

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

WT/DS360

**Opening Statement of the United States
at the First Meeting of the Panel with the Parties**

September 17, 2007

1. Thank you Mr. Chairman, and members of the Panel, for this opportunity to appear before you today. We appreciate your willingness to devote your time and energy to this dispute.
2. The claims in this dispute are relatively straightforward. This dispute concerns two customs duties that India imposes on imports from the United States, including on beer, wine and distilled spirits. These duties are the additional customs duty and the extra-additional customs duty, which I will refer to as the AD and the EAD respectively. (We note that India has referred to the EAD as the Special Additional Duty or SUAD; we, however, refer to it as the extra-additional customs duty since it is applied on top of and in addition to the additional customs duty as well as the basic customs duty). The AD and the EAD constitute ordinary customs duties, and India applies them at rates that exceed the bound rates to which it committed in its WTO Schedule, in some cases by as much as 267 percent. As a consequence, the AD and the EAD are each inconsistent with India's obligations under Article II:1(a) and II:1(b) of the GATT 1994. Those provisions obligate India to exempt imports from ordinary customs duties, or other duties or charges on or in connection with importation, that exceed those set out in its WTO Schedule.
3. India does not contest that either duty results in customs duties that exceed its WTO-bound rates. Rather, India contends that the AD and the EAD are intended to offset or counterbalance internal taxes applied to like domestic products and as such are not ordinary

customs duties subject to Article II:1(a) or II:1(b). Instead, India contends they are “charges equivalent to an internal tax” within the meaning of Article II:2(a) of the GATT 1994. However, there is no evidence that either duty is in fact equal to, or offsets, internal taxes applied to like domestic products. India’s written submission notably provides no accounting of how either the AD or the EAD is “equal to” or “offsets” internal taxes imposed on like domestic products that are not already applied on imported products. In fact, the only two internal taxes India identifies by name as internal taxes that the duties allegedly offset, are already imposed on imported products. The purpose or intent India attributes to the AD or the EAD alone is wholly insufficient to defend either, whether under Article II:1(a) and (b) or Article II:2(a). Moreover, India does not contest that either duty exceeds its WTO-bound rates and, in many instances, by very large margins. Instead, India merely relies on its unsubstantiated assertions that the AD and the EAD are “equal to” internal taxes on like domestic products.

4. I will return to this latter point in a few moments, but first want to focus on why the AD and the EAD are properly characterized “ordinary customs duties” within the meaning of GATT Article II:1(b).

Ordinary Customs Duties

5. As elaborated in the U.S. written submission, GATT Article II:1(b) obligates each Member to exempt imports from ordinary customs duties in excess of the bound rates set out in that Member’s WTO Schedule. In its written submission, India appears to generally agree with the interpretation of the term “ordinary customs duty” presented in the U.S. written submission. That is that an "ordinary customs duty" means a duty that applies to a good at the time of

importation – not on a case-by-case basis or in response to a singular or exceptional event or set of circumstances – but as a matter of course on, or in connection with, the good’s importation. An ordinary customs duty is typically *ad valorem* (that is, calculated on the value of the good), specific (for example, calculated based on the quantity of the good), or a combination thereof.¹

6. India’s view of why the AD and the EAD do not constitute ordinary customs duties boils down to three reasons. One, India does not intend the AD or the EAD to be an ordinary customs duty. Two, the “nature and purpose” of the AD and the EAD are “extra-ordinary”. Three, the AD and the EAD are distinct from India’s basic customs duty and, therefore, cannot be ordinary customs duties.² None of these reasons demonstrates that the AD or the EAD is *not* an ordinary customs duty.

7. With respect to India’s first and second reason, as cited in footnote 67 of the U.S. written submission, when faced with issues of this sort, the Appellate Body has not based a determination of whether a measure constitutes an ordinary customs duty on the name, stated purpose or intention of the measure, but instead on an examination of the structure, design and effect of the measure at issue. Thus, India’s singular focus on the intention or purpose it ascribes to the AD and EAD is misguided.

8. Examination of the structure, design and effect of the AD and the EAD reveals that both are ordinary customs duties. Both are structured and designed to, and in fact do, apply (i) at the time of importation, (ii) exclusively to imports, and (iii) as an *ad valorem* or specific duty. The

¹ U.S. First Written Submission, paras. 42-43.

² India First Written Submission, paras. 52-54.

rate of AD varies depending on the CIF value of the product, and the rate of EAD is a flat four percent. The AD and the EAD also each apply as a matter of course upon a good's importation, and their application does not depend on any outside factors. In each of these respects, the AD and the EAD are in structure and effect very much like India's basic customs duty. There is no evidence to support India's contentions that the AD and the EAD offset or counterbalance internal taxes applied to like domestic products - a point I will address in more detail later in my statement.

9. As to India's third reason, there is simply no basis in the WTO Agreement for India's proposition that a Member may impose only one customs duty properly categorized as an "ordinary customs duty" and that any other customs duty that the Member might impose is simply something other than an ordinary customs duty. Accordingly, contrary to India's contention, the fact that the AD and the EAD may be "distinct" from India's basic customs duty does not mean the AD and the EAD are not ordinary customs duties. Moreover, India's contentions that the AD and EAD are entirely distinct from the basic customs duty are incorrect. In fact, all three duties are imposed pursuant to the same provision under India's customs laws – that is, Section 12(1) of the Customs Act. And similarly all three duties may be exempted with respect to certain products pursuant to the same provision under India's customs laws – that is, Section 25(1) of the Customs Act. The fact that each duty is further elaborated under separate sections or sub-sections of the Customs Tariff Act does not make them "entirely distinct".

10. In any event, even if the AD and the EAD were not considered ordinary customs duties, they would nonetheless fall under GATT Article II:1(b). This is because GATT Article II:1(b)

also prohibits “other duties or charges” that are not set out in the Member’s Schedule. As elaborated in the U.S written submission, an “other duty or charge” is defined in relation to an ordinary customs duty, in that the term "other duties or charges" means those duties or charges that are not "ordinary" customs duties but are nonetheless imposed on, or in connection with, a product's importation. The AD and the EAD are customs duties applied on products – for example alcoholic beverages – on their importation. As such, if the AD or the EAD are not considered “ordinary customs duties”, either would nonetheless constitute an “other duty or charge” within the meaning of GATT Article II:1(b).

AD and EAD Exceed WTO-Bound Rates

11. Because the AD and the EAD are ordinary customs duties, or in the alternative other duties or charges, within the meaning of GATT Article II:1(b), India is obligated not to impose them in excess of the WTO-bound rates set out in its WTO Schedule. India has failed to meet that obligation.

12. Starting with the AD, as detailed in paragraph 23 of the U.S. written submission, the AD imposes duties on imports of alcoholic beverages that, on an *ad valorem* basis, range from 20 to 150 percent. And, as detailed in paragraph 50 of the U.S. submission, imposition of the AD on top of India’s basic customs duty results in ordinary customs duties on imports of beer, wine and distilled spirits (which I will collectively refer to as “alcoholic beverages”) that range from approximately 200 to 550 percent. India’s WTO Schedule specifies a bound rate of 150 percent for alcoholic beverages. The AD, thus, results in ordinary custom duties on imports of alcoholic beverages that are well over India’s WTO-bound rate – to be precise that are between 48 to 400

percentage points over India's WTO-bound rates. And, were the AD to be considered an other duty or charge, it would result in "other duties or charges" that exceed those set out in India's Schedule as India's Schedule does not specify any other duties or charges for any product.

13. Turning to the EAD, the EAD imposes a four percent ordinary customs duty on all imports except those specifically exempted through customs notifications. Exhibit US-1 details the imported products – in addition to distilled spirits – for which the EAD applies and for which its imposition results in ordinary customs duties in excess of India's WTO-bound rates. Exhibit US-1 is illustrative in that imposition of the EAD on any imported product for which India's basic customs duty is already at – or very near – India's WTO-bound rate results in a breach of India's WTO-bound rates. As with the AD, were the EAD to be considered an "other duty or charge," it would also exceed those set out in India's Schedule, as it does not specify any other duties or charges for any product.

14. As noted, India does not dispute the fact that the AD and the EAD each result in customs duties in excess of the bound rates set forth in India's Schedule. Nor does India contest the amounts by which they do. Instead, India simply reiterates its contention that the AD and the EAD are not ordinary customs duties. However, for the reasons I have already stated this morning, as well as those in the U.S. written submission, the AD and the EAD are properly considered ordinary customs duties, or in the alternative other duties or charges. And, because India imposes each of the AD and the EAD in excess of the ordinary customs duties, or other duties or charges, set forth in its WTO Schedule, each is inconsistent with Article II:1(b) and, as a consequence, also Article II:1(a) of the GATT 1994.

Article II:2(a) – General

15. India argues that notwithstanding Article II:1(a) and (b), the AD and the EAD are justified under Article II:2(a) of the GATT 1994. India calls Article II:2(a) an “exception to the rule limiting border charges to the amount of scheduled tariff bindings.”³

16. Article II:2(a) permits Members to 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.” Article II:2(a) thus consists of two elements, each of which must be met for a charge on the importation of a product to fall within the meaning of that provision. First, the charge must be “equivalent to an internal tax” imposed in respect of like domestic products. Second, the charge must be imposed in a manner consistent with GATT Article III:2 in respect of like domestic products. That is, the charge applied to imported products must not exceed the internal taxes on like domestic products to which they are asserted to be equivalent. The first element appears to focus on the qualitative aspects of the measure,⁴ whereas the latter appears to focus on its quantitative aspects.

17. India has not shown that the AD or the EAD meets either element. As a result, the Panel should reject India’s contention that the AD and the EAD may be justified under Article II:2(a). India, as the party asserting that the AD and the EAD are justified under Article II:2(a), bears the burden of substantiating that assertion and has failed to do so.

³ India First Written Submission, paras. 42 and 63.

⁴ See, e.g., Preparatory Committee, Legal Drafting Committee (Geneva Session) ECPT/TAC/PV/26, p.21 (noting that the word “equivalent” means that “for 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”).

Article II:2(a) – EAD

18. Let me begin with the first element of Article II:2(a) - a charge equivalent to an internal tax. With respect to the EAD, India asserts the EAD are “equal to” or “offset” three categories of internal taxes: (i) state-level value-added taxes or VATs; (ii) a Central Sales Tax; and (iii) unspecified “other local taxes and charges”. In support of this assertion, India cites language in its Customs Tariff Act that the Central Government may impose a duty on imports “as would counter-balance” certain internal taxes on domestic products. While India’s Customs Tariff Act may indeed state that, India fails to present, any evidence, however, that the EAD in fact accomplishes that. That is, that either the state-level VATs – which can vary from state to state for the same product – or the Central Sales Tax *are* equivalent to the EAD, or vice versa.

19. India’s explanation of the “principle applied by the Government of India in imposing” the EAD is equally unconvincing. As previously stated, the stated purpose or intention of the EAD is not determinative of whether it constitutes an ordinary customs duty or some other type of duty or charge. Instead, it is important to examine the structure, design and effect of the EAD. And, nothing in terms of the structure, design or effect of the EAD appears equivalent to the state-level VATs or the Central Sales Tax. First, as India explains the state-level VATs apply “broadly under ... four different rates of tax”: zero, 1, 4, and 12.5 percent.⁵ Second, while state-level VATs may broadly break down into these four rates, there is no requirement that each of the 28 individual Indian states apply the same rate to the same domestic products. Thus, one state may apply a VAT of four percent on a particular product, whereas another state may apply

⁵ India First Written Submission, para. 73.

no VAT on that same product. The same two points are true for the Central Sales Tax as well.

As India explained, the rate of Central Sales Tax on a particular product is linked to the VAT rate applicable to that product in the state in which the product originates. Thus, the Central Sales Tax on a particular product may similarly vary from product to product and from state to state.

In contrast, the EAD is set at a flat four percent rate; it does not vary from product to product nor does it vary based on the state into which it is imported. In fact, the Customs Tariff Act appears to expressly prohibit that, as the proviso to Section 3(5) states that where the internal taxes at issue are “leviable at different rates” the statute means to authorize imposition of a duty at a level so as to offset the “highest such tax.”

20. India’s explanations of how it “calibrates” the EAD to ensure that products exempt from the state-level VATs, and in turn the Central Sales Tax, are inapposite. The U.S. claims concern imports for which India imposes the EAD, not products that are exempt from the EAD. In any event, even if relevant, there are two important shortcomings in India’s contentions with respect to EAD exemptions, yet for the sake of time, I will save those points for our written submission.

21. Finally, in terms of the unnamed “other local taxes and charges,” India provides no details on any such other local taxes or charges. Thus, India has not even tried to substantiate its assertion that the EAD is equivalent to them.

22. With respect to the second element – imposed in a manner consistent with GATT Article III:2 – India asserts that the EAD is “equal to” the state-level VATs or the Central Sales Tax imposed on domestic products “from which imported like products *at the time of importation* are exempt.” What India neglects to inform the Panel, however, is that both the state level-VATs

and the Central Sales Tax apply to imported products. It is difficult to understand how the EAD offsets taxes that already apply to imported products. It is equally difficult to understand how the EAD results in duties on imported products that are “equal to” those applied to like domestic products, when imported products are subject to the EAD *in addition to* the same state-level VATs and the Central Sales Tax that apply to like domestic products. Put another way, assuming the EAD is “a charge equivalent” to the state-level VATs and the Central Sales Tax, imported products would be subject to these taxes twice – once in the form of the EAD at the time of importation and a second (or more) times on their internal sale within an Indian state or from one Indian state to another. Like domestic products are not subject to the EAD and thus are subject to taxes that are less than those applied to imported products. The EAD is therefore not a charge imposed in manner consistent with GATT Article III:2.

23. An additional point bears emphasizing with respect to the EAD given the fact that the state-level VATs and in turn the Central Sales Tax may, and in fact do, vary among the different Indian states. The EAD results 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. In this regard, it is irrelevant whether the EAD may also lead to lower taxes on imported products in another Indian state. The fact remains that some imported products are treated less favorably than their domestic like products, and that is inconsistent with Article III:2.

24. A final point on the EAD to note is that, for purposes of responding to India’s arguments today we have assumed that the imported products on the one hand – both alcoholic beverages and the products listed in Exhibit US-1 – and the domestic products subject to the internal taxes

at issue on the other, are – as India contends – “like” within the meaning of GATT Article III:2. We have assumed the same for the same purposes with respect to the AD. Because India has not identified any specific internal tax that the AD allegedly offsets, however, it is impossible to test the accuracy of India’s assertion that the products subject to the AD and the internal taxes it allegedly offsets are “like”.

Article II:2(a) – AD

25. In terms of whether the AD is “equivalent to an internal tax” or imposed in a manner consistent with GATT Article III:2, India provides very little in support of its assertions. India cites language in its Customs Tariff Act that directs the imposition of a duty on imports "equal to the excise duty" for the time being leviable on domestic alcoholic beverages in the different Indian states and asserts that the nature, intent and design of the AD is to offset state excises taxes. Yet, India does not identify any such state excise duties much less explain how the AD is "equivalent" to such unidentified state excise taxes. It further provides no accounting of how the AD is "equal" to such taxes much less how the AD is imposed in a manner consistent with GATT Article III. India's mere assertion that the AD is a charge equivalent to an internal tax under GATT Article II:2(a) does not make it so.

26. Thus, with respect to both the AD and the EAD India has failed to rebut the U.S. *prima facie* case that both the AD and the EAD are ordinary customs duties within the meaning of GATT Article II:1(b) and that India applies these duties to imports in excess of its WTO-bound rates.

Terms of Reference

27. As the United States noted in its first written submission, on July 3, 2007, after the DSB established this Panel with standard terms of reference, India’s Central Government issued Customs Notification 82-2007 which “exempts” alcoholic beverages from the rates of AD specified in Customs Notification 32/2003. India asserts that Customs Notification 82-2007 “effectively overrides” Customs Notification 32-2003 and that “[a]s of July 3, 2007 imports of alcoholic beverages are not charged the AD.”⁶ India acknowledges that Customs Notification 82-2007 was introduced after the Panel’s establishment, but nonetheless argues that it is within the Panel’s terms of reference and, therefore, that the Panel should take it into account in its examination of the AD.⁷

28. The United States disagrees. Customs Notification 82-2007 is not within this Panel’s terms of reference, and the Panel should not undertake to examine it in the course of this dispute.

29. First, it is not clear as a factual matter that Customs Notification 82-2007 eliminates the AD. In addition to other points on which the United States will elaborate in its second written submission, the United States is struck by India’s choice of words to describe Customs Notification 82-2007. That is, that it “effectively overrides” Customs Notification 32-2003. India does not assert that Customs Notification 32-2003 has been revoked, and the United States is not aware of any measure that does revoke it.

30. Second, even if India has eliminated the AD, Customs Notification 82-2007 is not within this Panel’s terms of reference. Customs Notification 82-2007 is not referenced in the U.S.

⁶ India’s First Written Submission, paras. 35-38 and 43.

⁷ *Id.*, para 37.

request for establishment and, since it was introduced on July 3, 2007, did not even exist when this Panel was established on June 20, 2007. To the extent Customs Notification 82-2007 has an impact on the AD would be a matter for the compliance stage of this dispute. We were surprised to see that India expressed a different view in its written submission as it appears to be a departure from its previous position. For example, before the *India – Autos* panel India argued that measures adopted by India after the panel’s establishment “should be left to a compliance panel, and the role of the initial panel should only be to take into account the situation existing as of the request for establishment of the panel and record the parties’ disagreement as to subsequent evolutions” of events after the panel’s establishment.⁸

31. Third, 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.” As the Appellate Body explained “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.’” “[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” is not to be condoned.⁹ The United States would be particularly concerned if Customs Notification 82-2007 had the effect of shielding the AD from scrutiny. For example, in the event that, after conclusion of these proceedings, India’s Central

⁸ Panel Report, *India – Autos*, paras. 6.37-6.38.

⁹ Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, paras. 137, 144.

Government exercised what it characterized its “complete discretion” to impose (or re-impose) the AD¹⁰ or the Indian states introduce measures similar to the AD, as India’s submission suggests is their intent.¹¹

32. We look forward to amplifying each of these points in our second written submission, including in connection with specific arguments India has raised in its written submission.

ACD - M/D

33. A final point we would like to address today is India’s contention that the statutory provisions establishing the AD do not mandate its imposition but only provide the Central Government the authority to impose it. The United States disagrees with India’s interpretation, in particular of its reading of the statutory words “*shall* be liable” to suggest imposition of the AD rests completely at the discretion of the Central Government. The United States will elaborate on this argument in its second written submission, but we do note that non-enforcement of a mandatory measure – which in the U.S. view the AD is – does not save the measure from being subject to challenge under the DSU.¹² In any event, India’s arguments on this issue are largely irrelevant to the outcome of this dispute. To the extent the Panel were to find the relevant statutory provisions did not mandate imposition of the AD, India freely admits Customs Notification 32-2003 does. Customs Notification 32-2003 is clearly a measure within the Panel’s terms of reference, and as reviewed a few moments ago, changes made with respect to the AD

¹⁰ India First Written Submission, para. 27-28, 30.

¹¹ India First Written Submission, para. 44.

¹² See, e.g., GATT Panel Report, *United States – Malt Beverages*, DS23/R, 39S/2006, adopted on 19 June 1992, para. 5.60.

subsequent to the Panel's establishment should not be taken into account. Therefore, the Panel need not undertake an examination of the mandatory-discretionary principle that India invites in its written submission.

Conclusion

34. Mr. Chairman, this concludes the oral statement of the United States. Thank you for your attention. We would be pleased to respond to any questions you may have.