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

(WT/DS360)

Closing Statement of the United States
at the Second Meeting of the Panel with the Parties

November 14, 2007

1. The United States has established a *prima facie* case that the AD and the EAD are each ordinary customs duties that India imposes in excess of its WTO-bound rate and are therefore inconsistent with GATT Article II:1(a) and (b).

2. India instead asserts that the AD and the EAD are charges under GATT Article II:2(a) that are equivalent to internal taxes and imposed consistently with GATT Article III:2.

3. The United States has demonstrated that neither the AD nor the EAD is in fact equivalent to an internal tax nor imposed consistently with GATT Article III:2. We have provided reasons in our written submissions and oral statement yesterday. In this statement, I would like to focus on two points that merit specific mention in light of the discussions over the last two days.

4. First, India argues that the AD and the EAD are imposed as a consequence of domestic products being charged an excise duty.

5. That is factually incorrect. As the United States has pointed out, imports may be liable for the EAD even in instances where like domestic products are not subject to the relevant internal tax or are exempted from the relevant internal tax, for example, where a state has exercised its discretion to deviate from the VAT rated suggested by the Empowered Committee. As noted in the U.S. second submission, states may deviate by imposing no rate when the Empowered Committee has suggested a 4 percent rate.

6. With respect to the AD, India has not even identified the state excise duties to which the AD on alcoholic beverages is equivalent, much less that the AD is imposed on imports as a consequence of state excise duties being levied on like domestic products.

7. India's contention is simply a repackaging of its earlier arguments that the stated purpose of the AD and EAD is sufficient to qualify those duties as in fact equivalent to an internal tax. As the United States has mentioned, the Panel should look at the structure, design, and effect of a duty and not its stated purpose.

8. Second, India asserts that the Central Government's authority to issue exemptions to the AD means that Section 3(1) itself does not mandate imposition of the AD nor imposition of the AD at the highest rate. This is incorrect. In fact, that Section 25 of the Customs Act and Section 3(8) of the Customs Tariff Act provide the Central Government authority to exempt products only proves that Section 3(1) requires the AD's imposition and that those provisions are only

exceptions to that rule – that is, that an AD shall be imposed.

9. The United States is struck by India's assertions in its second submission and statement yesterday that:

- through Customs Notifications 82/2007 and 102/2007, India has "removed" the possibility that the AD and the EAD subject imports to charges in excess of those imposed on like domestic products (para. 4.1) and;

- with those notifications in place, India has ensured conformity with its WTO obligations.

10. The first point the United States would make is that Customs Notifications 82/2007 and 102/2007 are not within the Panel's terms of reference, and their effect on the AD or EAD should not be taken into account in making findings on the AD or EAD as those measures are described in the U.S. panel request, and which form the basis of the Panel's terms of reference.

11. And we have explained that Customs Notification 82 does not "withdraw" the AD, and we do not believe that Customs Notification 102 provides a refund mechanism that – as India asserts – ensures imports are not subject to charges in excess of those on like domestic products. We have explained these points in our second written submission and yesterday's statement.

12. Today, I would like to draw attention to two additional points.

13. First, India's request that the Panel take Customs Notification 82 and 102 into account seeks to convert this panel proceeding over the conformity of the AD and the EAD with India's WTO obligations into a compliance proceeding under Article 21.5 of the DSU.

14. A panel, however, cannot properly judge whether one measure taken to bring another measure into conformity with a Member's WTO obligations in fact accomplishes that until it first makes a finding that the initial measure is WTO-inconsistent.

15. That is why in this dispute, even if Customs Notification 82 and 102 accomplish everything India claims they do, and we have explained that they do not, the Panel could not make a finding on the effect of those Customs Notifications without first making a finding on the AD and the EAD as set out in the U.S. panel request, which forms the basis of the Panel's terms of reference. Whether India's actions subsequent to the Panel's establishment have brought it into conformity with India's WTO obligations is a matter for another stage of this proceeding.

16. Second, as we have noted, India's invitation for the Panel to take Customs Notification 82 and 102 into account in making findings on the AD and the EAD as set out in the Panel's terms

of reference renders this dispute a "moving target." India could take yet another measure later in this proceeding, or the Indian states could impose new charges to replace the AD.

17. The Panel's findings in this dispute will contribute to a positive solution. First, it will provide a benchmark by which India and the United States may judge whether Customs Notification 82 or 102 or any other measure may bring the AD or the EAD into conformity with India's WTO obligations, in the event of a compliance proceeding under Article 21.5. The Panel's findings on the AD and EAD as described in the U.S. panel request will also provide clarity to India as it considers whether an exercise of what it has characterized as its complete discretion to resume collection of the AD complies with its WTO obligations. It will also guide the Indian states as they considering impose duties in lieu of the AD – as India suggests they may do – in assessing whether such duties comply with India's WTO obligations.

18. Mr. Chairman, Members of the Panel, this concludes my statement. I would like to thank you again for the time and attention you have devoted to this dispute and to braving the intricacies of the Indian tax and customs regime. We would also like to thank the Secretariat staff who have supported the Panel in this dispute.