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

(AB-2008-7 / DS360)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA

September 4, 2008

1. Good morning, Ms. Presiding Member and members of the division. On behalf of the United States, we thank you for the opportunity to appear here today.

Introduction

2. This dispute concerns two measures: the additional customs duty on imports of alcoholic beverages (or AD) and the extra-additional customs duty (or EAD) on imports of alcoholic beverages and other products. In this dispute, India has acknowledged that these measures are customs duties imposed on the importation of products, and does not contest that if these duties are ordinary customs duties or other duties or charges within the meaning of Article II:1(b), they result in charges in excess of those set out in its WTO Schedule. Instead, India has asserted that the AD and the EAD are justified under Article II:2(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Article II:2(a) permits Members to impose on the importation of products charges equivalent to internal taxes imposed consistently with Article III:2.

3. The Panel in this dispute nonetheless found that, despite the fact that India has conceded that these measures are customs duties, these duties are not to be analyzed under Article II of the GATT 1994 because they are "equivalent" to an internal tax. For the Panel, then, these customs duties would need to be reviewed as though they were internal taxes under Article III of the GATT 1994. The Panel's approach simply is not consistent with the plain text agreed to by WTO Members. Furthermore, the Panel's approach raises a number of serious systemic concerns.

4. The Panel reached its findings and conclusions despite finding (1) that the AD and the EAD are duties imposed on the importation of products[1] and (2) that both may result in charges

[1] Panel Report, paras. 7.258, 7.344; U.S. Appellant Submission, paras. 133, 145.

on imports in excess of those on like domestic products.[2] In particular, the Panel accepted India's explanations that it arrived at the rates of the AD by averaging higher and lower taxes applied to like domestic products[3] and that the internal taxes to which the EAD is allegedly equivalent already apply to imported products.[4] The Panel also reached its conclusions when it had no evidence before it from which to conclude that the AD and the EAD are equivalent to internal taxes, because India failed to identify the internal taxes to which either duty is allegedly equivalent or to substantiate that they exist or operate as India contends, even in response to direct questioning from the Panel.

5. The Panel's findings and conclusions are erroneous on multiple levels, including most fundamentally with respect to the interpretations of Articles II and III of the GATT 1994.

Relationship Between Article II:1(b) and II:2

6. I will begin with the relationship between Article II:1(b) and Article II:2 of the GATT 1994 – a relationship the Panel fundamentally misconceived. The correct relationship between the two is one of rule and exception: Article II:1(b) prohibits ordinary customs duties and all other duties or charges of any kind imposed on or in connection with importation that are not set out in a Member's Schedule, while Article II:2 provides an exception to that prohibition by permitting the Member to impose certain duties or charges on importation. As an exception, a Member may rely on Article II:2 to justify a measure that would otherwise be inconsistent with

---

[2] Panel Report, paras. 7.269, 7.274, 7.369; U.S. Appellant Submission, paras. 164-165-173.

[3] Panel Report, para. 7.269.

[4] Panel Report, paras. 7.366-7.367.

Article II:1(b). Article II:2 is not – as the Panel found – an element of establishing a *prima facie* case that a measure constitutes an ordinary customs duty or other duty or charge within the meaning of Article II:1(b).

7. The fact that Article II:2 is an exception, however, does not resolve the issue of which party bears the burden of proving that a measure does or does not fall within its scope. Nor does it address the issue of whether a party must substantiate its own assertions. India and the Panel misunderstood both of these points.

8. With respect to the first point, as the United States maintained before the Panel and continues to maintain before the Appellate Body,[5] if the responding party asserts that its measure may be justified under Article II:2(a) and substantiates that assertion, the complaining party bears the burden of proving that the measure does not fall within the scope of Article II:2(a). In this regard, Article II:2(a) is not an affirmative defense under which the responding party would bear the burden of proving that its measure falls within the scope of Article II:2(a). Article II:2(a), however, remains an exception to the rule that Members may not impose ordinary customs duties or other duties or charges of any kind that are not set out in their respective Schedules. On the other hand, if the responding party never contests that the duty or charge at issue is not within the scope of Article II:2 (that is, never claims it is of the type provided for in Article II:2), then there would be no need for either party to submit evidence or arguments concerning Article II:2 and a dispute could proceed without any consideration of Article II:2.

[5] U.S. Answer to Panel Question 44, paras. 6-11; U.S. Appellant Submission, paras. 30 n.28, 78.

9. As to the second point, while the complaining party bears the burden of proving that a measure does not fall within the scope of Article II:2(a), this does not alleviate the responding party from substantiating the facts it asserts. As the Appellate Body has stated, the party asserting a fact bears the burden of providing proof of that fact.[6] Therefore, if the responding party asserts that its measure is a charge equivalent to an internal tax imposed consistently with Article III:2, it must provide proof to substantiate that assertion. This requires India to identify the internal taxes to which it has asserted the AD and the EAD are equivalent and to substantiate that they exist and operate as India contends. However, in this dispute, India has consistently refused to identify the internal taxes to which it asserts the AD and the EAD are equivalent or to substantiate that they exist or operate as it contends. Indeed, even in its appellee submission, India's assertions that it did provide evidence of the relevant taxes are phrased in generalities; India does not point to any of its submissions or to any Panel findings to substantiate those assertions. Accordingly, India has not substantiated the facts it asserts and there was no basis for the Panel to find that such facts exist. In this connection we emphasize a point we made in our Appellant Submission: because India did not identify the particular internal taxes to which the AD and the EAD were allegedly equivalent, the Panel placed the United States in the impossible position of guessing the internal taxes to which India believed the AD and the EAD are equivalent.

10. It is important to note, however, that the United States nonetheless demonstrated that India's charges could not meet the requirements to fall within the scope of Article II:2, including

---

[6] Appellate Body Report, *United States – Shirts and Blouses*, p. 14.

by highlighting (1) that, if state-level excise duties exist, by India's own assertions, the AD is necessarily higher than the internal excise duties on some like domestic products; and (2) that the internal taxes to which the EAD is allegedly equivalent already applied to imported products.

11. When viewed as an exception, many of the difficulties the Panel perceived it resolved with is erroneous interpretation of Article II:1(b) and II:2 fall away. For example, the Panel perceived that if Article II:1(b) prohibited Members from imposing all duties or charges of any kind in excess of those set out in their respective Schedules, this would require Members to bind the duties and charges described in Article II:2.[7] This, however, is not the case. Article II:2 expressly permits Members to impose certain duties or charges "at any time" and, because of this, Members are not required to schedule or bind the duties described in Article II:2.

12. In fact, this is the point made in the 1980 GATT Council Decision[8] on which the Panel and India have so heavily relied.[9] The GATT Council Decision sought to solve a particular problem by replacing an outdated system for publication of tariff concessions with a loose-leaf system, and in this connection discussed the "other duties or charges" that needed to be bound or inscribed in Members' Schedules for purposes of Article II:1(b). Because Members may impose the duties or charges described in Article II:2 at any time, notwithstanding that they are not set out in their respective Schedules, the duties and charges described in Article II:2 need not be scheduled or bound. Accordingly, the Council Decision made clear that its proposal – that each

[7] Panel Report, para. 7.138.

[8] C/107/Rev.1, adopted on 26 March 1980, BISD 27S/22, 24, para. 9.

[9] *See, e.g.,* Panel Report, para. 7.144; India Appellee Submission, paras. 13-16.

Member inscribe in a special column the instrument by which a concession was first incorporated into its GATT Schedule – did not concern the duties or charges described in Article II:2.[10]

Inherently Discriminates

13. The Panel's fundamental misconception as to the relationship between Article II:1(b) and II:2 rests on its erroneous finding that Article II:1(b) only covers certain kinds of duties or charges imposed on or in connection with importation – in particular, those that inherently discriminate against imports . As elaborated in our Appellant Submission, the Panel's reading of Article II:1(b) to concern only certain kinds of duties or charges ignores the customary rules of interpretation, reading out the words "all", "other" and "of any kind" and reading in the words "that inherently discriminate against imports."[11] There is no basis for the Panel's approach of substituting its perception as to Article II:1(b)'s "readily apparent rationale" for the text of that provision. Moreover, even if the drafters viewed the duties and charges described in Article II:2 as not inherently discriminatory and, therefore, sought to ensure that they were not prohibited, this does not justify the Panel's flawed interpretation of Article II:1(b). Under the correct interpretation of Article II, the duties and charges described in Article II:2 are not prohibited; indeed they are expressly permitted under Article II:2.

Article II:2(a) Inquiry

14. In terms of Article II:2(a), the Panel's interpretation is fundamentally flawed. In particular, the Panel erroneously read out the requirement that the internal tax to which the

[10] U.S. Answer to Panel Question 68, paras. 23-24; U.S. Appellant Submission, para. 37.

[11] U.S. Appellant Submission, paras. 14-18.

charge is equivalent be imposed consistently with Article III:2.[12] India strains to explain the Panel's finding. India argues that the Panel set up a "two-step analysis" whereby it would first determine whether the duty or charge falls within the scope of Article II:2(a) and second determine whether the duty or charge is imposed consistently with Article II:2(a); only the latter of this would involve both an examination of whether the duty or charge is equivalent to an internal tax and whether the internal tax is imposed consistently with Article III:2.[13] The Panel, however, does not set out the two-step analysis India describes. Instead, the Panel found that if a charge is equivalent to an internal tax, it is subject to Article III:2 and that, if the internal tax to which the charge is equivalent is imposed inconsistently with Article III:2, that "would be the end result of the analysis... and not merely an intermediate result that would take the analysis of the border charge back to Article II."[14]

15. In this connection, the Panel also erred in finding that a border charge equivalent to an internal tax is subject to Article III:2 and that the consistency with Article III:2 of an internal tax (to which the border charge is equivalent) may only be examined under an independent Article III:2 claim.[15] Article III:2 concerns internal taxes, not border charges. Because of this, and contrary to the Panel's finding otherwise,[16] a border charge – even if equivalent to an internal tax

---

[12] Panel Report, para. 7.210; U.S. Appellant Submission, paras. 43-47.

[13] India Appellee Submission, paras. 48-49, 52.

[14] Panel Report, paras. 7.206, 7.209.

[15] U.S. Appellant Submission, paras. 48-62.

[16] Panel Report, para. 7.215; *see also* U.S. Appellant Submission, paras. 57-62.

– may not be the subject of an independent Article III:2 breach.

16. We elaborate on the consequences of the Panel's findings in our Appellant Submission, including that it appears to require that every claim that a measure is inconsistent with Article II:1(b), must be coupled with independent Article III, VI and possibly VIII claims.[17] As we indicate in our Appellant Submission, the Panel's approach is unfounded and unprecedented; we note that even India agrees that such a result is not the "logical or intended consequence of an Article II:2(a) enquiry."[18]

17. We emphasize that the Panel's findings have implications that reach well beyond this dispute or the elements of establishing a *prima facie* case of inconsistency with Article II:1(b). In particular, if as the Panel finds, Article II:1(b) only covers certain kinds of duties or charges, what exactly did Members agree to bind in their Schedules? The Panel's finding that Article II:1(b) covers those duties that inherently discriminate against imports does not answer this question. The Panel does not define what it means to inherently discriminate against imports, and it is not at all clear what it means. Does this mean, for example, that duties imposed on imports, for which there is no like domestic product to protect or to discriminate in favor of, are not subject to tariff commitments? India offers that it simply mean duties or charges that apply exclusively to imported products. [19] Yet, the duties or charges described in Article II:2 also apply exclusively to imports, but the Panel found that these duties and charges do not inherently

[17] U.S. Appellant Submission, paras. 59-62.

[18] India Appellee Submission, para. 139.

[19] India Appellee Submission, para. 18.

discriminate against imports. The Panel's findings raise significant unanswered questions. These questions go to the meaning of Member's tariff commitments and the ability of Members to derive the benefits of those commitments, particularly vis-a-vis Members with tax structures that may be complex or opaque.

The AD and EAD Are Inconsistent With Article II:1(a) and (b) and Not Justified Under II:2(a)

18. Because the Panel erred in finding that the United States failed to establish that the AD and the EAD are inconsistent with Article II:1(a) and (b), we request that the Appellate Body reverse those findings and find the AD and the EAD are each inconsistent with Article II:1(a) and (b) and not justified under Article II:2(a). We elaborate on why in our Appellant Submission[20] and address only a few points in this connection today.

19. First, India has not contested – either before the Panel or in its Appellee Submission – that, if the AD and the EAD are ordinary customs duties or other duties or charges, they result in charges in excess of those set out in its Schedule. In this regard, we draw the attention of the Appellate Body to the tables provided in paragraphs 136 and 148 of the U.S. Appellant Submission. The first of these tables (in the third column) shows the four AD rates for distilled spirits and the three AD rates for beer and wine corresponding to certain import values.[21] These rates are set at a combination of *ad valorem* and specific rates, with the specific rate applying if it

[20] U.S. Appellee Submission, para. 124-183.

[21] U.S. Appellant Submission, para. 136.

results in a higher duty than the *ad valorem* rate.[22] Also in that table, we show (in the sixth column) the total dollar amount of duties that result from application of the AD for imports of varying import values, and we show (in the seventh column) the corresponding effective duty rate. The AD applies, in addition to and on top of the basic customs duty,[23] as the table reflects. The table in paragraph 148 of the U.S. Appellant Submission provides a similar analysis for the EAD,[24] which also applies in addition to and on top of the basic customs duty.[25] These tables demonstrate respectively that the AD and the EAD result in duties on imports in excess of those set out in India's Schedule. India has not contested the factual information or the analyses provided in these tables, or the fact that it has not included any "other duties or charges" in its Schedule.

20. Second, the Panel found that the AD and the EAD are duties imposed on the importation of products[26] and agreed that, if the meaning of "ordinary customs duties" or "other duties or charges" put forward by the United States is the correct one, the AD and the EAD would constitute ordinary customs duties or other duties or charges within the meaning of Article II:1(b).[27] Therefore, the Appellate Body has both the factual findings upon which to find that the

---

[22] U.S. First Written Submission, para. 23.

[23] *See, e.g.,* U.S. Appellant Submission, para 3; U.S. First Written Submission, para. 19.

[24] U.S. Appellant Submission, para. 148.

[25] *See, e.g.,* U.S. Appellant Submission, para 3; U.S. First Written Submission, para. 28.

[26] Panel Report, paras. 7.246-7.248, 7.335-7.337.

[27] Panel Report, paras. 7.249, 7.338.

AD and the EAD constitute ordinary customs duties or other duties or charges imposed on importation, and uncontested facts upon which to find both are imposed in excess of those set out in India's Schedule.

21. Third, with respect to its assertions that the AD and EAD are justified under Article II:2(a), India only argues that it provided sufficient evidence to find them"equivalent" in function or purpose.[28] India does not contest that, if the Appellate Body interprets "equivalent" to mean virtually identical or corresponding in function (in the sense of operation), effect and amount, it should find that the AD and the EAD are not "equivalent" to internal taxes.

Alternatively, the AD and the EAD Are Inconsistent With Article III:2

22. In response to the alternative argument raised by the United States, India argues that, if the Appellate Body finds that the AD and the EAD are internal taxes, it cannot complete the analysis and find the AD or the EAD inconsistent with Article III:2. India's argument is incorrect. Moreover, we note that India does not object to the second part of the U.S. argument, that if the Appellate Body finds that the AD and the EAD are "otherwise subject to Article III:2," it should find them inconsistent with that provision. First, contrary to India's contention,[29] the United States did raise an Article III:2 claim as the Panel itself found.[30] Second, India is incorrect that Article III:2 is not closely related to the claims and defenses examined by the Panel under Article II:1(b) and II:2(a) respectively; moreover, the Panel did examine Article III:2 as part of

[28] India Appellee Submission, paras. 127, 131.

[29] India Appellee Submission, para. 141.

[30] Panel Report, paras. 7.405-7.406, 7.415.

examining the concept contained in Article II:2(a), equivalency and "imposed consistently with Article III:2."[31] Third, the United States requests the Appellate Body to find the AD and the EAD inconsistent with Article III:2 as part of its request that the Appellate Body find the AD and the EAD inconsistent with Article II:1(a) and (b) and not justified under Article II:2(a). To the extent the Appellate Body reverses the Panel's finding that "consistency with Article III:2" is not a concept that must be examined in considering whether a measure falls within the scope of Article II:2(a), but upholds the Panel's finding that whether a border charge equivalent to an internal tax is imposed consistently with Article III:2 is an element that may only be examined under a separate Article III:2 claim, the United States requests that the Appellate Body find the AD and the EAD inconsistent with Article III:2.

Other Issues

23. We note that India has raised a number of points in its Appellee Submission but in light of the time defer to our Appellant Submission which we believe adequately addresses those issues. The same is true for our Appellee Submission in response to the issues India raises in its Other Appellant Submission. We are of course happy to address those points further in response to any questions.

Conclusion

24. This concludes our opening statement. Thank you for your attention, and we look forward to any questions you may have.

[31] Panel Report, paras. 7.182-7.185, 7.204-7.212.