

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

(WT/DS360)

**SECOND SUBMISSION OF
THE UNITED STATES OF AMERICA**

October 23, 2007

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SHORT TITLE	FULL TITLE AND CITATION
<i>Argentina – Hides</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R, adopted on 16 February 2001
<i>Argentina – Textiles</i>	Appellate Body Report, <i>Argentina – Measures Affecting Footwear, Apparel and Other Items</i> , WT/DS56/AB/R, adopted on 22 April 1998
<i>Brazil – Coconuts</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted on 20 March 1997
<i>Chile – Price Bands</i>	21.5 Appellate Body Report, <i>Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted on 22 May 2007
<i>Chile – Price Bands</i>	Appellate Body Report, <i>Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted on 22 May 2007
<i>EC – Bananas</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R, adopted on 25 September 1997
<i>EC – Frozen Chicken</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted on 25 September 2005
<i>EEC – Parts and Components</i>	GATT Panel Report, <i>EEC – Regulation on Imports of Parts and Components</i> , L/6657, adopted 16 May 1990, BISD 37S/132
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/DS55/DS59/DS66/R, adopted on 23 July 1998
<i>Japan – Alcohol II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>Thailand – Steel</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams</i> , WT/DS122/AB/R, adopted on 5 April 2001

<i>United States – OCTG</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Duties on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, 17 December 2004
<i>United States – Malt Beverages</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R, adopted on June 19, 1992, BISD 39S/206
<i>United States – Blouses</i>	Appellate Body Report, <i>United States – Measures Affecting the Importation of Woven Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted on 23 May 1997
<i>United States – Superfund</i>	GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , L/6175, adopted on 17 June 1987, BISD 34S/146
<i>United States – Tobacco</i>	GATT Panel Report, <i>United States – Measures Affecting the Importation, Sale and Internal Use of Tobacco</i> , DS44/R, adopted on 4 October 1994, BISD 41S/131

I. Introduction

1. India's additional customs duty (AD) and extra-additional customs duty (EAD) on imports from the United States are inconsistent with Article II:1(a) and (b) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994). The AD and the EAD are both ordinary customs duties, and by imposing them, India is exceeding the rates specified in its Schedule to the GATT 1994 (WTO-bound rates). India's contentions that the AD and the EAD are not ordinary customs duties or other duties or charges imposed on or in connection with importation (ODCs) wrongly focus on the stated purpose of these duties, ignoring that examination of the structure, design and effect of the AD and the EAD reveals that both constitute ordinary customs duties within the meaning of GATT Article II:1(b). India has not contested that, if considered ordinary customs duties or ODCs, the AD and the EAD each result in duties in excess of WTO-bound rates.

2. India has instead attempted to defend the AD and the EAD by asserting that under GATT Article II:2(a) they are charges equivalent to an internal tax imposed consistently with GATT Article III:2. India, however, has not supported that assertion, and in fact, has made a number of admissions that disprove it. In particular, India has admitted that the AD and the EAD are at least "marginally" in excess of internal taxes on like domestic products and, therefore, neither may be considered imposed consistently with GATT Article III:2.

3. India has also suggested that the statutory provisions imposing the AD and the EAD are not mandatory. However, the AD and the EAD are composed of a series of measures that apply cumulatively and together mandate a breach of GATT Article II:1(a) and (b). And, in any event, India is incorrect as a factual matter that the relevant statutory measures are not mandatory. Finally, India – perhaps in recognition that the AD and the EAD may not be WTO-consistent – has invited this Panel to take into account two customs notifications that are not within this Panel's terms of reference. The Panel should not accept India's invitation and should limit its findings to those measures specified in the U.S. panel request.

4. Accordingly, 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 the GATT 1994.

II. The AD and EAD Are Each Inconsistent with GATT 1994 Article II:1(b)

A. The AD and the EAD Constitute Ordinary Customs Duties

5. GATT 1994 Article II:1(b) prohibits Members from levying "ordinary customs duties" or "other duties or charges imposed on or in connection with importation" (ODCs) in excess of the rates established in Members' Schedule ("WTO-bound rates").¹ The AD and the EAD are each inconsistent with this provision as "ordinary customs duties" that exceed India's WTO-bound rates.

¹ U.S. First Written Submission, paras. 34-35.

6. As explained in our prior submissions in this dispute, consistent with the customary rules of treaty interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties, the term “ordinary customs duty” means a duty applied as a matter of course on the importation of a good into the customs territory of a Member at the time of importation that is either *ad valorem* (calculated based on the value of the good), specific (calculated on the quantity of the good) or a combination thereof.² An “ordinary” customs duty is a duty that is “normal, customary or usual.”³ On account of its form as *ad valorem* or specific and the fact that it applies as a matter of course on a good’s importation (that is, the event for which liability ensues is importation) an “ordinary customs duty” is generally marked by a greater sense of transparency and predictability than other types of border measures.⁴

7. Ordinary customs duties are subject to the first sentence of GATT 1994 Article II:1(b) which prohibits such duties in excess of WTO-bound rates. ODCs in contrast are subject to the second sentence of Article II:1(b) which prohibits ODCs at any rate if not specified in the relevant Member’s Schedule. Thus, the consequence of a duty being considered an ODC is that a Member may not impose it at any rate if that Member has not inscribed in it its Schedule, *even if* it would not result in duties that exceed the Member’s WTO-bound rate. Were the duty to be considered an ordinary customs duty, however, the Member could impose it up to its WTO-bound rate.

8. The AD and EAD are both “ordinary customs duties” within the meaning of GATT Article II:1(b). The AD is an “ordinary customs duty” because it applies:

- at the time of importation (and, in this connection, it must be paid by the importer before the good may clear customs);
- as a matter of course upon a good’s importation (and, in this connection, it applies generally on the importation of alcoholic beverages into India and the event for which liability ensues is importation); and
- as a combination of *ad valorem* and specific duties.

² U.S. First Written Submission, para. 42; Appellate Body Report, *Chile – Price Bands*, paras. 274-277 (stating that an ordinary customs duty must be “expressed in the form of ‘an ad valorem duty or specific rates’” and that a duty does not fail to qualify as an ordinary customs duty simply because it may be based on “exogenous factors.”). The term “ordinary customs duty” also appears in the Agreement on Agriculture. Article 4.2 of that agreement refers to certain measures Members “have been required to be convert into ordinary customs duties” and Annex 5 of that agreement describes the mechanism by which “tariff equivalents” of such measures may be calculated so as to result in “ordinary customs duties” at *ad valorem* or specific rates. These provisions also suggest that an “ordinary customs duty” must be expressed as an *ad valorem* or specific duty or combination thereof.

³ U.S. First Written Submission, para. 42 (citing the definition of “ordinary” from the *New Shorter Oxford English Dictionary*).

⁴ See, e.g., 21.5 Appellate Body Report, *Chile – Price Bands*, para. 156; Appellate Body Report, *Chile – Price Bands*, para. 200; see also U.S. First Written Submission, para. 43.

9. The EAD is likewise an “ordinary customs duty” because it applies:

- at the time of importation (and, in this connection, it must be paid by the importer before the good may clear customs);
- as a matter of course upon a good’s importation (and, in this connection, it applies generally on the importation of products into India and the event for which liability ensues is importation); and
- as an *ad valorem* duty.

10. In this regard the AD and the EAD are no different than India’s basic customs duty (BCD). India has already conceded that the BCD is ordinary customs duty within the meaning of GATT 1994 Article II:1(b).⁵ Like the AD and the EAD, the BCD applies:

- at the time of importation (and, in this connection, it must be paid by the importer before the good may clear customs);
- as a matter of course upon a good’s importation (and, in this connection, it applies generally on the importation of products into India and the event for which liability ensues is importation); and
- as a combination of *ad valorem* and specific duties.

11. In addition to these similarities, there are a number of additional similarities between the BCD and the AD and the EAD. Together, these similarities indicate that the AD and the EAD, like the BCD, are “ordinary customs duties.” These similarities are reviewed in our first written submission, oral statement and responses to the Panel’s questions and include the fact that all three duties are referred to as “duties of customs,”⁶ authorized under the same constitutional provision,⁷ required to be levied under the same provision of the Customs Act,⁸ subjected to

⁵ See, e.g., India First Written Submission, para. 12; India Oral Statement at the First Panel Meeting, paras. 12, 21.

⁶ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 7.4; U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 19-22.

⁷ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 7.4; U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 22

⁸ U.S. First Written Submission, paras. 45, 58; U.S. Oral Statement at the First Panel Meeting, para. 9; U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 19-22. India’s contention that the AD and the EAD are not levied pursuant to Section 12 of the Customs Act is incorrect. See *supra* Section V.B (explaining why Section 12 mandates imposition of the “duties of customs” specified in the Customs Tariff Act, including the AD and the EAD). The mere fact that AD, EAD and BCD are elaborated in separate sections of the Customs Tariff Act does not make them entirely distinct. See U.S. Response to the Panel’s Questions in the Context

exemptions under the same provision of the Customs Act,⁹ and administered under the same customs rules and procedures.¹⁰

12. India, however, contends the AD and the EAD are “fundamentally distinct” from the BCD, and, on that basis, that the AD and the EAD are not ordinary customs duties within the meaning of GATT 1994 Article II:1(b). First, as reviewed above and in our prior submissions, the AD and the EAD are not fundamentally distinct. Second, although India has repeatedly asserted that the United States fails to understand the distinctions between the AD and the EAD on the one hand and the BCD on the other,¹¹ the distinctions India identifies do not affect the analysis of whether the AD or the EAD constitutes an “ordinary customs duty” within the meaning of GATT 1994 Article II:1(b). And in any event, the United States disagrees as a factual matter with several of the distinctions India draws. For example, despite India’s assertions otherwise, Section 25(1) of the Customs Act provides India’s Central Government the authority to issue exemptions from each the BCD, AD, and EAD.¹² And, India in fact cites Section 25(1) as the authority in issuing customs notifications exempting certain products from payment of the BCD, AD or EAD.¹³

13. The principle distinction India draws between the BCD and the AD and the EAD is that the latter are intended to offset internal taxes imposed on like domestic products. However, as we have emphasized, whether the AD and the EAD constitute ordinary customs duties must be

of the First Panel Meeting, para. 42.

⁹ U.S. First Written Submission, paras. 45, 58; U.S. Oral Statement at the First Panel Meeting, para. 9; U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 19-22; *see also infra* para. 12.

¹⁰ U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 24-28; India Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 12.6-12.10.

¹¹ *See, e.g.*, India Oral Statement at the First Panel Meeting, paras. 13; India First Written Submission, para. 25.

¹² U.S. First Written Submission, paras. 45, 58; U.S. Oral Statement at the First Panel Meeting, para. 9; U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 19-22. Section 25(1) of the Customs Act provides: “If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.” Section 3(8) of the Customs Tariff Act states that the provisions of the Customs Act, including with respect *inter alia* to exemptions, “shall apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.” Contrary to India’s assertion, Section 3(8) makes it explicit that Section 25(1) applies with respect to the AD and the EAD, and not that Section 3(8) establishes independent authority under the Customs Tariff Act for the Central Government to exempt imports from duties of customs.

¹³ *See e.g.*, Customs Notification 21/2002, Exhibit India-19 (citing only Section 25(1) of the Customs Act as the authority for exempting certain imports from the AD); Customs Notification 20/2006, Exhibit US-11 (citing only Section 25(1) of the Customs Act as the authority for exempting certain imports from the EAD).

based on an examination of their structure, design and effect;¹⁴ the stated purpose or intent of the duties does not determine whether either is or is not an ordinary customs duty.¹⁵

14. For example, in *EEC – Parts and Components*, the Panel considered whether the “policy purpose of a charge is relevant to determining the issue of whether the charge is imposed in ‘connection with importation’ within the meaning of Article II:1(b)” and whether “the mere description or categorization of a charge under the domestic law of a contracting party” is relevant to determining whether the measure is a charge on importation within the meaning of Article II:1(b). With respect to the former, the panel concluded that “it was not the policy purpose attributed to the charge but rather whether the charge is due on importation or at the time or point of importation or whether it is collected internally,” cautioning that “the policy purpose of charges is frequently difficult to determine objectively.”¹⁶ With respect to the latter, the panel found:

that if the description or categorization of a charge under the domestic law of a contracting party were to provide the required “connection with importation”, contracting parties could determine themselves which of these provisions would apply to their charges. They could in particular impose charges on products after their importation simply by assigning the collection of these charges to their customs administration and allocating the revenue generated to their customs revenue. With such an interpretation the basic objective underlying Articles II and III, namely that discrimination against products from other contracting parties should only take the form of ordinary customs duties imposed on or in connection with importation and not the form of internal taxes, could not be achieved. The same reasoning applies to the description or categorization of the product subject to a charge. The fact that the EEC treats imported parts and materials subject to anti-circumvention duties as not being “in free circulation” therefore cannot, in the view of the Panel, support the conclusion that the anti-circumvention duties are being levied “in connection with importation” within the meaning of Article II:1(b).¹⁷

15. This situation in *EEC – Parts and Components* is analogous to the present dispute in that India asserts that the AD and the EAD’s purpose is to offset internal taxes, citing language in Section 3(1) and 3(5) of the Customs Tariff Act, and on the basis of this assertion India contends

¹⁴ U.S. First Written Submission, para. 42 note 67; U.S. Oral Statement at the First Panel Meeting, para. 7.

¹⁵ U.S. First Written Submission, para. 45 note 71 (citing *EEC – Parts and Components*); U.S. Oral Statement at the First Panel Meeting, para. 7; Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 43.

¹⁶ GATT Panel, *EEC – Parts and Components*, para. 5.6.

¹⁷ *Id.*, para. 5.7. The panel in *Argentina – Hides*, similarly found that in examining a measure’s effect the “policy purposes” pursued by a measure is not relevant. Panel Report, *Argentina – Hides*, para. 11.182; see also India First Written Submission, para. 86 (citing *Argentina – Hides* in support of this proposition).

neither are “ordinary customs duties.” However, like the panel in *EEC – Parts and Components*, this Panel should reject India’s invitation to focus exclusively on the stated purpose of the AD or the EAD; the Panel should instead base its findings on the duties’ structure, design and effect. In *EEC – Parts and Components*, the panel rejected the notion that the stated purpose or characterization of the anti-circumvention duty under domestic law provided sufficient basis to characterize the measure as an internal tax rather than a customs duty. Similarly, this Panel should reject India’s contention that the stated purpose or characterization of the AD or the EAD under Sections 3(1) and 3(5) respectively of the Customs Tariff Act provide a sufficient basis to find the AD or the EAD a charge equivalent to an internal tax rather than an ordinary customs duty.

16. As we have also emphasized, an interpretation of GATT 1994 Article II:1(b) that would permit the stated purpose or intent of a measure to determine whether it fell within the scope of that article would permit Members to 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, similar to the situation faced in *EEC – Parts and Components*.¹⁸ In this dispute, India may attribute a different purpose to the BCD on the one hand and the AD and EAD on the other, but all three, based on an examination of their structure, design and effect as reviewed above, constitute “ordinary customs duties” within the meaning of GATT 1994 Article II:1(b). Moreover, as elaborated in Section III, neither the AD nor the EAD in fact offset or counterbalance internal taxes on like domestic products.

17. India’s focus on the “distinctions” between the BCD and the AD and the EAD suggests that in its view a Member may only impose one duty that may properly be characterized as an “ordinary customs duty” under GATT 1994 Article II:1(b).¹⁹ This interpretation would be not consistent with the text of GATT 1994 Article II:1(b), however. Nothing in the text suggests Members are limited to a single “ordinary customs duty” and, in fact, the text refers to “ordinary customs duties.” Use of the plural “duties” (rather than the singular “an ordinary custom duty”) suggests that GATT 1994 Article II:1(b) prohibits “ordinary customs duties” on the importation of products – whether resulting from the application of one or more individual duties – in excess of those specified in the relevant Member’s Schedule.

B. In the Alternative, the AD and the EAD Constitute ODCs

18. The United States believes that the AD and the EAD constitute “ordinary customs duties” within the meaning of GATT 1994 Article II:1(b). However, even if the AD or the EAD were

¹⁸ See GATT Panel Report, *EEC - Parts and Components*, paras. 5.6-5.7.

¹⁹ See, e.g., India First Written Submission, paras. 11, 19, 25-26, 54; India Oral Statement at the First Panel Meeting, paras. 11-12.

not an “ordinary customs duty,” each would constitute an “other duty or charge” (ODC) within the meaning of GATT 1994 Article II:1(b).²⁰

19. The AD and the EAD would each necessarily constitute an ODC if it were not an ordinary customs duty. This is because the word “other” as used in GATT 1994 Article II:1(b) means duties or charges that are not ordinary customs duties that are applied on or in connection with importation. If the AD and EAD are not an ordinary customs duty, then they must necessarily be something *other* than an ordinary custom duty. As elaborated above and in our responses to the Panel’s questions, the AD and the EAD apply on or in connection with importation.²¹ Specifically, the AD and the EAD apply at the time of importation and as a consequence of importation (that is, importation is the event for which liability for duty ensues).²² Moreover, in asserting that the AD and the EAD are charges equivalent to an internal tax within the meaning of GATT 1994 Article II:2(a),²³ India has implicitly characterized both as charges “imposed on importation” since the chapeau to GATT 1994 Article II:2 makes clear that it concerns measures “imposed on importation.” Therefore, if the AD or the EAD is not an ordinary customs duty, it must be an other duty or charge within the meaning of Article II:1(b).²⁴

C. The AD and EAD Are Each In Excess of WTO-Bound Rates

20. As reviewed in our first written submission, the AD when imposed with India’s BCD results in ordinary customs duties on imports of alcoholic beverages in excess of India’s WTO-bound rate. Specifically, the AD imposed with the BCD results in ordinary customs duties on imports of alcoholic beverages that exceed India’s WTO-bound rate of 150 percent *ad valorem* by amounts ranging from 48 to 400 percentage points.²⁵

21. With respect to the EAD when imposed with India’s BCD it results in ordinary customs duties on imports in excess of India’s WTO-bound rate.²⁶ The EAD also results in ordinary

²⁰ U.S. First Written Submission, paras. 47, 60, 65; U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 7-8.

²¹ U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 17-18, 24; *supra* Section II.A.

²² See U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 17-18, 24 (citing relevant provisions of India’s customs laws providing that the AD and the EAD are imposed at the time and as a consequence of importation).

²³ See, e.g., India First Written Submission, paras. 63; India Oral Statement at the First Panel Meeting, para. 9.

²⁴ In this regard, as note in our responses to the Panel’s questions, India’s argument that the EAD it is not applied on or in connection with importation because its purpose is to offset in internal taxes is without merit. The phrase “on or in connection with importation” does not concern the policy objective or purpose associated with the duty, but the relationship between the duty and importation. See U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 10.

²⁵ U.S. First Written Submission, para. 50.

²⁶ U.S. First Written Submission, paras. 64, 67.

customs duties on imports in excess of WTO-bound rates in any situation where the BCD is already at or very near India's WTO-bound rate.²⁷ Exhibit US-1 contains a number of examples in addition to alcoholic beverages where this is the case.

22. Were either the AD or the EAD to be considered an ODC, it would exceed the ODCs specified in India's Schedule as India's Schedule does not specify any ODCs for alcoholic beverages or any other product.

23. India has not contested the U.S. *prima facie* case that the AD and the EAD each result in duties on imports in excess of those specified in India's Schedule, focusing instead on its contention that the AD and EAD do not constitute ordinary customs duties or ODCs. Therefore, if the Panel finds the AD and the EAD are ordinary customs duties or ODCs within the meaning of GATT 1994 Article II:1(b) it should also find on the basis of the U.S. *prima facie* case that the AD and the EAD exceed India's WTO-bound rates.

D. The AD and EAD Are Each Inconsistent with GATT 1994 Article II:1(a) and II:1(b)

24. As reviewed above, the AD is an ordinary customs duty within the meaning of GATT 1994 Article II:1(b). The AD when imposed with the BCD results in ordinary customs duties on imports of alcoholic beverages in excess of India's WTO-bound rates.²⁸ The AD is therefore as such inconsistent with GATT 1994 Article II:1(b). As also reviewed above, the EAD is an ordinary customs duty within the meaning of GATT 1994 Article II:1(b). The EAD when imposed with the BCD results in ordinary customs duties on imports of alcoholic beverages and other products in excess of India's WTO-bound rates.²⁹ The EAD is therefore as such also inconsistent with GATT 1994 Article II:1(b).

25. Because the AD and the EAD are each inconsistent with GATT 1994 Article II:1(b), they are also each inconsistent with GATT 1994 Article II:1(a). Specifically, Article II:1(a) requires each WTO Member to "accord the commerce of [other Members] treatment no less favourable

²⁷ See U.S. Responses to the Panel's Questions in the Context of the First Panel Meeting, paras. 1-3 (explaining that Exhibit US-1 provides examples of products for which the EAD results in duties in excess of those in India's Schedule); Appellate Body Report, *Argentina – Textiles*, paras. 45-56, 62 (finding Argentina's minimum specific duty (DIEM) inconsistent with GATT 1994 Article II:1(b) the structure and design of the Argentine system was such that the possibility remained that the DIEM – depending on the import's transaction value and corresponding representative price set by Argentina – would exceed Argentina's WTO-bound rate); Appellate Body Report, *EC – Frozen Chicken*, para. 165 (explaining that "identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue.")

²⁸ See U.S. Responses to the Panel's Questions in the Context of the First Panel Meeting, paras. 35, 37 (detailing the provisions of Indian law comprising the AD and BCD that result in a breach of GATT 1994 Article II:1).

²⁹ See U.S. Responses to the Panel's Questions in the Context of the First Panel Meeting, paras. 36-37 (detailing the provisions of Indian law comprising the EAD and BCD and that result in a breach of GATT 1994 Article II:1).

than that provided for in” the Member’s Schedule. And, a Member that imposes ordinary customs duties on imports from another WTO Member in excess of its WTO-bound rates accords less favorable treatment to the commerce of that WTO Member than provided in its Schedule.³⁰ Accordingly, by imposing ordinary customs duties on imports of alcoholic beverages from the United States in excess of those set forth in India’s Schedule, the AD accords imports from the United States less favorable treatment than provided for in India’s Schedule and,³¹ as such, is inconsistent with GATT 1994 Article II:1(a). Similarly, because the EAD 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 AD and the EAD are each, as such, inconsistent with GATT 1994 Article II:1(a).

III. Neither the AD Nor the EAD Are Charges Within the Meaning of Article II:2(a)

A. Elements of the GATT 1994 Article II:2(a) Analysis

26. India asserts that the AD and the EAD are charges imposed in accordance with GATT 1994 Article II:2(a). GATT 1994 Article II:2(a) provides that Members may impose “on the importation of any product. . . 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.”

27. India describes GATT 1994 Article II:2(a) as comprising three elements: “Article II:2(a) ... permits WTO Members to levy certain charges at the border, provided that such charges are (a) ‘equivalent’ to an ‘internal tax’; (b) imposed in a manner that is consistent with Article III:2; and (c) in respect of a ‘like domestic product’.”³² These are the same elements the United States identified in its oral statement at the first panel meeting.³³

1. Equivalent

³⁰ Appellate Body Report, *Argentina – Textiles*, para. 47. India agrees that a breach of GATT 1994 Article II:1(b) results in a breach of GATT 1994 Article II:1(a). See India First Written Submission, paras. 60-61 (“A violation of GATT 1994 Article II:1(a) read with Article II:1(b) will be found where the challenged measure has resulted in the imposition of an OCD or an ODC in excess of what was committed in the Member’s Schedule.”)

³¹ See Appellate Body Report, *Argentina – Textiles*, para. 47 (“It is evident to us that the application of customs duties in excess of those provided for in a Members’s Schedule, inconsistent with the first sentence of Article II:1(b), constitutes ‘less favourable’ treatment under the provisions of Article II:1(a).”); see also *id.*, para. 45 (“Paragraph (b) prohibits a specific type of practice that will always be inconsistent with paragraph (a) . . .”).

³² India Oral Statement at the First Panel Meeting, para. 24; see also India First Written Submission, para. 64.

³³ U.S. Oral Statement at the First Panel Meeting, para. 16; India First Written Submission, para. 82. Although the United States and India subdivided the elements of GATT 1994 Article II:2(a) into two and three sub-parts respectively, both identify the same substantive elements that must be met for a measure to fall within Article II:2(a): the measure must be (i) a charge equivalent to an internal tax (ii) imposed consistently with GATT 1994 Article III:2 and, with respect to both (i) and (ii), imposed (iii) with respect to like domestic products.

28. With respect to the first element, as explained in our responses to the Panel’s questions in the context of the first meeting, a charge “equivalent to an internal tax” means a charge imposed on the importation of a product that is “equal in force, amount, or value” and corresponds or is “virtually identical especially in effect or function”³⁴ to an internal tax imposed on like domestic products.³⁵ In its responses to the Panel’s questions in the context of the first meeting, India appears to focus on only one aspect of “equivalence”, the amount of the charge in relation to the internal tax.³⁶ While the amount of the respective liability is certainly a factor in whether the charge on the imported product and the internal tax on the like domestic product are “equivalent”, the ordinary meaning of the word “equivalent” does not appear to prejudice the aspects of two measures that might be examined to determine whether they correspond or are virtually identical. Moreover, were the examination of whether a charge is equivalent to an internal tax focused solely on the amount of the charge in relation to the internal tax this would appear to make the requirement that the charge not be in excess of internal taxes largely redundant. Accordingly, the United States has suggested that the analysis should not be limited to examining the amount of the two measures but should review the structure, design and effect of the two measures.³⁷

29. The GATT Panel report in *United States – Superfund* supports the conclusion that examination of whether two measures are “equivalent” includes examination of the structure, design and effect of the two measures. In that dispute, the panel considered a charge imposed on imports of certain substances that contained particular chemicals, in principle, to be a charge equivalent to an internal tax on those particular chemicals.³⁸ In reaching its conclusion, the *Superfund* panel explained:

The drafters of the General Agreement explained the word “equivalent” used in [GATT 1994 Article II:2(a)] with the following example:

“If a [charge] is imposed on perfume because it contains alcohol, [the charge] to be imposed must take into consideration the value of the alcohol and not the value of the perfume, that is to say the value of the content and not the value of the whole” (EPCT/TAC/PV/26, page 21).

³⁴ 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”).

³⁵ U.S. Responses to Panel Questions in the Context of the First Panel Meeting, para. 30.

³⁶ India Responses to Panel Questions in the Context of the First Panel Meeting, paras. 13.5 and 14.1. For example, India asserts that “‘equivalence’ referred to in Article II:2(a) has to be limited to ensuring that the net fiscal burden imposed by the taxes imposed on imported products (excluding the ordinary customs duty) does not exceed that imposed on like domestic products” *Id.*, para. 13.5.

³⁷ U.S. Oral Statement at the First Panel Meeting, para. 19.

³⁸ GATT Panel Report, *United States - Superfund*, paras. 2.3, 2.4, 5.2.3, 5.27-5.28.

The tax on certain imported substances equals in principle the amount of the tax which would have been imposed under the Superfund Act on the chemicals used as materials in the manufacture or production of the imported substance if these chemicals had been sold in the United States for use in the manufacture or production of the imported substance. In the words which the drafters of the General Agreement used in the above perfume-alcohol example: The tax is imposed on the imported substances because they are produced from chemicals subject to an excise tax in the United States and the tax rate is determined in principle in relation to the amount of these chemicals used and not in relation to the value of the imported substance.³⁹

The *Superfund* panel next examined whether the charge on the imported chemicals in fact was equivalent to the tax on domestic chemicals and concluded that it was not because in some instances the charge on imported chemicals was based on the value of the imported substance rather than the value of the chemicals it contained. The panel explained: “Because the tax rate would in that case no longer be imposed in relation to the amount of taxable chemicals used in [the imported substances’] production but the value of the imported substance...it would not meet the requirement of equivalence which the drafters explained in the perfume-alcohol example mentioned in the preceding paragraph.”⁴⁰ Accordingly, the *Superfund* panel appears to have examined the structure, design and effect of the charge on the one hand and the internal tax on the other.

2. Imposed Consistently with GATT 1994 Article III:2

30. With respect to the second element, India has argued that the imports subject to the AD and the EAD and the domestic products subject to various internal taxes (to which the AD and the EAD are allegedly equivalent) are “like,”⁴¹ and for purposes of responding to India's arguments under Article II:2(a), the United States assumes that India's assertion is correct.⁴² Accordingly, for the AD and the EAD to be imposed consistently with GATT 1994 Article III:2, the AD and the EAD must be applied in a manner consistent with the first sentence of that article which concerns “like” products. GATT 1994 Article III:2, first sentence requires that internal taxes on imported products not be “in excess” of internal taxes on like domestic products. The Appellate Body in has explained that under Article III:2, first sentence, if:

³⁹ *Id.* para. 5.2.7 (second set of brackets in original).

⁴⁰ *Id.* para. 5.2.9.

⁴¹ India First Written Submission, paras. 83-84.

⁴² See U.S. Oral Statement at the First Panel Meeting, para. 24. We note that because neither the AD nor the EAD are “equivalent” to an internal tax or imposed in a manner consistent with Article III:2, as elaborated below, the Panel need not reach whether the products subject to the AD and EAD are in fact “like” the products subject to the internal taxes the AD and EAD allegedly “offset”.

the taxes on imported products are “in excess of” those on like domestic products... then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of ‘excess’ is too much. “The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a ‘trade effects test’ nor is it qualified by a *de minimis* standard.”⁴³

Thus, for a charge on imports allegedly equivalent to an internal tax on like domestic products to be imposed consistently with GATT 1994 Article III:2, the charge on imports must not exceed – by any amount – the charge on like domestic products.⁴⁴ For this reason, we note that India is incorrect when it asserts that “India with its federal structure and different rates of state excise duties, must only be required to demonstrate that the net tax burden of the AD imposed on imports of alcoholic liquor is ‘equivalent’ to the net fiscal burden imposed on like domestic products.”⁴⁵ India must demonstrate that the AD (and EAD) are not imposed “in excess” of the internal taxes on like domestic product to which these duties are allegedly equivalent. That is, any amount by which the AD (or EAD) exceeds the internal taxes on like domestic products is “too much.”

⁴³ Appellate Body Report, *Japan – Alcohol*, p. 23.

⁴⁴ This is contrary to what India appears to suggest in footnote 51 of its First Written Submission when it states that “the overall burden of taxation on imported products as a result of the SUAD may be marginally ‘in excess of’ the tax on like domestic products which is below the ‘*de minimi*’ level permissible under GATT Ad Article III, paragraph 3.” India First Written Submission, para. 85, note 51. (We assume India intended to reference the Ad Note to paragraph 2 rather than 3 as there is no Ad Note to paragraph 3 of GATT 1994 Article III.) As note above, the Ad Note to paragraph 2 of GATT 1994 Article III:2 concerns “directly competitive or substitutable” products, and in this dispute India has asserted that the imports and domestic products of concern are “like.” Accordingly, whether the AD and EAD are imposed consistently with GATT is to be analyzed under GATT 1994 Article III:2, first sentence and not the Ad Note to GATT 1994 Article III:2. And, as noted, there is no *de minimi* threshold under GATT 1994 Article III:2, first sentence.

⁴⁵ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 28.3; *see also id.*, para.14.3. India may also be blurring the elements of the GATT 1994 Article II:2(a) analysis which requires an assessment – as India acknowledges in its first written submission – both of whether the charge (i) is equivalent to an internal tax and (ii) imposed consistently with GATT 1994 Article III:2, specifically not in excess of internal taxes on like domestic products. India First Written Submission, paras. 65, 82. It is thus unclear why in its response to the Panel’s questions, India suggests that a charge applied on imports at the border must only be “equivalent” to the internal tax on like domestic products whereas a charge applied internally on imported products are subject to the “stricter standard” of not being “in excess” of internal taxes on like domestic products. *See* India Responses to Panel Questions in the Context of the First Panel Meeting, paras. 14.3, 28.3. There is no basis India’s contention; it is not only inconsistent with its position in its first written submission, but is not supported by the ordinary meaning of GATT 1994 Article II:2(a) or GATT 1994 Article III:2, as detailed above. *See supra* para. 27, 30; U.S. Responses to Questions in the Context of the First Panel Meeting, paras. 30. In addition, we note that the Ad Note to GATT 1994 Article III:1 makes clear that internal taxes imposed on imported products at the time or point of importation are subject to GATT 1994 Article III. Accordingly, there is no textual basis for India’s contention that Article III somehow subjects charges imposed on imports at the border to different requirements than charges imposed on imported products after importation. *See also* U.S. Responses to Questions in the Context of the First Panel Meeting, paras. 32-33.

31. The requirement of Article III:2, first sentence that imports not be subject to internal taxes in excess of internal taxes on like domestic products applies to each import in respect of each like domestic product. As the panel in *Argentina – Hides* explained:

The provisions of Article III:2, first sentence, are applicable to each and every import transaction. It is well established that the fact that some imported products receive more favourable tax treatment than like domestic products cannot successfully be invoked as justification for less favourable tax treatment of other imported products.⁴⁶

Thus, the AD and the EAD result in charges on imported products “in excess” of those on like domestic products, even if it leads to such excess taxation in just one Indian state.⁴⁷

B. AD Is Not a Charge Within the Meaning of GATT 1994 Article II:2(a)

32. India asserts that the AD is imposed in accordance with GATT 1994 Article II:2(a).⁴⁸ Specifically, India asserts that the AD is equivalent to state excise duties imposed on like domestic products.⁴⁹

33. Although India appears to agree that for a charge to fall under GATT 1994 Article II:2(a) it must be (a) equivalent to an internal tax; (b) imposed consistently with GATT 1994 Article III:2; and (c) imposed with respect to like domestic products, India curiously does not appear to address the middle element, namely that the AD is not imposed “in excess” of state excise taxes imposed on like domestic products. Instead, India argues that the AD is “equivalent” to state excise taxes imposed on like domestic products, admitting that the AD “could in some cases, have been less than the excise duty being charged on like domestic products in some States, and in other cases equal to or perhaps slightly in excess of the excise duty being charged in some other States.”⁵⁰

⁴⁶ Panel Report, *Argentina – Hides*, para. 11.1196; GATT Panel Report, *United States – Tobacco*, para. 98.

⁴⁷ See also U.S. Oral Statement at the First Panel Meeting, para. 23.

⁴⁸ India Responses to Panel Questions in the Context of the First Panel Meeting, para. 28.1; India First Written Submission, para. 42.

⁴⁹ India Responses to Panel Questions in the Context of the First Panel Meeting, para. 28.1; India First Written Submission, para. 42.

⁵⁰ India Responses to Questions in the Context of the First Panel Meeting of the Panel, paras. 28.4-28.5; see also *id.*, para. 8.c.1. In particular, India states: “[The AD rate] could only be achieved through a process of averaging, whereby the Central Government arrived at an approximation of the excise duties paid by different states on alcoholic liquor rate. This rate could in some cases, have been less than the excise duty being charged on like domestic products in some States, and in other cases equal to or perhaps slightly in excess of the excise duty being charged in some other States. However, the Central Government tried to ensure that to the extent possible, the rate was a reasonable representation of the net fiscal burden imposed on like domestic products on account of the excise duty payable on alcoholic liquor.” *Id.* para. 28.4.

34. On the basis of this omission, and admission, alone, the Panel may find that the AD is not imposed in accordance with GATT 1994 Article II:2(a). As recalled above, any amount by which a tax on imports is in excess of that tax on like domestic products results in a breach of GATT 1994 Article III:2, and, in relation to like domestic products, less taxation of some imports does not remove the breach resulting from excess taxation other imports. Therefore, since the AD – by India’s own admission – exceeds the excise duties charged on like domestic products in at least some instances, it is not imposed consistently with GATT 1994 Article III:2 with respect to like domestic products.

35. Although India’s admission alone provides sufficient reason to reject its assertion under GATT 1994 Article II:2(a), we note there are other grounds as well.

36. First, as explained above and in our other submissions, the AD is an ordinary customs duty within the meaning of GATT 1994 Article II:1(b) and, therefore, it is not a charge equivalent to an internal tax within the meaning of GATT 1994 Article II:2(a).

37. Second, even if the AD were not considered an ordinary customs duty but an other duty or charge on importation, India has presented no evidence that it is “equivalent” to an any internal tax on like domestic alcoholic beverages or imposed consistently with GATT 1994 Article III:2. Although India asserts that the AD on alcoholic beverages is equivalent to state excises duties on domestic alcoholic beverages, it has not actually identified any such state excise duties much less explained how the AD is equivalent to them or imposed consistently with GATT 1994 Article III.⁵¹ Simply citing Section 3(1)’s stated purpose that the AD is to be “equal to the excise duty for the time being leviable on a like article if produced or manufactured in India” – as India has done in this dispute – is insufficient.⁵² Instead, examination of whether two measures are “equivalent” requires an examination of the structure, design and effect of the measures.⁵³ As we cautioned during the first panel meeting, to accept the stated or intended purpose of the AD as proof that it is “equivalent” to state excise taxes without factual evidence to support that assertion, Members could very easily undermine the value of their tariff concessions by simply asserting that duties in excess of WTO-bound rates are intended to offset internal taxes (regardless whether they actually do).⁵⁴ We note in this regard despite repeated requests India

⁵¹ India’s explanation of how the AD may be equivalent to or not in excess of the central excise tax (CENVAT) is inapposite because the CENVAT does not apply to domestic alcoholic beverages and therefore is not the internal tax to which the AD on imports of alcoholic beverages is allegedly equivalent.

⁵² U.S. Oral Statement at the First Panel Meeting, paras. 3, 7, 19; U.S. Closing Statement at the First Panel Meeting, para. 5; *see also* U.S. First Written Submission, para. 42 note 67.

⁵³ U.S. Oral Statement at the First Panel Meeting, paras. 7 and 19; U.S. First Written Submission, para. 42 note 67 (citing Appellate Body and Panel reports to support the position that the name or stated purpose of a measure is not determinative of whether that measure falls within a particular GATT provision); *see supra* paras. 14-15 (discussing *EEC – Parts and Components*).

⁵⁴ *See* U.S. Closing Statement at the First Panel Meeting, para. 8.

has not identified the state excise taxes to which the AD on alcoholic beverages is allegedly equivalent.⁵⁵

38. Third, even if India had not admitted that the AD is imposed on imports in excess of state excise duties on like domestic products in some states, we recall that explanatory note to Section 3(1) which provides:

In this sub-section, the expression “the excise duty for the time being leviable on a like article if produced or manufactured in India” means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles on which the imported article belongs, *and where such duty is leviable at different rates, the highest duty.*⁵⁶

39. Notwithstanding India’s contentions to the contrary,⁵⁷ the “plain reading” of this explanatory note is that where the like domestic product is subject to various tax rates, the “excise duty for the time being leviable on a like article if produced or manufactured in India” means the highest rate of excise duty imposed. Thus, in instances where the like domestic product is subject to various tax rates, Section 3(1) provides that imports shall be liable to an additional duty that is equal to the highest rate of excise duty imposed. Because the rate of excise duty on like domestic alcoholic beverages varies from state to state,⁵⁸ this means that with respect to alcoholic beverages Section 3(1) provides that imports of alcoholic beverage shall be liable to an additional duty that is equal to the highest rate of excise duty imposed by any of the Indian states. Accordingly, Section 3(1) read with the explanatory note subjects imports of alcoholic beverages to rates of AD that exceed the rate of excise duties on like domestic alcoholic beverages in at least some Indian states and, as a consequence, the AD is not imposed consistently with GATT 1994 Article III:2.

40. In its responses to the Panel’s questions, India offers Customs Notifications 21/2002 (concerning the AD with respect to cement) and 82/2007 (concerning the AD with respect to alcoholic beverages) as evidence that Section 3(1) does not require the Central Government to levy the AD on imports at a rate equal to the highest rate of excise duty imposed on any like

⁵⁵ See U.S. Responses to Questions in the Context of the First Panel Meeting, para. 48 (explaining - and citing the Appellate Body report in *United States – Blouses* in support - that the party asserting a claim or defense bears the burden of presenting arguments and evidence to sustain it).

⁵⁶ Section 3(1) of the Customs Tariff Act, Exhibit US-3A.

⁵⁷ India Responses to Panel’s Questions in the Context of the First Panel Meeting, para. 27.g.4-27.g.6.

⁵⁸ India has already acknowledged that the rates of excise duty imposed on domestic alcoholic beverages varies from state to state. See, e.g., India Responses to Panel’s Questions in the Context of the First Panel Meeting, paras. 28.4-28.5.

domestic product.⁵⁹ Customs Notifications 21/2002 and 82/2007, however, were issued “[i]n exercise of the powers conferred by sub-sections (1) of section 25 of the Customs Act, 1962” and, with respect to the latter, also “sub-section (8) of section 3 of the Customs Tariff Act, 1975.”⁶⁰ Thus, Customs Notifications 21/2002 and 82/2007 appear to exempt imports of cement and alcoholic beverages respectively from the AD by virtue of the Section 25(1) of the Customs Act and Section 3(8) of the Customs Tariff Act and not because Section 3(1) of the Customs Tariff Act “merely empower” the Central Government to levy duties at the “highest rate.”⁶¹

41. We further note the evidence referred to in the EC’s Third Party Submission. In that submission, the EC explained that it had compared the taxation resulting from the AD on imports with the taxation resulting from excise taxes applied by a number of Indian States on like domestic products and concluded that the AD “exceeds by a large margin the taxation resulting from taxes denominated ‘excise duty’ in the legislation of most Indian States representing a major proportion of the market for wines and spirits.”⁶²

42. In sum, the AD not a charge equivalent to an internal tax (state excise duties) and, as India even concedes, is imposed on imports in excess of state excise duties on like domestic alcoholic beverages. Therefore, the AD is not a charge equivalent to an internal tax imposed consistently with GATT 1994 Article III:2.

C. EAD Is Not a Charge Within the Meaning of GATT 1994 Article II:2(a)

43. India also seeks to justify the EAD by asserting that it is imposed in accordance with GATT 1994 Article II:2(a) and identifies state level VATs and the CST in addition to unnamed other local duties and charges as the internal taxes to which EAD is allegedly equivalent. As explained above, to support this assertion, India must establish⁶³ that the AD is (a) a charge

⁵⁹ India Responses to Panel’s Questions in the Context of the First Panel Meeting, para. 27.g.7. India does not cite Customs Notification 82/2007 in this paragraph but does refer the Central Government’s decision “not to charge an AD on imported alcoholic liquor.” Elsewhere (e.g., paragraph 28.2) India explains that it is not charging the AD on imports of alcoholic beverages pursuant to Customs Notification 82/2007.

⁶⁰ Customs Notification 21/2002, Exhibit India-19; Customs Notification 82/2007, Exhibit India-6. Section 25(1) of the Customs Act of the Customs Tariff Act grants the Central Government the authority to “exempt...goods of any specified description from the whole or any part of duty of customs leviable thereon” and Section 3(8) of the Customs Tariff Act states that the provisions of the Customs Act apply to the duty chargeable under Section 3 of the Customs Tariff Act. Section 25(1) of the Customs Act, Exhibit US-2; Section 3(8) of the Customs Tariff Act, Exhibit US-3A.

⁶¹ India Responses to Panel’s Questions in the Context of the First Panel Meeting, paras. 27.g.1-27.g.7.

⁶² EC Third Party Submission, paras. 79-82.

⁶³ See U.S. Responses to Panel Questions in the Context of the First Panel Meeting, paras. 47-49 (explaining that as the party making this assertion, India bears the burden of sustaining it); Appellate Body Report, *United States – Shirts and Blouses*, WT/DS33/AB/R, p. 13 (“The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.”).

equivalent to an internal tax; (b) imposed consistently with GATT 1994 Article III:2; and (c) imposed with respect to like domestic products. As elaborated below and in our oral statement and responses to the Panel’s questions in the context of the first meeting,⁶⁴ India has not done so.

44. As an initial matter, India also acknowledges that the EAD may in some instances be “marginally ‘in excess’ of the tax on like domestic products.”⁶⁵ India incorrectly appears to view that fact as not detrimental to its assertion that the EAD is a charge imposed consistently with GATT 1994 Article III, arguing that this “marginal” amount in excess would be “below the ‘*de minimi*’ level permissible” under the Ad Note to GATT 1994 Article III. However, as explained above, the relevant inquiry with respect to the EAD concerns the first sentence to GATT 1994 Article III (to which the Ad Note does not apply) because the EAD and internal taxes to which the EAD is allegedly equivalent concern “like” products. There is no “permissible” *de minimi* level of excess taxation permitted under the first sentence of GATT 1994 Article III:2. Therefore, in conceding the EAD may result in *any* amount of charge on imports in excess of internal taxes on like domestic products, India has disproved its own assertions that the EAD is imposed consistently with GATT 1994 Article III and in turn justified under GATT 1994 Article II:2(a).

45. In any event, even if India had not made this admission, there is ample reason to reject India’s assertions that the EAD is justified under GATT 1994 Article II:2(a), both on the basis that the EAD is not a charge equivalent to an internal tax and that it is not imposed consistently with GATT 1994 Article III:2.

1. EAD Is Not "Equivalent" to the VAT, CST or Other Local Taxes or Charges

46. Foremost, the EAD is not “a charge equivalent to an internal tax” because as elaborated in Section II.A, it is an “ordinary customs duty” within the meaning of GATT 1994 Article II:1(b). It therefore cannot be a charge equivalent to an internal tax.

47. In addition, with respect to its assertions that the EAD is equivalent to other local taxes and charges, India has not – despite repeated requests⁶⁶ – identified any such other local taxes or charges. Accordingly, India cannot sustain its assertion that the EAD is equivalent to these local taxes or charges. (Nor can it sustain its assertion that the EAD is imposed consistently with GATT 1994 Article III:2.) As a consequence, India cannot sustain its assertion that the EAD is

⁶⁴ U.S. Oral Statement at the First Panel Meeting, paras. 18-24; U.S. Responses to Questions in the Context of the First Panel Meeting, paras. 19-23.

⁶⁵ India First Written Submission, para. 85 note 51.

⁶⁶ See U.S. Closing Statement at the First Panel Meeting, para. 7.

“equivalent” to other local taxes or charges on like domestic products (or imposed consistent with GATT 1994 Article III:2 in relation to them).⁶⁷

48. With respect to state level VATs and the CST, as noted above, examination of whether the EAD is “equivalent” to state level VATs and the CST, requires an examination of the structure, design and effect of the EAD on the one hand and the state level VATs and CST on the other.⁶⁸ Starting with the state level VATs, these internal taxes imposed by the various Indian states are not, in terms of their structure, design or effect, “equivalent” to the EAD. First, according to India the state level VATs are set generally at four different rates depending on the product subject to the VAT: zero and one, four and 12.5 percent *ad valorem*.⁶⁹ In contrast, the EAD is set at a single rate of four percent for all products.

49. Second, while the state level VATs may generally breakdown into these four rates, there is no requirement that the individual states apply the same rate to the same domestic products.⁷⁰ Thus, one state may apply a VAT of four or 12.5 percent on a particular product, whereas another state may apply no VAT on that same product. In fact, we understand that the reform that precipitated convergence of state level VATs around these four rates expressly contemplated some variation from state to state in terms of the applicable VAT rate on the same product. For example, a White Paper on State-Level Value Added Tax by the Empowered Committee of [Indian] State Finance Ministers explains that an individual state may exempt up to ten commodities of its choosing from the VAT and that certain goods will be “outside” the VAT system, including liquor.⁷¹ In addition, the Union Territory of Delhi applies its VAT at five rates (zero and one, four, 12.5 and 20 percent) and provides that the “Government may, if it deems necessary, reduce the rates of tax as specified ...by a notification to that effect in the official Gazette.”⁷² In contrast, the EAD does not prescribe different rates of EAD for different products and does not subject imports to different rates depending on the Indian state into which it is imported. The EAD prescribes for all products, and on the importation of a product into any state, a rate of four percent.

⁶⁷ See U.S. Responses to Questions in the Context of the First Panel Meeting, para. 48 (explaining - and citing the Appellate Body report in *United States – Blouses* in support – that the party asserting a claim or defense bears the burden of presenting arguments and evidence to sustain it).

⁶⁸ U.S. Oral Statement at the First Panel Meeting, para. 19.

⁶⁹ India First Written Submission, para. 73. We note, however, that some state level VATs appear to apply five rates: zero and one, four, 12.5 and 20 percent. See, e.g., Delhi, Value-Added Tax Act, Section 4 (dated June 21, 2006), Exhibit US-23. India also notes certain products that are “outside the VAT system”. India Responses to Questions in the Context of the First Panel Meeting, para. 33.1.

⁷⁰ India appears to acknowledge there may be various instances where the state level VATs may be levied at different rates from state to state. India Response to Panel’s Questions in the Context of the First Panel Meeting, para. 27.g.2.

⁷¹ Empowered Committee of State Finance Ministers, White Paper on State-Level Value Added Tax (January 17, 2005), paras. 2.18 and 2.19. Exhibit US-24.

⁷² Delhi, Value-Added Tax Act, Section 4, Exhibit US-23.

50. Third, the state level VATs operate by crediting against the VAT owed on a product's transfer, the VAT paid on the product's previous transfers.⁷³ By contrast, there is no mechanism for crediting against the EAD owed on a product, taxes or charges paid on the product's previous transfers. Nor is there a mechanism for crediting the EAD paid on product against the VAT owed on the product's subsequent transfers in India.⁷⁴

51. The CST is not equivalent to the EAD for similar reasons. Like the VAT, the CST is imposed at various rates and may vary from state to state and from product to product. Depending on the recipient, the CST may be set at a flat 3 percent rate (if the recipient is a registered dealer) or may be set at a rate corresponding to one of the four VAT rates applicable to that product in the state in which it originated (if the recipient is not a registered dealer).⁷⁵ In contrast, the EAD prescribes a flat four percent rate that does not vary from product to product or based on the recipient or the state into which the product is imported.

52. Further, with respect to both the VAT and the CST, the amount of EAD owed on imports as compared to the amount of VAT or CST owed on like domestic products is not equivalent, since it does not correspond and is not virtually identical to the VAT or CST respectively on like domestic products. For example, with respect to some products, the rate of state level VATs and the CST is 12.5 percent; whereas the EAD is four percent. A rate of four percent does not appear to correspond or be virtually identical to a 12.5 percent rate (we note in this context that India says that the base on which both are calculated are the same).⁷⁶ The different level of charges on imports under the EAD as compared to those on like domestic products under the VAT and CST is also addressed below in connection with whether the EAD results in charges on imports in excess of internal taxes on like domestic products and supports the conclusion that the EAD is not equivalent to the state level VATs or CST.

53. Finally, we reiterate that the stated purpose of the EAD is not sufficient to support India's assertion that it is a charge equivalent to an internal tax. Thus, the fact that Section 3(5) of the Customs Tariff Act authorizes the Central Government to impose "an additional duty as would counter-balance" certain internal taxes does not mean that the resulting EAD in fact "counter-balances" such internal taxes nor that the EAD is "a charge equivalent to an internal tax". As we

⁷³ India Responses to Questions in the Context of the First Panel Meeting, para. 32.b.1.

⁷⁴ India Responses to Panel's Questions in the Context of the First Panel Meeting, para. 32.a.1. In its oral statement and responses to the Panel's questions, India asserts there are "exemption and refund mechanisms for taxes imposed on imported products. *See, e.g.,* India Oral Statement at the First Panel Meeting, para. 11. This assertion is misleading. The only exemption or refund mechanism for taxes imposed on imported products that India has identified is the mechanism for crediting the EAD paid on an input against the *central excise duty* owed on the finished product. This mechanism as elaborated below does not alter the fact that the EAD results in charges on imports in excess of the state level VATs and CST on like domestic products. *See infra* para. 59.

⁷⁵ Section 8 of the Central Sales Tax Act, *as amended*, Exhibit India-3; India Responses to the Panel's Questions in the Context of the First Panel Meeting, para. 38.1; *see also* India First Written Submission, para. 76.

⁷⁶ *See, e.g.,* India First Written Submission, para. 69.

have emphasized, that determination requires an examination of the structure, design and effect of the measure, and that examination as elaborated above demonstrates that the EAD is not equivalent to the state level VATs or CST.

2. EAD Is Not Imposed Consistently with GATT 1994 Article III:2

54. India has also conceded two critical points that demonstrate that the EAD is not imposed consistently with GATT 1994 Article III:2: (i) the state level VATs and the CST apply to imported products sold within India;⁷⁷ and (ii) the EAD is not eligible as a credit against the state level VATs or CST owed on that sale.⁷⁸ This means that imported products are subject to the EAD as well as the state level VATs and CST with no offsetting credit against either for the EAD paid. As a consequence, and since domestic products are not subject to the EAD, imported products are subject to charges in excess of those on like domestic products⁷⁹ and therefore the EAD is not imposed consistently with GATT 1994 Article III:2.⁸⁰

55. India's assertions that it has "calibrated" the EAD with the state level VATs and CST to ensure "equality of taxation" for imported goods,⁸¹ is simply incorrect. India may contend that imports are exempt from the EAD (or subject to a 1 percent rate) when like domestic products are exempt from the state level VATs and CST (or subject to a 1 percent VAT or CST).⁸² However, this does not address the point raised in the preceding paragraph that imported products are subject to the EAD – regardless of the rate at which it is imposed – in addition to the state level VATs and the CST when domestic products are only subject to the latter. Thus, even in instances where the rate of EAD may be 1 percent when the rate of state level VATs or

⁷⁷ India Responses to Questions in the Context of the First Panel Meeting, paras. 30.a.3, 30.b.2, 30.c.3, 37.b.2, 41.2.

⁷⁸ India Responses to Questions in the Context of the First Panel Meeting, para. 32.a.1.

⁷⁹ We also note that the EC compared the taxation resulting from the EAD on imports with the taxation resulting from indirect taxes on like domestic products and concluded that the EAD "leads in practice to taxation of imported wines and spirits which is higher in amount than the taxation of Indian wines and spirits in several Indian States." See EC Third Party Submission, paras. 97-99.

⁸⁰ This conclusion does not change because some imports – imports not sold within India – may not be subject to the state level VATs or CST. First, as explained above the requirement of Article III:2, first sentence that imports not be subject to internal taxes in excess of internal taxes on like domestic products applies to each import in respect of each like domestic product. Second, as explained below, the rate of EAD exceeds the rate of state level VAT or CST on the like domestic products in some instances. In such instances, application of EAD results in charges on imports – even if they are not sold within India – in excess of those on like domestic products. We note in this regard India's assertion that the EAD, VAT and CST are calculated on the same base. See, e.g., India First Written Submission, para. 69.

⁸¹ India First Written Submission, paras. 74.-75; India Responses to Questions in the Context of the First Panel Meeting, paras. 12.11, 41.2-41.3.

⁸² It is not clear that imports are necessarily exempt from the EAD when like domestic products are not subject to a state level VAT or the CST. For example, in instances where a state has exercised its authority to deviate with respect to a particular product from the rates of VAT generally leviable on that product (see *supra* Section III.C.1), it is not clear what mechanism, if any, exists to imports would likewise be exempt from EAD.

CST is 1 percent, the fact remains that imports are subject to both the EAD and the state level VATs and CST when domestic products are only subject to the latter. Further, the fact that some imports may be exempt from the EAD does not change the fact that other imports – for example alcoholic beverages and the products listed in Exhibit US-1 – are subject to the EAD in addition to the state level VATs and CST when like domestic products are only subject to the latter.

56. Moreover, the explanatory note to Section 3(5) appears to indicate that the rate of EAD may not vary on the same product based on the applicable VAT or CST rate. Specifically, the explanatory note provides:

In this sub-section, the expression “sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India” *means* the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, *the highest such tax or, as the case may be, such charge.*

57. Notwithstanding India’s contentions to the contrary,⁸³ the “plain reading” of this explanatory note means that where the like domestic product is subject to various tax rates, the “sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India” *means the highest rate of such tax or charge imposed.* Thus, in instances where the like domestic product is subject to various tax rates, Section 3(5) read with the explanatory note provides that, if the Central Government imposes the EAD,⁸⁴ imports shall be liable to an EAD that is equal to *the highest rate of tax or charge imposed on like domestic products not to exceed four percent.* In other words, Section 3(5) calls for a single rate of EAD for each product. As a consequence, where the like domestic product is subject to various rates of state level VAT or CST, the EAD on imports will necessarily exceed the rate of state level VAT or CST on at least some like domestic products.

58. India’s assertions that it has “calibrated” the EAD with the state level VATs and CST also wrongly suggests that the rate of EAD on the one hand and the rates of state level VATs and the CST on the other are the same. They are not. First, the rate of CST for sales to registered dealers is three percent whereas the rate of EAD is four percent.⁸⁵ Second, as noted above, there

⁸³ India Responses to Panel’s Questions in the Context of the First Panel Meeting, para. 27.g.4-27.g.6.

⁸⁴ See U.S. Responses to Panel’s Questions in the Context of the First Panel Meeting, para. 15.

⁸⁵ Section 8 of the Central Sales Tax Act, *as amended*, Exhibit India-3; see also India Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 38.1.

may be instances where the rate of state level VATs vary from state to state. In such instances, the EAD which is imposed at a single rate cannot at the same time be equal to two or more rates of state level VAT on like domestic products. Thus, for example, if the VAT rate in one state (State A) is four percent and in another state (State B) is zero, when imported into State B, the rate of EAD will not equal the VAT rate in one of the states. This also true with respect to the CST when its rate is based on rate of state level VAT of the state from which the product originates (i.e., sales to non-registered dealers). Third, in instances where the CST is based on the rate of state level VAT of the state from which it originates, there may be instances where the rate of CST varies within in a single state. For example, if the VAT rate in one state (State A) is four percent and in another state (State B) is zero, when sold from State A to a non-registered dealer in State C, a product will be subject to a CST rate of four percent; whereas when sold from State B to a non-registered dealer in State C, the product will be subject to a CST rate of zero. The EAD imposed at a single rate cannot at the same time be equal to two or more rates of CST.

59. India also suggest that the EAD is calibrated to the CST and VAT because the EAD paid on an input for a finished product may be credited against the *central excise tax* (abbreviated “CENVAT”)⁸⁶ owed on the finished product.⁸⁷ Taxes owed under the central excise tax, however, would not appear relevant to the question of whether the EAD results in charges on imports in excess of those imposed by the state level VATs or CST on like domestic products. And, India has acknowledged there is no mechanism for crediting the EAD paid against the state level VAT or CST owed. Thus, regardless of them mechanism that may exist for credits against the central excise tax, the fact remains that imports are subject to the EAD in addition to state level VATs and the CST when domestic like products are only subject to the latter.

60. In sum, the EAD is not a charge equivalent to an internal tax (state level VATs, the CST, or unnamed other local taxes or charges) and, as India even concedes, it is imposed on imports in excess of internal taxes on like domestic product. Therefore, the EAD is not a charge equivalent to an internal tax imposed consistently with GATT 1994 Article III:2.

IV. Terms of Reference

A. Neither Customs Notification 82/2007 Nor 102/2007 Is Within the Panel's Terms of Reference

⁸⁶ India calls its central excise tax the “Central Value Added Tax (CENVAT).” See Section 3 of the Central Excise Act, US-Exhibit 21.

⁸⁷ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 41.2-41.4; see also *id.* paras. 32.a.2. India also suggests that the EAD may be credited against other unspecified internal taxes which ensure that the EAD does not result in excess taxation of imports. India Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 32.a.2., 41.4. India however provides no further detail or evidence in support of this assertion and in any event has admitted that no credits may be taken for the EAD against the state level VATs or CST – the two named taxes to which India asserts the EAD is equivalent.

61. India has invited this Panel to make findings with respect to two Customs Notifications issued after the date of this Panel’s establishment on June 20, 2007: Customs Notification 82/2007 and Customs Notification 102/2007 issued on July 3, 2007 and September 14, 2007 respectively. The Panel should not accept India’s invitation because these measures are not within the Panel’s terms of reference.

62. India contends that Customs Notification 82/2007 “effectively overrides” or “effectively removes” the AD imposed by Customs Notification 32/2007 and that as a result imports of alcoholic beverages are “not liable to an additional duty within the meaning of Section 3(1) of the [Customs Tariff Act].”⁸⁸ With respect to Customs Notification 102/2007, India asserts that it establishes a “credit mechanism [that] effectively addresses the issue of double taxation” with respect to the EAD.⁸⁹

63. As an initial matter, it is not clear that either customs notification accomplishes what India contends it does. First, contrary to India’s assertions, Customs Notification 82/2007 does not appear to “effectively remove” or “effectively override” the AD. As explained below, Section 3(1) is mandatory, providing that imports “shall ... be liable” to the AD, and remains in force. In addition, as India acknowledges, Customs Notification 32/2003 also “remains in force” in as much as it contemplates an AD on alcoholic liquor.”⁹⁰ In this connection, we suspect India’s characterization of Customs Notification 82/2007 as “effectively” overriding or “effectively” removing the AD is to avoid incorrectly suggesting that Customs Notification 82/2007 in fact removes the AD.

64. Second, Customs Notification 102/2007 raises a number of questions as to its effect on the EAD. In particular, while Customs Notification 102/2007 states that it exempts imports from the EAD, it subjects such an exemption to a number of conditions, including that the importer must pay the EAD at the time of importation and may only thereafter seek a refund of the EAD paid if certain documentation can be provided.⁹¹ Initial indications from U.S. industry are that the conditions to which exemption from the EAD is subject may effectively undermine the

⁸⁸ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 40.b.1; India First Written Submission, para. 17.

⁸⁹ India Closing Statement at the First Meeting of the Panel, para. 19.

⁹⁰ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 40.c.3. We also note that Customs Notification 82/2007 does not rescind or supercede Customs Notification 32/2003 but instead “exempts” imports from the AD specified in Customs Notification 32/2003. It is not uncommon, however, for India’s Central Government to issue one customs notification rescinding or superceding a prior customs notification and to issue a new customs notification to replace the one rescinded or superceded. For example, Customs Notification 19/2006 states that it is “in supersession of” Customs Notification 19/2005 (levying the EAD on certain specified imports) and that it “hereby directs” that all imports shall be liable to the EAD. Customs Notification 19/2006, Exhibit US-7. And, Customs Notification 12/2005 “rescinds” Customs Notification 5/2004, which prior to Customs Notification 11/2005 specified the rates of BCD on distilled spirits. Customs Notification 12/2005, (March 1, 2005) Exhibit US-25; Customs Notification 5/2004, Exhibit US-26 (Jan. 8, 2004).

⁹¹ Customs Notification 102/2007, India Exhibit-22.

exemption itself. In addition, Customs Notification 19/2006, requiring imposition of the EAD, remains in force.

65. In any event, regardless of what exactly Custom Notification 82/2007 or Customs Notification 102/2007 accomplish, as mentioned, neither of these measures are within this Panel's terms of reference and, accordingly the Panel, may not take their effect on the AD and EAD into account in making findings on the latter.

66. In this regard, the U.S. request for the establishment of a panel in this dispute forms the basis of this Panel's terms of reference.⁹² The U.S. panel request includes a number of measures comprising the BCD, AD and EAD; it does not include Customs Notification 82/2007 or Customs Notification 102/2007 as neither of these measures existed at the time.⁹³ This Panel's term of reference were fixed on the date of its establishment, June 20, 2007. Accordingly, this Panel's terms of reference are limited to those measures existing on the date of establishment and cited in the U.S. panel request.⁹⁴ Because Customs Notification 82/2007 and Customs Notification 102/2007 are not cited in the U.S. panel request, and did not even exist on the date of establishment, they are outside this Panel's terms of reference⁹⁵ and the Panel, therefore, may not make findings with respect to them.⁹⁶

67. India argues that, notwithstanding the fact that Customs Notification 82/2007 was issued after the date of establishment, it is nonetheless within the Panel's terms of reference because it does not "change the essence" of the AD. India quotes from the Appellate Body's report in *Chile – Price Bands* in support of this proposition.⁹⁷ The Panel should reject India's argument.

⁹² See WT/DS360/6 (July 3, 2007) (setting forth the Panel's terms of reference as follows: "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS360/5, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."); Request for the Establishment of a Panel by the United States, WT/DS360/5 (May 24, 2007); see also Appellate Body Report, *EC – Bananas*, para. 142; Appellate Body Report, *Thailand – Steel*, para. 86.

⁹³ Request for the Establishment of a Panel by the United States, WT/DS360/5 (May 24, 2007). India's contention that the U.S. panel request includes amendments issued after the date of establishment on account of that request's reference to "any amendments, related measures, or implementing measures" is incorrect. That reference concerns "any amendments, related measures, or implementing measures" existing as of the date of the request and not amendments or measures coming into existence thereafter.

⁹⁴ Appellate Body Report, *United States – OCTG*, para. 160 ("A panel's terms of reference are governed by the claims set out in the complaining party's panel request.").
to or contained in the terms of reference.

⁹⁵ See, e.g., Panel Report, *Indonesia – Autos*, para. 14.3 (finding that a measure not cited in the panel request and not existing on the date of establishment was not within the panel's terms of reference); see also *id.*, note 642 (citing additional panels to have taken this approach).

⁹⁶ Appellate Body Report, *Brazil – Coconuts*, p. 22 (stating that a panel's jurisdiction is limited to its terms of reference).

⁹⁷ India First Written Submission, para. 37. In paragraph 37, India attributes the following quote to paragraph 144 of the Appellate Body Report in *Chile – Price Bands*: "a panel has the authority to examine a legal instrument

68. First, India contends that Customs Notification 82/2007 “effectively removes the AD on alcoholic liquor imposed by [Customs Notification] 32/2003” and that as a result imports of alcoholic beverages are “not liable to an additional duty within the meaning of Section 3(1) of the [Customs Tariff Act].”⁹⁸ If this is true, it would not seem tenable for India to also argue that Customs Notification 82/2007 does not “change the essence” of Customs Notification 32/2003. A measure effectively removing liability for another measure would seem to necessarily change the essence of the latter measure. In other words, if Customs Notification 82/2007 does what India contends – i.e. effectively removes the AD – then it would seem to fundamentally change the essence of the AD.⁹⁹

69. Second, India’s selectively reads, and in fact misquotes, the Appellate Body’s findings in *Chile – Price Bands* and fails to note a number of distinctions between the facts of that dispute and the one before this panel. In *Chile – Price Bands*, the Appellate Body found that “if the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measure as amended in coming to a decision in a dispute.”¹⁰⁰ In that dispute, the Appellate Body concluded that the measures before it on appeal included Law 19.772, an amendment to Law 18.525 (establishing Chile’s price band system) enacted after the date of the panel’s establishment.¹⁰¹

70. The parameters the Appellate Body described in *Chile – Price Bands* do not exist with respect to this dispute.¹⁰² It is not necessary to consider Customs Notification 82/2007 (or Customs Notification 102/2007) in order to secure a positive solution in this dispute. In fact,

enacted after the establishment of the panel that amends a measure identified in the panel request.” That quote does not appear in the Appellate Body’s report. See *infra* paras. 69-70 (quoting paragraph 144 of the Appellate Body’s Report in *Chile – Price Bands*).

⁹⁸ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 40.b.1, 40.c.2; India Oral Statement at the First Panel Meeting, para. 17; India First Written Submission, para. 17.

⁹⁹ The facts of this dispute are also distinguishable from *Chile – Price Bands*. That dispute concerned a legislative amendment, enacted after the date of establishment, to the law cited in the panel request (Law 18.525) as establishing Chile’s price band system. The amendment made explicit a requirement already considered implicit under Chilean law as of date of establishment, and Chile’s price band system remained “essentially the same” after the amendment as before. *Id.* paras. 137-139. In this dispute, the “amendment” at issue allegedly effectively removes the AD and allegedly permits something that expressly was not permitted under Indian law as of the date of establishment – the non-payment of the AD.

¹⁰⁰ Para. 144

¹⁰¹ Para. 139. In *EC – Frozen Chicken*, the Appellate Body concluded that the circumstances of that dispute were different than the circumstances in *Chile – Price Bands* and declined to find two measures that were not cited in the panel request to be within the panel’s terms of reference. Appellate Body Report, *EC – Frozen Chicken*, paras. 155-162.

¹⁰² It should be noted that the parties in *Chile – Price Band* agreed that the panel properly issued findings on Law 18.525, as amended by Law 19.772. *Id.* paras. 133, 143.

doing so would be contrary to that objective. In this regard, we note that the Appellate Body in *Chile – Price Bands* prefaced its finding quoted above by stating:

We emphasize that we do not mean to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by us. We do not suggest that this occurred in this case. However, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a “moving target.”¹⁰³

71. As we noted in our oral statement at the first panel meeting, we share the Appellate Body’s concern that if a panel takes into account measures introduced after the date of establishment, this creates a “moving target” and may result in shielding a measure from panel scrutiny. This concern is particularly acute in this dispute.

72. First, the “amendments” at issue are customs notifications that India contends “effectively remove” the AD (Customs Notification 82/2007) and “effectively addresses the issue of double taxation” of the EAD (Customs Notification 102/2007).¹⁰⁴ India has already acknowledged that its Central Government can, at its discretion, withdraw Customs Notification 82/2007 and reinstate Customs Notification 32/2003.¹⁰⁵ We understand this same discretion to exist with respect to Customs Notification 102/2007. India has also acknowledged that it contemplates that “subsequent to the removal of the AD,” the Indian states will impose measures similar to the AD.¹⁰⁶ And we further note that Section 3(1) of the Customs Tariff Act mandates imposition of the AD. It is also unclear, as noted above, whether Customs Notification 102/2007 in fact resolves the issue of “double taxation” of imports. Accordingly, there is a very real possibility that after conclusion of these proceedings, Customs Notification 82/2007 or Customs Notification 102/2007 may be withdrawn, that the Indian states may introduce measures similar to the AD, or that Customs Notification 102/2007 may not in fact eliminate charges on imports in excess of those on like domestic products. We trust that India has issued Customs Notification 82/2007 and Customs Notification 102/2007 – as it states – in the spirit of honoring its WTO commitments and not with the intent of shielding the AD or EAD from Panel scrutiny. However, we offer that consideration of these notifications in relation to AD and EAD would not contribute

¹⁰³ Para. 144.

¹⁰⁴ In contrast, *Chile – Price Bands* concerned enactment of one law amending another law. Appellate Body Report, *Chile – Price Bands*, para. 137.

¹⁰⁵ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 40.c.2-40.c.4; *see also* India First Written Submission, para. 27-28, 30 (emphasizing the Central Government’s “complete discretion” with respect to the AD).

¹⁰⁶ India First Written Submission, para. 44; *see also* Government of India, Press Release: “Withdrawal of the Additional Duty of Customs (In Lieu of State Excise on Wines, Spirits and Liquors) on Wine, Spirits and Liquors,” Exhibit US-10.

to securing a positive solution in this dispute given the uncertainty today as to what the measures accomplish or how long they will remain in effect and that possibility that the AD may be reimposed, either by the Central Government or the states.

73. Second, as explained above, it is not clear the effect either Customs Notification 82/2007 or Customs Notification 102/2007 have on the measures in dispute.¹⁰⁷ Were they to have the effect India contends, this could demand an adjustment in the U.S. arguments in this dispute. Given the fact that the United States was unable to consult on these measures because of their adoption after the date of panel establishment, and given the limited time the United States has had to review and understand either measure, including taking stock of how the measures work in practice, whether such adjustments are warranted is unknown. Moreover, given India's Central Government's asserted "complete discretion" to issue customs notifications, it not at all clear that later in these proceedings the Panel or the United States may not be faced with examining yet another customs notification in connection with the AD or EAD. This appears to be exactly the type of "moving target" situation with which the Appellate Body was concerned.

74. The extent to which either Customs Notification 82/2007 or Customs Notification 102/2007 has an effect on the AD or EAD would be a matter for the compliance stage of this dispute, as India itself notes in its arguments in *India – Autos*.¹⁰⁸

V. The AD and EAD Are Mandatory Not Discretionary

75. India asserts that Section 3 of the Customs Tariff Act and Section 12 of the Customs Act are not mandatory¹⁰⁹ and as a consequence that they "may not be characterized as 'measures' subject to challenge by the United States."¹¹⁰ India urges the Panel to restrict its examination to the relevant customs notifications levying the AD and the EAD, which it considers to be the only

¹⁰⁷ In contrast, in *Chile – Price Bands*, the party's agreed the amendment made explicit that duties imposed as consequence of the price band system were capped at 31.5 percent, Chile's WTO-bound rate. Appellate Body Report, *Chile – Price Bands*, para. 137.

¹⁰⁸ U.S. Oral Statement, para. 30 (quoting India's arguments in *India – Autos*).

¹⁰⁹ India First Written Submission, paras. 27-32.

¹¹⁰ *Id.*, para. 39. We note that India's position in this dispute appears to directly contradict the position it has taken in *United States – Shrimp Bonding* where it argues that there is no mandatory-discretionary distinction and that measures that merely provide the discretion for WTO-inconsistent conduct may be found WTO-inconsistent as such. See *United States – Shrimp Bonding*, WT/DS345, Non-Confidential Summary of India First Submission (March 20, 2007), para. 16 ("distinction between "mandatory" and "discretionary" under the GATT 1947 does not survive any longer. The very existence of discretion to impose measures that represent impermissible responses to dumping or subsidization renders such provisions in the laws, regulations and administrative procedures of Members inconsistent with their obligations under Article 18.4 of the Antidumping Agreement and Article 32.5 of the Subsidies Agreement). We do not concur with India's position in *Shrimp Bonding* but not it here in light of the contrary position India has taken here. See *United States – Shrimp Bonding*, WT/DS345, U.S. First Written Submission, para. 52; *United States – Shrimp Bonding*, WT/DS345, U.S. Second Written Submission, para. 44.

mandatory measures in this dispute.¹¹¹ This argument should not divert the Panel’s attention from the fact that the AD and the EAD result in charges in excess of those specified in India’s Schedule.

76. The Panel should reject India’s argument. First, despite India’s contention to the contrary and strained legal analysis in support thereof, as elaborated below, Section 3(1) and 3(5) of the Customs Tariff Act and Section 12 of the Customs Act are mandatory. Section 3(1) of the Customs Tariff Act and Section 12 of the Customs Act require both imposition of the AD and its imposition at the “highest rate.” Section 3(5) of the Customs Tariff Act requires that if the EAD is imposed it shall be levied at the “highest rate.” Sections 3(2), 3(6) and 3(7) of the Customs Tariff Act are also mandatory, requiring that the AD and EAD shall be calculated on top of and in addition to the BCD.

77. Second, on account of these requirements, Section 12 of the Customs Act and Section 3(1), 3(2) and 3(7) of the Customs Tariff Act when imposed together with the BCD mandate a breach of GATT 1994 Article II:1(a) and (b) with respect to the AD. None of these measures provide the Central Government the discretion to act in a manner consistent with GATT 1994 Article II:1(a) or (b).¹¹² Although Customs Notification 32/2003 specifies the rate of AD on alcoholic beverages, the statutory provisions mandating its imposition result in a breach regardless of the rate of AD specified in a customs notification. As explained in our first written submission, because India already imposes the BCD on imports of alcoholic beverages at its WTO-bound rate, imposition of the AD at any rate in addition to the BCD results in ordinary customs duties in excess of India’s WTO-bound rate.¹¹³

78. If the AD were considered an ODC, Section 12 of the Customs Act and Section 3(1), 3(2) and 3(7) of the Customs Tariff Act would likewise necessarily breach of GATT 1994 Article II:1(b) because India does not specify any ODCs in its Schedule. These statutory provisions also mean that the AD is not justified under GATT Article II:2(a) because, as explained above, the AD is not “equivalent” to an internal charge and these provisions require that, where internal taxes are imposed on like domestic products at different rates, the rate of AD on imports shall be the highest of those rates. Therefore, Section 12 of the Customs Act and Section 3(1), 3(2) and

¹¹¹ *Id.*, paras. 39, 41; India Oral Statement at the First Panel Meeting, para. 32.

¹¹² India suggests the distinction between mandatory and discretionary legislation turns on whether there is relevant discretion vested in the executive branch. India Oral Statement at the First Panel Meeting, para. 31. We would point out 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. Moreover, a measure mandating WTO-inconsistent action is inconsistent as such regardless of whether the measure is actually applied or enforced. See GATT Panel Report, *United States – Malt Beverages*, para. 5.39, 5.60.

¹¹³ See U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 3 (describing how in *Argentina – Textiles* the Appellate Body found Argentina’s DIEM as such inconsistent with GATT 1994 Article II:1(b) even though the DIEM did not result in duties in excess of Argentina’s WTO-bound rate for all imports).

3(7) of the Customs Tariff Act also necessarily result in charges on imports that are not equivalent to any internal charge and are in excess of internal taxes on like domestic products.¹¹⁴

79. The above is also true with respect to the EAD as well. If the EAD were considered an ODC, Section 12 and Section 3(5), 3(6) and 3(7) would necessarily constitute a breach of GATT Article 1994 Article II:1(b), because India does not specify any ODCs in its Schedule. These statutory provisions also mean that the EAD is not “equivalent” to any internal charges and these provisions require that, where internal taxes are imposed on like domestic products at different rates, the rate of EAD on imports shall be the highest of those rates. Therefore, Section 12 of the Customs Act and Section 3(5), 3(6) and 3(7) of the Customs Tariff Act necessarily result in charges on imports that are not equivalent to any internal charge and are in excess of internal taxes on like domestic products.¹¹⁵

80. The United States suggests, however, that the Panel need not engage in elaborate analysis of whether Section 12 of the Customs Act or Sections 3(1) and 3(5) of the Customs Tariff Act are mandatory verses discretionary as the U.S. claims concern the AD comprising a number of provisions of Indian law (including Section 3(1) of the Customs Act and Customs Notification 32/2003)¹¹⁶ that when imposed together with the BCD result in ordinary customs duties on alcoholic beverages that exceed India’s WTO-bound rate in breach of GATT 1994 Article II:1(a) and (b).¹¹⁷ Similarly, the U.S. claims with respect to the EAD, concern the EAD comprising a number of provisions of Indian law (including Section 3(5) and Customs Notification 19/2006)¹¹⁸ when imposed together with the BCD result in ordinary customs duties on imports that exceed India’s WTO-bound rate in breach of GATT 1994 Article II:1(a) and (b).¹¹⁹ With respect to both the AD and the EAD, the provisions of Indian law comprising them, when applied together with the BCD mandate a breach of GATT 1994 Article II:1(a) and (b). India itself acknowledges that the AD and the EAD are mandatory in so far as Customs Notification 32/2003 and 19/2006 specify the rates at which imports shall be liable to the AD and the EAD respectively.

A. Section 3(1) of the Customs Tariff Act

81. As reviewed in our responses to the Panel’s questions,¹²⁰ Section 3(1) of the Customs Tariff Act provides: “Any article imported into India shall, in addition, be liable to a duty ...

¹¹⁴ See *supra* paras. 38-39.

¹¹⁵ See *supra* paras. 56-57.

¹¹⁶ See U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 35 (specifying the provisions of Indian law comprising the AD).

¹¹⁷ See *id.*, para. 38.

¹¹⁸ See *id.*, para. 36 (specifying the provisions of Indian law comprising the EAD)

¹¹⁹ See *id.*, para. 38.

¹²⁰ U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 12.

equal to the excise duty for the time being leviable on a like article if produced or manufactured in India.”¹²¹ The wording of Section 3(1) is thus clear on its face: the AD shall be imposed on articles imported into India.

82. It is simply not tenable, as India argues, that Section 3(1)’s use of the words “shall...be liable” “merely establishes that a product is ‘exposed to’ or may ‘bear the burden of’ a tax and does not by itself require the tax to be levied.”¹²² Notably, India bases this contention solely on its definition of “liable” (“exposed, as to damage, penalty, expense, burden etc.”), and conveniently neglects to acknowledge that the word “liable” is preceded by the words “shall be.” Later, India argues that the word “shall” “merely suggests that imported goods shall be the subject matter of a levy.”¹²³ It is unclear why India believes that a requirement that imports be the subject matter of a levy would not be mandatory.

83. It is also clear that Section 3(1) mandates imposition of the AD because for products other than alcoholic beverages it is the only legal instrument subjecting imports to the AD. We note that India explains that the rate of AD for products other than alcoholic beverages is pegged to the rates of central excise tax on like domestic products; and no customs notifications have been issued specifying the rates of AD (or requiring its collection) for products other than alcoholic beverages.¹²⁴

84. India asserts that Section 3(1) is discretionary because the Central Government may exercise its authority under Section 25(1) of the Customs Act and Section 3(8) of the Customs Tariff Act to “exempt” certain imports from payment of the AD.¹²⁵ The fact that those provisions provide the Central Government such authority, however, only proves that Section 3(1) requires its imposition. That is, in the absence of an exercise of authority under Section 25(1) or Section 3(8) to exempt certain imports, all imports “shall... be liable” for payment of the AD under Section 3(1). The fact that India issued a customs notification¹²⁶ pursuant to Sections 25(1) and 3(8) apparently exempting imports of alcoholic beverages from the rates of AD specified in Customs Notification 32/2003 further supports this point: Section 3(1) requires the imposition of the AD on alcoholic beverages (and all other imports) and only through an exercise of authority under a separate statutory provisions may imports be exempt from the AD.

¹²¹ Section 3(1) of the Customs Tariff Act, Exhibit US-3A (emphasis added).

¹²² India Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 11.1.

¹²³ *Id.*, para. 11.5.

¹²⁴ *Id.*, para. 37.j.1; *see also* U.S. First Written Submission, para. 21. Customs Notification 89/1982 cited by India in this regard further supports this point. That notification exempts imported goods from payment of the AD in excess of the excise duty leviable on like domestic products. Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 27.d.2. There would, however, be no need for Customs Notification 89/1982 to exempt imports from duties in excess of the excise duty leviable on like domestic products if Section 3(1) did not mandate their imposition in the first instance.

¹²⁵ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 27.k.2.

¹²⁶ Customs Notification 82/2007, Exhibit India-6.

85. India also contends that with respect to the alcoholic beverages the proviso to Section 3(1) supports its contention that Section 3(1) is not mandatory.¹²⁷ As reviewed in our responses to the Panel’s questions, India’s reading is in this regard is similarly untenable.¹²⁸ The proviso merely sets out an exception to Section 3(1) with respect to the rate of AD for alcoholic beverages and does not supercede the requirement in Section 3(1) that any article imported into India shall be liable to the AD nor does the proviso grant the Central Government discretion to deviate from that requirement with respect to alcoholic beverages. We also note that in its responses to the Panel’s questions, India appears to concede that the opening paragraph of Section 3(1) (“[a]ny article which is imported into India shall, in addition, be liable to a duty...”)¹²⁹ applies equally to imports of alcoholic beverages as it does to imports of other products.¹²⁹

86. As we also reviewed in our responses to the Panel’s questions, comparison of the language in Section 3(1) with Section 3(5) of the Customs Tariff Act further demonstrates that Section 3(1) requires imposition of the AD.¹³⁰ While Section 3(5) provides that the Central Government “may ... direct that [imports] shall be liable” to the EAD, Section 3(1) provides that imports “shall ...be liable” to the AD. And, while Customs Notification 32/2003 states that it “hereby specifies ... the rates” of AD, Customs Notification 19/2006 states that it “hereby directs that all goods ... shall be liable to an additional duty of customs at a rate of four percent *ad valorem*.”¹³¹

87. Section 3(1) is also mandatory with respect to the rate at which the AD shall be levied on imports. As reviewed above,¹³² Section 3(1) requires that where excise duties are leviable on domestic products at different rates, the AD shall be levied at the highest of such rates.

B. Section 12 of the Customs Act

88. Section 12 of the Customs Act is likewise mandatory. It provides:

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.¹³³

¹²⁷ India First Written Submission, para. 29.

¹²⁸ U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 13-14.

¹²⁹ India Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 27.b.2.

¹³⁰ U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 15

¹³¹ Customs Notification 19/2006 (March 1, 2006), Exhibit US-7.

¹³² See *supra* paras. 38-39.

¹³³ Section 12 of the Customs Act, Exhibit US-2 (emphasis added).

89. As reviewed in our responses to the Panel’s questions “shall” expresses a command and “used in laws, regulations, or directives ... express[es] what is mandatory.”¹³⁴ Section 12 requires the levying of customs duties *inter alia* on imports as specified in the Customs Tariff Act. The Customs Tariff Act specifies that imports shall be liable to the AD and at the “highest rate.” Therefore, read in conjunction with Section 3(1) of the Customs Tariff Act, Section 12 of the Customs Act mandates the imposition of the AD.

90. India’s contention that Section 12 of the Customs Tariff Act applies only with respect to the BCD specified in Section 2 of the Customs Tariff Act is not support by the text of the provision. In particular, Section 12 does not limit its application to Section 2 of the Customs Tariff Act nor generally to specific or relevant provisions of the Customs Tariff Act. Instead, Section 12 broadly refers to the Customs Tariff Act and any other provision of law in force. In addition, as reviewed in our responses to the Panel’s questions, the AD is an “ordinary customs duty” and under provisions of Indian law is refer to as a “duty of customs.”¹³⁵ Thus, the reference in Section 12 of the Customs Act to “duties of customs” appears to similarly refer broadly to any duty of customs imposed under any provision of Indian law.

C. Section 3(5) of the Customs Tariff Act

91. Section 3(5) of the Customs Tariff Act, although discretionary in terms of whether the Central Government imposes the EAD, is mandatory with respect to the rate at which the EAD shall be imposed should the Central Government chose to exercise that discretion. As reviewed above,¹³⁶ in instances where the like domestic product is subject to various tax rates, Section 3(5) read with the explanatory note provides that, if the Central Government imposes the EAD, imports shall be liable to an EAD that is equal to the highest rate of tax or charge imposed on like domestic products not to exceed four percent.

VI. Conclusion

92. For the reasons set out above and in its prior submissions and statements, the United States respectfully requests the Panel to find that:

- (1) the AD is:

¹³⁴ 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.)”).

¹³⁵ U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, paras. 19-23.

¹³⁶ See *supra*, paras. 56-57.

- (a) inconsistent with GATT 1994 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 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; and
- (2) the EAD:
- (a) inconsistent with GATT 1994 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 1994 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.

TABLE OF EXHIBITS

Exhibit US-	
23	Delhi, Value-Added Tax Act, Section 4
24	Empowered Committee of State Finance Ministers, White Paper on State-Level Value Added Tax (January 17, 2005)
25	Customs Notification 12/2005 (March 1, 2005)
26	Customs Notification 5/2004, Exhibit US-26 (Jan. 8, 2004)