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

(WT/DS360)

Answers of the United States to Questions of the Panel
in Relation to the Second Substantive Meeting with the Parties

November 26, 2007

For the United States:

Q42. With reference to para. 3.1 of India's rebuttal, please address India's statement that the United States "seems to have expanded its claims to cover additional duty on all imports into India."

1. India's statement is based on paragraph 35 of the U.S. response to Panel Question 16. India misreads that paragraph.[1] In Panel Question 16, the Panel asked for clarification regarding the particular measures being challenged. In paragraph 35, we set out the specific measures comprising the additional customs duty (AD): Section 12 of the Customs Act; Section 3(1), 3(2), and 3(7) of the Customs Tariff Act; and Customs Notification 32/2003. That paragraph should not be read as expanding the U.S. claims against the AD to products other than alcoholic beverages. The U.S. claims against the AD concern only the AD imposed on alcoholic beverages, and the measures comprising the AD on alcoholic beverages are specified in paragraph 35 and the U.S. panel request. This product coverage is made clear, for example, in paragraph 72(1) of the U.S. first written submission and paragraph 92(1) of the U.S. second written submission.[2] In those paragraphs (and others) the United States states that it is seeking findings that the AD is:

> inconsistent with GATT Article II:1(b) as an ordinary customs duty that subjects imports of alcoholic beverages to ordinary customs duties in excess of those set forth in India's WTO Schedule inconsistent with the GATT 1994 with respect to imports of alcoholic beverages; and
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> inconsistent with GATT 1994 Article II:1(a) as an ordinary customs duty that affords imports of alcoholic beverages from the United States less favorable treatment than that provided for in India's WTO Schedule.[3]

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[1] U.S. Responses to the Panel's Questions in the Context of the First Panel Meeting, para. 35.

[2] U.S. First Written Submission, para. 72(1); U.S. Second Written Submission, para. 92(1).

[3] *Id*.

Q43. With reference to the US replies to Panel Question No. 2 and 21, is the United States arguing that the charges identified in Article II:2 of the GATT 1994 are ODCs within the meaning of Article II:1(b), second sentence?

2. Yes. In response to Panel Questions 2 and 21, the United States pointed out that by asserting that the AD and the EAD may be justified under GATT Article II:2(a), India has implicitly conceded that the AD and the EAD are charges imposed on the importation of products.[4] This is because paragraph (a) of GATT Article II:2 refers to a "charge" (equivalent to an internal tax imposed consistently with GATT Article III:2), and the chapeau to GATT Article II:2 provides that nothing in GATT Article II shall prevent a Member from imposing such a charge "on the importation of any product." Thus, reading paragraph (a) and the chapeau together, GATT Article II:2(a) concerns a "charge" imposed "on the importation of any product" (that is equivalent to an internal tax imposed consistently with GATT Article III:2).

3. Paragraphs (b) and (c) of GATT Article II:2 concern, respectively, an "anti-dumping or countervailing duty imposed consistently with Article VI" and a "fee or charge commensurate with the cost of services rendered." Like paragraph (a) of GATT Article II:2, read together with the chapeau to GATT Article II:2, paragraphs (b) and (c) concern certain duties or charges imposed "on the importation of any product."

4. The second sentence of GATT Article II:1(b), read together with the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*,[5] prohibits "all other duties or charges imposed on or in connection with importation" (or ODCs) that are not specified in the relevant Member's WTO Schedule, except as provided in Article II:2. As explained in the U.S. first and second written submissions,[6] the word "other" in the second sentence of GATT Article II:1(b) refers to duties or charges "other" than ordinary customs duties. In other words, the only duties or charges imposed on or in connection with importation that the second sentence of GATT Article II:1(b) does not cover are ordinary customs duties. The measures described in paragraphs (a) through (c) of GATT Article II:2 are not ordinary customs duties and, as explained above, constitute "duties" or "charges" imposed "on the importation of any product." Accordingly, they are a subset of "all other duties or charges" (that are not ordinary customs duties) "imposed on or in connection with importation" within the meaning of GATT Article II:1(b).

5. However, unlike other ODCs within the meaning of GATT Article II:1(b), a Member may impose the ODCs described in paragraphs (a) through (c) of GATT Article II:2 – notwithstanding

[4] U.S. Responses to the Panel's Questions in the Context of the First Panel Meeting, paras. 9-10, 50; *see also* U.S. Second Written Submission, para. 19.

[5] U.S. First Written Submission, paras. 34-35.

[6] U.S. First Written Submission, paras. 47, 60; U.S. Second Written Submission, para. 19.

that it has not included such a duty or charge in its WTO schedule – because the chapeau to GATT Article II:2 expressly states that nothing in Article II shall prevent the Member from imposing such a duty or charge.

Q44. Is it the United States' position that sub-paragraphs (a) through (c) of Article II:2 of the GATT 1994 set out exceptions that are affirmative defences?

6. No. GATT Article II:2(a) concerns a particular type of other duty or charge imposed on importation (namely a charge equivalent to an internal tax imposed consistently with GATT Article III:2) that a Member may impose notwithstanding the provisions of GATT Article II.

7. As part of establishing a *prima facie* case under GATT Article II:1(b), the complaining party must show that the measure in dispute constitutes an ordinary customs duty or an other duty or charge imposed on or in connection with importation and that such duty or charge exceeds those duties or charges specified in the responding party's WTO Schedule.

8. In addition, in cases where the complaining party asserts that the measure in dispute is an "other duty or charge imposed on or in connection with importation" (ODC) in breach of the second sentence of GATT Article II:1(b), and the responding party contends that the measure meets the criteria of paragraphs (a), (b) or (c) of GATT Article II:2, then the complaining party must also establish that the measure in dispute does not meet the criteria of the particular paragraph of Article II:2 identified by the responding party.

9. The Appellate Body briefly addressed this issue the *Shirts and Blouses* dispute. In that dispute, the Appellate Body noted that 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.[7] The Appellate Body described such a requirement as "similar" to an affirmative defense, but did not state that like an affirmative defense the responding party bears the burden of proof. The GATT Panel in the *Customs User Fee* dispute similarly appears to have required the responding party to demonstrate the applicability of GATT Article II:2 (in that dispute GATT Article II:2(c)) but did not appear to consider GATT Article II:2 an affirmative defense under which the responding party would bear the burden of proof.[8]

10. In this dispute, the United States has established a *prima facie* case that the AD and the EAD are ordinary customs duties, and India has not rebutted that case. As ordinary customs duties, the AD and the EAD are not a charge equivalent to an internal tax under GATT Article II:2(a), and India has not suggested that either is a fee for services rendered or antidumping or countervailing duty. In the alternative, the United States has also presented a *prima facie* case

[7] Appellate Body Report, *United States – Shirts and Blouses*, WT/DS33/AB/R, p. 16, n.23.

[8] GATT Panel Report, *United States – Customs User Fee,* BISD 35S/245, adopted 2 February 1998, para. 98.

that the AD and the EAD are ODCs that India has not set out in its WTO Schedule. India has not rebutted that case.

11. India asserts that the AD and the EAD are charges equivalent to an internal tax imposed consistently with GATT Article III:2 and, therefore, are justified under GATT Article II:2(a). As elaborated in our prior submissions,[9] India has not, however, put forth evidence and argument that support that assertion. Further, the United States has demonstrated that the AD and the EAD are not equivalent to an internal tax nor imposed consistently with GATT Article III:2,[10] and accordingly has demonstrated that neither the AD nor the EAD meet the criteria of GATT Article II:2(a).

Q45. With reference to the US reply to Panel Question No. 22, is the United States suggesting that a single charge which is imposed on imported and like domestic products and which provides that importation itself is the event for which liability arises in the case of imports would not be an internal tax within the meaning of the Note ad Article III? If so, what would be the basis for such an assertion? Is not the normal situation one where liability to pay a tax needs to have arisen before such tax can be collected or enforced?

12. No, the United States is not asserting that a single charge imposed on imported and like domestic products and, in the case of the imported product, collected or enforced at the time or point of importation, is not an internal tax. As the Ad Note to GATT Article III:2 makes clear, an internal tax applied to imported products that is collected or enforced at the time or point of importation, is nonetheless to be regarded as an internal tax under GATT Article III, if that tax is applied to both imported products and like domestic products. In contrast to GATT Article II, the Ad Note to GATT Article III does not concern charges "imposed on or in connection with importation" but rather taxes or charges that in the case of imported products are "collected or enforced at the time of importation."

13. In the U.S. response to Panel Question 22, the United States explained that the Ad Note to GATT Article III and GATT Article II:2(a) are distinct provisions and apply to different measures. The Ad Note to GATT Article III applies to internal taxes "collected or enforced at the time or point of importation." GATT Article II:2(a) concerns charges "imposed on the importation of any product." Importantly, the Ad Note applies to any internal tax that "applies to an imported product and to the like domestic product," whereas GATT Article II:2(a) applies to charges that are only imposed on imports, but that are "equivalent to an internal tax" on like domestic products.

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[9] U.S. Second Written Submission, paras. 32-60; U.S. Oral Statement at the First Panel Meeting, paras. 3, 15-25; U.S. Oral Statement at the Second Panel Meeting, paras. 2, 12-17.

[10] U.S. Second Written Submission, paras. 32-60; U.S. Oral Statement at the First Panel Meeting, paras. 3, 15-25; U.S. Oral Statement at the Second Panel Meeting, paras. 2, 12-17.

14. This dispute concerns certain duties imposed on importation that do not apply to like domestic products. These duties are not internal taxes that also apply to domestic products that just happen to be collected on imported products at the time or point of importation. Internal taxes enforced or collected at the time of importation are governed by Article III, whereas the United States in this dispute has established a *prima facie* case that the AD and the EAD are inconsistent with GATT Article II:1(b), and India for its part has asserted a defense of those duties under GATT Article II:2(a).

Q64. With reference to para. 50 of the US rebuttal, where the United States refers to "previous transfers", does the United States mean that taxes paid abroad on previous transfers are not creditable against the EAD?

15. Yes. The state-level VATs operate by crediting the VAT paid on previous transfers against the VAT owed on subsequent transfers. As a factual matter, pursuant to Section 3(6) of the Customs Tariff Act, the EAD is calculated on the "value" of the imported product plus the basic customs duty (BCD) and the AD owed on the import.[11] Read together, Section 14(1) of the Customs Act and Rule 3 of the Customs Valuation Rules provide that the "value" of an import shall be the "transaction value," and Rules 4 and 9 of the Customs Valuation Rules set forth how "transaction value" shall be calculated.[12] Rules 4 and 9 do not provide for taxes paid on previous transfers to be deducted in calculating an import's transaction value. Accordingly, taxes paid on the import's transfers prior to the point of importation into India are not credited against the EAD owed on importation. However, more relevant to the issues presented in this dispute, paragraph 50 of the U.S. second written submission also points out that there is no mechanism for crediting the EAD paid on an imported product against the VAT owed on the product's subsequent transfers in India, whereas the VAT paid on domestic products is credited against the VAT owed on the product's subsequent transfers in India.[13]

Q65. At paras. 72, 81 and 83 and footnote 124 of the US rebuttal and para. 35 of its reply to Panel Question No. 16, the United States says that Section 3(1) of the CTA mandates imposition of the AD. How can this be reconciled with the US statement in footnote 8 of its rebuttal, where it is stated that India is incorrect in arguing that the AD and EAD are not levied pursuant to Article 12 of the Customs Act.

16. Section 3(1) of the Customs Tariff Act requires imposition of the AD, and Section 12 of the Customs Act requires the levying of customs duties *inter alia* as specified in the Customs Tariff Act. Thus, both provisions mandate the imposition or levying of the AD, with Section

[11] Section 3(6) of the Customs Tariff Act, Exhibit US-3A; U.S. First Written Submission, para. 28.

[12] Customs Valuation Rules, Exhibit US-8; U.S. First Written Submission, paras. 19, 28.

[13] U.S. Second Written Submission, para. 50.

3(1) being the more specific mandate.[14]

Q66. With reference to para. 77 of the US rebuttal, please explain why the "statutory provisions mandating [...] imposition [of the AD] result in a breach regardless of the rate of AD specified in a customs notification". Is this true for Customs Notification 82/2007?

17. The BCD rate on distilled spirits is 150 percent.[15] India's WTO-bound rate for distilled spirits is 150 percent.[16] The BCD and the AD are both ordinary customs duties.[17] Accordingly, imposition of the AD on distilled spirits at any rate in addition to the BCD on distilled spirits results in ordinary customs duties on distilled spirits that exceed India's WTO-bound rates. Section 12 of the Customs Act and Section 3(1), 3(2) and 3(7) of the Customs Tariff Act mandate that a duty equal to the excise duty leviable on like domestic product shall be levied on imports and that that duty shall be levied in addition to the BCD.[18] Therefore, unless the excise duty leviable on like domestic products is zero – and India contends it is well above zero[19] – these statutory provisions mandate the imposition of duties on imports of distilled spirits that exceed India's WTO-bound rate, regardless of the actual rates of AD specified in Customs Notification 32/2003 or any other customs notification. Consequently, these statutory provisions result in a breach of GATT Article II:1(b).[20]

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[14] *See* U.S. Second Written Submission, paras. 88-90; *see also* U.S. First Written Submission, paras. 12, 45, 58; U.S. Responses to the Panel's Questions in the Context of the First Panel Meeting, paras. 19-20, 35-36.

[15] U.S. First Written Submission, paras. 16, 49.

[16] U.S. First Written Submission, para. 48.

[17] *See, e.g.,* U.S. First Written Submission, paras. 42-46; U.S. Second Written Submission, paras. 5-17.

[18] Section 12 of the Customs Act and Section 3(1), 3(2) and 3(7) of the Customs Tariff Act mandate imposition of the AD, in addition to and on top of the BCD, at a rate equal to the excise duties leviable on like domestic products, and where leviable at different rates, at the highest excise duty rate. *See, e.g.,* U.S. First Written Submission, paras. 18-22, 50; U.S. Responses to the Panel's Questions in the Context of the First Panel Meeting, paras. 14-15, 19; U.S. Second Written Submission, paras. 38-39.

[19] India contends the AD is equal to (or an approximation of) the excise duties the states impose on domestic alcoholic beverages, and by setting the AD at *ad valorem* rates between 20 and 150 percent, India must be asserting that the rates of excise duties on domestic alcoholic beverages are well above zero. *See* India First Written Submission, para. 42; India Second Written Submission, paras. 3.1-3.4.

[20] At the time of the Panel's establishment, the BCD on wine and beer was 100 percent, whereas India's WTO-bound rate for wine and beer is 150 percent. Therefore, at the time of the Panel's establishment, the AD on wine and beer resulted in ordinary customs duties that exceeded India's WTO-bound rate for wine and beer when the AD rate was 25 percent or greater. *See* U.S. First Written Submission, para. 50. However, we note that after the date of this Panel's establishment, India – pursuant to Customs Notification 81/2007 – raised the BCD on wine and beer to 150 percent. Customs Notification 81/2007 is not within this Panel's terms of reference (*see* U.S. Responses to the Panel's Questions in the Context of the First Panel Meeting, para. 34), but if it were, the AD on wine and beer would at any rate result in ordinary customs duties on beer and wine that exceed India's WTO-bound rate.

18. Customs Notification 82/2007 does not change this conclusion. First, we recall that Customs Notification 82/2007 is not within the Panel's terms of reference.[21] In addition, India has not argued that Customs Notification 82/2007 is in any way relevant to the Panel's examination of the measures within the Panel's terms of reference (*i.e.*, those measures comprising the AD as identified in the U.S. panel request and in existence as of the date of the Panel's establishment). In particular, India has not argued that Customs Notification 82/2007 affects the operation of any measure within the Panel's terms of reference, acknowledging that Customs Notification 82/2007 is only effective as of July 3, 2007 (i.e., after the date of the Panel's establishment). In this regard, Customs Notification 82/2007 is not evidence as to the operation or effect of the measures within the Panel's terms of reference, and accordingly it is not evidence that is relevant to this dispute.[22] Further, taking Customs Notification 82/2007 into account in making findings on the AD comprising the measures specified in the U.S. panel request would not contribute to a positive solution in this dispute for the reasons stated in our previous submissions.[23]

19. Second, Customs Notification 82/2007 does not change the fact that Section 12 of the Customs Act and Section 3(1), 3(2) and 3(7) of the Customs Tariff Act mandate imposition of the AD in addition to the BCD. Customs Notification 82/2007 only appears to exempt imports – pursuant to the Central Government's authority under Section 25(1) of the Customs Act and Section 3(8) of the Customs Tariff Act – from the rates of duty specified in Customs Notification 32/2003. Customs Notification 82/2007 does not affect the statutory provisions imposing the AD nor does it rescind or remove Customs Notification 32/2003 specifying the rates of AD on alcoholic beverages, which India acknowledges remains in effect[24].

Q67. With reference to footnote 112 of the US rebuttal, why cannot the requisite discretion be the result of the interplay of two provisions, one imposing a requirement and

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[21] U.S. Second Written Submission, paras. 65-66; U.S. Oral Statement at the First Panel Meeting, paras. 28, 30; Oral Statement at the Second Panel Meeting, para. 20.

[22] *See* Appellate Body Report, *EC – Selected Customs Matters*, WT/DS315/AB/R, adopted on 11 January 2006, para. 186 (upholding panel and quoting panel's conclusion that evidence that pre-dates or post-dates panel establishment may be taken into account "to determin[e] whether or not a violation of ... the GATT 1994 exists *at the time of [panel] establishment*") (italics added); see *id*., para. 188 ("While there are temporal limitations on the measures that may be within a panel's terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of a panel.")

[23] U.S. Second Written Submission, paras. 70-73; U.S. Oral Statement at the First Panel Meeting, paras. 28, 31; U.S. Oral Statement at the Second Panel Meeting, para. 24; *see also* U.S. Closing Statement at the Second Panel Meeting, para. 17 (explaining why Panel findings on the AD and the EAD as of the date of the Panel's establishment will contribute to a positive solution in this dispute).

[24] *See* India Responses to the Panel's Questions in the Context of the First Panel Meeting, para. 40.c.3.

another allowing for the requirement to be neutralized by way of the granting of exemptions?

20. In footnote 112 of the U.S. second written submission, the United States notes that "the discretion that is relevant in terms of whether a measure is mandatory or discretionary is whether the measure itself (and not another measure) provides such discretion." Put another way, in determining whether a particular measures mandates a WTO breach, the relevant question is whether or not that measure mandates the action it describes (and whether that action mandates a WTO breach).[25] It would seem possible that one measure could on its face mandate the particular action it describes, but by virtue of its interplay with another measure not in fact mandate such action. That, however, is not the case in this dispute.

21. In this dispute, Section 12 of the Customs Act and Section 3(1), 3(2) and 3(7) of the Customs Tariff Act mandate the actions they describe, that is imposition of the AD in addition to and on top of the BCD on imports of alcoholic beverages. No measure (statutory or otherwise) operates to "neutralize" or undo the fact that these statutory provisions require imposition of the AD on imports of alcoholic beverages. Contrary to India's suggestions, the fact that Section 25(1) of Customs Act and Section 3(8) of the Customs Tariff Act authorize the Central Government, if it decides it is in the public interest, to exempt imports from "any duty of customs" does not change the fact that India is mandated to impose the AD.[26] The AD thus "as such" breaches India's WTO obligations. And as of the date of the Panel's establishment[27] India's Central Government had not exempted imports of alcoholic beverages from the AD.[28]

22. In prior disputes where panels haves considered whether a measure was mandatory or discretionary, the panels have examined whether the measure requires action that is inconsistent with the WTO Agreement or whether it merely authorizes the executive branch to take action

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[25] *See, e.g.,* Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, paras. 7.69-7.106 (analyzing whether the cited provisions mandated (or prohibited) the action described).

[26] To the contrary, the fact that the Central Government appears to require express statutory authority to exempt imports from the AD required to be levied under Section 12 and Section 3(1), 3(2) and 3(7) only confirms that the AD is mandatory. *See* U.S. Second Written Submission, para. 84.

[27] As noted in the U.S. Second Written Submission, the Panel's terms of reference were fixed on the date of its establishment, and the Panel's terms of reference do not include Customs Notification 82/2007. U.S. Second Written Submission, paras. 65-74; U.S. Oral Statement at the Second Panel Meeting, paras. 18-24.

[28] Moreover, the fact that in practice a Member may not enforce or adhere to a legal requirement does not render the requirement itself discretionary. *See* Appellate Body Report, *India – Patents*, WT/DS50/AB/R, adopted on 16 January 1998, para. 69; Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, para. 7.74; GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206, 281-282, paras. 5.39, 5.60.

that is inconsistent with the WTO Agreement.[29] The Appellate Body has explained the importance of this examination as follows: "[W]here discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the WTO Agreement in good faith."[30] In this dispute, however, Section 12 of the Customs Act and Section 3(1), 3(2) and 3(7) of the Customs Tariff Act do not merely provide India's Central Government the discretion to act inconsistently with its WTO obligations. Section 12 and Section 3(1), 3(2) and 3(7) require imposition of the AD (in addition to and on top of the BCD), and for the reasons provided in our prior submissions, result in a breach of GATT Article II:1(b).

Q68. A 1980 GATT Council Decision on "Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions states the following: "As can be seen from Article II:2 of the General Agreement, such 'other duties or charges' [as are described in Article II:1(b)] 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".[31] Please comment.

23. The phrase "such 'other duties or charges'" in the cited paragraph of the Council Decision refers to the "other duties or charges" that needed to be "bound" for purposes of Article II:1(b) since the question presented was which ODCs 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 ODCs described in GATT 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 aries 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

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[29] *See, e.g.,* Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, paras. 7.67-7.106 (analyzing whether the cited provisions mandated (or prohibited) the action described).

[30] Appellate Body Report, *United States – 211 Omnibus Appropriations Act of 1988,* WT/DS176/AB/R, adopted 1 February 2002, para. 259.

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

> 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 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.[32]

24. The cited paragraph of the 1980 Council Decision, in referring to "such" ODCs, thus appears to be referring to a particular subset of ODCs – 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." Accordingly, it would be inaccurate to read the cited paragraph of Council Decision as pronouncing that the duties or charges described in paragraph (a) through (c) of GATT Article II:2 are not ODCs. Moreover, because GATT Article II:2 permits the ODCs described in paragraphs (a) through (c) of GATT Article II:2, Members can impose them without including them in their GATT schedules. It follows that those duties or charges Members include in their schedules are not the duties or charges described in paragraphs (a) through (c) of GATT Article II:2.

For both parties:

Q69. What would be the legal implications of a determination that a particular border charge is equivalent to an internal tax imposed in respect of the like domestic product but imposed inconsistently with the provisions of Article III:2? Please elaborate

25. The measure could not be justified under GATT Article II:2(a) and would breach GATT Article II:1(b) if imposed on imports in an amount or manner inconsistent with that paragraph.

[32] C/107/Rev.1, adopted on 26 March 1980, BISD 27S/22, 24, para. 9 (underlining in original; italics added).