

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

***(WT/DS360)***

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

**August 3, 2007**

## **I. INTRODUCTION**

1. India has imposed ordinary customs duties on imports of alcoholic beverages from the United States that result in ordinary customs duties on these imports as high as 550 percent. India imposes these customs duties by levying an “additional customs duty” and an “extra-additional customs duty” in addition to and on top of a “basic customs duty” on imports of alcoholic beverages. India levies these duties through the following measures: (1) Section 12 of the Customs Act, 1962 (“Customs Act”) requiring the collection of customs duties as specified in the Customs Tariff Act, 1975; (2) Sections 2 and 3 and the First Schedule of the Customs Tariff Act, 1975 (“Customs Tariff Act”); (3) Customs notices issued pursuant to Section 25 of the Customs Tariff Act, including Customs Notification 20/1997 and 11/2005; (4) Customs Notification 32/2003; (5) Customs Notification 19/2006. Imposed in conjunction with the basic customs duty, the additional customs duty and extra-additional customs duty on alcoholic beverages are each inconsistent with Article II:1(a) and (b) of the GATT 1994.

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

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

## **II. LEGAL ARGUMENT**

### **A. Introduction**

4. GATT Article II:1(b) requires India to exempt imports from “ordinary customs duties” or “other duties or charges of any kind imposed on or in connection with ...importation” in excess of those provided for in its Schedule, and GATT Article II:1(a) requires India to afford no less favorable treatment to imports than provided for in its Schedule. Together these provisions serve to “preserve the value of tariff concession negotiated by a Member with its trading partners, and bound in that Member’s schedule.” Both the additional customs duty and extra-additional customs duty are inconsistent with GATT Article II:1(a) and (b).

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

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

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

**B. The Additional Customs Duty on Alcoholic Beverages Is Inconsistent with GATT Article II:1(b) and II:1(a)**

**1. GATT Article II:1(b)**

**(a) Ordinary Customs Duty or Other Duty or Charge**

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

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

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

measures. It follows that an “ordinary customs duty” is a duty – either *ad valorem*, specific or a combination thereof – calculated based on the quantity or value of the good at the time of importation that applies as a matter of course upon a good’s importation.

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

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

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

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

15. In any event, the additional customs duty would be inconsistent with GATT Article II:1(b) even if it were an ODC within the meaning of the second sentence of that article. ODCs are defined in relation to ordinary customs duties in that “other duties or charges” mean those duties or charges that are not “ordinary” customs duties but are nonetheless imposed on or in connection a product’s importation. With respect to the additional customs duty, the second sentence of GATT Article II:1(b) would ensure that India may not avoid its tariff commitments simply by imposing a duty or other charge on the importation of alcoholic beverages that may

not be characterized as an “ordinary” customs duty but nonetheless results in other duties or charges that exceed those set out in its Schedule. In this dispute, determining whether the additional customs duty is either an ordinary customs duty or ODC within the meaning of GATT Article II:1(b), however, is not determinative of the outcome of this dispute, as in either case, the additional customs duty would exceed the rates set out in India’s Schedule, as discussed below.

**(b) In Excess of**

16. The additional customs duty subjects imports of alcoholic beverages to ordinary customs duties “in excess of” those provided for in India’s Schedule. Part 1 of India’s Schedule sets forth the following bound rates of duty on beer, wine and distilled spirits as 150 percent ad valorem. India’s Schedule does not identify any other duties or charges applicable to alcoholic beverages.

17. India applies a 100 percent basic customs duty on beer and, prior to July 3, 2007, also a 100 percent basic customs duty on wine. On July 3, 2007, the basic customs duty on wine increased to 150 percent. (The U.S. claims concern measures India imposed at the time of the Panel’s establishment on June 20, 2007 and, accordingly, are not based on any effect the July 3, 2007 customs notification may have had on the collection of the additional customs duty on alcoholic beverages.) With respect to distilled spirits, India applies a basic customs duty equal to its 150 percent WTO bound rate.

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

Value	BC	AD (% or USD)	BC Owed (USD)	AD Owed (USD)	Total Duties (USD)	Effective Rate of AD	Effective Rate of Duty	WTO Bound Rate
Beer and Wine								
41	100%	40*	41.00	40	81.00	97.6%	197.6%	150%
100	100%	20%	100.00	40	140.00	40%	140.0%	150%
26	100%	37*	25.00	37	62.00	148%	248.0%	150%
37	100%	50%	37.00	37	74.00	100%	200.0%	150%
1	100%	75%	1.00	1.5	2.50	150%	250%	150%

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

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

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

20. Thus, applied in conjunction with the basic customs duty, the additional customs duty results in ordinary customs duties that far exceed India’s WTO bound rates for alcoholic beverages. Accordingly, the additional customs duty as imposed pursuant to Section 3(1) of the Customs Tariff Act and Customs Notification 32/2003 is, as such, inconsistent with Article II:1(b) as an ordinary customs duty in excess of those duties specified in India’s Schedule.

## 2. GATT Article II:1(a)

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

### C. The Extra-Additional Customs Duty Is Inconsistent with GATT Article II:1(a) and II:1(b)

## 1. GATT Article II:1(b)

### (a) Ordinary Customs Duty or Other Duty or Charge

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

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

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

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

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

27. Similarly, even if the extra-additional customs duty were not an ordinary customs duty but were instead an ODC, it would be in breach of Article II:1(b) of the GATT 1994. As explained above, ODCs are defined in relation to ordinary customs duties in that “other duties or charges” mean those duties or charges that are not “ordinary” customs duties but are nonetheless imposed on or in connection with a product’s importation. With respect to the extra-additional customs duty, the second sentence of GATT Article II:1(b) would ensure that India may not

avoid its tariff commitments simply by imposing a duty or other charge on the importation of alcoholic beverages that may not meet the technical definition of an “ordinary” customs duty, but nonetheless results in customs duties or other charges that exceed those set out in India’s Schedule. In this dispute, as is the case with the additional customs duty, determining whether the extra-additional customs duty is either an ordinary customs duty or ODC within the meaning of GATT Article II:1(b) is not determinative of the outcome in this dispute as, in either case, the extra-additional customs duty would exceed the rates set out in India’s Schedule, as discussed below.

**(b) In Excess Of**

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

29. Part of 1 of India’s WTO Schedule binds ordinary customs duties on beer, wine and distilled spirits (HS Nos. 2203-2206 and 2208) at 150 percent *ad valorem* and does not identify any other duties or charges applicable to alcoholic beverages. India’s basic customs duty on beer and wine is 100 percent *ad valorem* whereas the basic customs duty on distilled spirits is 150 percent *ad valorem*. As noted above, Customs Notification 81/2007 (July 3, 2007) raised the applied basic customs duty on wine to 150 percent *ad valorem* on July 3, 2007. Thus, the extra-additional customs duty would result in customs duties in excess of India’s bound rates on wine as well when imposed in conjunction with a basic customs duty of 150 percent, for the same reasons the extra-additional customs duty results in customs duties in excess of India’s bound rates for distilled spirits and products listed in Exhibit US-1. Because India raised the basic customs duty on wine to 150 percent after the date of the Panel’s establishment, we have not included that argument here.

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

**Extra-Additional Customs Duty on Distilled Spirits\***



Value	EAD	BC	BC Owed	EAD Owed	Effective Rate of EAD	Total Duties	Effective Rate of Total Duty	WTO Bound Rate
100	4%	150%	150.00	10	10.0%	160.00	160%	150%

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

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

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

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

34. The applied rates of basic customs duties for products in Exhibit US-1 are at India’s WTO bound rates for those products, and none of the products are indicated in India’s Schedule as ones subject to an ODC. As a result, application of the extra-additional customs duty in conjunction with the basic customs duty results in ordinary customs duties on those products that exceed those set forth in India’s Schedule. As with alcoholic beverages, the extra-additional customs duty on other products applies in addition to and is calculated on top of the basic customs duty.

35. Exhibit US-1 is an illustrative list; there may be products in addition to those listed in Exhibit US-1 for which imposition of the extra-additional customs duty in conjunction with the

basic customs duty results in ordinary customs duties in excess of those set forth in India's Schedule. The United States has challenged the extra-additional customs duty as such. Accordingly, the U.S. claims concern the extra-additional customs duty itself and therefore any instance for which application of the extra-additional customs duty in conjunction with the basic customs duty results in ordinary customs duties in excess of those set forth in India's Schedule.

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

## **2. GATT Article II:1(a)**

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

## **III. CONCLUSION**

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

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

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

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