textiles*, paras. 44-55, 61-63.

<sup>48</sup> Panel Report, *United States – Certain EC Products*, paras. 6.70, 6.72.

<sup>49</sup> *Supra* para. 25.

<sup>50</sup> The Panel indicates that it requires this of the United States because it has not provided a “general test” for whether the duty or charge in dispute inherently discriminates against imports. See, e.g., Panel Report, para. 7.159 n.203.

domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or part; (b) an anti-dumping or countervailing duty applied consistently with the provisions of Article VI; or (c) a fee or other charge commensurate with the cost of services rendered, and must do so regardless of whether or not the responding party raises Article II:2.<sup>51</sup> The Panel’s findings of course do not stop there. In addition to establishing that the measure falls outside the scope of Article II:2(a), (b) and (c), the complaining party must also establish that the measure is not some other duty or charge that does not inherently discriminate against imports. There is no basis for the Panel’s unprecedented approach.

**4. The Panel Erred in Finding that a Charge Equivalent to an Internal Tax Falls Within the Scope of Article II:2(a) Regardless of Whether the Internal Tax to Which it Is Equivalent is Imposed Consistently With Article III:2**

43. Having found that the United States must establish that a charge falls outside the scope of Article II:2(a) to establish that it falls within the scope of Article II:1(b), the Panel examined the requirements for a charge to be considered as falling within the scope of Article II:2(a). The Panel observed that Article II:2(a) comprised two distinct “concepts”: (i) the concept of “equivalency” (i.e., whether the charge is equivalent to an internal tax) and (ii) the concept of “imposed consistently with Article III:2.”<sup>52</sup> Despite noting that Article II:2(a) contains *two* concepts, the Panel found that only one of these is relevant to determining whether a charge imposed on the importation of a product falls within the scope of Article II:2(a) – the concept of equivalency – and accordingly that a charge equivalent to an internal tax falls within the scope of Article II:2(a) regardless of whether the tax to which it is equivalent is imposed consistently with Article III:2.<sup>53</sup> In other words, the Panel read out the requirement under Article II:2(a) that, for a charge to fall within its scope, the internal tax to which the border charge is equivalent must be imposed consistently with Article III:2. The Panel’s finding is in error.

44. Foremost, the Panel’s finding is not consistent with the text of Article II:2(a) and, accordingly, not in keeping with the relevant rule of treaty interpretation reflected in Article 31 of the Vienna Convention. Article II:2(a) provides:

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic

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<sup>51</sup> Panel Report, para. 7.159.

<sup>52</sup> Panel Report, paras. 7.171, 7.203.

<sup>53</sup> Panel Report, paras. 7.209-7.210, 7.214-7.215.

product ....<sup>54</sup>

45. As both India and the United States explained before the Panel, this text means that for a charge imposed on the importation of a product to fall within the scope of Article II:2(a), it must meet two requirements: it must be (i) a charge equivalent to an internal tax (ii) imposed consistently with Article III:2 in respect of a like domestic product.<sup>55</sup> The Panel, however, reads the second requirement entirely out of the text, finding that “we consider that, for purposes of an inquiry under Article II:2(a), equivalence is both a necessary and sufficient condition whereas consistency of the internal tax with the provisions of Article III:2 is not a necessary condition.”<sup>56</sup> Looked at in another way, the Panel essentially finds that a charge equivalent to an internal tax imposed *inconsistently* with Article III:2 would fall within the scope of Article II:2(a).<sup>57</sup> There is no basis for the Panel’s approach. Not only does it fail to read the phrase “consistently with [Article III:2]” in accordance with its ordinary meaning, but it fails to give those words any meaning at all, rendering the Panel’s approach inconsistent with the relevant rule of treaty interpretation, including that words in a treaty should not be read so as to render them *inutile*.<sup>58</sup>

46. Recognizing that its finding could be viewed as rendering the phrase *inutile*, the Panel attempts to justify its finding by arguing that the Article II:2(a)’s inclusion of the phrase “consistently with Article III:2” is a mere cross-reference or “reminder” that a border charge

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<sup>54</sup> Article II:2(a). Article II:2(a) concerns two types of border charges equivalent to an internal tax imposed consistently with Article III:2: those in respect of like domestic products and those in respect of an article from which the imported product has been manufactured or produced in whole or part. Only the former is at issue in this dispute.

<sup>55</sup> U.S. Oral Statement at the First Panel Meeting, para. 16; U.S. Second Written Submission, para. 27 & n.33; India First Written Submission, para. 64; India Oral Statement at the First Panel Meeting, para. 24.

<sup>56</sup> Panel Report, para. 7.210.

<sup>57</sup> The Panel states “a border charge which is equivalent to an internal tax imposed inconsistently with Article III:2 would fall outside the scope of Article II:1.” Panel Report, paras. 7.209. Read in conjunction with its early finding that charges within the scope of Article II:2(a) fall outside the scope of Article II:1, the Panel is essentially stating that a charge equivalent to an internal tax imposed inconsistently with Article III:2 falls within the scope of Article II:2(a) and hence outside the scope of Article II:1.

<sup>58</sup> Appellate Body Report, *Section 211*, para. 338 (citing *Gasoline*); Appellate Body Report, *Gasoline*, p. 23. The Panel’s finding is also inconsistent with its earlier finding that charges falling within the scope of Article II:2(a) can be distinguished from “other duties or charges of any kind” because they do not inherently discriminate against imports. If charges equivalent to an internal tax may fall within the scope of Article II:2(a) without any requirement that they be imposed consistently with Article III:2, this would permit charges equivalent to an internal tax imposed *inconsistently* with Article III:2 to fall within the scope of Article II:2(a). It is difficult to reconcile the Panel’s view that charges within the scope of Article II:2(a) do not inherently discriminate against imports when charges imposed *inconsistently* with Article III:2 would necessarily afford less favorable treatment and hence discriminate against imports.



equivalent to an internal tax is subject to Article III:2.<sup>59</sup> As elaborated below, however, border charges – whether equivalent to an internal tax or otherwise – are not subject to Article III:2. Therefore, the phrase “consistently with Article III:2” in Article II:2(a) cannot be a “reminder” that border charges equivalent to an internal tax are subject to Article III:2.

47. The Panel also erroneously suggests that its finding is consistent with the object and purpose of the GATT 1994.<sup>60</sup> The Panel’s finding, however, would permit Members to impose border charges equivalent to an internal tax<sup>61</sup> in amounts in excess of those on like domestic products.<sup>62</sup> Moreover, because under the Panel’s finding such a charge would not fall within the scope of Article II:1, Members would be free to impose them in excess of tariff bindings. Further, because the Panel is incorrect that border charges equivalent to an internal tax are subject to Article III:2, the Panel’s finding would mean that charges equivalent to an internal tax imposed inconsistently with Article III:2 would fall outside the scopes of both Article II and III, and Members would be free to impose them without the discipline of either Article. Contrary to the Panel’s assertion,<sup>63</sup> this would undermine the value of tariff concessions and would not be consistent with the object and purpose of the GATT 1994 of “substantially reducing ‘tariffs’.”

#### **5. The Panel Erred in Finding that a Border Charge “Equivalent” to an Internal Tax Is Subject to Article III:2**

48. As mentioned above, the Panel attempts to justify its erroneous finding that under Article II:2(a) there is no requirement that a charge equivalent to be imposed consistently with Article III:2, based on its finding that “border charges” equivalent to an internal tax are subject to Article III:2.<sup>64</sup> Article III:2, however, concerns internal taxes and other internal charges, not border charges, and therefore, the Panel’s finding that border charges equivalent to an internal tax are subject to Article III:2 is likewise in error.

49. Foremost, the Panel’s findings are not consistent with the text of Article III:2. Article

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<sup>59</sup> Panel Report, paras. 7.211-7.213; *see also* paras. 7.194, 7.196, 7.206.

<sup>60</sup> Panel Report, para. 7.214.

<sup>61</sup> As elaborated below, the Panel finds that a “charge equivalent to an internal tax” merely requires that the charge be intended to serve the same purpose as the internal tax.

<sup>62</sup> The issue of the extent of disciplines on border charges is one that is currently receiving renewed interest, particularly in light of some proposals that have been made concerning border charges in the context of global climate change.

<sup>63</sup> Panel Report, para. 7.214.

<sup>64</sup> Panel Report, paras. 7.206-7.213; *see also id.* para. 7.196. The Panel considers a “border charge” on that is “is imposed on the importation of a product.” *See, e.g.*, Panel Report, para. 7.196.

III:2, and Article III:1 to which Article III:2 refers, provide:

Article III\*

*National Treatment on Internal Taxation and Regulation*

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The Ad Note to Article III provides:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

50. As the text of Article III:2 makes clear, it concerns “internal taxes or other internal charges of any kind” applied to imported products in excess of those applied to like domestic products and “internal taxes or other internal charges” applied to imported or domestic products so as to afford protection to domestic production. It does not refer to charges or duties imposed on or in connection with the importation of a product. The title of Article III (“National Treatment on Internal Taxation and Regulation”) also indicates that Article III:2 concerns internal measures, as does Article III:1 (referring to “internal taxes and other internal charges”) and the Ad Note to Article III. With respect to the Ad Note, as explained more below, it concerns a situation where an internal charge imposed at the time or point of importation” may nevertheless be regarded as an “internal tax or other internal charge” and thus subject to Article III.

51. In contrast to Article III:2, Article II concerns duties and charges “imposed on or in connection with importation” in excess of the duties and charges set forth in Members’

Schedules. This includes Article II:2(a) which concerns certain types of duties or charges imposed on importation that Members are permitted to impose notwithstanding the fact that they are not set forth in the Members' Schedules. Thus, while Article II concerns duties and charges imposed on or in connection with importation, Article III:2 concerns taxes and other charges imposed internally.

52. The distinction between types of measures subject to Article III:2 as compared to Article II is not a novel issue. It has been the subject of discussion in a number of prior reports, with each arriving at the conclusion that border charges are subject to Article II while internal taxes and other internal charges are subject to Article III:2.<sup>65</sup> The panel in *EEC – Parts and Components* explained:

The distinction between import duties and internal charges is of fundamental importance because the General Agreement regulates ordinary customs duties, other import charges and internal taxes differently: the imposition of 'ordinary customs duties' for the purpose of protection is allowed unless they exceed tariff bindings; all other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of bound items (Article II:1(b)). By contrast, internal taxes that discriminate against imported products are prohibited, whether or not the items are bound (Article III:2)."<sup>66</sup>

53. It is also relevant to point out that this dispute does not concern a situation described in the Ad Note to Article III. The Ad Note identifies a situation where despite the fact that the charge is collected or enforced at the time of importation, it nonetheless remains an internal measure and is accordingly subject to Article III. That situation concerns one where an internal measure applies to both the imported and the like domestic product.<sup>67</sup> The situation concerned in this dispute, however, is not one where the measure applies to both the imported and the like domestic product, but instead a situation where the measure is acknowledged by the Panel to be a border measure that is not the same measure or measures that apply to products within India's customs territory. Thus, the situation concerned in this dispute is not one that falls within the scope of the Ad Note. As a consequence, the Panel's finding that a border charge equivalent to

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<sup>65</sup> See, e.g., GATT Panel Report, *EEC – Parts and Components*, para. 5.8-5.9; Panel Report, *Dominican Republic – Cigarettes*, para. 7.84; GATT Panel Report, *EEC – Animal Feed Proteins*, paras. 4.13-4.18.

<sup>66</sup> GATT Panel Report, *EEC – Parts and Components*, paras. 5.4 and 5.7.

<sup>67</sup> As noted above, the Ad Note concerns a situation where a measure imposed at the time or point of importation may "nevertheless be regarded as an internal tax or other internal charge... and accordingly subject to the provisions Article III." In particular, the Ad Note indicates that an internal charge collected or enforced at the time or point of importation does not automatically fall outside the scope of Article III, but instead may nonetheless be considered an "internal" charge and subject to Article III, provided the internal charge is also imposed on the like domestic product.

an internal tax is subject to Article III:2 cannot be justified by way of the Ad Note.<sup>68</sup>

54. Although the Panel acknowledges that “by its terms Article III:2 applies to ‘internal taxes or other internal charges’<sup>69</sup> and that this dispute does not concern the situation addressed in the Ad Note,<sup>70</sup> the Panel nevertheless concludes that a border charge equivalent to an internal tax is subject to Article III:2.<sup>71</sup> The Panel does not arrive at this finding based on an analysis of Article III:2 or consideration of the Ad Note, but based on its assessment that “the reference in Article II:2(a) to an internal tax imposed consistently with the provisions of Article III:2 would not make much sense if the border charge contemplated in Article II:2(a) were not caught by the provisions of Article III:2.”<sup>72</sup> In other words, the Panel assumes that a border charge equivalent to an internal tax is subject to Article III:2 based solely on the reference to Article III:2 in Article II:2(a).

55. Contrary to the Panel’s assumption, however, the reference in Article II:2(a) to an internal tax imposed “consistently with [Article III:2]” does not mean that the border charge to which the internal tax is equivalent is subject to Article III:2. Instead, the reference in Article II:2(a) to an internal tax imposed “consistently with [Article III:2]” indicates that, for a measure to be permitted under Article II:2(a) it must not only be a charge equivalent to an internal tax but the internal tax to which the charge is equivalent must be imposed consistently with Article III:2. For a border charge to fall within the scope of Article II:2(a) it must be equivalent to something else, and that something else is an internal charge imposed consistently with Article III:2 in respect of the like domestic product. Thus, it is the “something else” that is being analyzed for consistency with Article III:2, not the border charge itself.<sup>73</sup>

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<sup>68</sup> The Panel itself acknowledges this. Panel Report, para. 7.180 n.228.

<sup>69</sup> 7.206.

<sup>70</sup> Panel Report, para. 7.180 n.228.

<sup>71</sup> Panel Report, para. 7.206. It is also relevant to point out that the Panel did not find that a border charge equivalent to an internal tax *is* an internal tax. Indeed, the Panel acknowledges that a border charge equivalent to an internal tax is not in fact an internal tax but is instead a border charge that is equal, or virtually equal, to an internal tax in one respect but not others. Panel Report, paras. 7.180; *see also id.*, para 7.250 (stating that the “border charge in question is not itself an internal tax, but merely equivalent to such a tax”). Thus, the Panel’s finding that a border charge equivalent to an internal tax is subject to Article III:2 is not based on any misconception that the border charge is in fact an internal tax.

<sup>72</sup> Panel Report, para. 7.206.

<sup>73</sup> In this regard, it is relevant to point out that Article II:2(a) provides that “[n]othing in this Article shall prevent any contracting party from *imposing* at any time on the importation of a product...a charge equivalent to an internal tax *imposed* consistently with [Article III:2]...” If the object of “imposed consistently with [Article III:2]” is the charge the provision would read “nothing ...shall prevent a contracting party from imposing a charge... imposed consistently with [Article III:2].” Under such a reading the second appearance of the verb “impose” would be redundant. Conversely, if “imposed consistently with [Article III:2]” refers to the internal tax, each appearance of

56. It is also important to emphasize that India did not assert that either the AD or the EAD were an internal tax nor that any claims of inconsistency against them should be analyzed under Article III:2 rather than Article II. In fact, by choosing to defend the duties under Article II:2(a), India acknowledges that both are border charges and that India's obligations concerning these duties are contained in Article II, not Article III.

**6. The Panel Erred in Finding that to Establish that a Measure is Not a Charge Equivalent to an Internal Tax “Imposed Consistently With Article III:2” the Complaining Party Must Bring an Independent Claim under Article III:2**

57. After erroneously reading out of Article II:2(a) the requirement that the internal tax to which a border charge is equivalent must be “imposed consistently with [Article III:2]” and finding that the border charge is subject to Article III:2, the Panel then (i) finds that “if the complaining party wishes a panel to examine the internal tax and an equivalent border charge in light of the requirements of Article III:2, it is open to the complaining part to include in its panel request an independent claim of violation of Article III:2,”<sup>74</sup> and (ii) because in the Panel's view the United States had not pursued independent Article III:2 claims,<sup>75</sup> the Panel did not examine the AD or the EAD and the internal taxes to which they are allegedly equivalent in light of the requirements of Article III:2.

58. There is no basis for the Panel's finding. As mentioned, border charges – whether equivalent to an internal tax or otherwise – are not subject to Article III:2; accordingly, it would not be possible for a complaining party to pursue a border charge under an independent Article III:2 claim. The provision under which “to examine the internal charge and an equivalent border charge in light of the requirements of Article III:2” is Article II:2(a).<sup>76</sup>

59. Moreover, even if the Panel's interpretation were correct that a border charges equivalent to an internal tax were somehow subject to Article III:2, this would not require the complaining party to bring an *independent* claim under Article III:2 to establish that the charge does not fall

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the word “impose” is giving meaning in accordance with the principle of construction that words in a treaty should be read to give meaning to each term. Appellate Body Report, *Section 211*, para. 338 (citing *Gasoline*); Appellate Body Report, *Gasoline*, p. 23.

<sup>74</sup> Panel Report, para. 7.215.

<sup>75</sup> Panel Report, paras. 7.415-7.418.

<sup>76</sup> In this regard, India and the United States were in agreement before the Panel. Although the United States asserted claims both under Article II and Article III in its panel request and first written submission, India did not assert that they AD and the EAD were not subject to Article II. Instead, India conceded both duties were border charges and by choosing to defend the duties under Article II:2(a) acknowledges that India's obligations concerning these duties are contained in Article II, not Article III.

within the scope of Article II:2(a) much less, as the Panel also finds, to establish that the charge falls within the scope of Article II:1(b).<sup>77</sup> As explained above, for a measure to be permitted due to Article II:2(a) two requirements must be met: (i) the measure must be a charge equivalent to an internal tax and (ii) the internal tax to which it is equivalent must be imposed consistently with Article III:2; there is no basis for the Panel's finding that only the first of these requirements must be met. Because a measure must also meet the second of these requirements, if the complaining party establishes that it is not met, the measure falls outside the scope of Article II:2(a). The consequence of establishing this, is that the measure is not permitted under Article II:2(a), and if the measure results in duties or charges in excess of those set out in the Member's Schedule, it breaches Article II:1(b).

60. However, under the Panel's finding, if a complaining party does not bring and establish an independent Article III:2 claim, it cannot establish that the duty or charge falls outside the scope of Article II:2(a) (on account of the fact that it cannot establish that the internal charge to which the border charge is equivalent is imposed inconsistently with Article III:2). Because in the Panel's view establishing that a charge falls outside the scope of Article II:2(a) is necessary to establish that it falls within the scope of Article II:1(b), the complaining party also cannot establish that the measure falls within the scope of Article II:1(b). This means that a complaining party cannot establish that a measure breaches Article II:1(b) if it does not also assert and establish an independent Article III:2 claim against the measure.

61. Furthermore, it also would seem to mean that a complaining party cannot establish that a measure breaches Article II:1(b) if it does not also assert and establish an independent Article VI claim and, possibly, an independent Article VIII claim (the provisions referred to in subparagraphs (b) and (c) of Article II:2). This is because in the Panel's view establishing that the measure falls within the scope of Article II:1(b) also requires the complaining party to establish that the measure falls outside the scope of Article II:2(b) and (c) (and is otherwise a duty of the kind that inherently discriminates against imports).<sup>78</sup> Together, this suggests that under the Panel's finding, every Article II:1(b) claim must be coupled with independent claims under Articles III:2 and VI. Moreover, because the Panel found that establishing that a measure falls outside the scope of Article II:2 is necessary to establish a *prima facie* case that the measure

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<sup>77</sup> This results from the Panel's erroneous finding that to establish that a measure falls within the scope of Article II:1(b), the complaining party must establish that the measure falls outside the scope of Article II:2(a).

<sup>78</sup> The implications of the Panel's findings however are somewhat different for measures found to be equivalent to an internal tax as compared to those found to be antidumping or countervailing duties. While a complaining party could challenge an antidumping or countervailing duty under Article VI, it could not challenge border charge equivalent to an internal tax under Article III:2 because border charges are not, for the reasons explained above, subject to Article III:2. Thus, the implications of the Panel's finding is that the complaining party could not challenge a border charge equivalent to an internal tax under either Article II:1(b) or Article III:2, whereas even if a complaining party could not establish that an antidumping or countervailing duty fell outside the scope of Article II:2(b) because it was not imposed consistently with Article VI, it could nonetheless establish that the measure was imposed inconsistently with Article VI under an Article VI claim.

falls within the scope of Article II:1(b), this means that every Article II:1(b) claim must be coupled with independent Article III:2 and VI claims regardless of whether the responding party asserts that either Article II:2(a) or (b) or Article III:2 or VI are even relevant.<sup>79</sup>

62. The Panel’s finding and its implication are unprecedented. No prior panel or Appellate Body report – despite the number that have addressed Article II:1(b) claims – has found that an element of establishing a *prima facie* case under Article II:1(b) is asserting and establishing independent claims under Articles III:2 and VI.<sup>80</sup>

**7. The Panel Erred In Finding that “Equivalent” Means Serving the Same Function and Does Not Relate to the Amount or Effect of the Charge**

*a. “Equivalent” in Article II:2(a) Means Virtually Identical in Function (in the Sense of Operation), Effect and Amount and Not Serving the Same Function (in the Sense of Purpose)*

63. The Panel’s interpretation of “equivalent” in Article II:2(a) is also in error. In particular, the Panel erred in finding that a charge “equivalent” to an internal tax means a charge that merely serves the same function (in the sense of purpose) as an internal tax and that a charge may be “equivalent” to an internal tax regardless of whether it is equivalent in amount, effect or function (in the sense of operation).<sup>81</sup>

64. The Panel’s finding is in error in two key respects. First, the Panel incorrectly focuses on a single attribute to determine whether the charge and an internal tax are “equivalent,” namely their respective functions. As the United States explained before the Panel, however, the ordinary meaning of the word “equivalent” read in its context is corresponding or virtually

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<sup>79</sup> Exactly how the Panel’s flawed analysis would play out with respect to Article II:2(c) is unclear. Article II:2(c) concerns “fees or other charges [on the importation of a product] commensurate with the cost of services rendered.” Article VIII requires that “all fees and charges of whatever kind (other than import and export duties and other than taxes within the purview of Article III) imposed...on or in connection with importation ... shall be limited in an amount to the approximate cost of services rendered ...” Although Article II:2(c) does not reference Article VIII there appears to be a link between the two. *See, e.g.*, GATT Panel Report, *US – Customs User Fee*, paras. 75-76. Yet, because Article II:2(c) does not include a reference to Article VIII it is not clear how the Panel would view Article II:2(c) – whether or not it would consider that the complaining party could not establish that the fee or charge was commensurate with the cost of services rendered without asserting and establishing an independent Article VIII claim.

<sup>80</sup> *See supra* paras. 41 and 25 (noting that no prior panel or Appellate Body reports have adopted an interpretation like the Panel’s).

<sup>81</sup> Panel Report, paras. 7.185-7.189.

identical in effect, amount and function<sup>82</sup> such that a charge “equivalent” to an internal tax is a charge that corresponds or is virtually identical in effect, amount and function to an internal tax. Thus, contrary to the Panel’s findings, whether a charge is “equivalent” to an internal tax does not turn on whether it serves the same function (in the sense of purpose) as the internal tax but instead on a variety of attributes and whether with respect to those attributes the charge corresponds or is virtually identical to the internal tax.<sup>83</sup> In this regard, it is important to emphasize that whether a charge is “equivalent” to an internal tax necessarily entails a comparison of the former to the latter. While the outcome of that comparison must be that the two correspond or are virtually identical in order to consider the two equivalent, the comparison itself does not limit the attributes of the two that may be compared.

65. This approach is consistent, for example, with how the Appellate Body has interpreted the word “like”, another word that requires a comparison of two things, namely an imported and a domestic product. In *EC – Asbestos*, the Appellate Body noted that “like” does not prejudice what attributes or criteria should be compared in evaluating whether two products are “like”<sup>84</sup> and faulted the panel in this regard for focusing on a single criteria in determine that the product at issue were “like.” The Appellate Body stated: the panel “should have examined the evidence relating to each of those four criteria and, then, weighed all of that evidence, along with any other relevant evidence, in making an overall determination of whether the products at issue could be characterized as ‘like’. Yet, the Panel expressed a ‘conclusion’ that the products were ‘like’ after examining only the first of the four criteria.”<sup>85</sup> In light of this failure, the Appellate Body reversed the panel’s finding that the products at issue were “like.”<sup>86</sup>

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<sup>82</sup> U.S. First Written Submission; U.S. Second Written Submission. The U.S. submissions cite the *Merriam-Webster Dictionary* which defines “equivalent” as “equal in force, amount, or value”; “corresponding or virtually identical especially in effect or function” and *The New Shorter Oxford English Dictionary* which defines equivalent as: “1. Of person or things: equal in power, rank, authority, or excellence (Foll. by *to*, *with*, *for*) ....2. Equal in value, significance, or meaning. (Foll. by *to*, *with*, *for*)...3. That is virtually the same thing; having the same effect (Foll. by *to*)...4. Having the same relative position or function; corresponding (Foll. by *to*).” See Merriam-Webster Online Dictionary available at <<http://www.merriam-webster.com/dictionary/equivalent>> (visited on July 9, 2008); *New Shorter Oxford English Dictionary* (1993) at 843. The *New Shorter Oxford English Dictionary* includes “illustrative quotes” for the numbered definitions as follows: “2 ...The minstrel, or menestrier, became very early a word of abuse, equivalent to blackguard. ... Speedboats and crystal chandeliers at prices equivalent to a lifetime’s wages. 3 equivalent circuit a notional electric circuit in which competent such as resistors and capacitors are interconnected so as to reproduce the behavior of a more complicated circuit or device and simplify its analysis. 4 ... We have the right to maintain missiles on the Russian border ..., but ... they do not have the equivalent right.”

<sup>83</sup> See U.S. Second Written Submission, para. 28 (noting that the word “equivalent” does not prejudice the aspects of the two measures to be compared).

<sup>84</sup> Appellate Body Report, *EC – Asbestos*, paras. 91-92, 101-104.

<sup>85</sup> *Id.*, para. 109.

<sup>86</sup> *Id.* paras. 125-126.



66. Although examination of whether two products are “like” is somewhat different than examining whether two measures are “equivalent,” the value of taking into account various attributes or criteria and supporting evidence that may indicate the relatedness of two things remains. As elaborated above, read in its context, the relevant attributes in terms of whether a charge is “equivalent” to an internal tax appear to be their respective amounts, effects and functions (in the sense of operation).

67. The Panel’s interpretation of “equivalent,” however, omits consideration the charges’ amount, effect or function,<sup>87</sup> erroneously limiting its analysis to a single attribute, the charge’s function (in the sense of purpose).<sup>88</sup> This is incorrect for the reasons states above. It is also troubling that the Panel’s apparent basis for limiting its interpretation of the word “equivalent” to a single attribute, is its reliance on one of several definitions of the German word “äquivalent.”<sup>89</sup> As German is not an official WTO language, the Panel’s reliance on the definition of a German word is not appropriate.

68. Second, the attribute the Panel focuses on – function (in the sense of purpose) – is in itself incorrect. By focusing on function (in the sense of purpose) the Panel sets up a test for determining whether a charge is equivalent to an internal tax based on the purpose or reason the Member had for imposing.<sup>90</sup> Under such a test it would be irrelevant that the charge does not actually serve the purpose or reason for which it was imposed nor would it be relevant that, despite being imposed for the same purpose or reason, the charge and internal tax differ in other ways – for example in amount, effect or function (in the sense of operation).<sup>91</sup>

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<sup>87</sup> The Panel’s interpretation of “equivalent” relies on the word “function” in a different sense than the United States. The Panel views the word “function” as meaning “purpose” or “reason for existing,” Panel Report, paras. 7.186-7.194. In contrast, the United States views the word “function” in connection with interpreting the word “equivalent” in Article II:2 as referring to whether the charge is equivalent in function - that is in how the charge and the internal tax operate or apply. *See, e.g.*, Second Written Submission, paras. 5, 48-53 (explaining how the EAD operated in comparison to how the VATs and CST and noting that the intended purpose of the EAD is not determinative of whether it is “equivalent” to them).

<sup>88</sup> The Panel similarly limits the definition of “equivalent” of “corresponding,” assuming that the only relative consideration in terms of whether a charge corresponds to an internal tax would be their respective functions. Panel Report, para. 7.186.

<sup>89</sup> Panel Report, para. 7.179 & n.227; *see also Meyers kleines Lexikon Philosophie*, ed. Redaktion für Philosophie des Bibliographischen Institutes (Mannheim/Wein/Zürich: Bibliographische Institute, 1987), p. 46.

<sup>90</sup> In the Panel’s view, this is limited to examining whether the purpose or function of the tax is to tax a product (“*qua* product”) or to tax an imported product (“*qua* foreign product”). Panel Report, paras. 7.190-7.191.

<sup>91</sup> And, this is exactly, what the Panel’s findings appear to permit India to do in respect of the AD and the EAD: to impose a charge in excess of India’s WTO-bound rates and in amounts that India concedes may exceed internal taxes on like domestic products based on India’s characterization of these duties as serving to offset these internal taxes on like domestic products. India First Written Submission, para. 85 n.51; India Answer to Panel Question 28, paras. 28.4-28.5. Moreover, because India never identified the internal taxes that the AD allegedly

69. As the United States explained before the Panel,<sup>92</sup> however, whether a charge is equivalent to an internal tax must be based on an examination of the structure, design and application of the two measures (with the relevant attributes for comparison in that examination being amount, effect and function); otherwise a Member would be free to impose duties or charges on importation in excess of those set forth in its Schedule based solely on the reason or purpose it had for imposing them or its own characterization of them under domestic law. As noted in the U.S. submissions to the Panel,<sup>93</sup> prior panels and the Appellate Body when faced with arguments that the purpose or characterization of a measure under domestic law is determinative have rejected those arguments, for example, with respect to whether a measure was a “charge ... imposed on importation,”<sup>94</sup> “measure of the kind ... required to be converted to an ordinary customs duty,”<sup>95</sup> or “internal tax[]...applied so as to afford protection to domestic production.”<sup>96</sup> In each of these disputes, the panel or Appellate Body determined that whether the measure is in fact what it is claimed to be turns on an examination of the structure, design and effect of the measure in comparison to the internal tax to which it is allegedly equivalent. Therefore, contrary to the Panel’s finding, the function or purpose a Member may attribute to a charge, or the reason it may have for imposing it, is not determinative of whether the charge is equivalent to an internal tax.

70. In this connection, the Panel wrongly dismisses the U.S. concern that an approach that excludes consideration of whether the charge and internal tax are equivalent in effect and amount and focuses only on the function (in the sense of purpose) of the charge, undermines the value of tariff concessions.<sup>97</sup> An interpretation of “equivalent” that would permit a Member to impose a charge on importation in excess of those set forth in its Schedule based solely on its own

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offsets, the Panel’s findings also mean that one can determine whether a charge’s function is equivalent to the function of an internal tax without actually examining the internal tax to which the charge is equivalent, again making clear that the assertion of the Member imposing the charge is sufficient to indicate the charge’s purpose or function.

<sup>92</sup> U.S. Second Written Submission, para. 28; *cf* U.S. First Written Submission, para. 42; U.S. Second Written Submission, para. 15-16.

<sup>93</sup> U.S. First Written Submission, para. 42 n.67, para. 45 n.71; U.S. Second Written Submission, paras. 14-15.

<sup>94</sup> GATT Panel Report, *EEC – Parts and Components*, paras. 5.6-5.7.

<sup>95</sup> 21.5 Appellate Body Report, *Chile – Price Bands*, para. 149, 162, 189; Appellate Body Report, *Chile – Price Bands*, para. paras. 226, 227, 239, 252.

<sup>96</sup> Appellate Body Report, *Japan – Alcohol*, p. 29-31; Appellate Body Report, *Chile – Alcohol*, para. 61.

<sup>97</sup> As the Appellate Body discussed in its report in the *Argentina – Textiles* dispute, Article II:1(a) and (b) serve “to preserve the value of tariff concessions negotiated by Members with its trading partners, and bound in that Member’s schedule.” Appellate Body Report, *Argentina – Textiles*, para. 47.

characterization of that measure as serving the same function or purpose as an internal tax, would make it all too easy for Members to undermine the value of those concessions: a Member could simply ensure that it characterizes a charge as having the same function or purpose as an internal tax and, then, be free to impose that charge at any level.<sup>98</sup> The Panel dismisses this concern based on its view that “a border charge” equivalent to an internal tax is “caught by the provisions of [Article III:2].” However, as explained above, border charges are not subject to Article III:2.

71. Aside from the serious systemic concerns with the Panel’s interpretation, the Panel wrongly finds support for its interpretation in the perfume example cited by the Legal Drafting Committee. The Legal Drafting Committee explained the word “equivalent” in Article II:2(a) with the following example:

If a [charge] is imposed on perfume because it contains alcohol, the [charge] to be imposed must take into consideration the value of the alcohol and not the value of the perfume, that is to say the value of the content and not the value of the whole.<sup>99</sup>

The Panel, however, reads this as indicating that “equivalent” means having the same function because a charge on perfume based on the value of the perfume cannot be said to have the same function as an internal tax on domestic alcohol. The Panel’s basis for this conclusion and its implication that this example would not also support a definition of “equivalent” of virtually equal in effect, function or amount, is unclear. The Panel appears to think that the perfume example is one where the “function” or purpose of the charge and the internal tax is the same,

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<sup>98</sup> U.S. Closing Statement at the First Panel Meeting, para. 8; U.S. Second Written Submission, para. 37. When faced with a similar argument in *EC – Parts and Components*, the GATT Panel rejected the EC’s suggestion that the “policy purpose of a charge” and “the mere description or categorization of a charge under the domestic law of a contracting party” were relevant to determining whether the measure is a charge on importation within the meaning of Article II:1(b). With respect to the former, the panel concluded that “it was not the policy purpose attributed to the charge but rather whether the charge is due on importation or at the time or point of importation or whether it is collected internally,” cautioning that “the policy purpose of charges is frequently difficult to determine objectively.” With respect to the latter, the panel found that “that if the description or categorization of a charge under the domestic law of a contracting party were to provide the required ‘connection with importation’, contracting parties could determine themselves which of these provisions would apply to their charges. They could in particular impose charges on products after their importation simply by assigning the collection of these charges to their customs administration and allocating the revenue generated to their customs revenue....The same reasoning applies to the description or categorization of the product subject to a charge. The fact that the EEC treats imported parts and materials subject to anti-circumvention duties as not being ‘in free circulation’ therefore cannot, in the view of the Panel, support the conclusion that the anti-circumvention duties are being levied “in connection with importation” within the meaning of Article II:1(b).” GATT Panel, *EEC – Parts and Components*, para. 5.6-5.7. The panel in *Argentina – Hides*, similarly found that in examining a measure’s effect the “policy purposes” pursued by a measure is not relevant. Panel Report, *Argentina – Hides*, para. 11.182; see also India First Written Submission, para. 86 (citing *Argentina – Hides* in support of this proposition).

<sup>99</sup> EPCT/TAC/PV/26, page 21.

namely to tax alcohol, and that this must be the reason the Drafting Committee considered the above example to describe a charge equivalent to an internal tax. The Panel assumes too much. In the first place, the passage quoted above does not speak of function or purpose at all. To the contrary, the passage is describing the structure of the charge in question, and in particular the basis on which the amount of the charge will be ascertained (that is, on the basis of the value of the alcohol rather than on the basis of the value of the perfume). Moreover, while the purpose of a charge and an internal tax may be to tax alcohol, simply having the same purpose, or in the Panel's words fulfilling the same function, does not make a charge equivalent to an internal tax, in particular in situations where the charge and internal tax may have the same purpose or function, but the effect or amount of the charge and the internal tax differ. For example, a charge and an internal tax could have the same purpose or "function" – to tax perfume – but the internal tax could be calculated as a 10 percent charge on the value of the alcohol the perfume contains, while the charge on the importation of perfume could be calculated as a 10 percent charge on the value of the perfume. Under the Panel's reasoning, the charge and internal tax would be "equivalent" because the purpose or "function" of the charge and internal tax are the same – to tax perfume – regardless of the fact that the tax on the imported product is greater on account of how the tax on perfume is calculated. The Panel's reasoning, however, does not find support in the Legal Drafting Committee example, which indicates that a charge and an internal tax calculated based on the value of different products would not be equivalent. The fundamental flaw in the Panel's reasoning is that it looks to the purpose of the charge and internal tax as determinative rather than examining the structure, design and effect of both to determine whether – despite any intended purpose – the two are in fact "equivalent".

b. *The Panel's Reasons for Dismissing Other Interpretations of "Equivalent" Are Erroneous*

72. While the Panel acknowledges other definitions of the word "equivalent,"<sup>100</sup> it wrongly dismisses the definitions of "having the same effect," "equal in amount," "that is virtually the same thing" and "virtually identical especially in effect or function".<sup>101</sup> The Panel dismisses the

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<sup>100</sup> Panel Report, paras. 7.179. The Panel cites the *Shorter Oxford English Dictionary* which contains the following definition of "equivalent." This definition is the same as the definition of "equivalent" in the *New Shorter Oxford English Dictionary* cited by the United States above and in its submissions to the Panel.

<sup>101</sup> Panel Report, paras. 7.179-7.185. The Panel also dismisses the definitions of "equal in value, significance, or meaning" *inter alia* based on its reasoning that while one may compare the value of "two sheep" to "two hens," one cannot do the same with a tax and a charge because "charges are not normally not considered to have a value." Panel Report, para. 7.181. The definition of "value," however, includes "that amount of a commodity, medium of exchange, etc., considered to be equivalent" and "a numerical quantity that is assigned or is determined by calculation or measurement." *New Shorter Oxford English Dictionary* at 3542; Merriam-Webster Online Dictionary available at <<http://www.merriam-webster.com/dictionary/value>> (visited on July 9, 2008). Notably, the definition of value is not limited to the amount of a commodity or medium of exchange, but uses "etc." to indicated that it is not presenting a closed list. Therefore, value may connote the amount or numerical quantity of something and, contrary to the Panel's assertion, it is possible to compare the "value" of a charge to that of an internal tax, for example whether a 4% ad valorem charge is equal in value to 3% ad valorem tax.

definitions of “having the same effect” and “equal in amount” because, in its view, if “equivalent” meant “having the same effect” or “equal in value” it would “fail to give separate meaning to the concepts of ‘equivalence’ and ‘consistency with Article III:2’, contrary to the requirement of effective treaty interpretation.”<sup>102</sup> In the first instance, since in the Panel’s view a charge equivalent to an internal tax falls within the scope of Article II:2(a) regardless of whether it is imposed consistently with Article III:2, if the amount of the charge is not taken into account in evaluating whether it is “equivalent” to an internal tax, there would be no part of the Article II:2(a) analysis that would.

73. Moreover, even under the proper interpretation of Article II:2(a) where the charge must be equivalent to an internal tax imposed *consistently* with Article III:2, allowing the definitions of “equal in amount” or “having the same effect” to inform the meaning of “equivalent” would not fail to give separate meaning to the requirement that the charge equivalent to an internal tax be imposed consistently with Article III:2. First, the word “equivalent” characterizes a relationship between a charge imposed on the importation of a product and an internal tax; the concept of consistently with Article III:2 imposes limits on what kind of internal taxes an Article II:2(a) charge may permissibly be equivalent to: an internal tax that does not tax imported products in excess of like domestic products. Thus, once a border charge is found to be “equivalent” to an internal tax, the Article II:2(a) analysis calls for that internal tax to be examined as if it applied to imported products in the amount levied on imports by virtue of the border charge. Therefore, whether a border charge is “equal in amount” to an internal tax does not prejudice that tax’s consistency with Article III:2. In addition, while a charge may be “equivalent” to an internal tax without being exactly or precisely equal in amount to the internal tax, the same is not true for a tax imposed consistently with Article III:2 in respect of a like domestic product, since Article III:2 prohibits *any* amount of taxation of imports in excess of like domestic products. Second, the Panel wrongly assumes that if the definitions of “having the same effect” or “equal in amount” inform the meaning of “equivalent,” the only attributes of the charge that could be considered is its effect or amount. However, as noted above, evaluation of whether a charge is equivalent to an internal tax requires consideration of their respective effect, function and amount; there is no basis for limiting the inquiry as to whether a charge is “equivalent” to an internal tax to a single attribute.

74. The Panel also dismisses the definitions of “virtually the same thing” “virtually identical, especially in effect or function.” While at one point the Panel appears to acknowledge that “‘equivalent’ denotes something that is equal, or virtually equal,” it fails to consider whether the charge is “virtually the same thing” or “virtually identical” in effect, function (in the sense of operation) or amount or in any way other than function (in the sense of purpose). The Panel does not explain its failure to do so. In light of the nature of what Article II:2(a) permits Members to do – that is, to impose a charge on importation in excess of the duties and charges to which it committed in its Schedule – the requirement that charge be “equivalent to an internal tax

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<sup>102</sup> Panel Report, para. 7.185.

imposed consistently with [Article III:2]” must be interpreted in a manner that ensures that it does not permit Members to undermine the value of the tariff bindings to which they have committed. An interpretation of Article II:2(a) that calls for the charge to be virtually identical to an internal tax, in ways that are not limited to its alleged purpose or “function,” and requires that the charges imposed on imported products not exceed those on like domestic products, ensures this. The interpretation of Article II:2(a) offered by the Panel – one that requires only that the charge serve the same function or purpose of an internal tax and ignores whether the charge subjects imports to charges in excess of those on like domestic products – does not.

**8. The Panel’s Erred Finding that a Responding Party Is Not Required to Support Its Assertions that a Measure Falls Within the Scope of Article II:2(a)**

75. Related to its erroneous finding that establishing a *prima facie* case that a measure falls within the scope of Article II:1(b) requires the complaining party to demonstrate that the measure falls outside the scope of Article II:2, the Panel found that India as the responding party was not required to support its assertion that the AD and the EAD fall within the scope of Article II:2(a).<sup>103</sup> The Panel’s finding is in error.

76. In this dispute, the United States established a *prima facie* case that the AD and the EAD are each ordinary customs duties or other duties or charges imposed on imports in excess of those set forth in India’s Schedule, and therefore, are inconsistent with Article II:1(a) and (b). In response, India asserted that the AD and the EAD are justified under Article II:2(a) as charges equivalent to internal taxes imposed consistently with Article III:2. The United States responded to India’s claim and explained why neither the AD nor the EAD were permitted under Article II:2(a) thus meeting its burden to show that these measures breached Article II:1.<sup>104</sup> Furthermore, India did not support those assertions. As elaborated below, it did not substantiate that any state-level excise duties exist, that the Indian states impose them or that they operate such that the AD is “equivalent” to them. Nor did India substantiate that state-level VATs, sales taxes and other local taxes or charges exist, that the Indian states impose them, or that they operate such that the EAD is “equivalent” to them. Moreover, India provided no evidence that the internal taxes to which the AD and the EAD are allegedly equivalent are imposed consistently with Article III:2. Not only did India fail to support its assertions, it affirmatively refused to provide relevant information in response to requests from the Panel. The Panel should have drawn the logical

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<sup>103</sup> Panel Report, paras. 7.160, 7.163; *see also e.g.*, 7.721 (noting India asserted that all states impose state-level excise duties on alcoholic beverages but noting that there was no evidence before the Panel that this was in fact the case); 7.385-7.386 (noting India asserted that all states impose state-level VATs/sales taxes and other local taxes or charges but noting that there was no evidence before the Panel that this was in fact the case).

<sup>104</sup> The United States had requested on several occasions, including in consultations, that India identify and substantiate any relevant state-level measures. India refused. The United States was entitled to draw the conclusion that no such state-level measures existed.

inference that no such state-level taxes existed. In fact, India concedes that both the AD and the EAD may in some cases result in charges on imports in excess of those on like domestic products and therefore in effect concedes neither are equivalent to an internal tax “imposed consistently with [Article III:2].”<sup>105</sup> The Panel, however, finds the fact that the AD and the EAD may lead to charges on imports in excess of those on like domestic products irrelevant, noting that it “would not be justified in requiring India initially to make a *prima facie* case that the border charges at issue fall within the scope of Article II:2(a).”<sup>106</sup> The Panel misunderstood the relevant responsibility of India as the party asserting the affirmative of a fact or argument to adduce sufficient evidence and argument to support that assertion.

77. First, contrary to the Panel’s view, India’s failure in this regard is far from irrelevant. It means that India did not establish what it asserted was true – in particular that any internal taxes exist much less that the AD and the EAD are equivalent to such taxes or that such taxes are imposed consistently with Article III:2. In the absence of any evidence in support of India’s assertion (or even a complete assertion of the relevant facts), there was no basis to find that these measures are not in breach of Article II:1 because they are permitted under Article II:2.

78. Second, the Panel’s finding is tied to its erroneous finding that establishing that a measure falls outside the scope of Article II:2 is an element of establishing a *prima facie* case that a measure falls within the scope Article II:1(b). As explained above, however, Article II:2 is an exception to Article II:1(b). In this regard, if a complaining party has made a *prima facie* case that a measure is inconsistent with Article II:1(b) and if the responding party does not assert that Article II:2 applies, then the parties are in agreement that the measure falls outside the scope of Article II:2 and therefore that the measure cannot be justified by way of Article II:2. However if the responding party asserts that the measure does not breach Article II:1(b) because it is a measure described in Article II:2(a), (b), or (c) and substantiates that assertion, then the complaining party would bear the burden of proving the measure falls outside the scope of Article II:2 and, therefore, cannot be justified by way of Article II:2. Importantly, the fact that the complaining party would bear the burden of proof in this situation does not relieve the responding party of its burden of substantiating its own assertions that the exception set out in Article II:2 applies.

79. Framed in the context of this dispute, the United States has established a *prima facie* case that the AD and the EAD are inconsistent with Article II:1(a) and (b). India has asserted the AD and the EAD are justified under Article II:2(a). Were India to substantiate those assertions, at minimum by identifying the particular internal taxes to which the AD and the EAD are allegedly equivalent and indicating how they are “equivalent” to an internal tax “imposed consistently with [Article III:2],” the United States would then bear the burden of proving that the measures fall

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<sup>105</sup> Panel Report, paras. 7.269, 7.369; India First Written Submission, para. 85 n.51; India Answer to Panel Question 28, paras. 28.4-28.5.

<sup>106</sup> Panel Report, para. 7.163.

outside the scope of Article II:2 and therefore may not be justified under Article II:2. In other words, as the party asserting that the AD and EAD fall within the scope of Article II:2(a) and are justified under that provision, once the United States establishes a *prima facie* case that the AD and the EAD are inconsistent with Article II:1(a) and (b), India must put forward evidence and argument to support its assertions that the measures fall within the scope of Article II:2(a).<sup>107</sup> As the Working Party Report on Border Tax Adjustments noted: “it was generally agreed that countries adjusting taxes should, at all times, be prepared, if requested, to account for the reasons for adjustment, for the methods used, for the amount of compensation and to furnish proof thereof.”<sup>108</sup> The Panel erred in requiring otherwise in this dispute.

80. As a related matter, although Article II:2 is an exception that may be invoked in defense of a measure that would otherwise be inconsistent with Article II, it is not an affirmative defense in the sense that the responding party bears the ultimate burden of proof.<sup>109</sup> Instead, to raise a defense under Article II:2 the responding party must assert that defense and provide sufficient evidence and argument to establish that what it asserts is true (i.e., that the measure is a charge equivalent to an internal tax imposed consistently with Article III:2). This is consistent with the responsibility that either party has to support the facts and arguments it puts forward. Having asserted, and supported, a defense under Article II:2, the ultimate burden would rest with the complaining party to rebut and ultimately disprove that evidence and argument. For example, in *United States – EC Products*, the panel rejected the U.S. defense of its measure under Article II:2(c) because the United States had not provided any evidence to support its contention that the measure was commensurate with the cost of services rendered.<sup>110</sup> The fact that Article II:2 is not an affirmative defense, however, does not justify the Panel’s finding that the burden of proof rests with the complaining party to prove that a measure fall outside the scope of Article II:2 in the absence of the responding party asserting that its measure may be justified under Article II:2. and (ii) providing evidence and argument in support of that assertion.<sup>111</sup> Nor does it excuse the

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<sup>107</sup> See Appellate Body Report, *United States – Shirts and Blouses*, p. 13; Appellate Body Report, *EC – Hormones*, para. 98 (explaining that once the complaining party has presented evidence and argument sufficient to establish a presumption that a measure is inconsistent with the responding party’s WTO obligations, “it is then up to the responding party to “bring evidence and argument to rebut the presumption.”)

<sup>108</sup> L/3464, 18S/100-101, paras. 14-17.

<sup>109</sup> See Appellate Body Report, *EC – GSP*, para. (pertaining to the idea that the question of which party bears the burden of raising a provision and which party bears the burden of proof on the provision are separate concepts).

<sup>110</sup> Panel Report, *United States – Certain EC Products*, para. 6.70-6.72.

<sup>111</sup> The Panel appears to confuse the requirement that the party invoking Article II:2 must substantiate that what it asserts is true with the issue of who bears the burden of proof under Article II:2. See Panel Report, para. 7.164. As explained in Sections II.A.2b and II.A.8 and to the Panel, India bears the burden of substantiating its assertion that the AD and the EAD are charges equivalent to an internal tax imposed consistently with Article III:2 and, if India does so, the United States bears the burden of proving that the measures do not constitute such charges.



Panel from drawing the logical inference that India's refusal to respond to the Panel's request for information about the alleged state-level measures meant that no such state-level measures existed.<sup>112</sup>

81. In this regard, the Panel's dismissal of the relevance of the panel report in *United States – Customs User Fee* is incorrect.<sup>113</sup> In *Customs User Fee*, the GATT panel stated that "it was of the view that the government imposing the fee [alleged to fall under Article II:2(c)] should have the initial burden of justifying any government activity being charged for. Once a *prima facie* satisfactory explanation had been given, it would then be upon the complainant government to present further information calling into question the adequacy of that explanation."<sup>114</sup> The Appellate Body referred to the *Customs User Fee* in its report in *United States – Shirts and Blouses* as an example of instances where panels have required the responding party that has invoked a defense under GATT Article II:2 to assert that provision and to demonstrate its applicability.<sup>115</sup> The Panel appeared to believe that *Customs User Fee* dispute was distinguishable from the present one because it concerned Article II:2(c) instead of Article II:2(a) and because the assertion the panel called upon the United States to substantiate was that the fees the United States imposed were to cover the cost of "services rendered."<sup>116</sup> These distinctions, however, do not change the nature of Article II:2 as an exception to Article II:1(b) nor the requirement that the party asserting that a measure falls within its scope must substantiate that assertion.

### **B. The Panel Failed to Make an "Objective Assessment" of the Matter Under Article 11 of the DSU**

82. Article 11 of the DSU instructs each panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." In examining a panel's obligation to make an "objective assessment of the matter," the Appellate Body has explained that Article 11 requires panels to take account of the evidence put before them and prohibits them from wilfully disregarding or distorting such evidence or

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See Sections II.A.2b and II.A.8 and U.S. Answer to Panel Question 44, paras. 6-11.

<sup>112</sup> The failure to draw such an inference is not in keeping with the Panel's responsibility to conduct an objective assessment of the matter under Article 11 of the DSU.

<sup>113</sup> Panel Report, paras. 7.162-7.163.

<sup>114</sup> GATT Panel Report, *United States – Customs User Fee*, para. 98.

<sup>115</sup> Appellate Body Report, *United States – Shirts and Blouses*, p. 16, n.23.

<sup>116</sup> Panel Report, paras. 7.162-7.163.

making affirmative findings that lack a basis in the evidence before them.<sup>117</sup>

83. The Panel in this dispute failed to meet this obligation. In particular, the Panel failed to make an objective assessment of the facts of this dispute and the applicability of Article II:2(a) with respect to India’s assertion that the AD on alcoholic beverages and the EAD fall within the scope of Article II:2(a). As detailed below, the Panel did not require India to support this assertion and instead made several related findings that are not supported by the evidence before the Panel.

### **1. Not Requiring India to Support its Assertions**

84. Before the Panel India asserted that the AD and the EAD are charges equivalent to an internal tax imposed consistently with GATT Article III:2. Specifically, India asserted that the AD offsets or counterbalances, or is “equivalent” to, excise duties imposed internally by the various India states on domestic alcoholic beverages and that the EAD offsets or counterbalances, or is “equivalent” to, VATs, sales taxes and other local taxes collected or imposed by the various Indian states. The Panel did not require India to support these assertions, yet nonetheless found that the evidence before it supported (or was not inconsistent with) the finding that the AD is “equivalent” to state-level excise duties and the EAD is “equivalent” to state-level VATs, sales taxes, and other local taxes and charges.<sup>118</sup> As elaborated below with respect to each the AD and the EAD, the Panel’s approach is inconsistent with its obligation to make an objective assessment of the matter under Article 11 of the DSU.

#### *a. Excise Duties and the AD*

85. Beginning with the AD, although India asserted that the AD on alcoholic beverages offsets or counterbalances state-level excise duties, at no point in the proceeding before the Panel did India identify such excise duties nor submit any evidence to the Panel to substantiate its assertion that such excise duties exist or operate in the manner India contends. India failed to do so despite repeated requests by the United States and the Panel to provide such evidence. In particular, the United States has requested India to identify and provide information on the excise duties the AD on alcoholic beverages allegedly offsets on a number of occasions, including in discussions prior to initiating this dispute, during consultations, and in questions to India as part of its most recent Trade Policy Review. On each occasion, India failed to identify such excise duties or provide information substantiating its contentions as to their existence or operation. The

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<sup>117</sup> Appellate Body Report, *EC - Hormones*, para. 133; Appellate Body Report, *US - Wheat Gluten*, paras. 161-162; Appellate Body Report, *US - Carbon Steel*, para. 142.

<sup>118</sup> See, e.g., Panel Report, paras. 7.294, 7.389, 7.276, 7.371.

Panel also asked India for this information, orally at the first meeting of the Panel<sup>119</sup> and in writing after the second meeting of the Panel.<sup>120</sup> India did not respond to either request of the Panel.<sup>121</sup> While the Panel noted that this was “regrettable,” as it would have enabled the Panel to verify India’s assertions, the Panel asserted that even without such evidence the Panel could conclude that the United States had failed to establish that the AD on alcoholic beverages was not equivalent to such state-level excise duties imposed in respect of like domestic alcoholic beverages.<sup>122</sup>

86. The Panel’s approach is inconsistent with its obligation to make an objective assessment of the matter. Specifically, as the Appellate Body has stated on a number of occasions, “the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.”<sup>123</sup> The Panel in this dispute, however, did not require India to identify the state-level excise duties to which the AD on alcoholic beverages is allegedly equivalent or to support its assertions that such excise duties exist, that each of the 28 Indian states and 7 Union Territories impose them, or that they operate such that the AD offsets or counterbalances them. Instead, not having any such evidence before it or even knowing the state-level excise duties to which India contends the AD on alcoholic beverages is equivalent, the Panel nonetheless assumed that such excise duties do exist and operate as India contends and then required the United States to establish that the AD is not equivalent to them.<sup>124</sup> In doing so the Panel placed an impossible burden on the United States to guess which state-level excise duties India contends the AD on alcoholic beverages offsets or counterbalances and then prove that such excise duties do not exist or do not operate such that the AD offsets or counterbalances them.

87. The Panel’s suggestion that the United States could have simply “availed itself of the assistance of Indian tax lawyers” to obtain the state-level “excise duties” misses the point.<sup>125</sup>

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<sup>119</sup> See U.S. Closing Statement at the First Panel Meeting, para. 7 (noting that the Panel asked India to identify the taxes the AD and the EAD allegedly offset).

<sup>120</sup> Questions by the Panel Posed in the Context of the Second Panel Meeting, Question 58. In its answers to the questions posed by the Panel in the context of the second panel meeting, India omits Question 58 and renumbers the questions sequentially.

<sup>121</sup> See, e.g., Panel Report, para. 7.270 n. 310 (noting that in a written question the Panel asked India to identify relevant State excise duties and any differences in terms of the form of taxation, applicable duty rates, etc. but that India did not respond); see also paras. 7.271-7.272 (noting that the absence of evidence before the Panel that the state excise duties exist or that the states impose them).

<sup>122</sup> See, e.g., Panel Report, paras. 7.720 n. 310, 7.295.

<sup>123</sup> See, e.g., Appellate Body Report, *EC – Hormones*, para. 98; *United States – Shirts and Blouses*, p. 14.

<sup>124</sup> Panel Report, paras. 7.271-7.272, 7.291.

<sup>125</sup> Panel Report, para. 7.161 n.210.

Because India has not supported its assertion that the AD counterbalances or offsets state-level excise duties, including most critically by identifying the state-level excise duties to which the AD is allegedly equivalent, the United States did not know, and continues not to know, which state-level excise duties it might want to seek to obtain information about. In this regard, the Panel implicitly assumes even further that each Indian state has an excise duty denominated an “excise duty” and indicates somehow that that “excise duty” is the excise duty which the AD on alcoholic beverages offsets or counterbalances.<sup>126</sup> The evidence before the Panel simply does not support that assumption. First, as the Panel notes “denominations of State taxes may vary from State to State.”<sup>127</sup> Second, India acknowledged that there is no official definition of what constitutes an “excise duty,” only its general view that excise duties are those imposed on production or manufacture of a product.<sup>128</sup> Third, because the AD on alcoholic beverages is imposed by the Central Government allegedly to offset or counterbalance excise duties on alcoholic beverages imposed by the various Indian states, there is no reason the latter would indicate that the AD is intended to offset them. Fourth, while the Indian states are prohibited from imposing taxes on imported alcoholic beverages other than “excise duties on the manufacturer or production,” they are not prohibited from imposing other taxes or fees on imported alcoholic beverages, for example excise duties on the consumption or transfer of imported alcoholic beverages.<sup>129</sup> None of these facts support the Panel’s assumption that the “excise duties” that it considers the AD offsets or counterbalances are readily identifiable. To the contrary, these facts indicate the opposite: that if the Indian states impose taxes on the production or manufacturer of alcoholic beverages, they may or may not be denominated “excise duties” (and would not specify that they are the taxes the AD is allegedly offsetting), and that, if the Indian states impose taxes on the consumption or transfer of alcoholic beverages, for example, they too may be denominated “excise duties.” For example, India refers to the central excise tax, which is imposed on the production or manufacture of a product in India as the “Central VAT” or “CENVAT” but India acknowledges that despite being referred to as the CENVAT, the CENVAT is not a VAT but an excise duty.<sup>130</sup> In light of these facts, a panel undertaking an objective assessment of the matter could not reasonably conclude that the state-level excise duties which India contends the AD offsets or counterbalances are readily identifiable. Instead, the United States could at best guess which internal taxes are the internal taxes to which India contends the AD is equivalent. And, in this regard, the Panel appears to require the United States to raise a defense on India’s behalf by identifying state-level excise duties for which the AD on alcoholic beverages may be “equivalent”.

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<sup>126</sup> Panel Report, para. 7.265.

<sup>127</sup> Panel Report, para. 7.271 n.313 (citing the EC Third Party Submission) .

<sup>128</sup> India Answer to Panel Question 36, para. 36.1.

<sup>129</sup> *See, e.g.*, Panel Report, para. 7.287; U.S. Comments on the Interim Report, paras. 173.

<sup>130</sup> *See, e.g.*, Panel Report, para. 7.353.

88. The Panel’s suggestion that the United States could have obtained the information India failed, and refused to, provide by availing itself of the assistance of Indian tax lawyers or accounting firms is also troubling – it first presumes that there are such domestic lawyers or firms operating in every Member that would be available, and second presumes that each Member has the resources to avail itself of them, a presumption that would likely be of serious concern to small, least developed and developing countries.

89. If the Panel had made an objective assessment of the matter, it would have inferred from India’s failure (including in response to direct questioning from the Panel) to identify such excise duties and to substantiate that such excise duties exist, that the states impose them, and that they operate such that the AD offsets or counterbalances them, that no such excise duties exist, that the states do not impose them, and that they do not operate such that the AD offsets or counterbalances them, and the Appellate Body should draw this inference in reviewing the Panel’s findings.

90. The Panel’s approach of alleviating India of its burden of substantiating the facts it asserts or effectively raise its defense, and instead and requiring the United States to do so, is inconsistent with the Panel’s obligation to make an objective assessment of the matter contrary to Article 11 of the DSU.<sup>131</sup>

*b. Sales Taxes and Other Local Taxes or Charges and the EAD*

91. The Panel similarly fails to make an objective assessment of the matter with respect to India’s assertion that the EAD offsets or counterbalances state-level sales taxes on alcoholic beverages and other local taxes or charges on various unidentified products. As with the state-level excise duties, India fails to identify or submit any of the state-level sales taxes on alcoholic beverages<sup>132</sup> or any of the local taxes or charges to which it contends the EAD is equivalent.<sup>133</sup> Despite this failure, the Panel nonetheless assumes that such sales taxes or charges exist, that each of the 28 Indian states and 7 Union Territories impose them, and that they operate such that

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<sup>131</sup> The Panel states that there is no requirement in Article II:2 to specifically identify the relevant internal tax. The Panel misses the point. Panel Report, paras. 7.265, 7.270; *see also* para. 7.351 (concerning the internal taxes to which the EAD is allegedly equivalent). While Article II:2, like most other provisions of the GATT, does not spell out the evidence that may be offered to substantiate a contention that the measure at issue does or does not fall within its scope, this does not mean – as the Panel appears to believe – that a party may assert a measure falls within its scope without providing any evidence to support that assertion.

<sup>132</sup> India contends that certain products are not subject to VATs, including alcoholic beverages, and that such products are subject to state-level sales taxes. *See, e.g.*, Panel Report, para. 7.352.

<sup>133</sup> Panel Report, paras. 7.364, 7.369, 7.385 (noting that there is no specific information on state-level VATs, sales taxes or other local taxes or charges).

the EAD offsets or counterbalances them.<sup>134</sup> For the same reasons as indicated with respect to the state-level excise duties allegedly offsetting or counterbalancing the AD, the Panel's approach constitutes a failure to make an objective assessment of the matter. The Panel placed an impossible burden on the United States to guess the state-level sales taxes and local taxes and charges India contends that the EAD offsets or counterbalances and then prove that such taxes or charges do not exist or do not operate such that the EAD offsets or counterbalances them, and in this regard, similarly appears to require the United States to raise a defense on India's behalf. As with the state-level excise duties, the Panel should have inferred (and the Appellate Body should so infer in reviewing the Panel's findings) from India's failure to substantiate its assertions that such taxes or charges exist, that the states impose them, and that they operate such that the EAD offsets or counterbalances them, that no such taxes or charges exist, that the states do not impose them, and that they do not operate such that the EAD offsets or counterbalances them.

## **2. Making Inferences That Are Not Supported by Evidence Before the Panel About the Existence and Operation of Indian State-Level Excise Taxes and the AD on Alcoholic Beverages**

92. The Panel made a number of inferences about the AD on alcoholic beverages and the state-level excise duties to which it is allegedly equivalent that are not supported by the evidence before the Panel. In particular, the Panel found that the evidence before it supported the following inferences:

- (i) state-level excise duties on domestic alcoholic beverages exist;<sup>135</sup>
- (ii) each of the Indian states impose them;<sup>136</sup>
- (iii) the AD on imports of alcoholic beverages may only be levied if an excise duty is levied on like domestic products; and<sup>137</sup>
- (iv) none of the Indian states impose excise duties or other internal charges on

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<sup>134</sup> See U.S. Comments on India's Answer to Panel Question 52(b), para. 5 (emphasizing there was no evidence before the Panel that state-level sales taxes apply or if they do that they do not apply to imported products); U.S. Comments on India's Answer to Panel Questions 48(c), 48(f), 49(a), 50, paras. 1-4 (emphasizing that there is no evidence before the Panel of any local taxes or charges or that if they exist they do not apply to imported products and noting that India bears the burdening of supporting its assertions in this regard).

<sup>135</sup> Panel Report, para. 7.271-7.272, 7.291.

<sup>136</sup> Panel Report, para. 7.271-7.272, 7.291.

<sup>137</sup> Panel Report, para. 7.247, 7.281.

imported alcoholic beverages.<sup>138</sup>

The Panel used these inferences as a basis for its finding that the evidence before it supported or was not inconsistent with India’s assertion that the AD and the EAD are “equivalent” to state-level excise duties and VATs, sales taxes, and other local taxes and charges, respectively. As elaborated below, none of these inferences are supported by evidence before the Panel and, having nonetheless made and relied upon them to find that the “evidence” before it supported India’s assertion, the Panel breached its obligation to make an objective assessment of the matter.

*a. The Panel’s Inference that State-Level Excise Duties on Domestic Alcoholic Beverages Exist, Each of the Indian States Impose Them, and the AD on Imports of Alcoholic Beverages May Only Be Levied If an Excise Duty Is Levied on Like Domestic Products*

93. The Panel appears to base its inferences that (i) state-level excise duties on domestic alcoholic beverages exist, (ii) each of the 28 Indian states impose them, or (ii) the AD on imports of alcoholic beverages may only be levied if an excise duty is levied on like domestic products on the following:

- India’s assertions that all Indian states that permit the sale of alcoholic beverages impose an excise duty on domestic alcoholic beverages and that if like domestic products are not charged an excise duty imported products will also not be charged an AD;<sup>139</sup>
- authorization under India’s Constitution for the Indian states to impose excise duties on the manufacturer or production of alcoholic beverages;<sup>140</sup>
- the fact that the AD was being levied on imported products on the date the Panel was established;<sup>141</sup>
- references in CN 32/2003 and the proviso to Section 3(1) of the Customs Tariff Act to “state excise duties for the time being leviable on like alcoholic liquors produced or manufactured in different States”; and<sup>142</sup>

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<sup>138</sup> Panel Report, para. 7.292; *see also id.* paras. 7.287-7.288.

<sup>139</sup> Panel Report, para. 7.271, 7.281 (mentioning the “previously discussed condition that the AD is to be levied on alcoholic liquor . . . excise duty is leviable”); *see also* para. 7.247 (appearing to be where the panel “previously discussed” this “condition”).

<sup>140</sup> Panel Report, para. 7.271, 7.291; *see also* para. 7.284.

<sup>141</sup> Panel Report, para. 7.247.

<sup>142</sup> Panel Report, para. 7.262.

– a statement in an India Supreme Court case that AD “can be levied only if on a like article excise duty could be levied.”<sup>143</sup>

None of the above, however, supports the inferences that the Panel drew. First, in the circumstances of this dispute, where India refused to provide support for its assertions, India’s unsubstantiated assertions are not evidence from which the Panel may infer that state-level excise duties exist or that they operate in the manner India contends. Second, the mere fact that the Indian states are authorized to impose excise duties on the manufacture or production of domestic alcoholic beverages does not indicate that the Indian states exercised such authority and each imposed excise duties on domestic alcoholic beverages. Nor does the mere fact that CN 32/2003 and Section 3(1) reference state excise duties on domestic alcoholic beverages, or that the AD was being collected pursuant to these measures, amount to proof that such excise duties exist or that the Indian states each impose them. Third, as elaborated Section II.B.2(iii), the Supreme Court case on which the Panel relies to conclude that the AD on alcoholic beverages may only be levied if an excise duty is levied on like domestic products, concerns the AD on products *other* than alcoholic beverages and does not address the AD on alcoholic beverages. Therefore, none of the bases on which the Panel relied to infer that (i) state-level excise duties on domestic alcoholic beverages exist, (ii) each of the 28 Indian states impose them, or (iii) the AD on imports of alcoholic beverages may only be levied if an excise duty is levied on like domestic products, find any support in the evidence before the Panel.

*b. The Panel’s Inference that None of the Indian States Impose Excise Duties or Other Internal Charges on Imported Alcoholic Beverages*

94. The Panel’s inference that none of the Indian states impose excise duties or other internal charges on imported alcoholic beverages similarly finds no basis in the evidence before the Panel and in fact distorts or disregards contrary evidence provided by the United States. First, while India’s Constitution appears to limit the Indian states’ authorization to impose excise duties on the manufacture or production of alcoholic beverages to domestic products, it does not so limit the Indian states’ authorization to impose excise duties other than on production or manufacture, for example, excise duties on the transfer or consumption of alcoholic beverages.<sup>144</sup> Moreover, India’s Constitution expressly authorizes the Indian states to impose fees on alcoholic beverages.<sup>145</sup> Therefore, the evidence before the Panel indicates that while the Indian states are not authorized to impose excise duties on the manufacture or production of imported alcoholic beverages, they are authorized to impose excise duties, for example, on the transfer or consumption of imported alcoholic beverages and fees on imported alcoholic beverages.

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<sup>143</sup> Panel Report, para. 7.247.

<sup>144</sup> U.S. Comments on the Interim Report, para. 73.

<sup>145</sup> Panel Report, para. 7.287; U.S. Comments on the Interim Report, para. 73.



Specifically, as the United States explained to the Panel:<sup>146</sup>

[T]he State Governments’ lack of power to impose excise duties is more narrow than described by the Panel and does not deprive States of the power to impose excise duties on the consumption, transport etc. of alcoholic beverages not produced or manufactured in India. In this regard, India has represented that the term “excise duty” under India’s Constitution refers to an excise tax on the manufacture or production of a good.<sup>147</sup> Therefore, Entry 51 of List 2 (State List) and Entry 84 of List 1 (Central Government List) only refer to the authority to impose “duties of excise” on the manufacture or production of a product<sup>148</sup> and not, for example, the authority to impose excise duties on consumption, transport or transfer of the product.<sup>149</sup> Moreover, Entry 8 of List 2 grants the State Governments the exclusive authority with respect to “[i]ntoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors”<sup>150</sup>; Entry 26 grants the State Governments exclusive authority with respect to “trade and commerce with the State” (except with respect to industries where the control by the Central Government is declared “expedient” in which case the power is shared); and Entry 66 grants the State Governments exclusive authority with respect to “fees in respect of any of the matters in this List, but not including fees taken in any court”. Thus, in addition to their exclusive authority to impose excise duties on the manufacture or production of alcoholic beverages manufactured or produced in the relevant State, the Indian States are granted broad authority *inter alia* with respect to the possession, transport, purchase and sale of alcoholic beverages, with respect to trade and commerce within the State and with respect to fees in respect of both. Moreover, India has made clear that while Article 286 prohibits States from levying taxes on the sale or purchase of goods in the course of importation, it does not prohibit the

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<sup>146</sup> U.S. Comments on the Interim Report, paras. 72-73. Note, footnotes below reproduce the footnotes contained in quoted text from the U.S. Comments on the Interim Report.

<sup>147</sup> India Reply to Question 36, para. 36.1 (footnote as it appears in quoted text).

<sup>148</sup> India Reply to Panel Question 48, paras. 48.5, 48.6, 48.7 (“Entry 51 of the Constitution of India empowers Indian States to impose an excise duty on their manufacture or product, which will be charged and collected in the State of manufacture”; “Constitution of India divides the power to impose an excise duty on the production or manufacture of goods between the Center (Entry 84) and the State (Entry 51)”).

<sup>149</sup> In this regard, the United States recalls that the EC noted in its Third Party Submission that it considers an excise duty a tax on consumption rather than manufacture or production. EC Third Party Submission, para. 17 n.11. In response the EC’s submission, India stated that “excise duty” under its Constitution means duties of excise on production and manufacture. India Reply to Question 36, para. 36.1.

<sup>150</sup> India Reply to Panel Question 26, para. 26.1 (quoting Entry 8 of List 2).

imposition of taxes on imported goods *per se*.<sup>151</sup> Accordingly, it is not clear that the States lack the power to impose excise duties or taxes on the consumption, transport, transfer, storage, etc. of imported alcoholic beverages. In fact, when India issued Customs Notification 82/2007, it noted that it decided to withdraw the AD on alcoholic beverages “in lieu of State Excise Duty”.<sup>152</sup>

While the Panel appears to acknowledge that the Indian states have the authority to impose fees on alcoholic beverages – an acknowledgment directly contradicting the Panel’s findings – the Panel inextricably disregards this evidence.<sup>153</sup> In this connection, it is important to recall that the Panel assumed the each Indian state exercised its authority under India’s Constitution to impose excise duties on the production or manufacture of alcoholic beverages.<sup>154</sup> However, when faced with similar authority under India’s Constitution for the Indian states to impose other internal charges on imported alcoholic beverages the Panel assumes the opposite, that the states did not exercise such authority and did not impose such charges on imported alcoholic beverages.<sup>155</sup> In addition to its failure to base its finding on evidence before it, it is difficult to understand how the Panel’s unexplained disparate treatment of such evidence constitutes an “objective assessment” of the matter.

*c. Relying On Evidence of the AD as Applied to Products Other than Alcoholic Beverages*

95. In support of its inference that the AD on imports of alcoholic beverages may be levied only if an excise duty is levied on domestic alcoholic beverages, the Panel cites (i) India’s statement that that if domestically manufactured goods are not charged an excise duty, imported like products will not be charged the AD and (ii) a passage from an Indian Supreme Court case, *Hyderabad Industries Ltd. v. Union of India* providing that “[t]he levy of additional duty being with a view to provide for counter balancing the excise duty leviable, we are clearly of the opinion that additional duty can be levied only if on a like article excise duty could be levied.”<sup>156</sup>

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<sup>151</sup> India Reply to Panel Question 48, paras. 48.9. 48.11, 48.12. 48.13.

<sup>152</sup> Exhibit US-10; *see also* India First Written Submission, para. 44 (noting that “subsequent to the removal of the AD [on alcoholic liquor] the Central Government has left it to the respective State Governments to levy such charges that are equivalent to the corresponding state excise charges that are payable on like domestic alcoholic beverages...”).

<sup>153</sup> Panel Report, paras. 7.287-7.288, 7.292.

<sup>154</sup> *See, e.g.*, Panel Report, para. 7.291.

<sup>155</sup> Panel Report, paras. 7.287, 7.92 & n.346.

<sup>156</sup> Panel Report, para. 7.247; *see also id.* para. 7.247.

96. Both India's statement<sup>157</sup> and *Hyderabad Industries*, however, concerned the AD on products other than alcoholic beverages and do not support the Panel's inference with respect to the operation of the AD on alcoholic beverages. The fact that India's statement and *Hyderabad Industries* concern products other than alcoholic beverages is critical because the AD operates differently with respect to alcoholic beverages than it does for other products. In particular, the AD on products other than alcoholic beverages is imposed solely through Section 3(1) of the Customs Tariff Act and is set at rate "equal" to the rate of excise duty imposed by the Central Government on like domestic products under the Central Excise Tax (CET).<sup>158</sup> India sets excise duty rates for products other than alcoholic beverages in the First and Second Schedules to the Central Excise Tax and may modified CET rates or exempt particular products from the CET through CET notifications.<sup>159</sup> The rate of AD on products other than alcoholic beverages then follows automatically from the rate of CET established for like domestic products. Accordingly, India imposes the AD on products other than alcoholic beverages at rates "equal" to the excise duties imposed on like domestic products without having issued any customs notifications specifying the rates of the AD.<sup>160</sup> Thus, for example, if the rate of CET for a particular product is modified through a CET notification, the rate of AD on the like imported product adjusts in tandem; and if a particular product is exempted from the CET, the like imported product is also exempt from the AD. India does not contest these facts; in fact, India's own explanations of how the AD on products other than alcoholic beverages confirms them.<sup>161</sup>

97. In contrast, there is no such built-in mechanism to ensure that if state-level excise duties are not levied on like domestic products, the AD is not levied on imported alcoholic products. Instead, for alcoholic beverages the Central Government specified the rates of the AD in

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<sup>157</sup> The Panel attributes India's statement to paragraph 3.5 of India's Second Oral Statement and India's Comments on the U.S. Answer to Panel Question 43, each of which cite *Hyderabad Industries*. Panel Report, para. 7.247 n.271. In both places India is careful to refer to the AD generally and not the AD on alcoholic beverages and in both places cites in support of its statement a Supreme Court case which itself only concerns the AD imposed on products other than alcoholic beverages. See U.S. Comments on the Interim Report, para. 51. Specifically, in paragraph 3.5 it states: [I]f domestically manufactured goods are not charged an excise duty, then imported like products will also not be charged the AD even if they are imported into the customs territory of the country" (citing *Hyderabad* as support for this latter statement). India repeats this sentence in its comments on the U.S. answer to Question 43 (underlining added). India Oral Statement at the Second Panel Meeting, para. 3.5; India Comments on U.S. Answer to Panel Question 43, para. 5. Thus, the Panel is incorrect that India even asserted that the AD *on alcoholic beverages* only applies if excise duties are imposed on like domestic products.

<sup>158</sup> U.S. First Written Submission, para. 21; U.S. Second Written Submission, para. 83, U.S. Comments on the Interim Report, paras. 52-53, 62.

<sup>159</sup> *Id.*

<sup>160</sup> U.S. Second Written Submission, para. 83 & n. 124; U.S. First Written Submission, para. 21; India Reply to Panel Question 27(j), para. j.1.

<sup>161</sup> See, e.g., India Reply to Panel Question 27(j), para. j.1.

Customs Notification 32/2003, and those rates do not automatically vary in relation to any changes in the amount or imposition of any state-level excise duties on like domestic alcoholic beverages. Once again, India contested none of these points: in the first instance, as noted, India's statements concerned the AD imposed on products other than alcoholic beverages, and moreover, India explains that any modifications to the rates of excise duty specified in Customs Notification 32/2003 must be made through issuance of another customs notification (i.e., the rates of AD do not vary automatically as rates of state-level excise duties vary).

98. The *Hyderabad* decision, likewise, concerns the AD imposed on products other than alcoholic beverages, in particular Section 3(1) of the Customs Tariff Act.<sup>162</sup> While the Panel correctly notes that Section 3(1) also applies to the AD on alcoholic beverages, it only does so as applied in conjunction with the proviso to Section 3(1) which specifies that the AD on alcoholic beverages shall "have regard to" excise duties imposed by the various Indian states, as compared to Section 3(1) which provides that the AD shall be "equal" to excise duties. Therefore, in discussing the relationship between the imposition of the AD and the imposition of excise duties the fact that the *Hyderabad* decision concerned only Section 3(1) and not also the proviso is, contrary to the Panel's suggestion, significant.

99. Because India's statement and *Hyderabad* decision concern that the AD on products other than alcoholic beverages and the AD on other products operates fundamentally differently than the AD on alcoholic beverages, the Panel could not consistent with its obligation to make an objective assessment of the matter rely on them to infer that the AD on alcoholic beverages may "be levied only if on like domestically manufactured alcoholic liquor ... excise duty is leviable."

100. The Panel relies on its inference that the AD may only be levied if excise duties are levied on like domestic alcoholic beverages, in support of its finding that the AD is designed to counterbalance state-level excise duties.<sup>163</sup> It also relies on this inference to find that the United States was correct in saying that the AD on alcoholic beverages applies as a matter of course on importation.<sup>164</sup> However, because the evidence the Panel supports the fact that the AD on alcoholic beverages applies as a matter of course on importation (as detailed in the U.S. submissions and in Section),<sup>165</sup> even without the Panel's inference it is clear that the AD on alcoholic beverages applies as a matter of course on importation.

### 3. Disregarding Evidence Before the Panel that Indian State-Level

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<sup>162</sup> The Panel acknowledges this, including by acknowledging that the *Hyderabad* decision was made before the proviso existed. Panel Report, para. 7.247.

<sup>163</sup> Panel Report, para. 7.281.

<sup>164</sup> Panel Report, para. 7.247.

<sup>165</sup> See, e.g., U.S. Comments on the Interim Report, paras. 55-56.

### **VATs, Sales Taxes, and Other Local Taxes Apply to Imported Products**

101. The Panel found that the evidence before it supported India's contention that the EAD offsets or counterbalances state-level VATs, sales taxes and other local taxes and charges<sup>166</sup> and relied *inter alia* on this to find that the United States failed to establish that the EAD was not equivalent to them.<sup>167</sup> In reaching this conclusion, considering that EAD offsets or counterbalances state-level VATs, sales taxes and other local taxes or charges, the Panel disregarded critical evidence before it. In particular, the Panel disregarded the fact that the state-level VATs, Central Sales Tax and other local taxes and charges already apply to imported products.<sup>168</sup> Because these taxes or charges already apply to imported products, it is incorrect to suggest that the EAD offsets or counterbalances them, which implies that EAD is imposed on imported products because such taxes or charges are not imposed on imported products. Therefore, the EAD cannot be considered to offset or counterbalance the state-level VATs, Central Sales Tax and other local taxes and charges; instead the EAD subjects imported products to a charge in addition to these internal charges.

102. The Panel disregards this fact by noting that India only contends that the EAD "was introduced to counterbalance only those of the relevant internal taxes or charges that would be leviable on a good in respect of a domestic sale transaction equivalent to the import transaction involving the like good."<sup>169</sup> This may or may not have been India's intention, but the fact is that the EAD applies generally to all imported products; it is not limited to imported products that only encounter a "first sale" transaction (nor is a refund provided for those imported products for which the EAD has been and that in a subsequent transaction have also been subject to state-level VATs, the Central Sales Tax or other local taxes or charges).<sup>170</sup> Therefore, even if the EAD could be said to offset or counterbalance state-level VATs, the Central Sales Tax and other local taxes or charges on the "first sale" transaction, the evidence before the Panel does not support the notion that the EAD on imported products subject to subsequent sales transactions offsets or counterbalances these internal taxes or charges, since in those subsequent sales transactions imported products are subject to the state-level VATs, the Central Sales Tax and other local taxes or charges.

103. Having disregarded this fact, and considering that the evidence before the Panel

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<sup>166</sup> Panel Report, paras. 7.375, 7.377, 7.383.

<sup>167</sup> See, e.g., Panel Report, paras. 7.388-7.390.

<sup>168</sup> Panel Report, para. 7.366-7.367.

<sup>169</sup> Panel Report, para. 7.366.

<sup>170</sup> See, e.g., Panel Report, paras. 7.366-7.367.

supported India’s assertion that the EAD offsets or counterbalances state-level VATs, the Central Sales Tax and other local taxes or charges, the Panel failed to make an objective assessment of the matter in accordance with Article 11 of the DSU.

**4. Making Inferences That Are Not Supported by Evidence Before the Panel About the Existence and Operation of Indian State-Level Value-Added Taxes (VATs), Sales Taxes and Other Local Taxes and the EAD**

104. The Panel also failed to make an objective assessment of th matter in accordance with Article 11 of the DSU with respect to its findings that the EAD is “equivalent” to state-level VATs, sales taxes and other local taxes. In particular, the Panel made a number of inferences about the EAD and the relevant state-level taxes or charges to which it is allegedly equivalent that are not supported by the evidence before the Panel. In particular, the Panel found that the evidence before it supported the following inferences that are not supported by the evidence before the Panel:

- (i) state-level sales taxes on alcoholic beverages and other local taxes or charges exist;
- (ii) the Indian states impose them; and
- (iii) the EAD may only be levied on an imported product if an excise duty is levied on a like domestic product;

105. Because, as explained below, these inferences are not supported by evidence before the Panel, by making and relying on them the Panel breached its obligation under Article 11 of the DSU to make an objective assessment of the matter.

106. The Panel appears to base its inferences that (i) state-level sales taxes on alcoholic beverages and other local taxes or charges exist and (ii) the states impose them on the following:

- India’s assertions that such taxes exist and the states impose them;<sup>171</sup> and
- authorization under India’s Constitution for the Indian states to impose them.<sup>172</sup>

The bases, however, do not support the Panel’s inferences. First, in the circumstances of this dispute, where India refused to support its assertions, India’s unsubstantiated assertions are not

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<sup>171</sup> Panel Report, paras. 7.352-7.365, 7.364-7.365.

<sup>172</sup> Panel Report, paras. 7.352 & n.387, 7.355.

evidence from which the Panel may infer that state-level sales taxes on alcoholic beverages and other local taxes or charges exist or that they operate in the manner India contends. Second, the mere fact that the Indian states are authorized to impose sales taxes does not indicate that the Indian states exercised such authority and each imposed sales taxes on alcoholic beverages or imposes other local taxes or charges. The Panel’s inferences are therefore not supported by the evidence before the Panel.

107. The Panel bases its inference that the EAD may only be imposed on an imported product if the like domestic product is subject to “relevant internal taxes” on its finding that the AD on alcoholic beverages may only be levied on imported products if like domestic products are subject to state-level excise duties.<sup>173</sup> For the reasons stated above, the Panel’s finding that the AD on alcoholic beverages may only be levied on imported products if like domestic products are subject to state-level excise duties is not supported by evidence before the Panel. Accordingly, the Panel’s reliance on this finding to infer that the EAD may only be imposed on an imported product if the like domestic product is subject to “relevant internal taxes, is likewise not supported by evidence before the Panel. There is also no basis to assume as the Panel does that the mere fact that the measures imposing the AD and the EAD “corresponding language” suggest that the two duties and the internal taxes to which they are allegedly equivalent apply or operate in the same manner.<sup>174</sup>

108. The Panel’s inference not only finds no basis in the evidence before the Panel but the evidence actually before the Panel contradicts its inference that the EAD may only be imposed on an imported product if the like domestic product is subject to “relevant internal taxes.” In particular, evidence before the Panel indicates that there may be instances where the EAD is imposed on an imported product when the like domestic product is not subject to the applicable state-level VAT or Central Sales Tax, specifically when a state has exempted a domestic product from its VAT (which acts to exempt that product from the Central Sales Taxes when sold from that state to another Indian state). The Panel acknowledges these facts,<sup>175</sup> yet nonetheless, and without explanation, infers that the EAD may only be levied on an imported product if state-level VATs, sales taxes, and other local taxes or charges are levied on the like domestic

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<sup>173</sup> Panel Report, paras. 7.336, 7.375.

<sup>174</sup> The Panel relies on its inference that the EAD may only be levied if excise duties are levied on like domestic products, to support its finding that the evidence before it supported India’s contention that the EAD offsets or counterbalances state-level VATs, sales taxes and other local taxes or charges. Panel Report, para. 7.375. The Panel also relies on this inference to find that the United States was correct in saying that the EAD applies as a matter of course on importation. Panel Report, para. 7.366. Because the evidence the Panel supports the fact that the AD on alcoholic beverages applies as a matter of course on importation (as detailed in the U.S. submissions and in Section II.E.1 ), even without the Panel’s inference it is clear that the EAD applies as a matter of course on importation.

<sup>175</sup> Panel Report, paras. 7.360, 7.362, 7.369.

product.<sup>176</sup> The Panel’s inference is simply not borne out by the facts before the Panel.

**C. The Panel Erred in Finding that the United States Failed to Establish that the AD and the EAD Fall Outside the Scope of Article II:2(a)**

109. The Panel found that the United States failed to establish that the AD and the EAD fall outside the scope of Article II:2(a). The Panel’s findings are premised on: (i) its erroneous findings as to the relationship between Article II:1(b) and Article II:2 and the elements required to establish a *prima facie* case of inconsistency under Article II:1(b); (ii) its erroneous interpretation of “equivalent” in Article II:2(a) and the elements necessary to establish that a measure falls within the scope of Article II:2(a); and (iii) its failure to make an objective assessment of the matter in accordance with Article 11 of the DSU. On account of these erroneous findings, the Panel’s findings that the United States failed to establish that the AD and the EAD fall outside the scope of Article II:2(a) are also in error.

110. More specifically, because the Panel fundamentally misconceived the relationship between Articles II:1(b) and II:2 and the elements of a *prima facie* case under Article II:1(b), the Panel viewed the issue of whether a measure falls within the scope of Article II:2(a) as one to be raised and established by the complaining party, even in the absence of the responding party raising the issue or substantiating its assertion that the measure falls within the scope of Article II:2(a). However, as discussed above, the responsibility to prove that a measure falls outside the scope of Article II:2(a) does not rest with the complaining party until and unless the responding party raises Article II:2(a) and substantiates its assertions that the measure in dispute falls within its scope.

111. Therefore, in this dispute, because India has not substantiated its assertion that the AD on alcoholic beverages falls within the scope of Article II:2(a) as a charge equivalent to state-level excise duties imposed consistently with Article III:2 in respect of the like domestic product, the burden did not fall to the United States to prove that the AD fell outside the scope of Article II:2(a) because it was not a charge equivalent to state-level excise duties imposed consistently with Article III:2 in respect of like domestic products. Similarly, with respect to the EAD, because India has not substantiated its assertion that the EAD falls within the scope of Article II:2 as a charge equivalent to state-level VATs, sales taxes and other local taxes or charges, the burden did not fall to the United States to prove that the EAD fell outside the scope of Article II:2(a) because it is was not a charge equivalent to state-level VATs, sales taxes and other local taxes or charges imposed consistently with Article III:2 in respect of like domestic products. Therefore, in the absence of evidence to substantiate that the either the AD or the EAD fell within the scope Article II:2(a), the Panel should have found that neither measure did. The Panel, however, takes the contrary approach, taking as a fact that both measures fall within the scope of Article II:2(a) until the United States established otherwise. For the reasons stated, the

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<sup>176</sup> Panel Report, para. 7.336, 7.375.



Panel’s approach is in error.

112. In addition, in light of its erroneous interpretation of “equivalent” in Article II:2(a), the Panel erroneously relied on the indented purpose or function of the AD on alcoholic beverages and the EAD and the reasons India would want to impose them to reach its finding that the United States had failed to establish that those measures are not “equivalent” to state-level excise duties. Whether or not the Panel correctly identified the purpose of the AD on alcoholic beverages or the EAD or India’s reason for imposing them, does not address the issue of whether the AD and the EAD are “equivalent” to state-level excise duties and state-level VATs, sales taxes and other local taxes or charges, respectively. At most the indented purpose or function of, or reason for, the AD on alcoholic beverages and the EAD indicates that India may have intended the AD and the EAD to be equivalent to state-level excise duties; it does not indicate that the AD on alcoholic beverages or the EAD are in fact is equivalent, or as the Panel found that the United States failed to establish that the AD on alcoholic beverages and the EAD are not equivalent, to state-level excise duties and state-level VATs, sales taxes and other local taxes or charges, respectively.<sup>177</sup> As explained above, addressing the issue of whether the AD on alcoholic beverages and the EAD are equivalent to the state-level excise duties and state-level VATs, sales taxes and other local taxes or charges, respectively, would require a comparison of the structure, design and effect of AD on alcoholic beverages and the EAD on the one hand and respective state-level taxes on the other to determine whether the AD on alcoholic beverages and the EAD, respectively, are virtually identical or corresponds to them in amount, effect and function (in the sense of operation). The Panel did not undertake such an analysis, and its finding that the United States failed to establish that the AD on alcoholic beverages and the EAD are not equivalent to internal taxes is erroneous because of it.

113. Moreover, in light of its erroneous finding that a measure may fall within the scope of Article II:2(a) regardless of whether the internal tax to which it is equivalent is imposed consistently with Article III:2, the Panel erroneously considered the fact that the AD on alcoholic beverages and the EAD result in charges on imported products in excess of charges on like domestic products irrelevant. The fact that the AD on alcoholic beverages and the EAD result in charges on imported products in excess of charges on like domestic products, however, far from being irrelevant, is evidence in and of itself that the AD on alcoholic beverages and the EAD are not equivalent to internal taxes “imposed consistently with [Article III:2]” and thus demonstrate that the Panel erred in finding that the United States had failed to establish that the AD on

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<sup>177</sup> In fact, it does not even indicate that the AD serves the same function or purpose as state-level excise duties since determining that the AD serves the same function or purpose as state-level excise duties would imply a comparison of the purpose or function of the AD on the one hand with the purpose or function of state-level excise duties on the other. However, because there was no evidence before the Panel that such state-level excise duties exist much less what their purpose or function is, there is no basis on which the Panel could objectively conclude that the purpose of the two are the same.

alcoholic beverages and the EAD fall outside the scope of Article II:2(a).<sup>178</sup>

114. Furthermore, had the Panel made an objective assessment of the matter including by requiring India to support its assertion that the AD and the EAD are charges equivalent to internal taxes imposed consistently with Article III:2 and by taking into account evidence before it that the state-level VATs, Central Sales Tax and other local taxes and charges already apply to imported products, it could not have found that the United States failed to establish that the AD and EAD are not equivalent to state-level excise duties and state-level VATs, Central Sales Tax and other local taxes and charges, respectively. In particular, had the Panel required India to substantiate its assertions that (i) state-level excise duties exist; (ii) each of the Indian states impose them; and (iii) none of the Indian states impose excise duties or other internal charges on imported alcoholic beverages, the Panel could not have found that the United States failed to establish that the AD is not equivalent to state-level excises duties, since there was no evidence indicating that such excise duties even exist much less that the AD is equivalent to them or that they are imposed consistently with Article III:2.<sup>179</sup> Similarly, with respect to the EAD, had the Panel required India to substantiate its assertions that (i) state-level sales taxes and other local taxes or charges exist and (ii) that each of the Indian states impose them and (iii) taken into account evidence before the Panel that the state-level VATs, Central Sales Tax and other local taxes and charges already apply to imported products, the Panel could not have found that the United States failed to establish that the EAD is not equivalent to state-level VATs, sales taxes and other local taxes or charges. This is because there was no evidence indicating that state-level sales taxes and other local taxes or charges exist and the evidence before the Panel indicated that rather than counterbalancing taxes or charges imposed on domestic products that do not apply to imported products, the EAD subjects imported products to a charge in addition to the state-level VATs, CST and other local taxes or charges to which imported products are already subject.<sup>180</sup>

115. As elaborated below, applying the correct interpretations of Article II:1(b) and II:2(a), including the correct interpretation of “equivalent” in Article II:2(a) and the elements necessary to establish that a measure falls within the scope of Article II:2(a), and undertaking an objective

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<sup>178</sup> The Panel did not explicitly find that the United States failed to establish that the AD and the EAD fall outside the scope of Article II:2(a) but it did so implicitly by setting up a requirement that the United States establish that the AD on alcoholic beverages and the EAD fall outside the scope of Article II:2(a) as part of establishing that the measures fall within the scope of Article II:1(b) and finding that, because the United States had not established that the AD and the EAD are not equivalent to internal taxes, the United States had failed to establish that the AD and the EAD fall within the scope of Article II:1(b). *See* Panel Report, paras. 7.297-7.298, 7.392-7.393.

<sup>179</sup> The Panel itself acknowledges that its finding that the United States failed to establish that the AD is not equivalent to state-level excise duties rests on the premise that such excise duties exist, that each of the Indian states impose them, and do so as envisaged under Indian law. *See* Panel Report, paras. 7.290-7.292.

<sup>180</sup> The Panel itself acknowledges that its finding that the United States failed to establish that the EAD is not equivalent to state-level VATs, sales taxes and other local taxes or charges rests on the premise that such taxes or charges exist, that each of the Indian states impose them, and do so as envisaged under Indian law. *See* Panel Report, paras. 7.384-7.387.

assessment of the matter, leads to the conclusions the AD on alcoholic beverages is not a charge equivalent to state-level excise duties imposed consistently with Article III:2 in respect of like domestic products, the EAD is not a charge equivalent to state-level VATs, sales taxes and other local taxes or charges imposed consistently with Article III:2 in respect of like domestic products, and therefore neither measure falls within the scope of Article II:2(a). This conclusion is relevant, not because it is an element of establishing a *prima facie* case that the AD and the EAD fall within the scope of Article II:1(b) as the Panel erroneously finds, but because it disproves the defense raised by India that the AD and the EAD may be justified under Article II:2(a). India's defense under Article II:2(a) including the reasons the AD and the EAD do not fall within its scope are address in Section II.E.5-6. below.

**D. The Panel Erred in Finding that the United States Is Not Challenging the Customs Act and the Custom Tariff Act With Respect to the AD and the EAD**

116. The Panel finds that the United States is not challenging Section 12 of the Customs Act and Section 3(1) of the Customs Tariff Act with respect to the AD on alcoholic beverages and is not challenging Section 12 of the Customs Act and Section 3(5) of the Customs Tariff Act with respect to the EAD.<sup>181</sup> The Panel also finds that the U.S. challenge to the AD is limited to the AD as imposed through CN 32/2003 and its challenge to the EAD limited to EAD as imposed through CN 19/2006.<sup>182</sup> The Panel's findings are in error.

117. The United States is challenging the AD as imposed through Section 12 of the Customs Act, Sections 3(1), 3(2) and 3(7) of the Customs Tariff Act and CN 32/2003 and the EAD as imposed through Section 12 of the Customs Act, Sections 3(5), 3(6) and 3(7) of the Customs Tariff Act and CN 19/2006. The Panel's findings to the contrary are simply not consistent with the claims the United States has raised in this dispute.

118. In particular, the U.S. challenges to the AD and the EAD are set out in the U.S. panel request. That request provides that the United States considers the AD and the EAD each to be inconsistent with Article II:1(a) and (b) of the GATT 1994 and identifies the relevant Indian measures as including *inter alia* Section 12 of the Customs Act, Section 3 of the Customs Tariff Act, CN 32/2003 and CN 19/2006.<sup>183</sup> In addition, in its first written submission, the United States explains that the AD and the EAD are each inconsistent with Article II:1(a) and (b) and that India imposes the AD and the EAD *inter alia* through Section 12 of the Customs Act,

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<sup>181</sup> Panel Report, paras. 7.106.

<sup>182</sup> *Id.*

<sup>183</sup> Panel Request, WT/DS360/5.

Section 3 of the Customs Tariff Act, CN 32/2003 and CN 19/2006.<sup>184</sup> Further, in response to Panel Question 16, the United States lists each of the measures comprising the AD and the EAD, including Section 12 of the Customs Act, Section 3 of the Customs Tariff Act, CN 32/2003 and CN 19/2006, and states that it “is challenging the AD as such (as composed of the provisions cited above) and the EAD as such (as composed of the provisions cited above).”<sup>185</sup> Moreover, in response to India’s argument that the Panel should “limit its examination to the identified Customs Notifications,” the United States consistently objected, explaining why the Panel should consider Section 12 of the Customs Act and Section 3(1), 3(5), 3(6) and 3(7) as measures subject to challenge.<sup>186</sup>

119. India acknowledges that that the U.S. challenge to the AD and the EAD include not only CN 32/2003 and CN19/2006 but also the relevant statutory provisions. For example, India states: “The United States has identified Section 12 of the Customs Act and Section 3 of the [Customs Tariff Act] as two offending measures in the present dispute, and in doing so has effectively challenged the empowering provisions in the two legislation as such, independently from the application of that legislation (through the identified Customs Notifications) in specific instances.”<sup>187</sup>

120. In its report, although the Panel acknowledges that the United States has described the AD and the EAD as comprising a number of provisions of Indian law, including Section 3(1) and 3(5) of the Customs Tariff Act, and that the United States considers the AD and the EAD to be levied through these provisions,<sup>188</sup> it appears to reach the findings that the U.S. is not challenging Section 3(1) and 3(5) of the Customs Tariff Act on account of the fact that United States “has never said that it is challenging Section 3(1) or Section 3(5) of the Customs Act separately from the AD on alcoholic liquor and the SUAD.”<sup>189</sup> While the Panel is correct that the United States is not challenging Sections 3(1) and 3(5) *separately* from the AD on alcoholic beverages or the EAD, this is because the AD comprises *inter alia* Section 3(1) and the EAD comprises *inter alia* Section 3(5). As the United States explained before the Panel, the United States is challenging the AD and the EAD, each of which is levied through a series of measures which together comprise the AD and the EAD respectively.

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<sup>184</sup> U.S. First Written Submission, para. 2.

<sup>185</sup> U.S. Answer to Panel Question 16, paras. 35-38.

<sup>186</sup> U.S. Second Written Submission, para. 75-90; U.S. Oral Statement at the Second Panel Meeting, paras. 25-28; U.S. Answer to Panel Question 66, paras. 17-19.

<sup>187</sup> India First Written Submission, para. 39.

<sup>188</sup> Panel Report, para. 7.106.

<sup>189</sup> *Id.*

121. In this regard, the Panel distorts the U.S. position the Panel need not engage in an elaborate analysis of whether Section 3(1) and 3(5) of the Customs Tariff Act are mandatory to mean the U.S. is not challenging those provisions.<sup>190</sup> The U.S. made this point because even if the Panel concluded that Section 3(1) and 3(5) of the Customs Tariff Act are not mandatory, India had acknowledged that Customs Notifications 32/2003 and 19/2006 are mandatory; therefore, regardless which measures comprising the AD or the EAD are mandatory, there is no doubt that the AD and the EAD are mandatory.<sup>191</sup>

122. The United States raised each of the above points in its comments on the Panel's interim report.<sup>192</sup> The Panel, however, did not respond to these point or even more generally to the disagreement expressed by the United States that its claims against the AD and the EAD were limited to CN 32/2003 and CN 19/2006.<sup>193</sup>

123. Because the Panel erred in finding that the U.S. challenge to the AD and the EAD are limited, respectively, to the AD as imposed through CN 32/2003 and the EAD as imposed through CN 19/2006, the Appellate Body should reverse that finding and instead find that the United States properly challenged the AD comprising *inter alia* Section 3(1) of the Customs Tariff and CN 32/2003 and the EAD comprising *inter alia* Section 3(5) of the Customs Tariff Act and CN 19/2006. As a consequence, in response to the U.S. request that the Appellate Body find the AD and the EAD each inconsistent with Article II:1(a) and (b) – which request is discussed in more detail in Section II.E – the United States respectfully requests that the Appellate Body make those findings with respect to the AD comprising *inter alia* Section 3(1) of the Customs Tariff and CN 32/2003 and the EAD comprising *inter alia* Section 3(5) of the Customs Tariff Act and CN 19/2006.

**E. The Panel Erred in Finding that the United States Had Failed to Establish that the AD and the EAD Are Each Inconsistent with Article II:1(b), and the Appellate Body Should Find that the AD and the EAD Are Each Inconsistent With Article II:1(b) and II:1(a) and Not Justified Under Article II:2(a)**

124. The Panel finds that the United States failed to meet its burden of establishing that the

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<sup>190</sup> Panel Report, para. 7.106 n.167.

<sup>191</sup> The United States notes that the Panel appears to make a similar point in paragraph 7.108 where it notes: “Since under the relevant customs notifications in force on the date of establishment of this Panel the AD on alcoholic liquor and the SUAD were required to be applied by the Central Government to imports of subject goods, it is of no particular importance whether the statutory provisions upon which the customs notifications are based are also mandatory. We therefore see no need to examine the relevant statutory provisions in this light.” Panel Report, para. 7.108.

<sup>192</sup> U.S. Comments on the Interim Report, paras. 26-29.

<sup>193</sup> Panel Report, paras. 6.1-6.151.

AD and the EAD are inconsistent with Article II:1(a) or (b),<sup>194</sup> in particular because the United States had failed to establish that either duty falls within the scope of that article.<sup>195</sup> The Panel's finding is based on its erroneous interpretations of Articles II:1(b), II:2 and III:2 and its erroneous finding regarding the elements necessary to establish a *prima facie* case that a measure is inconsistent with Article II:1(b). Because the Panel based its assessment of the conformity of the AD and the EAD with Article II:1(a) and (b) on these erroneous findings, in addition to a number of failures to adhere to its obligations under DSU Article 11 outlined above, the Panel's findings that the United States failed to establish that the AD and the EAD are inconsistent with Article II:1(a) and (b) are also in error. In light of this, the Appellate Body should reverse the Panel's findings the United States failed to establish that the AD and the EAD are inconsistent with Article II:1(a) and (b) and, applying the correct interpretation of those provisions, complete the analysis and find that the AD and the EAD are each inconsistent with Article II:1(a) and (b).

125. The Appellate Body should also find that neither the AD nor the EAD is justified under Article II:2(a). Because Article II:2(a) is an exception to Article II:1(b), the proper order of analysis is to examine whether the duties are inconsistent with Article II:1(b) and if so to then examine India's defense that they are nonetheless justified under Article II:2(a).

**1. The Appellate Body Should Find the AD Inconsistent with Article II:1(a) and (b)**

126. Article II:1 of the GATT 1994 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.

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<sup>194</sup> Panel Report, para. 8.1.

<sup>195</sup> Panel Report, paras. 7.298, 7.393.

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.<sup>196</sup> Thus, Article II:1(b) prohibits Members from imposing “ordinary customs duties” and “all other duties or of any kind imposed on or in connection with importation” in excess of the rates set forth in the Member’s Schedule (“bound rates” or “tariff bindings”), and Article II:1(a) prohibits Members from according less favorable treatment to imports than provided for in the Member’s Schedule.<sup>197</sup> As the Appellate Body has explained, 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.”<sup>198</sup>

127. The AD on alcoholic beverages is inconsistent with Article II:1(a) and (b) because it results in “ordinary customs duties,” or “other duties or charges of any kind imposed on or in connection with importation,” on imports of alcoholic beverages that exceed the duties or charges set forth for alcoholic beverages in India’s Schedule.

*a. The AD Constitutes an Ordinary Customs Duty or Other Duty or Charge of Any Kind*

128. The AD constitutes an ordinary customs duty within the meaning of Article II:1(b). As elaborated above, and in the U.S. submissions to the Panel, 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 and not in response to particular set of circumstances.<sup>199</sup>

129. The AD on alcoholic beverages applies (i) at the time of importation, (ii) as a matter of course on importation, (iii) exclusively to imports (i.e., not to domestic products), and (iv) as an *ad valorem* or specific duty, depending on the CIF value of the import.<sup>200</sup> The obligation to pay the AD on alcoholic beverage accrues based on the products as they enter India’s customs

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<sup>196</sup> Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade, 1994, paras. 1-2.

<sup>197</sup> See, e.g., Appellate Body Report, *Argentina – Textiles*, paras. 45-47.

<sup>198</sup> Appellate Body Report, *Argentina – Textiles*, para. 47; Panel Report, *US - Certain EC Products*, para. 6.57 (quoting the Appellate Body in *Argentina – Textiles*).

<sup>199</sup> *Supra*; U.S. First Written Submission, para. 43.

<sup>200</sup> Panel Report, paras. 7.246-7.248; see also U.S. First Written Submission, para. 44.

territory and are assessed on the basis of such products at the moment of importation.<sup>201</sup>

130. The AD on alcoholic beverages also shares the same or similar attributes a India’s basic customs duty (BCD), which India acknowledges is an “ordinary customs duty.”<sup>202</sup> In particular, the BCD also takes the form of an *ad valorem* or specific duty (or combination thereof), is imposed at the time of and as a matter of course on the importation of a good, and applies exclusively to imports.<sup>203</sup> In addition, the AD and the BCD are both referred to by India as “customs duties,” imposed (and privy to exemptions) through the same or similar provisions of Indian customs law, and administered by the same customs personnel and at the same time.<sup>204</sup> Because the AD possess the same attributes as the BCD – a duty India considers an “ordinary customs duty” – this indicates that the AD is the “normal, customary” and “of the usual kind” of duty imposed and thus “ordinary” within the meaning of the phrase “ordinary customs duties.”<sup>205</sup>

131. On account of these facts, the Appellate Body, applying the correct interpretation of the phrase “ordinary customs duty,” should find that AD constitutes an ordinary customs duty within the meaning of GATT Article II:1(b).<sup>206</sup>

132. In any event, because the AD is a duty imposed on importation of a product,<sup>207</sup> if the AD is found not to constitute an “ordinary customs duty,” it must be found to constitute an “other duty or charge of any kind imposed on or in connection with importation” within the meaning of

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<sup>201</sup> See Panel Report, paras. 7.246-7.248; see also U.S. First Written Submission, para. 44; U.S. Answer to Panel Question 12, paras. 17-29; U.S. Second Written Submission, paras. 8-9.

<sup>202</sup> India First Written Submission, para. 12; Panel Report, para. 7.230.

<sup>203</sup> Panel Report, paras. 7.246-7.248; U.S. First Written Submission, para. 45; U.S. Second Written Submission, paras. 8, 10-11; see also U.S. Comments on the Interim Report, paras. 59-60 (explaining that the Panel misconstrued the U.S. point in comparing the AD and the BCD).

<sup>204</sup> Panel Report, paras. 7.253-7.255; see also, e.g., U.S. First Written Submission, paras. 44-45; U.S. Second Written Submission, paras. 11-12.

<sup>205</sup> In this regard, the Panel appears to misconstrue the U.S. point in comparing the AD and BCD. Panel Report, paras. 7.253 and 7.255. The Panel suggests that the U.S. position is that “India’s customs duty regime regards both the BCD and the AD as ‘ordinary customs duties.’” This is incorrect. The purpose of the comparison is to demonstrate that the AD shares the same or similar attributes as the BCD. As elaborated above, whether a duty is “ordinary” entails a comparison of what is “customary, normal” or “of the usual kind”. In examining the attributes of a duty India considers “ordinary” and comparing those attributes to the AD, this can elucidate whether the AD is also “ordinary”.

<sup>206</sup> The intended purpose of AD not determinative. See *supra* Section II.A.7 ; see also, e.g., U.S. Second Written Submission, para. 13; U.S. First Written Submission, para. 45 n.71.

<sup>207</sup> Panel Report, para. 7.248.



Article II:1(b).<sup>208</sup> As detailed above, Article II:1(b) concerns ordinary customs duties and *all* other duties or charge of *any kind* imposed on or in connection with importation such that any duty imposed on importation that is not an ordinary customs duty must necessarily constitute an “other duty or charge”.<sup>209</sup> As also detailed above, resolving whether the AD constitutes an “ordinary customs duty” or an “other duty or charge” is unnecessary, because either way, the AD falls within the scope of Article II:1(b) and, as elaborated below either way would result in duties on imports of alcoholic beverages in excess of those set out in India’s Schedule.

133. In this regard, it is important to highlight that the Panel’s, finding that “the AD on alcoholic liquor met the elements of the U.S. definition of ‘ordinary customs duties’.”<sup>210</sup> It is only on account of the Panel’s erroneous belief that to establish a *prima facie* case that the AD fell within the scope of Article II:1(b), the United States must “in addition” demonstrate that the AD “inherently discriminates against imports” by demonstrating *inter alia* that the duty falls outside the scope of Article II:2, that the Panel reached its finding that the AD fell outside the scope of Article II:1(b). Thus, to the extent the Appellate Body reverses the Panel’s finding that Article II:1(b) applies only to those duties or charges that “inherently discriminate against imports” or its finding that establishing a *prima facie* case requires the complaining party to demonstrate that the duty or charge “inherently discriminates against imports”(whether by demonstrating that the duty or charge falls outside the scope of Article II:2 or otherwise), the Appellate Body may find based on the Panel’s own findings that the AD constitutes an “ordinary customs duty.”

*b. The AD Is Imposed In Excess of India’s Bound Rates*

134. The AD subjects imports of alcoholic beverages to ordinary customs duties “in excess of” those provided for in India’s Schedule.<sup>211</sup> Part 1 of India’s Schedule sets forth the following bound rates of duty on beer, wine and distilled sprits as follows:<sup>212</sup>

<b>Product</b>	<b>WTO Bound Rate (<i>ad valorem</i>)</b>
Beer (HS No. 2203)	150 percent

<sup>208</sup> See, e.g., U.S. First Written Submission, para. 47; U.S. Second Written Submission, paras. 18-19.

<sup>209</sup> *Supra*, Sections II.A.1 and 2; see also U.S. First Written Submission, para. 47; U.S. Second Written Submission, para. 18-19.

<sup>210</sup> Panel Report, para. 7.258.

<sup>211</sup> U.S. First Written Submission, paras. 41-53; see also U.S. Second Written Submission, paras. 20-23.

<sup>212</sup> GATT 1994, Marakesh Protocol, Schedule XII: India; U.S. First Written Submission, para. 48 and Exhibit US-12.

Wine (HS Nos. 2204, 2205, 2206)	150 percent
Distilled Spirits (HS No. 2208)	150 percent

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

135. India applies a 100 percent BCD on beer and, prior to July 3, 2007, also a 100 percent basic customs duty on wine.<sup>213</sup> With respect to distilled spirits, India applies a BCD equal to its 150 percent WTO bound rate.<sup>214</sup>

136. In addition to the BCD, Section 3(1) of the Customs Tariff Act requires the imposition of the AD on imports and Customs Notification 32/2003 set outs the rates of AD on imports of alcoholic beverages.<sup>215</sup> Section 3(2) of the Customs Tariff Act requires that the AD be calculated on the value of the import inclusive of the BCD owed.<sup>216</sup> As a result, the AD 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:<sup>217</sup>

<b>AD on Alcoholic Beverages*</b>								
<b>Value (USD)</b>	<b>BC</b>	<b>AD (% or USD)</b>	<b>BC Owed (USD)</b>	<b>AD Owed (USD)</b>	<b>Total Duties (USD)</b>	<b>Effective Rate of AD</b>	<b>Effective Rate of Duty</b>	<b>WTO Bound Rate</b>
Beer and								

<sup>213</sup> U.S. First Written Submission, para. 49 and Exhibit US-4 (Customs Notification 20/1997 (March 1, 1997)). On July 3, 2007, the BCD on wine increased to 150 percent. U.S. First Written Submission, para. 49 (citing Customs Notification 81/2007 (July 3, 2007)). CN 81/2007 is not part of the Panel’s terms of reference and the U.S. arguments that the AD results in ordinary customs duties in excess of India’s WTO bound rate are not based on CB 81/2007 or the fact that the BCD on wine increased from 100 to 150 percent.

<sup>214</sup> U.S. First Written Submission, para. 49 and Exhibit US-5 (Customs Notification 11/2005 (March 1, 2005)).

<sup>215</sup> U.S. First Written Submission, paras. 18-19, 22-23, 50 and Exhibits US-3A (Customs Tariff Act) and US-6 (CN 32/2003 (March 1, 2003)).

<sup>216</sup> U.S. First Written Submission, paras. 19, 50 and Exhibit US-3A (Customs Tariff Act). For example, an AD of 150 percent applied on the value of an import with a CIF value of 1 USD and a BCD of 150 percent or 1.50 USD results in an AD 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. U.S. First Written Submission, para. 50 n.77.

<sup>217</sup> U.S. First Written Submission, para. 50.

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%
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 (%).

137. As the above table demonstrates,<sup>218</sup> with respect to beer and wine, all but the lowest rate of AD – 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 AD at all rates results in ordinary customs duties that exceed India’s WTO bound rates. In fact, since the BCD on distilled spirits is already equal to India’s WTO bound rate, any ordinary customs duty imposed in addition to the BCD on imports of distilled spirits would exceed India’s WTO bound rate. Thus, applied in conjunction with the BCD, the AD results in ordinary customs duties that far exceed India’s WTO bound rates for alcoholic beverages.

138. Before the Panel, India did not contest the fact that the AD applied in conjunction with the BCD results in duties on beer and wine that exceed 100 percent and on distilled spirits that exceed 150 percent. Instead, India only contested the characterization of the AD as an ordinary customs duty or other duty or charge within the meaning of Article II:1(b) arguing instead that the AD is justified under Article II:2(a). Therefore, the Appellate Body has before it uncontested facts necessary to complete the Panel’s analysis and find that the AD, 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 Appellate Body Should Find that the AD Is Inconsistent with

<sup>218</sup> This table appears in paragraph 50 of the U.S. First Written Submission.

### Article II:1(a)

139. 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 AD 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 AD accords imports from the United States less favorable treatment than provided for in India’s Schedule and,<sup>219</sup> as such, is inconsistent with GATT Article II:1(a).

140. In response to the U.S. arguments that the AD is inconsistent with Article II:1(a), the Panel agreed that if the AD were inconsistent with Article II:1(b), it would also be inconsistent with Article II:1(a).<sup>220</sup> However, because the Panel erroneously found that the United States had failed to establish that the AD is inconsistent with Article II:1(b), it also failed to establish that the EAD is inconsistent with Article II:1(a).<sup>221</sup> Therefore, if the Appellate Body reverses the Panel’s finding that the United States failed to establish that the AD is inconsistent with Article II:1(b) and find that the AD is inconsistent with Article II:1(b), then the Appellate Body should also reverse the Panel’s finding that the United States failed to establish that the AD is inconsistent with Article II:1(a), and find that the AD is inconsistent with Article II:1(a).

### 3. The Appellate Body Should Find the EAD Inconsistent with Article II:1(b)

141. The EAD is also inconsistent with Article II:1(a) and (b) because, like the AD, it results in “ordinary customs duties,” or “other duties or charges of any kind imposed on or in connection with importation,” on imports that exceed the duties or charges set forth for alcoholic beverages in India’s Schedule.<sup>222</sup>

#### a. *The EAD Constitutes an Ordinary Customs Duty or Other Duty or*

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<sup>219</sup> 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)”...).

<sup>220</sup> Panel Report, para. 7.400.

<sup>221</sup> Panel Report, para. 7.401.

<sup>222</sup> As elaborated above, Article II:1(b) prohibits Members from imposing "ordinary customs duties" and "all other duties or of any kind imposed on or in connection with importation" in excess of the rates set forth in the Member's Schedule, and Article II:1(a) prohibits Members from according less favorable treatment to imports than provided for in the Member's Schedule.

### *Charge of Any Kind*

142. The EAD constitutes an ordinary customs duty within the meaning of Article II:1(b). Applying the correct interpretation of the term “ordinary customs duties” reviewed above, the EAD is an ordinary customs duty for many of the same reasons as the additional customs duty is. First, the EAD 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.<sup>223</sup> The EAD, like the AD, also shares the same or similar attributes as the BCD, which India acknowledges is an “ordinary customs duty.”<sup>224</sup> In particular, both duties take the form of an *ad valorem* or specific duty (or combination thereof), are imposed at the time of and as a matter of course on the importation of a good, and apply exclusively to imports.<sup>225</sup> In addition, the EAD and the BCD are both referred to by India as “customs duties,” imposed (and privy to exemptions) through the same or similar provisions of Indian customs law, and administered by the same customs personnel and at the same time.<sup>226</sup> Because the EAD possess the same attributes as the BCD – a duty India considers an “ordinary customs duty” – this indicates that the EAD is the “normal, customary” and “of the usual kind” of duty imposed and thus “ordinary” within the meaning of the phrase “ordinary customs duties.”<sup>227</sup>

143. On account of these facts, the Appellate Body, applying the correct interpretation of the phrase “ordinary customs duty,” should find that EAD constitutes an ordinary customs duty within the meaning of GATT Article II:1(b).<sup>228</sup>

144. In any event, for the same reasons as stated with respect to the AD, because the EAD is a

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<sup>223</sup> See Panel Report, para. 7.335; *see also, e.g.*, U.S. First Written Submission, para. 57.

<sup>224</sup> India First Written Submission, para. 12; U.S. Second Written Submission, para. 10.

<sup>225</sup> See Panel Report, paras. 7.336-7.337; U.S. First Written Submission, para. 57; U.S. Second Written Submission, paras. 9-11; *see also* U.S. Comments on the Interim Report, paras. 90-92 (explaining that the Panel misconstrued the U.S. point in comparing the EAD and the BCD).

<sup>226</sup> Panel Report, paras. 7.339-7.341 ; *see also* U.S. First Written Submission, para. 58; U.S. Second Written Submission, paras. 8-11.

<sup>227</sup> In this regard, the Panel appears to misconstrue the U.S. point in comparing the EAD and BCD. Panel Report, paras. 7.340-7.341. The Panel suggests that the U.S. position is that “India’s customs duty regime regards both the BCD and the EAD as ‘ordinary customs duties’.” This is incorrect. The purpose of the comparison is to demonstrate that the EAD shares the same or similar attributes as the BCD. As elaborated above, whether a duty is “ordinary” entails a comparison of what is “customary, normal” or “of the usual kind”. In examining the attributes of a duty India considers “ordinary” and comparing those attributes to the EAD, this can elucidate whether the EAD is also “ordinary”.

<sup>228</sup> The intended purpose of AD not determinative. *See supra* Section II.A.7; *see also, e.g.*, U.S. Second Written Submission, para. 13; U.S. First Written Submission, para. 82.

duty imposed on importation of a product,<sup>229</sup> if the EAD is found not to constitute an “ordinary customs duty,” it must be found to constitute an “other duty or charge of any kind imposed on or in connection with importation” within the meaning of Article II:1(b). Moreover, as also noted with respect to the AD, resolving whether the EAD constitutes an “ordinary customs duty” or an “other duty or charge” is unnecessary, because either way, the EAD falls within the scope of Article II:1(b) and, as elaborated below either way would result in duties on imports in excess of those set out in India’s Schedule.

145. As with the AD, it is also important to highlight that the Panel’s, finding that “the EAD meets the elements of the US definition of ‘ordinary customs duties’.”<sup>230</sup> It is only on account of the Panel’s erroneous belief that to establish a *prima facie* case that the EAD falls within the scope of Article II:1(b), the United States must “in addition” demonstrate that the EAD “inherently discriminates against imports” by demonstrating *inter alia* that the duty falls outside the scope of Article II:2, that the Panel reached its finding that the EAD falls outside the scope of Article II:1(b). Thus, to the extent the Appellate Body reverses the Panel’s finding that Article II:1(b) applies only to those duties or charges that “inherently discriminate against imports” or its finding that establishing a *prima facie* case requires the complaining party to demonstrate that the duty or charge “inherently discriminates against imports”(whether by demonstrating that the duty or charge falls outside the scope of Article II:2 or otherwise), the Appellate Body may find based on the Panel’s own findings that the EAD constitutes an “ordinary customs duty.”

*b. The EAD Is Imposed In Excess of India’s Bound Rates*

146. The EAD subjects imports of alcoholic beverages as well as other imports to ordinary customs duties “in excess of” those provided for in India’s 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.<sup>231</sup> As explained in the U.S. submissions to the Panel, in addition to the BCD and the AD, Section 3(5) of the Customs Tariff Act provides for the imposition of the EAD on imports and Section 3(6) of the Customs Tariff Act requires that the EAD be calculated on the value of the import inclusive of BCD and AD owed.<sup>232</sup> Customs Notification 19/2006 requires that the EAD be levied on imports at four percent *ad valorem* on “all goods specified under the Chapter, heading, sub-heading or tariff item of the First Schedule

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<sup>229</sup> Panel Report, para. 7.337.

<sup>230</sup> Panel Report, para. 7.343; U.S. Second Written Submission, paras. 9-11.

<sup>231</sup> U.S. First Written Submission, paras. 3, 66; U.S. Answer to Panel Question 1, para. 2 (explaining that the EAD imposed in conjunction with the BCD results in a breach of India’s WTO-bound rates for any product for which the rate of BCD is at or very near India’s WTO-bound rate and that Exhibit US-1 is an illustrative list of products for which that the United States has identified that this would be the case).

<sup>232</sup> Panel Report, 7.341-7.342; U.S. First Written Submission, para. 61 and Exhibit US-3A (Customs Tariff Act).

to [the Customs Tariff] Act.”<sup>233</sup> The First Schedule of the Customs Tariff Act generally establishes the highest basic customs duty that India’s Central Government may impose on goods falling under Chapters 1 through 99 of the Harmonized Tariff Schedule, including for example alcoholic beverages and the products listed in Exhibit US-1.<sup>234</sup>

147. With respect to alcoholic beverages, 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. The BCD on beer and wine is 100 percent *ad valorem* whereas the basic customs duty on distilled spirits is 150 percent *ad valorem*.<sup>235</sup>

148. Even factoring out the cumulative effect of the AD, the EAD, when imposed in conjunction with the BCD, results in ordinary customs duties on distilled spirits that exceed those set forth in India’s WTO Schedule.<sup>236</sup>

EAD 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 (%).

149. As noted, Section 3(6) of the Customs Tariff Act requires that the EAD be calculated on

<sup>233</sup> U.S. First Written Submission, para. 61 and Exhibit US-7 (Customs Notification 19/2006).

<sup>234</sup> U.S. First Written Submission, para. 15.

<sup>235</sup> U.S. First Written Submission, para. 62 and Exhibits US-4 (Customs Notification 20/1997 (March 1, 1997 containing the BCD rate for beer and wine) and Exhibit US-5 (Customs Notification 11/2005 (March 1, 2005) containing the BCD rate for distilled spirits).

<sup>236</sup> This table appears in paragraph 63 of the U.S. First Written Submission. The table does not include the effect of the AD; U.S. claims concerning the EAD do not rely on its imposition in conjunction with the AD to demonstrate that the EAD 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 EAD applies in addition to and is calculated on top of both the BCD and the AD.

the value of the import inclusive of the BCD owed,<sup>237</sup> such that the effective rate of the EAD on imports of distilled spirits is 10 percent and the effective rate of aggregate duties (EAD in conjunction with the BCD) 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.

150. With respect to beer and wine, although imposition of the EAD in conjunction with the BCD on beer and wine has not exceeded India's WTO bound rates of "ordinary customs duty", India's Schedule does not specify any "other duties or charges" within the meaning of GATT Article II:1(b) for beer or wine (or for distilled spirits). Thus, to the extent the EAD is an "other duty or charge," the EAD on beer and wine would exceed the "other duties or charges" set out in India's Schedule. In fact, to the extent the EAD is an "other duty or charge," the EAD duty on beer, wine, spirits and every other product for which India took commitments in its Schedule would exceed the "other duties or charges" set out in India's Schedule, as India has not scheduled the EAD for any product included in its Schedule, including those products listed in Exhibit US-1.<sup>238</sup>

151. With respect to imports other than alcoholic beverages, 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 "other duty or charge" that results from application of the EAD in conjunction with the BCD 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.<sup>239</sup>

152. The applied rates of BCD 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 "other duty or charge." As a result, application of the EAD in conjunction with BCD results in ordinary customs duties on those products that exceed those set forth in India's Schedule.<sup>240</sup>

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

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<sup>237</sup> Panel Report, para. 7.342; *see also, e.g.*, U.S. First Written Submission, paras. 28 61, 63. Section 3(6) of the Customs Tariff Act also requires that the EAD be calculated in addition to and on top of the AD, but as noted, the effect of the additional customs duty has not been taken into account in the above table.

<sup>238</sup> U.S. First Written Submission, para. 65; U.S. Second Written Submission, para. 22.

<sup>239</sup> U.S. First Written Submission, para. 66.

<sup>240</sup> U.S. First Written Submission, para. 67.



for milk) imposition of the EAD 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.<sup>241</sup>

154. As 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 EAD in conjunction with the BCD results in ordinary customs duties in excess of those set forth in India’s Schedule. The United States has challenged the EAD as such. Accordingly, the U.S. claims concern the EAD itself and therefore any instance for which application of the EAD in conjunction with the BCD results in ordinary customs duties in excess of those set forth in India’s Schedule.<sup>242</sup>

155. As demonstrated above, the EAD, imposed in conjunction with the BCD, 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 “other duties or charges” in excess of those set forth in its Schedule. Accordingly, the EAD 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).

156. Before the Panel, India did not contest the fact that the EAD applied in conjunction with the BCD results in duties on imports from the United States in excess of those set forth in its Schedule. Instead, India only contested the characterization of the EAD as an ordinary customs duty or other duty or charge within the meaning of Article II:1(b) arguing instead that the EAD is justified under Article II:2(a). Therefore, the Appellate Body has before it uncontested facts necessary to complete the Panel’s analysis and find that the EAD, as imposed pursuant to Section 3(5) of the Customs Tariff Act and Customs Notification 19/2006 is, as such, inconsistent with Article II:1(b) as an ordinary customs duty in excess of those duties specified in India’s Schedule.

#### **4. The Appellate Body Should Find that the EAD Is Inconsistent with Article II:1(a)**

157. 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. The EAD imposed pursuant to Section 3(5) of the Customs Tariff Act and Customs Notification 19/2006 results in ordinary customs duties on imports from the United States that exceed those set out in India’s WTO Schedule. By imposing ordinary customs duties on imports from the United States in excess of those set forth in India’s Schedule, the EAD accords imports from the United States less favorable treatment than provided for in India’s Schedule and, as such, is inconsistent with GATT Article II:1(a).

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<sup>241</sup> U.S. First Written Submission, para. 68.

<sup>242</sup> U.S. First Written Submission, para. 69.

158. In response to the U.S. arguments that the EAD is inconsistent with Article II:1(a), the Panel agreed that if the EAD were inconsistent with Article II:1(b), it would also be inconsistent with Article II:1(a).<sup>243</sup> However, because the Panel erroneously found that the United States had failed to establish that the EAD is inconsistent with Article II:1(b), it also failed to establish that the EAD is inconsistent with Article II:1(a).<sup>244</sup> Therefore, if the Appellate Body reverses the Panel’s finding that the United States failed to establish that the EAD is inconsistent with Article II:1(b) and find that the EAD is inconsistent with Article II:1(b), then the Appellate Body should also reverse the Panel’s finding that the United States failed to establish that the EAD is inconsistent with Article II:1(a), and find that the EAD is inconsistent with Article II:1(a).

**5. The Appellate Body Should Find that the AD Is Not Justified Under Article II:2(a)**

159. In response to the U.S. claims that the AD on alcoholic beverages is inconsistent with Article II:1(a) and (b), India asserted that the AD is a charge equivalent to internal taxes imposed consistently with Article III:2 in respect of like domestic products and, therefore, is justified under Article II:2(a). Specifically, India asserted that the AD is a charge equivalent to state-level excise duties. As elaborated above, for a measure to fall within the scope of Article II:2(a), the measure must be (i) a charge equivalent to an internal tax (ii) imposed consistently with Article III:2 in respect of like domestic products. For a charge to be “equivalent” to an internal tax it must be is virtually identical or corresponds in effect, amount and function (in the sense of operation) to an internal tax,<sup>245</sup> and for an internal tax to be imposed consistently with Article III:2 it must not result in charges on imported produces in excess – by any amount – of the charge on like domestic products.<sup>246</sup> The stated purpose of a measure or its characterization under domestic law is not determinative.

160. As also elaborated above, Article II:2(a) is an exception to Article II:1(b) that a responding party may raise to rebut a *prima facie* case that a measure is inconsistent with Article II:1(b) and, if the responding party raises Article II:2(a) asserting that the measure is a charge equivalent to an internal tax imposed consistently with Article III:2 in respect of the like domestic product, it is the responding party’s burden to substantiate that assertion.<sup>247</sup> If the responding party substantiates that assertion, the burden then falls to the complaining party to disprove that.

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<sup>243</sup> Panel Report, para. 7.400.

<sup>244</sup> Panel Report, para. 7.401.

<sup>245</sup> See *supra* Section II.A.7.a.

<sup>246</sup> See, e.g., U.S. Second Written Submission, paras. 30-31.

<sup>247</sup> See *supra* Sections II.A.2.b and II.A.8.

161. In this dispute, although India has asserted that the AD constitutes a charge equivalent to state-level excise duties imposed consistently with Article III:2 in respect of like domestic products, India the Panel found that India did not specify which such duties it had in mind.<sup>248</sup> Nor has it substantiated its assertions. Indeed, it refused to answer the Panel’s questions seeking that information. In particular, India presented no evidence that state-level excise duties exist, that each of the Indian states impose them or that they are set at levels equal to or greater than the AD.<sup>249</sup> It has also presented no evidence that state-level excise duties are virtually identical or correspond in amount, effect or function (in the sense of operation). In that light, the Appellate Body can complete the analysis and draw the appropriate inference: that such state-level excise duties do not exist, that the Indian states do not impose them, or that the AD exceeds them does not correspond in amount, effect or function (in the sense of operation).

162. Instead, as noted above examination of whether two measures are “equivalent” requires an examination of the structure, design and effect of the two measures and a comparison of whether the two measures’ respective structures, designs and effect demonstrates that they are equivalent in effect, amount and function (in the sense of operation).<sup>250</sup> Having not identified any state-level excise duties to which the AD is equivalent much less provided any evidence concerning their structure, design or effect, India could not and did not substantiate its assertion that the AD is equivalent to state-level excise duties.

163. In addition to India’s failure to support its assertions, the evidence before the Panel indicates that the AD is not equivalent to state-level excise duties imposed consistently with respect to like domestic products. First, as explained above, the evidence before the Panel indicates that the AD is an ordinary customs duty within the meaning of Article II:1(b) and, therefore, it is not a charge equivalent to an internal tax within the meaning of Article II:2(a).

164. Second, uncontested facts indicate that the AD is not “equivalent” to an internal tax “imposed consistently with [Article III:2].” In particular, India explains that it arrived at the rates of AD through “a process of averaging” the rates of state-level excise duties and indicates that it is therefore possible that in some instances that the AD may subject imports to charges in excess

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<sup>248</sup> Panel Report, para. 7.271 n.310.

<sup>249</sup> *See supra*. And as discussed above, the Panel's inferences to the contrary are not supported by the evidence before it and as such not based on an objective assessment of the matter. For example, the Panel's finding that the AD may only be imposed on an imported product if state-level excise duties are imposed on the like domestic product is not supported by evidence before the Panel nor is the Panel's finding that none of the Indian states impose excise duties or other internal charges on imported alcoholic beverages.

<sup>250</sup> *See supra* Section II.B.2; *see also* U.S. Second Written Submission, para. 28; U.S. Oral Statement at the First Panel Meeting, paras. 7 and 19; U.S. First Written Submission, para. 42 note 67 (citing Appellate Body and Panel reports to support the position that the name or stated purpose of a measure is not determinative of whether that measure falls within a particular GATT provision); *see supra* paras. 14-15 (discussing *EEC – Parts and Components*).

of those on like domestic products. The Panel also finds this.<sup>251</sup> If India averaged the rates of excise duties levied in the various states and the rates of AD reflect the average rate of those excise duties, this necessarily means that the AD exceeds the excise duties imposed on like domestic products in some Indian states. Accordingly, the AD does not constitute a charge equivalent to an internal tax “imposed consistently with [Article III:2].”<sup>252</sup>

165. In addition, as India and the Panel both acknowledge, the structure and level of state-level excise duties vary from state to state.<sup>253</sup> Therefore, even if the AD were virtually identical in structure or amount to the state-level excise duty in one Indian state, it would not be so in relation to another Indian state.

166. Moreover, the explanatory note to Section 3(1) provides:

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.<sup>254</sup>

The explanatory note, therefore, provides that where the like domestic product is subject to various tax rates, the “excise duty for the time being leviable on a like article if produced or manufactured in India” means the highest rate of excise duty imposed. Thus, in instances where the like domestic product is subject to various tax rates, Section 3(1) provides that imports shall be liable to an additional duty that is equal to the highest rate of excise duty imposed. Because as noted above the rate of excise duty on like domestic alcoholic beverages varies from state to state, this means that with respect to alcoholic beverages Section 3(1) provides that imports of alcoholic beverage shall be liable to an additional duty that is equal to the highest rate of excise duty

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<sup>251</sup> India Answer to Panel Question 8.c.; India Answer to Panel Question 28, paras. 28.4-28.5. The Panel also notes India explanation that it arrived at the rates of AD by “a process of averaging, whereby the Central Government tried to ensure that to the extent possible, the rate was a reasonable representation of the net fiscal burden imposed on like domestic products,” Panel Report, para. 7.269, and states that India’s attempt at averaging could have meant that the rate of AD for alcoholic liquor exceeded the rate of excise duty applicable to like domestic alcoholic liquor in some States and in some price bands,” Panel Report, para. 7.274.

<sup>252</sup> Depending on the degree of excess taxation, this fact also indicates that the AD is not virtually identical in amount to state-level excised duties and therefore suggest that the AD is not “equivalent” to state-level excise duties.

<sup>253</sup> Panel Report, paras. 7.271-7.273.

<sup>254</sup> Section 3(1) of the Customs Tariff Act, Exhibit US-3A.

imposed by any of the Indian states. Accordingly, Section 3(1) read with the explanatory note subjects imports of alcoholic beverages to rates of AD that exceed the rate of excise duties on like domestic alcoholic beverages in at least some Indian states and, as a consequence, the AD is not imposed consistently with Article III:2.<sup>255</sup>

167. Finally, the fact that Section 3(1) of the Customs Tariff Act states that the AD is to “have regard to” excise duties leviable on like domestic products, does not constitute evidence that the AD in fact does not exceed those excise duties in amount.<sup>256</sup> It simply characterizes the stated purpose or intent of Section 3(1) and provides no indication as to whether the AD fulfills the purpose. The fact that under India’s Constitution the Indian states and the Central Government lack authority to impose excise duties on the manufacture or production of imported alcoholic beverages, and that in light of these limitations “it is not unreasonable” for India to have imposed the AD, similarly does not amount to proof that the AD applies or operates such that it is equivalent to an internal tax imposed consistently with Article III:2. Whether or not it is “reasonable” from a domestic policy perspective for India to have imposed a charge equivalent to an internal tax does not address the issue of whether the charge it imposed – the AD – in fact offsets or counterbalances state-level excise duties; because there is no evidence before the Panel as to the application and operation of state-level excise duties, there is no basis on which to conclude that such duties apply and operate such that the AD offsets or counterbalances them.

168. For the reasons stated above, the Appellate Body should find that the AD on alcoholic beverages is not justified under Article II:2(a); it is neither a charge “equivalent” to an internal tax nor is the internal tax to which it is allegedly equivalent “imposed consistently with Article III:2.”

## **6. The Appellate Body Should Find that the EAD Is Not Justified Under Article II:2(a)**

169. In response to the U.S. claims that the EAD on alcoholic beverages is inconsistent with Article II:1(a) and (b), India asserts that the EAD is a charge equivalent to internal taxes imposed consistently with Article III:2 in respect of like domestic products and, therefore, is justified under Article II:2(a).

170. With respect to state-level sales taxes and other local taxes or charges, India has presented

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<sup>255</sup> Depending on the degree of excess taxation, this would also indicate that the AD is not virtually identical in amount to state-level excise duties and therefore suggest that the AD is not “equivalent” to state-level excise duties.

<sup>256</sup> See *supra* Section II.B.2; see also, e.g., U.S. Second Written Submission, para. 37. In this regard, the Panel’s suggestion that Section 3(1) of the Customs Tariff Act does not state the purpose of the AD but instead a direction to take account of state-level excise duties is in apposite. Panel Report, para. 7.277. Either way, Section 3(1) simply states that the AD on alcoholic beverages is supposed to have regard to state-level excise duties. This does not amount to evidence that the AD in fact has regard to state-level excise duties much less is equivalent to them.

no evidence that such taxes or charges exist, that the Indian states impose them or that EAD is equivalent to them.<sup>257</sup> As discussed above, the Panel's inferences to the contrary are not supported by the evidence before it and as such not based on an objective assessment of the matter. Moreover, the inference that may be drawn from India's failure to identify such taxes or charges or substantiate that they exist, that each of the Indian states impose them, and that operate such that the EAD is equivalent to them, particularly in light of the U.S. request for India to do so, is that they do not exist, the Indian states do not impose them, and they do not operate such that the EAD is equivalent to them. Having not substantiated that state-level sales taxes or other local taxes or charges to which the AD is equivalent exist much less provided any evidence concerning their structure, design or effect, India could not and did not substantiate its assertion that the AD is equivalent to these taxes or charges.<sup>258</sup>

171. With respect to the state-level VATs and CST to which India contends the EAD is equivalent, when examined in light of the correct interpretation of Article II:2(a), the uncontested facts before the Panel demonstrate that the EAD is not a charge "equivalent" to these taxes "imposed consistently with Article III:2."

172. Beginning with the second element, India states "the overall burden of taxation on imported products as a result of the SUAD may be marginally 'in excess of' the tax on like domestic products."<sup>259</sup> India also concedes: (i) the state-level VATs and the CST apply to imported products sold within India,<sup>260</sup> and (ii) the EAD is not eligible as a credit against the state-level VATs or CST owed on that sale.<sup>261</sup> Accordingly, imported products are subject to the EAD as well as the state-level VATs and CST with no offsetting credit against either for the EAD paid, subjecting imported products to charges in excess of those on like domestic products. Whether view separately or together, India's concessions indicate that EAD is not imposed consistently with GATT 1994 Article III:2.<sup>262</sup>

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<sup>257</sup> See *supra* Section II.B.1.

<sup>258</sup> The Panel's reliance on its finding that the purpose of the EAD is to offset or counterbalance such taxes is an insufficient basis on which to conclude, in the absence of such evidence, that the EAD is "equivalent" to such taxes.

<sup>259</sup> India First Written Submission, para. 85 note 51. India refers to the EAD as the SUAD in its submissions to the Panel.

<sup>260</sup> Panel Report, para. 7.366; *see also, e.g.*, India Responses to Questions in the Context of the First Panel Meeting, paras. 30.a.3, 30.b.2, 30.c.3, 37.b.2, 41.2; U.S. Second Written Submission, para. 54.

<sup>261</sup> Panel Report, para. 7.367; *see also, e.g.*, India Responses to Questions in the Context of the First Panel Meeting, para. 32.a.1; U.S. Second Written Submission, para. 54.

<sup>262</sup> Contrary to the Panel's view, the fact that India contends that the EAD offsets or counterbalances the state-level VATs and CST on the "first sale" transaction, does not change this conclusion. Panel Report, paras. 7.366-7.367. To be imposed consistently with Article III:2 in respect of like domestic products, the internal tax to

173. In addition, the Panel finds:

[I]t is clear from the information we have and the explanations India has provided that there could conceivably be circumstances where the SUAD is levied at a rate that is higher than the rate resulting from imposition of the relevant internal taxes on like domestic goods, or results in a higher tax burden being imposed on products being imported. Such circumstances might, for example, arise where an equivalent domestic transaction: (i) involve a ‘good of local importance’ for which a particular State has set a rate of State VAT of nil, (ii) involves an inter-State sale to a registered dealer or (iii) is subject to State VAT and followed by an intra-State re-sale transaction involving the same good.<sup>263</sup>

Therefore, the Panel’s findings also indicate that the EAD does not constitute a charge equivalent to an internal tax “imposed consistently with [Article III:2].”

174. In this connection, the Panel’s finding that the EAD may only be imposed on an imported product if state-level VATs, sales taxes and other local taxes or charges are imposed on the like domestic product is not supported by evidence before the Panel and, as discussed above, not make in accordance with an objective assessment of the matter. In addition, the evidence before the Panel indicated that opposite of the Panel’s finding, namely that there may be instances where the EAD is impose on an imported product when the like domestic product is not subject to the applicable state-level VAT or CST, specifically when a state has exempted a domestic product from its VAT (which acts to exempt that product from the CST when sold from that state to another Indian state).<sup>264</sup>

175. Other evidence before the Panel also demonstrates that the EAD does not constitute a charge equivalent to an internal tax “imposed consistently with [Article III:2],” in particular the explanatory note to Section 3(5). The explanatory note to Section 3(5) states:

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

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which the EAD is allegedly equivalent must not subject *any* imports to internal taxes in excess of those on like domestic products. Moreover, as explained below, the rate of EAD exceeds the rate of state-level VAT or CST on the like domestic products in some instances. In such instances, application of EAD results in charges on imports – even if they are not sold within India – in excess of those on like domestic products.

<sup>263</sup> Panel Report, para. 7.369 (internal citations omitted). The United States presented evidence to the Panel on each of these circumstances. *See* U.S. Second Written Submission, paras. 54, 58; U.S. Second Oral Statement, paras. 13, 16; U.S. Comments on India’s Answer to Panel Question 55, paras. 7-10.

<sup>264</sup> *Supra* Section II.B.4.

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.*

The explanatory note thus provides that where the like domestic product is subject to various tax rates, 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” *means the highest rate of such tax or charge imposed.* Thus, in instances where the like domestic product is subject to various tax rates, Section 3(5) read with the explanatory note provides that, if the Central Government imposes the EAD, imports shall be liable to an EAD that is equal to *the highest rate of tax or charge imposed on like domestic products not to exceed four percent.* In other words, Section 3(5) calls for a single rate of EAD for each product. As a consequence, in instances where the Indian states subject a like domestic product to different rates of state-level VAT or CST (for example zero in one state and four percent in another), the EAD on imports will necessarily exceed the rate of state-level VAT or CST on at least some like domestic products and therefore is not equivalent to an internal tax “imposed consistently with [Article III:2].”<sup>265</sup>

176. In terms of whether the AD is “equivalent” state-level VATs and the CST, that determination requires an examination of the structure, design and effect of the EAD on the one hand and state-level VATs and CST on the other. That examination demonstrates that the EAD is not equivalent to state-level VATs or the CST, whether in amount, effect or function (in the sense of operation).

177. Starting with the state-level VATs, examination of the structure or design of the EAD as compared to the state-level VATs indicates that the two are not equivalent in function or operation. First, India asserts that the state-level VATs are set generally at four different rates depending on the product subject to the VAT: zero and one, four and 12.5 percent *ad valorem*.<sup>266</sup> In contrast, the EAD is set at a single rate of four percent for all products.<sup>267</sup>

178. Second, while the state-level VATs may generally breakdown into these four rates, there is no requirement that the individual states apply the same rate to the same domestic products.<sup>268</sup>

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<sup>265</sup> U.S. Second Written Submission, paras. 56-57.

<sup>266</sup> Panel Report, para. 7.360; India First Written Submission, para. 73; U.S. Second Written Submission, para. 48; U.S. Second Oral Statement, para. 16.

<sup>267</sup> *E.g.*, Panel Report, para. 7.348.

<sup>268</sup> Panel Report, para. 7.361; U.S. Second Written Submission, para. 49; U.S. Comments on India’s Answer to Panel Questions 55 and 53, paras. 6 and 7. India acknowledges that the “VAT, the CST and other taxes and charges which [the SUAD] is intended to counterbalance may vary from State to State.” India Response to



India's Constitution authorizes the Indian states, not the Central Government, to tax the intra-state sale or purchase of goods, and Indian states' VAT Acts expressly provide that the states may reduce or raise any VAT rate set out in their respective VAT Acts.<sup>269</sup> Thus, one state may apply a VAT of four or 12.5 percent on a particular product, whereas another state may apply no VAT on that same product. In fact, the reform that precipitated convergence of state-level VATs around these four rates expressly contemplated some variation from state to state in terms of the applicable VAT rate on the same product. For example, a non-binding White Paper on State-Level Value Added Tax by the Empowered Committee of Indian State Finance Ministers explains that an individual state may exempt up to ten commodities of its choosing from the VAT and that certain goods will be "outside" the VAT system, including liquor.<sup>270</sup> In contrast, the EAD does not prescribe nor contemplate different rates of EAD for different products and does not subject imports to different rates depending on the Indian state into which it is imported. The EAD prescribes a rate of four percent for all products which applies on the importation of a product into any state.

179. Third, the state level VATs operate by crediting against the VAT owed on a product's transfer, the VAT paid on the product's previous transfers.<sup>271</sup> By contrast, there is no mechanism for crediting against the EAD owed on a product, taxes or charges paid on the product's previous transfers. Nor is there a mechanism for crediting the EAD paid on product against the VAT owed on the product's subsequent transfers in India.<sup>272</sup>

180. The CST is not equivalent to the EAD for similar reasons. Like the VAT, the CST is imposed at various rates and may vary from state to state and from product to product. Depending on the recipient, the CST may be set at a flat 3 percent rate (if the recipient is a registered dealer) or may be set at a rate corresponding to one of the four VAT rates applicable to that product in the state in which it originated (if the recipient is not a registered dealer).<sup>273</sup> In contrast, the EAD

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Panel's Questions in the Context of the First Panel Meeting, para. 27.g.2.

<sup>269</sup> Panel Report, paras. 7.361, 7.379; U.S. Second Written Submission, para. 49 and Exhibit US-23 (Delhi, Value-Added Tax Act, Section 4); U.S. Answer to Panel Question 54, para. 6 and Exhibits US-27, US-28, US-29 (VATs Acts of Goa, Punjab and Maharashtra).

<sup>270</sup> Panel Report, para. 730 & n.406; *see also id.* para. 7.369; U.S. Second Written Submission, para. 49 and Exhibit US-24 (Empowered Committee of State Finance Ministers, White Paper on State-Level Value Added Tax (January 17, 2005)); U.S. Second Oral Statement, para. 16.!

<sup>271</sup> Panel Report, para. 7.367; *see also* India Answer to Panel Question 32, para. 32.b.1; U.S. Second Written Submission, para. 50.

<sup>272</sup> Panel Report, para. 7.367; *see also* India Answer to Panel Question 32, para. 32.a.1; U.S. Second Written Submission, para. 50.

<sup>273</sup> Panel Report, para. 7.363; *see also* U.S. Second Written Submission, para. 51 (citing Section 8 of the Central Sales Tax Act, *as amended*).

prescribes a flat four percent rate that does not vary from product to product or based on the recipient or the state into which the product is imported.

181. Further, with respect to both the VAT and the CST, the amount of EAD owed on imports as compared to the amount of VAT or CST owed on like domestic products is not equivalent, since it does not correspond and is not virtually identical to the VAT or CST respectively on like domestic products. For example, with respect to some products, the rate of state-level VATs and the CST is 12.5 percent; whereas the EAD is four percent. A rate of four percent does not appear to correspond or be virtually identical to a 12.5 percent rate.<sup>274</sup> In addition, as discussed above, the rates of state-level VATs, and in turn the rates of CST, may differ among the Indian states, and where that is the case, the explanatory note to Section 3(5), requires that rate of EAD shall be the highest of those rates, not to exceed four percent. Thus, for example, some states may subject a product to a zero rate whereas another state may subject that product to a four percent rate. In such a case, the EAD rate in accordance with the explanatory note and Customs Notification 19/2006, would remain at four percent even though some like domestic products face a state VAT or CST at a zero rate. A four percent rate does not appear to correspond or be virtually identical to a zero rate.

182. Finally, the fact that Section 3(5) of the Customs Tariff Act states that the EAD may be imposed to “counter-balance” state-level VATs, sales taxes and other local taxes or charges, does not constitute evidence that the EAD in fact does.<sup>275</sup> It simply characterizes the stated purpose or intent of Section 3(5) and provides no indication as to whether the EAD fulfills the purpose. The fact that under India’s Constitution the Indian states and the Central Government lack authority to impose taxes on the sale or purchase of good during the course of importation, and that in light of these limitations “it seems natural that [India’s Central Government] might possibly wish to use a ‘duty of customs’ in order to counterbalance” state-level VATs, sales taxes, and other local taxes or charges imposed on like domestic products,<sup>276</sup> similarly does not amount to proof that the EAD applies or operates such that it is equivalent to an internal tax imposed consistently with Article III:2. Whether or not it is “natural” from a domestic policy perspective for India to have imposed a charge to counterbalance state-level VATs, sales taxes, or other local taxes or charges, does not address the issue of whether the charge it imposed – the EAD – in fact offsets or counterbalances these taxes or charges. However, because there is no evidence before the Panel as to the application and operation of state-level sales taxes or other local taxes or charges, there is no basis on which to conclude that such taxes or charges apply and operate such that the EAD offsets or counterbalances them. And, because the evidence before the Panel indicates that the EAD is not equivalent to state-level VATs and CST imposed consistently with Article III:2, it is clear that the EAD does not apply or operate in such a manner.

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<sup>274</sup> See, e.g., India First Written Submission, para. 69.

<sup>275</sup> See *supra* Sections II.A.7 and II.B.1 and 4; see also, e.g., U.S. Second Written Submission, para. 53.

<sup>276</sup> Panel Report, paras. 7.380, 7.382.

183. For the reasons stated above, the Appellate Body should find that the EAD is not justified under Article II:2(a); it is neither a charge “equivalent” to an internal tax nor is the internal tax to which it is allegedly equivalent “imposed consistently with Article III:2.”

**7. In the Alternative, the Appellate Body Should Find the AD and the EAD Inconsistent with Article III:2**

184. For the reasons stated above, the AD and the EAD are border charges and thus subject to Article II not Article III. However, in the event the Appellate Body finds either to constitute an internal tax or otherwise be subject to Article III, the United States respectfully requests the Appellate Body to complete the analysis and find that the AD and the EAD are inconsistent with Article III:2. The Appellate Body has before it uncontested facts necessary to make this finding. With respect to the AD, India has stated that it arrived the amount of the AD:

through a process of averaging, whereby the Central Government arrived at an approximation of the excise duties paid by different states on alcoholic liquor rate. This rate could in some cases, have been less than the excise duty being charged on like domestic products in some States, and in other cases equal to or perhaps slightly in excess of the excise duty being charged in some other States. However, the Central Government tried to ensure that to the extent possible, the rate was a reasonable representation of the net fiscal burden imposed on like domestic products on account of the excise duty payable on alcoholic liquor.

The rates of AD on alcoholic liquor imposed through CN 32/2003 represent the most practical method of imposing the levy at a single point (i.e. At the time of import) and ensuring that the net fiscal burden imposed on imported products does not exceed the burden imposed on like domestic products, where differences in excise duties in each State in the Union make it practically infeasible to arrive at or administer a single rate of AD. While it is possible that in some States and in some price bands, the AD imposed on imported products may be marginally in "excess of" the excise duty imposed on like domestic products in that state, it is equally likely that the AD is less than the State excise duty in some other States. Since GATT Article II:2(a) requires equivalence of net fiscal burden, the AD imposed through CN 32/2003 was able to achieve this and was to that extent, consistent with India's WTO obligations.<sup>277</sup>

185. Based on India’s statement the Panel finds that India's attempt at averaging could mean that the rate of AD for alcoholic beverages exceeded the rate of excise duty applicable to like

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<sup>277</sup> India Answer to Panel Question 28, paras. 28.4-28.5.

domestic alcoholic beverages in some states and in some price bands.<sup>278</sup> As noted above, if India averaged the rates of excise duties levied in the various states and the rates of AD reflect the average rate of those excise duties, this necessarily means that the AD exceeds the excise duties imposed on like domestic products in some Indian states. Because of this, if the AD is considered an internal tax, the AD is inconsistent with Article III:2 which prohibits the imposition of internal taxes on imported products in excess of those on like domestic products.<sup>279</sup>

186. With respect to the EAD, there are also uncontested facts that, if it is considered an internal tax, demonstrate it is inconsistent with Article III:2. India states “the overall burden of taxation on imported products as a result of the SUAD may be marginally ‘in excess of’ the tax on like domestic products.”<sup>280</sup> India also concedes: (i) the state-level VATs and the CST apply to imported products sold within India;<sup>281</sup> and (ii) the EAD is not eligible as a credit against the state-level VATs or CST owed on that sale.<sup>282</sup> Accordingly, imported products are subject to the EAD as well as the state-level VATs and CST with no offsetting credit against either for the EAD paid, subjecting imported products to charges in excess of those on like domestic products. Whether view separately or together, India’s concessions indicate that EAD, if considered an internal tax, is inconsistent with Article III:2.<sup>283</sup>

#### IV. CONCLUSION

187. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body find that:

- (1) the Panel erred in finding that Article II:1(b) applies only to duties or charges that

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<sup>278</sup> Panel Report, para. 7.274.

<sup>279</sup> The Explanatory Note to Section 3(1) is also evidence that the AD subjects imports to charges in excess of those on like domestic products. As explained above, the Explanatory Note requires that in situations where the amount of state-level excise duty varies among the Indian states, the amount of AD shall be the highest of such amounts. *See supra*.

<sup>280</sup> India First Written Submission, para. 85 note 51. India refers to the EAD as the SUAD in its submissions to the Panel.

<sup>281</sup> Panel Report, para. 7.366; *see also, e.g.*, India Responses to Questions in the Context of the First Panel Meeting, paras. 30.a.3, 30.b.2, 30.c.3, 37.b.2, 41.2; U.S. Second Written Submission, para. 54.

<sup>282</sup> Panel Report, para. 7.367; *see also, e.g.*, India Responses to Questions in the Context of the First Panel Meeting, para. 32.a.1; U.S. Second Written Submission, para. 54.

<sup>283</sup> The Explanatory Note to Section 3(5) is also evidence that the EAD subjects imports to charges in excess of those on like domestic products. As explained above, the Explanatory Note requires that in situations where the amounts of state-level VATs, sales taxes, and other local taxes or charges vary among the Indian states, the amount of EAD shall be the highest of such amounts. *See supra* Section II.B.

- “inherently discriminate against imports”;
- (2) the Panel erred in finding that the duties and charges described in Article II:2 fall outside the scope of Article II:1(b);
  - (3) the Panel erred in finding that establishing a *prima facie* case that a duty or charge falls within the scope of Article II:1(b) requires demonstrating that the duty or charge inherently discriminates against imports including by demonstrating that the duty or charge falls outside the scope of Article II:2;
  - (4) the Panel erred in finding that a charge equivalent to an internal tax falls within the scope of Article II:2(a) regardless of whether the internal tax to which it is “equivalent” is imposed consistently with Article III:2;
  - (5) the Panel erred in finding that a border charge is subject to Article III:2;
  - (6) the Panel erred in finding that to establish that a measure is not a charge equivalent to an internal tax “imposed consistently with [Article III:2]” the complaining party must bring an independent claim under Article III:2;
  - (7) the Panel erred in finding that “equivalent” means serving the same function and does not relate to the amount or effect of the charge;
  - (8) the Panel erred in finding that a responding party is not required to support its assertions that a measure falls within the scope of Article II:2(a) and can refuse to provide information requested by a panel;
  - (9) the Panel failed to make an “objective assessment” of the matter under Article 11 of the DSU by:
    - (i) not requiring India to support its assertions that AD offsets or counterbalances, or is “equivalent” to, excise duties imposed internally by the various India states on domestic alcoholic beverages and that the EAD offsets or counterbalances, or is “equivalent” to, VATs, sales taxes and other local taxes collected or imposed by the various Indian states;
    - (ii) making the following inferences that are not supported by evidence before the Panel about the existence and operation of Indian state-level excise taxes and the AD on alcoholic beverages:
      - (a) state-level excise duties on domestic alcoholic beverages exist;
      - (b) each of the Indian states impose them;

- (c) the AD on imports of alcoholic beverages may only be levied if an excise duty is levied on like domestic products; and
- (d) none of the Indian states impose excise duties or other internal charges on imported alcoholic beverages; and
- (iii) disregarding evidence before the Panel that Indian state-level VATs, sales taxes, and other local taxes apply to imported products; and
- (iv) making the following inferences that are not supported by evidence before the Panel about the existence and operation of Indian state-level VATs, sales taxes and other local taxes and the EAD:
  - (a) state-level sales taxes on alcoholic beverages and other local taxes or charges exist;
  - (b) the Indian states impose them; and
  - (c) the EAD may only be levied on an imported product if an excise duty is levied on a like domestic product;
- (10) the Panel erred in finding that the United States failed to establish that the AD on alcoholic beverages and the EAD fall outside the scope of Article II:2(a);
- (11) the Panel erred in finding that the United States is not challenging the Customs Act and the Custom Tariff Act with respect to the AD on alcoholic beverages and the EAD;
- (12) the Panel erred in finding that the United States failed to establish that the AD on alcoholic beverages is inconsistent with Article II:1(a) and (b);
- (13) the AD is inconsistent with Article II:1(b) and II:1(a) and not justified under Article II:2(a);
- (14) the Panel erred in finding that the United States failed to establish that the EAD is inconsistent with Article II:1(a) and (b); and
- (15) the EAD is inconsistent with Article II:1(b) and II:1(a) and not justified under Article II:2(a).