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

(WT/DS360)

Answers of the United States to Questions by the Panel
Posed in the Context of the First Substantive Meeting with the Parties

For the United States:

Q1. Please clarify the product scope of the United States' claims in respect of the "extra-additional duty" as follows:

(a) A distinction is initially drawn between alcoholic beverages, on the one hand, and other products, on the other hand (e.g., at para. 29). Later, the United States argues that it is challenging the "extra-additional duty" as such (para. 69). It thus appears that the US claims are not limited in scope to the products mentioned, i.e., alcoholic beverages and the identified other products. What is the purpose of distinguishing between alcoholic beverages and other products?

1. With respect to the extra-additional customs duty (EAD), the United States is not intending to distinguish between alcoholic beverages and other products. The United States has provided alcoholic beverages as a particular example of the problem, and then elaborated the problem with additional examples contained in Exhibit US-1.

2. The EAD applies to all imports with the exception of those that have been exempted through a customs notification, and the U.S. claim is an as such claim that concern all imports for which imposition of the EAD in combination with India's basic customs duty (BCD) results in a breach of India's WTO-bound rates. 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. Exhibit US-1 is an illustrative list of products for which that the United States has identified this would be the case.[1]

3. The Appellate Body in *Argentina – Textiles* faced a similar situation where the Appellate Body found Argentina's "minimum specific duty" or DIEM inconsistent with GATT Article II:1(b) to the extent it resulted in ordinary customs duty in excess of Argentina's WTO-bound rate. In that dispute, Argentina imposed the DIEM in lieu of a 35 percent *ad valorem* duty (calculated on a good's transaction value) in situations where the DIEM resulted in a higher duties on imports as compared to imposition of the 35 percent *ad valorem* duty. Argentina calculated the DIEM by multiplying an import's "representative price" (a price Argentina set) by 35 percent. If that amount was higher than the amount resulting by multiplying the import's

[1] We also note that, if the EAD is properly characterized as an other duty or charge (ODC) within the meaning of GATT Article II:1(b), it constitutes a breach of Article II:1(b) for all products to which it applies regardless of whether such products are at or very near their WTO-bound rates, since India does not specify any ODCs in its Schedule, and accordingly any ODC would be inconsistent with Article II:1(b).

transaction value by 35 percent, then Argentina would apply the DIEM in that amount. Although with respect to some imports, the DIEM did not result in duties in excess of Argentina's WTO-bound rate (35 percent *ad valorem*), the Appellate Body found the DIEM as such inconsistent with GATT Article II:1(b) to the extent it results in customs duties in excess of Argentina's WTO-bound rate. The Appellate Body explained "the structure and design of the Argentine system is such that" the possibility remained that the "ad valorem equivalent" of the DIEM – depending on the import's transaction value and corresponding representative price set by Argentina – would exceed Argentina's WTO-bound rate.[2] As the Appellate Body did in *Argentina – Textiles*, this Panel should find the EAD as such inconsistent with GATT Article II:1(b) to the extent it results in ordinary customs duties on imports in excess of India's WTO-bound rate. Like in *Argentina – Textiles*, the structure and design of the EAD is such that the EAD imposed in conjunction with the BCD on imports for which the BCD is at or very near India's WTO-bound rate results in ordinary customs duties that exceed India's WTO-bound rate. The fact that in some instances – i.e., products for which the BCD is not at or near India's WTO-bound rate – does not save the EAD from as such being inconsistent with GATT Article II:1(b).

4. In terms of the distinction made in paragraph 29, that distinction was made to point out a difference between the additional customs duty (AD) and the EAD. The EAD applies at the same rate (four percent) for all imports, whereas the AD applies different rates for alcoholic beverages as compared to other imports. The rates of AD set out in paragraph 23 of the U.S. written submission apply only with respect to alcoholic beverages. The rates of AD for all other products are required under Section 3(1) of the Customs Tariff Act to be "equal" to the rate of excise duty on the corresponding like domestic product. We understand from India that rates of excise duty and rates of AD for products other than alcoholic beverages are not set out in a customs or excise notification, but that imports other than alcoholic beverages are charged an AD at a rate that equals the rate of central excise tax.[3]

(b) At para. 72(2), the United States claims that the "extra-additional duty" subjects "imports, including alcoholic beverages and products listed in Exhibit US-1" to WTO-inconsistent duties. Is the United States asking the Panel to draw conclusions for products other than alcoholic beverages and the products listed in Exhibit US-1? If so, is the United States arguing that the "extra-additional duty", as such, results in India breaching its WTO obligations for any and all imports?

5. The United States is challenging the EAD since the EAD breaches India's obligations under Article II of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). That is, the U.S. claims include a claim against the EAD itself as well as a claim against particular duties imposed on particular tariff lines. With respect to the EAD itself, the EAD results in duties in excess of India's bound rate of duty with respect to any import for which India's applied basic

[2] Appellate Body, *Argentina – Textiles*, WT/DS56/AB/R, paras. 48-56.

[3] U.S. First Written Submission, para. 21.

customs duty is at or very near its WTO-bound rate. Because the EAD imposes a duty in excess of India's bound rate, the EAD itself is inconsistent with India's obligations. And of course each particular duty that India applies to a tariff line in excess of its bound rate is inconsistent with India's obligations under Article II of the GATT 1994. As indicated in the answer to question 1(a), the EAD as such results in a breach of India's WTO-bound rate with respect to any import for which India's applied basic customs duty is at or very near its WTO-bound rate. Exhibit US-1 lists examples of products for which India's BCD is at or very near India's WTO-bound rate and for which the EAD imposed in conjunction with the BCD results in ordinary customs duties that exceed India's WTO-bound rate.

6. In addition, paragraph 72(2) mentions alcoholic beverages in addition to products listed in Exhibit US-1 because Exhibit US-1 does not include alcoholic beverages, and we wanted to make clear that our claims concern alcoholic beverages even though alcoholic beverages are not listed in Exhibit US-1.

Q2. With reference to para. 65 of the US first written submission, please clarify your claim in relation to the "extra-additional duty". At para. 65 it is assumed that the duty in question is an ODC whereas previously (para. 59) and subsequently (para. 72) it is assumed that it is an ordinary customs duty. Is the US argument that the "extra-additional duty" is, at the same time, an ordinary customs duty and an ODC? Please develop your argument.

7. No, the United States believes that the EAD is properly characterized as an ordinary customs duty. In paragraph 72 of our written submission, we therefore conclude that the EAD is an ordinary customs duty and subjects imported alcoholic beverages to ordinary customs duties in excess of those set forth in India's Schedule.

8. However, even if the EAD were not an ordinary customs duty, then (as we suggested at paragraph 65 of the U.S. first written submission, and as further developed in the following paragraph), the EAD would be an "other duty or charge" (ODC). Thus, because India has not specified any ODCs in its Schedule, the EAD - even if not an ordinary customs duty - would be inconsistent with GATT Article II:1(b).

9. The EAD would necessarily constitute an ODC if it were not an ordinary customs duty. This is because the word "other" as used in GATT Article II:1(b) means duties or charges other than ordinary customs duties that are applied on or in connection with importation. If the EAD is not an ordinary customs duty, then it must necessarily be something *other* than an ordinary custom duty. As elaborated in the answer to question 12,[4] the EAD is applied on or in connection with importation. Moreover, in asserting the EAD is a charge equivalent to an

[4] *See also* U.S. First Written Submission, paras. 44, 47, 57, and 60; U.S. Oral Statement at the First Panel Meeting, para. 8 and 10.

internal tax within the meaning of GATT Article II:2(a),[5] India has implicitly characterized the EAD as a charge "imposed on importation" since the chapeau to GATT Article II:2 makes clear that it concerns measures "imposed on importation." Therefore, if it is not an ordinary customs duty, it must be an other duty or charge within the meaning of Article II:1(b).

10. In this regard, India's argument that the EAD applies at the time of importation but not on or in connection with importation is incorrect. The phrase "on or in connection with importation" does not concern the policy object or purpose associated with the duty, but the relationship between the duty and importation; thus, India's argument that the EAD is not applied on or in connection with importation because its purpose is to offset internal taxes is without merit. For example, the fact that Article VI:2 of the GATT 1994 permits the imposition of an antidumping duty to "offset or prevent dumping," does not mean that an antidumping duty is not imposed on or in connection with importation.

Q3. Could the United States provide some information on its trade interest in this case, in relation to each of the measures at issue?

11. The United States is a major exporter of goods, including to India, and India represents a significant and growing market.[6] Accordingly, the United States has an interest in ensuring that U.S. products have the opportunity to compete in the Indian market on terms that enjoy the benefits of India's WTO commitments. Both the AD and EAD represent barriers to U.S. exports.

For both parties:

Q11. Please explain the meaning of the phrase "shall be liable" as it appears in sections 3(1) and 3(5) of India's Customs Tariff Act. In particular, does the term "liable" essentially mean "subject by law to" and does the phrase "shall be liable" require the imposition of the additional duty?

12. Section 3(1) of the Customs Tariff Act provides: "Any article imported into India shall, in addition, be liable to a duty ... equal to the excise duty for the time being leviable on a like article if produced or manufactured in India." The word "shall" is used to express a command and "used in laws, regulations, or directives to express what is mandatory."[7] The word "liable"

[5] *See, e.g.,* India First Written Submission, paras. 63; India Oral Statement at the First Panel Meeting, para. 9.

[6] *See* U.S. First Written Submission, para. 10 (providing data on the size of the Indian alcoholic beverages markets).

[7] Merriam-Webster Online Dictionary *available at* < http://www.merriam-webster.com/dictionary/shall> (visited on October 5, 2007); *see also New Shorter Oxford English Dictionary* at 2808 (1993) (defining "shall" as meaning "must according to a command or instruction...in the third person (chiefly in statutes, regulations, etc.)").

means "obligated by law" or "subject by law".[8] Thus, the wording of Section 3(1) is clear on its face: the AD is to be imposed on articles imported into India.

13. India contends that Section 3(1) when read with the proviso to Section 3(1) confers discretion to the Central Government to impose the AD but does not require it to impose the AD.[9] India's reading is untenable.

14. The text of the proviso makes no reference to "discretion" not to impose the AD. The proviso to Section 3(1) merely states: "Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty, having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States." The proviso sets out an exception to Section 3(1) with respect to the *rate* of AD for alcoholic beverages. In particular, the proviso authorizes the Central Government to specify a rate for alcoholic beverages that "ha[s] regard to" the rate of excise duty on like domestic products. The proviso thus authorizes the Central Government to deviate from the requirement in Section 3(1) that the rate of AD be "equal to" the rate of excise duty on like domestic products. The proviso to Section 3(1), however, does not supercede the requirement in Section 3(1) that any article imported into India shall be liable to the AD and does not grant the Central Government discretion to deviate from that requirement with respect to alcoholic beverages.

15. Customs Notification 32/2003, which sets out the rates of AD on alcoholic beverages, confirms this reading. Customs Notification 32/2003 does not provide that the imports "shall be liable" to the AD; instead Customs Notification 32/2003 is a notification that carries out the proviso to Section 3(1) by "specif[ying] ...the rates of additional duty ..."[10] Customs Notification 32/2003 thus carries out a mandate found elsewhere. Contrasting these provisions with the Indian provisions that impose the EAD provides further confirmation. Section 3(5) of the Customs Tariff Act provides: "If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article ... such additional duty ... it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification."[11] In contrast to Section 3(1), Section 3(5) appears to confer authority on the Central Government to impose the EAD but does not appear to require the Central Government to do so. Customs Notification 19/2006 on the other hand states that it "hereby directs that all

[8] Merriam-Webster Online Dictionary *available at* <http://www.merriam-webster.com/dictionary/liable> (visited on October 5, 2007); *see also New Shorter Oxford English Dictionary* at 1575 (1993) (defining "liable" as meaning "bound or obligated by law or equity").

[9] India First Written Submission, para. 29.

[10] Customs Notification 32/2003 (March 1, 2003), Exhibit US-6.

[11] Section 3(5) of the Customs Tariff Act, Exhibit US-3A.

goods ... shall be liable to an additional duty of customs at a rate of four percent *ad valorem.*"[12] The absence of language mandating that imports shall be liable to AD in Customs Notification 32/2003 similar to that in Customs Notification 19/2006 indicates that the legal mandate to collect the AD is contained in Section 3(1) of the Customs Tariff Act and that Customs Notification 32/2003 specifies the rates at which the AD shall be imposed.

Q12. With reference to para. [16] of the EC oral statement, please offer short factual answers to the list of questions indicated.

16. In paragraph 16 of the EC oral statement, the EC poses the following questions:

> "What is the event that triggers the imposition of the charge? How is the charge labelled and what type of legislation has introduced it? When is the charge due? What authorities are responsible for the collection of the charge? On the basis of what legislation do these authorities act? What are the procedures followed for the collection of the charge? Who is responsible for the payment of the charge? Does the charge appear to correspond or to be like a tax imposed internally?"

17. **What is the event triggering imposition of the AD and the EAD?** Products imported into India become liable to the AD and EAD upon importation into India. This is made clear by the statutory provisions and customs notifications concerning the AD and EAD. Specifically, with respect to the AD, Section 3(1) of the Customs Tariff Act provides: "Any article which is imported into India shall, in addition, be liable to a duty..." Customs Notification 32/2003 specifies the rates of AD for alcoholic beverages "when imported into India". With respect to the EAD, Section 3(5) of the Customs Tariff Act provides that the Central Government may "direct that such imported article shall, in addition, be liable to an additional duty not exceeding four per cent..." Customs Notification 19/2006 specifies that goods "when imported into India, shall be liable to an additional of customs at the rate of four percent." Thus, the event for which liability for the AD and the EAD ensue is the importation of a good into India.

18. Customs notifications specifying the rates of basic customs duty (BCD) for alcoholic beverages and other products similarly provide that goods shall be exempt "when imported into India" from so much of the duty of customs leviable thereon under the [First Schedule to the Customs Tariff Act] as is in excess of" rates specified in the relevant customs notification.[13] In other words, Indian customs notifications use the same language – regardless of whether the notice is referring to the BCD, AD or EAD – to characterize the relationship between importation

[12] Customs Notification 19/2006 (March 1, 2006), Exhibit US-7.

[13] Customs Notification 21/2002 (March 1, 2002) read in conjunction with Customs Notification 11/2005 (March 1, 2005) (specifying rate of basic customs duty for HS 2208, distilled spirits, as well as other products including some products listed in Exhibit US-1); Customs Notification 20/1997 (March 1, 1997) (specifying the rate of basic customs duty for wine and beer prior to July 3, 2007); *see also* U.S. First Written Submission, para. 15 (explaining that the applied rate of basic customs duty is typically set out in customs notifications that specify a lower rate of duty than specified in the First Schedule to the Customs Tariff Act).

and liability for a duty. This indicates that the event for which liability for the AD and EAD ensues is the same event for which liability for the BCD arises, and India has already characterized the BCD as applied on or in connection with importation.[14]

19. **How is the charge labeled and what type of legislation has introduced it?** Indian enactments effectively label the AD and the EAD as customs duties. Specifically, India introduced the AD on alcoholic beverages through its 2001 Finance Bill as an amendment to the "Customs Tariff Act."[15] The Customs Tariff Act in conjunction with the "Customs Act"[16] requires that any "article which is imported into India shall in addition be liable to a duty equal to" excised duties on like domestic products. " The AD is imposed "in addition" to India's basic customs duty and collected on alcoholic beverages at rates specified in a "Customs Notification."[17] The AD may be exempted with respect to any good through a "Customs Notification." [18]

20. With respect to the EAD, it was introduced through India's 2005 Finance Bill as an amendment to "Customs Tariff Act"[19]. The Customs Tariff Act, in conjunction with the "Customs Act",[20] authorizes collection of an "additional duty"on "any imported article."[21] The EAD is collected at a rate specified in a "Customs Notification,"[22] and that Customs Notification expressly refers to the EAD as "additional duty of customs."[23] We also note that although it is not within the Panel's terms of reference, Customs Notification 102/2007 which India alleges

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[14]India states that the BCD is an ordinary customs duty within the meaning of GATT Article II:1(b), and thus implicitly recognizes that the BCD applies on or in connection with importation. *See* India Oral Statement at the First Panel Meeting, para. 12; India First Written Submission, para. 12. In addition, its oral responses to the questions from the Panel, India stated the BCD was an example of a duty imposed on or in connection with importation.

[15] Government of India, Finance Bill, 2005 (announced February 28, 2001; entered into force April 1, 2001), Exhibit US-18; U.S. First Written Submission, para. 18 (citing the 2001 Finance Bill).

[16] Section 12 of the Customs Act requires "duties of customs" to be levied at such rates as specified in the Customs Tariff Act. The Customs Tariff Act specifies the rate of additional customs duty as a rate "equal to" excise duties leviable on like domestic products. Thus, the Customs Tariff Act in conjunction with the Customs Act required imposition of the AD. *See* U.S. First Written Submission, paras. 13, 18.

[17] Customs Notification 32/2003 (March 1, 2003), Exhibit US-6.

[18] Section 25 of the Customs Act states that the Central Government may by customs notification exempt any good from the whole or part of "duty of customs leivable thereon". Exhibit US-2. Customs notifications providing for exemption from the AD or EAD reference Section 25 of the Customs Act as the legal basis for the exemption. *See, e.g.,* Customs Notification 20/2006, Exhibit US-11.

[19] Government of India, Finance Bill, 2005 (announced February 28, 2005; entered into force April 1, 2005), Exhibit US-19; *see also* U.S. First Written Submission, para. 26 (citing the 2005 Finance Bill).

[20] Section 12 of the Customs Act, Exhibit US-2.

[21]Section 3(5) of the Customs Tariff Act, Exhibits US-3A.

[22] Customs Notification 19/2006 (March 1, 2006), Exhibit US-7.

[23]*Id.*

addresses the EAD likewise refers to the EAD as an "additional duty of customs."[24]

21. The BCD – which India concedes is a an ordinary customs duty imposed or in connection with importation[25] – is likewise collected pursuant to the Customs Tariff Act, in conjunction with the Customs Act,[26] and is collected at rates specified *inter alia* in Customs Notifications.[27]

22. Further, the Central Government appears to derive its authority to collect the BCD, AD and EAD by virtue of Item 83 of the Union List of the Indian Constitution. Item 83 grants the Central Government the exclusive authority to levy "duties of custom."[28] India also noted in response to a question from the Panel during the first meeting that the Central Government collected the EAD because Article 286 of the Indian Constitution prohibited states from collecting the duty. Article 286 prohibits states from imposing "a tax on the sale or purchase of goods where such sale or purchase taxes place ...in the course of the import into, or export of the goods out of, the territory of India".[29]

23. Additionally, while the AD and EAD in addition to BCD are each collected pursuant to the Customs Tariff Act, in conjunction with the Custom Act, Indian internal taxes are collected pursuant to entirely separate provisions of Indian law. For example, India's Central Excise Act and Central Excise Tariff Act require the collection of a "Central Value Added Tax" or CENVAT.[30] The CET applies to goods manufactured in India and applies upon the "removal" of such goods from the place of manufacture or production in India.[31] Similarly, the India's Central Sales Tax Act requires the collection of a "tax" on the sale of any good – whether imported or domestic – on its sale from an entity in one Indian state to an entity in an another Indian state,[32] and Indian state Value-Add Tax Acts set out value-added taxes applied to goods – whether imported or domestic – upon their sale within an Indian state.[33] We are not aware of taxes imposed either under the Central Sales Tax Act or state VATs being referred to as "duties of customs" or "customs duties."

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[24] Customs Notification 102/2007 (September 14, 2007).

[25] *See, e.g.,* India First Written Submission, para. 12; India Oral Statement at the First Panel Meeting, para. 12; *see also supra* note 14.

[26] Section 2 of the Customs Tariff Act, Exhibit US-3A; Section 12 of the Customs Act, Exhibit US-2.

[27] *See, e.g.,* Customs Notifications 11/2005, Exhibit US-5; Customs Notification 21/2002, Exhibit US-9.

[28] Entry 83, List I, Seventh Schedule to the Indian Constitution, Exhibit US-20; *see also* India Oral Statement at the First Panel Meeting, para. 4.

[29] Exhibit India-17.

[30] Central Excise Act, Sections 3 and 4, Exhibit US-21; *see also* U.S. First Written Submission, para. 21. While the CENVAT is sometimes referred to as a "duty of excise", we are not aware of any instance – statutory or otherwise – of it being referred to as a "duty of customs" or "customs duty".

[31] *Id.*

[32] Central Sales Tax Act, Section 6, Exhibit India-3.

[33] *Id.*

24. **When is the charge due?** Duties imposed pursuant to the Customs Act and Customs Tariff Act – including the BC, AD and EAD – are assessed at the time of the good's importation and must be paid by the importer before the good may be permitted to clear customs.[34]

25. **What authorities are responsible for the collection of the charge?** "Officers of customs" designated by the Central Board of Excise and Customs or the Commissioner of Customs are responsible for collecting duties imposed pursuant to the Customs Act and Customs Tariff Act – including the BC, AD, and EAD – prior to clearing the good through customs.[35]

26. **On the basis of what legislation do these authorities act?** Officers of custom collect the BCD, AD, and EAD pursuant to the Customs Tariff Act and Customs Act in addition to regulations promulgated thereunder – for example, Customs Valuation Rules, 1998.[36]

27. **What are the procedures followed for the collection of the charge?** Procedures for clearing goods through Customs, including the government officials responsible for collection of the BCD, AD, and EAD, the persons liable for payment of the BCD, AD, and EAD and the time at which payment of such duties is due, are generally set out in Sections 44 through 49 of the Customs Act. Sections 14 and 15 of the Customs Act along with the Customs Valuation Rules, 1998 establish rules and procedures for valuing goods for purposes of assessing duties of customs. Sections 3(2) and 3(6) establish additional rules for calculating the amount of AD or EAD owed.

28. **Who is responsible for the payment of the charge?** The importer of the good is responsible for payment of any duty – including the BCD, AD or EAD – owed on the good.[37]

29. **Does the charge appear to correspond or to be like a tax imposed internally?** No. Neither the AD or the EAD appears to correspond to or be like a tax imposed internally. As explained in paragraphs 19 through 25 nothing in terms of the structure, design or effect of the AD or EAD appears equivalent to a tax imposed internally. Rather, examination of the structure, design and effect of the AD and EAD indicate that each are ordinary customs duties.

Q13. Please provide your view on the meaning and content to be given to the concept of "equivalence" as it appears in Article II:2(a) of the GATT 1994.

30. Article II:2(a) refers to "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". In Article

[34] Sections 17 and 47 of the Customs Act, 1962, Exhibits US-2 and US-22a. Under certain circumstances, goods may clear customs on execution of bonds or under duty deferment procedures. *See* Sections 146 and 147 of the Customs Act, 1962, Exhibit US-22b.

[35] Sections 2(34) and 47 of the Customs Act. Exhibits US-22c and US-22a.

[36] *Id.;* Customs Valuation Rules, 1998, Exhibit US-8.

[37] Section 47 of the Customs Act, Exhibit US-22a.

II:2(a), the term "equivalent" is used as an adjective to describe the term "charge" and describes a relationship between the term "charge" and the term "internal tax." The ordinary meaning of the word "equivalent" is "equal in force, amount, or value"; "corresponding or virtually identical especially in effect or function"[38]. Taken in the context of Article II:2(a), an "equivalent" charge thus appears to mean a charge imposed on importation that corresponds or is virtually identical in effect, function and amount to an internal tax imposed on the like domestic product.

31. The term "charge" in Article II:2(a) is described not only by the term "equivalent" but also by the phrase "imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product." Whether a charge is "equivalent" to an internal tax and whether a charge is imposed consistently with Article III:2, as noted in the U.S. Oral Statement,[39] are separate inquiries. Importantly, under the Article III:2 inquiry, the question is not whether the charges are in effect equal or virtually identical but whether the charges subject imported products to *any* taxation in excess of that imposed on like domestic products.[40]

Q14. Please provide your view on whether a tax applied internally (i.e., not at the border) to imported products pursuant to one statutory provision would need to be "equivalent" to an internal tax applied to like domestic products pursuant to another statutory provision in the same way and sense as the former would need to be "equivalent" to the latter if the former were applied at the point and time of importation.

32. Taxes applied internally are subject to GATT Article III, and GATT Article III:2 in particular. Article III:2 prohibits internal taxes on imported products in excess of those imposed on like domestic products and prohibits "dissimilar" taxation of directly competitive or substitutable products.[41] The obligations in Article III:2 are the same for internal taxes applied to imported products internally (*i.e.*, not at the border) as they are for internal taxes applied to imported products at the point and time of importation.

33. By contrast, the term "equivalent" appears in GATT Article II:2(a), which refers to a charge imposed on importation that is "equivalent" to an internal tax *and* is imposed consistently with GATT Article III:2. As noted in the answer to question 13, whether a charge is "equivalent" to an internal tax is a separate inquiry from whether the charge is imposed consistently with GATT Article III:2.

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[38]Merriam-Webster Online Dictionary *available at* <http://www.merriam-webster.com/dictionary/equivalent> (visited on October 5, 2007)*; see also New Shorter Oxford English Dictionary* at 843 (defining "equivalent" followed by "to" as meaning "virtually the same thing; having the same effect").

[39] U.S. Oral Statement, para. 16.

[40] *See* Appellate Body, *Japan – Alcohol*, p. 23 (finding that any amount of excess taxation of imports is too much; there is no *de minimis* qualifier under Article III:2, first sentence, concerning "like products").

[41]GATT Article III:2 and the Ad Note to GATT Article III:2.

For the United States:

Q15. What is the United States' position in relation to Customs Notification CN 81/2007 (not submitted; but see, e.g., footnote 75 of the US first written submission), particularly in relation to whether it should be taken into account?

34. Customs Notification 81/2007 (raising the applied basic customs duty for wine from 100 to 150 percent) was issued on July 3, 2007, after the establishment of this Panel on June 20, 2007. Customs Notification 81/2007 is not cited in the U.S. panel request; it is not within this Panel's terms of reference; and the Panel is therefore not in a position to make findings or recommendations in respect of it. The Panel may take Customs Notification 81/2007 into account, however, to the extent it assists the Panel in assessing the measures that are within the Panel's terms of reference – for example, to understand that the applicable rate of BCD may differ from the rate of BCD set out in the First Schedule of the Customs Tariff Act by virtue of a prior or subsequent modification of the rate through a customs notification.[42]

Q16. Please clarify, both for the additional duty and the "extra-additional duty", which of the measures listed at para. 2 of the US first written submission is alleged to give rise to a particular violation. In particular, please indicate whether what is being challenged is a specific statutory provision by itself, a notification issued on its basis, etc.

35. The AD, EAD and BCD as challenged in this dispute each comprise several provisions of Indian law. Specifically, the AD comprises the following:

- Section 12 of the Customs Act. Section 12 requires that duties of customs shall be imposed at rates specified under the Customs Tariff Act.

- Section 3(1) of the Customs Tariff Act. Section 3(1) requires the imposition of a duty "in addition"on all imports [equal to excise duties on like domestic products], and the proviso to Section 3(1) authorizes the Central Government to specify rates of such duty on alcoholic beverages [that "have regard to" the rates of excise duty on like domestic products (i.e., that deviate from the requirement that the duty be "equal" to the excise duty on like domestic products)]

- Section 3(2) of the Customs Tariff Act. Section 3(2) requires *inter alia* that duties of customs leviable under Section 12 of the Customs Act shall be included in the calculation of the amount of duty under owed under Section 3(1).

- Section 3(7) of the Customs Tariff Act. Section 3(7) requires that the duties imposed under Section 3 shall be in addition to any other duty imposed under the

[42] *See* U.S. First Written Submission, para. 15 (citing Customs Notification 81/2007).

Customs Tariff Act or any other law.

- Customs Notification 32/2003. Customs Notification 32/2003 specifies the rates at which the duty imposed under Section 3(1) of the Customs Tariff Act shall be imposed on imports of alcoholic beverages.

36. The EAD comprises the following:

- Section 12 of the Customs Act. Section 12 requires that duties of customs shall be imposed at rates specified under the Customs Tariff Act.

- Section 3(5) of the Customs Tariff Act. Section 3(5) authorizes the Central Government to impose by customs notification "such additional duty as would counter-balance" certain internal taxes on like domestic products.

- Section 3(6) of the Customs Tariff Act. Section 3(6) requires *inter alia* that duties of customs leviable under Section 12 of the Customs Act and the duty leviable under Section 3(1) of the Customs Tariff Act shall be included in the calculation of the amount of duty under owed under Section 3(5).

- Section 3(7) of the Customs Tariff Act. Section 3(7) requires that the duties imposed under Section 3 shall be in addition to any other duty imposed under the Customs Tariff Act or any other law.

- Customs Notification 19/2006. Customs Notification 19/2006 requires the imposition of an "additional duty of customs" of four percent *ad valorem* on all good specified under the First Schedule to the Customs Tariff Act.

37. The BCD comprises the following:

- Section 12 of the Customs Act. Section 12 requires that duties of customs shall be imposed at rates specified under the Customs Tariff Act.

- Section 2 of the Customs Tariff Act. Section 2 requires duties of customs to be levied at rates specified in the First Schedule to the Customs Tariff Act.

- First Schedule to the Customs Tariff Act. The First Schedule specifies "standard" rates of duty for all imports.

- Customs Notification 11/2005. Customs Notification 11/2005 exempts imports of distilled spirits from custom duties leviable under the First Schedule that are in excess of the rates specified in the notification.

- Customs Notification 20/1997. Customs Notification 19/2007 exempts imports of beer and wine from "so much of that portion of the duty of customs leviable thereon which is specified in the said First Schedule as is in excess of" the rates specified in the notification.

38. The measures the United States is challenging this dispute are the AD, EAD and BCD comprising the provisions of Indian laws cited above. The United States 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). The provisions of Indian law that comprise the AD and BCD apply cumulatively, and together result in ordinary customs duties on alcoholic beverages that exceed India's WTO-bound rate in breach of GATT Article II:1(a) and (b). Similarly, with respect to the EAD, the provisions of Indian law that comprise the EAD and BCD apply cumulatively, and together result in ordinary customs duties on alcoholic beverages that exceed India's WTO-bound rate in breach of GATT Article II:1(a) and (b).

Q17. With reference to paras. 36, 37 and 72 of the US first written submission, can the United States clarify whether the specific measures at issue in this case are the additional duty and, respectively, the "extra-additional duty", taken in isolation, or is the United States challenging the combination of the additional duty and the basic customs duty, on the one hand, and of the "extra-additional duty" and the basic customs duty, on the other hand?

39. Please see the answer to Question 16.

Q18. Without prejudice to the United States' view that the issue is not outcome-determinative in this case, please elaborate on whether and why a charge imposed (i) on an ad valorem, specific or combined basis, (ii) in addition to the basic/ordinary customs duty of the Member concerned and (iii) with a separate and independent legal basis qualifies as an ordinary customs duty or as an "other duty or charge", assuming that the charge in question is not recorded as either in the Member's Schedule.

40. As explained in the U.S. First Written Submission,[43] 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. In light of this, the AD and EAD both constitute "ordinary customs duties."

41. First, the AD is imposed as a combination of an *ad valorem* and specific duty (and calculated respectively based on the value and quantity of the import) and the EAD is imposed as

[43] U.S. First Written Submission, paras. 42-43.

an *ad* valorem duty (and calculated on the value of the import).[44] Second, both the AD and the EAD apply as a matter of course on a product's importation into India. In this regard, we recall the answer to Question 16, that the event for which liability for the AD and the EAD arises is importation. Further, the structure of India's customs regime supports the conclusion that both the AD and EAD are ordinary customs duties, as reviewed in the U.S. First Written Submission.[45]

42. The Panel's question also asks about "a charge imposed with a separate and independent legal basis". Assuming the Panel is inquiring about a charge imposed on importation that is separate and independent on a legal basis from another charge imposed on importation, the United States does not consider such a factor dispositive of whether either charge constitutes an ordinary customs duty within the meaning of GATT Article II:1(b). Each charge should be evaluated on its own merits, and to the extent it has been acknowledged that one charge constitutes an ordinary customs duty, comparison between that charge and another charge may shed light on whether the other charge also constitutes an ordinary customs duty. Such a comparison would be relevant in this dispute since India has acknowledged that the BCD constitutes an ordinary customs duty within the meaning of GATT Article II:1(b)[46] and the AD and EAD are similar to the BCD.

43. The name attributed to a charge and the fact that it is applied in addition to another charge labeled a "basic/ordinary customs duty" do not determine whether the charge constitutes an ordinary customs duty. Otherwise, Members could avoid or manipulate WTO commitments simply by attributing a particular purpose to a measure (regardless of what the measure in fact does) or by calling a measure by one name versus another.[47] In this dispute, India may call one duty a "basic customs duty" and another an "additional duty" and apply one in addition to the other, but both are "ordinary customs duties" within the meaning of GATT Article II:1(b).

Q19. Are "excise duties" leviable on alcoholic liquor at State level (section 3(1)) and "sales tax, value added tax, local tax or any other charges ... leviable on a like article on its sale, purchase or transportation in India" (section 3(5)) "internal taxes or charges" within the meaning of Article III:2 of the GATT 1994?

44. Both Section 3(1) and 3(5) appear to reference internal taxes. Section 3(1) of the Customs Tariff Act references "excise duties" imposed on like articles produced or manufactured

[44] *See* U.S. Written Submission, paras. 23, 29, 44, and 57.

[45] *See* U.S. First Written Submission, paras. 45 and 58; U.S. Oral Statement at the First Meeting of the Panel, paras. 8-9.

[46] India First Written Submission, para. 12.

[47] The GATT Panel in *EEC - Parts and Components* recognized a similar point with respect to whether an "anti-circumvention duty" should be considered a duty on or in connection with importation under Article II:1(b) or an internal tax under Article III:2. *See* GATT Panel, *EEC - Parts and Components*, paras. 5.6-5.7.

in India. To the extent Section 3(1) is referring to excise duties imposed within India, for example under India's Central Excise Act, the reference would appear to be a reference to internal taxes. Section 3(5) of the Customs Tariff Act references "sales tax, value added tax, local tax or any other charge for the time being leviable on a like article on its sale, purchase or transportation in India." Section 3(5) thus appears in that connection to be referencing internal taxes. However, without knowing the details of the internal taxes to which Section 3(1) and 3(5) appear to refer, we cannot determine that they constitute internal taxes within the meaning of Article III:2 of the GATT 1994.

Q20. With reference to para. 19 of the US first oral statement, is the United States implying that the "extra-additional duty" could only be considered "equivalent" if each of the 28 States applied the same rate to the same domestic products?

45. A charge "equivalent to an internal tax" means a charge imposed on importation that corresponds or is virtually identical in effect, function and amount to an internal tax imposed on the like domestic product.[48] And as an initial matter, the United States recalls that in this dispute, the EAD differs from state-level VATs and the CST in a number of respects aside from the amount.

46. Paragraph 19 of the U.S. oral statement highlights, as a factor indicating the EAD is not "equivalent" to state-level VATs and the CST, the variation in the rates of the state-level VATs and CST from product to product and from state to state, in contrast to the EAD which applies at a flat four percent rate for all imports. India has not explained how the EAD (a charge imposed on imports at a single rate) corresponds to, or is virtually identical to, internal taxes imposed on like domestic products at several different rates. (For example, the state-level VATs generally apply at rates of 0, 4, 12.5 and 20 percent[49]). It has also not explained how the EAD (imposed at four percent) corresponds, or is virtually identical, to internal taxes on like domestic products imposed at rates other than four percent. (For example, state-level VATs may apply at 0, 12.5 or 20 percent[50]).

Q21. With reference to para. 17 of the US first oral statement, what is the basis for the US contention that it is up to India to demonstrate that the "extra-additional duty" falls to be assessed under Article III:2 of the GATT 1994 rather than Article II:1?

47. Paragraph 17 of the U.S. oral statement argues that India as the party asserting that the

[48] *See supra* answer to Question 13.

[49] *See* India First Written Submission, para. 73.

[50] *Id.*

AD and the EAD are justified under Article II:2(a) bears the burden of sustaining that assertion.[51] Accordingly, the U.S. assumes that the intended reference in this question was to Article II:2.

48. As the Appellate Body has expressed on several occasions, it is up to the complaining party to present evidence and argument "sufficient to establish a presumption" that a measure is inconsistent with WTO obligations. It is then up to the responding party to "bring evidence and argument to rebut the presumption."[52] "The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[53]

49. In this dispute, the United States has presented evidence and argument sufficient to establish *prima facie* case that the AD and the EAD are (i) ordinary customs duties that (ii) exceed India's WTO-bound rates and, therefore, are inconsistent with GATT Article II:1(a) and (b). And having made a prima facie case that the AD and the EAD are ordinary customs duties, the necessary corollary of that showing is that neither the AD nor the EAD is a "charge equivalent to an internal tax." It is up to India to rebut that *prima facie* case. India has not done that. Specifically, it has not rebutted the evidence and argument presented by the United States that the AD and EAD are ordinary customs duties (or other duties or charges imposed on or in connection with importation) and has not contested that the AD and EAD result in charges in excess of those set forth in its WTO Schedule.

50. In this regard, as the United States noted to the Panel during the first Panel meeting, the measures specified in Article II:2(a) are specific types of "other ...charges applied on or in connection with importation" that Members have agreed are permissible.[54] Therefore, by asserting that the AD and EAD are "charges equivalent to an internal tax" within the meaning of GATT Article II:2(a),[55] India is in effect conceding the AD and EAD are other charges applied on or in connection with importation and asserting that, even though the AD and EAD are not specified in its WTO Schedule, the AD and EAD are nonetheless justified as charges equivalent to an internal tax under GATT Article II:2(a).

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[51] We also note that India has not asserted that either the AD or EAD should be assessed under GATT Article III:2 rather than under Article II. In fact, India's own defense of the AD and EAD implicitly acknowledge that the duties are properly assessed under Article II, with the debate concerning whether the duties constitute ordinary customs duties within the meaning of Article II:1(b) or charges equivalent to an internal tax under Article II:2(a).

[52] *See, e.g.,* Appellate Body Report, *United States – Shirts and Blouses*, WT/DS33/AB/R, p. 13

[53] *Id.*

[54] The chapeau to Article II:2 states: "Nothing in this Article shall prevent any contracting party from imposing at any time *on the importation* of any product..." Article II:2 of the GATT 1994 (emphasis added). Thus, Article II:2(a)'s reference to a "charge equivalent to an internal tax" is a reference to a charge imposed on the importation of any product that is equivalent to an internal tax.

[55] *See, e.g.,* India First Written Submission, para. 63; India Oral Statement at the First Panel Meeting, paras. 6, 9, 24.

51. As the party asserting that the AD and EAD are "charges equivalent to an internal tax", it is up to India to present evidence and argument sufficient to establish that what it asserts is true. As the United States explained in paragraph 21 of its oral statement, India has not done that.

Q22. How does the United States reconcile its view, expressed in its oral reply to Panel Question No. 2 at the first substantive meeting, that the charges at issue in Article II:2(a) of the GATT 1994 are "other duties and charges" with the provisions of the Note ad Article III of the GATT 1994 which appear to contemplate that where an internal tax is collected or enforced at the time and point of importation is nevertheless to be regarded as an internal tax or charge subject to Article III?

52. Article II:2(a) concerns charges imposed on the importation of products, specifically charges imposed on importation of products that are equivalent to an internal tax. Article III:2 concerns internal taxes applied to imported and domestic products, and the Ad Note to Article III clarifies that an internal tax "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...subject to Article III." Article II:2(a) and the Ad Note to Article III thus concern different types of measures, with the former concerning charges imposed on or in connection with importation (and permitting those that are "equivalent to an internal tax" and are imposed consistently with [Article III:2]) and the latter concerning internal taxes (including those that are collected at the time of importation).[56] In other words, the "charge" referred to in Article II:2(a) is different and distinct from, but equivalent to, an internal tax. While the Ad Note to Article III refers to an internal tax and deals with the question of the timing of the collection or enforcement of that tax in the case of imported products.

53. The AD and EAD are ordinary customs duties or, alternatively, other duties or charges imposed on or in connection with importation for the reasons stated in the U.S. first written submission, oral statement and these answers to question.[57] They are not internal taxes within the meaning of the Ad Note to GATT Article III. First, the AD and EAD are not imposed on domestic products. Second, they are not merely collected or enforced at the time of importation. Importation itself is the event for which liability for the AD and the EAD ensues. That is unlike the case with an internal tax collected or enforced at the time of importation. For example, in the *Mexico – Beverage Tax* dispute, the internal tax in dispute (called the "Tax on Production and Services" or IEPS) applied to domestic and imported soft drinks. With respect to imported

[56]Article II:2(a) does not concern internal taxes but charges that are equivalent to internal taxes. A measure cannot be "equivalent" to an internal tax and at the same time *be* an internal tax. Thus, by its express terms Article II:2(a) covers measures other than the internal taxes subject to Article III:2.

[57] U.S. First Written Submission, paras. 41-47, 56-60; U.S. Oral Statement at the First Panel Meeting, paras. 5-10; *supra* answers to Questions 2 and 18.

products, the internal tax was collected at the time of importation (and on each subsequent internal transfer of the imported soft drink.) Liability for payment of the IEPS ensued on the transfer of a soft drink - whether at the border or internally.[58] That is not the case with respect to the AD and the EAD.

Q23. With reference to para. 22 of the US first oral statement, please elaborate on the US contention that imported products would "be subject to these taxes [VAT or CST] twice".

54. Paragraph 22 was assuming *arguendo* that if the EAD is equivalent to state-level VATs and the CST, then imported products would be subject to the EAD (as a charge equivalent to the state-level VATs and the CST) plus the state-level VATs and the CST; in contrast, domestic products would be subject to only state-level VATs or the CST. For example, an imported product sold by an importer in one Indian state to a retailer in another Indian state would be liable for the CST. It would also be subject to the EAD. In contrast, a domestic product sold by the distributor in one Indian state to a retailer in another Indian state would be liable for the CST. It would not also be subject to the EAD. Thus, in this example, even if the EAD were considered equivalent to the CST, it would not be imposed consistently with GATT Article III:2 because imports would be subject to taxation in excess of that to which like domestic products are subject.

[58] *See* Panel Report, *Mexico – Tax Measures on Soft Drink and Other Beverages*, WT/DS308/R, paras. 2.2, 8.145-8.147.

TABLE OF EXHIBITS

Exhibit US-	
18	2001 Finance Bill
19	2005 Finance Bill
20	List 1 to the Seventh Schedule to the Indian Constitution
21	Central Excise Tax Act, Chapters 1-2
22A 22B 22C	Customs Act, 1962, Sections 44-51 Customs Act, 1962, Sections 142-161 Customs Act, 1962, Sections 1-2