

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

**AB-2008-7**

*Report of the Appellate Body*



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CASES CITED IN THIS REPORT

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<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Dairy (Article 21.5 – New Zealand and US)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Chile – Alcoholic Beverages</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045, and Corr.1
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – 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 22 May 2007
<i>China – Auto Parts</i>	Panel Report, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, WT/DS340/R, WT/DS342/R, and Add.1 and Add.2, circulated to WTO Members 18 July 2008
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925
<i>EEC – Minimum Import Prices</i>	GATT Panel Report, <i>EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables</i> , L/4687, adopted 18 October 1978, BISD 25S/68
<i>EEC – Parts and Components</i>	GATT Panel Report, <i>European Economic Community – Regulation on Imports of Parts and Components</i> , L/6657, adopted 16 May 1990, BISD 37S/132

Short Title	Full case title and citation
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>India – Additional Import Duties</i>	Panel Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/R, circulated to WTO Members 9 June 2008
<i>Japan – Alcoholic Beverages 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, DSR 1996:I, 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Turkey – Textiles</i>	Panel Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Certain EC Products</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Customs User Fee</i>	GATT Panel Report, <i>United States – Customs User Fee</i> , L/6264, adopted 2 February 1988, BISD 35S/245
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
<i>US – Section 337 Tariff Act</i>	GATT Panel Report, <i>United States Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S/345
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571

<b>Short Title</b>	<b>Full case title and citation</b>
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

ABBREVIATIONS USED IN THIS REPORT

<b>Abbreviation</b>	<b>Description</b>
Additional Duty	Duties imposed by India on imports of alcoholic beverages pursuant to authority under Section 3(1) of the Customs Tariff Act
Basic Customs Duty	India's basic customs duty imposed pursuant to authority under Section 12 of the Customs Act
Customs Act	India's Customs Act, 1962 (Act 52 of 1962) (Exhibits US-2 and IND-1)
Customs Tariff Act	India's Customs Tariff Act, 1975 (Act 51 of 1975) (Exhibits US-3A and IND-2A)
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Enabling Clause	GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, L/4903, 28 November 1979, BISD 26S/203
Extra-Additional Duty	Duties imposed by India pursuant to authority under Section 3(5) of the Customs Tariff Act; the Panel and India referred to this measure as the "SUAD", an abbreviation based on the phrase "such additional duty"
GATT 1947	<i>General Agreement on Tariffs and Trade 1947</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Harmonized System	Harmonized Commodity Description and Coding System
<i>Hyderabad v. India</i>	Supreme Court of India, <i>Hyderabad Industries Ltd. v. Union of India</i> , 1999 (108) E.L.T. 321 (S.C.) (Exhibit IND-11)
OCDs	"Ordinary customs duties" as referred to in Article II:1(b), first sentence, of the GATT 1994
ODCs	"Other duties or charges" as referred to in Article II:1(b), second sentence, of the GATT 1994
Panel Report	Panel Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/R, circulated to WTO Members 9 June 2008
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
VAT	Value-added tax
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization

WORLD TRADE ORGANIZATION  
APPELLATE BODY

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

United States, *Appellant/Appellee*  
India, *Appellant/Appellee*

Australia, *Third Participant*  
Chile, *Third Participant*  
European Communities, *Third Participant*  
Japan, *Third Participant*  
Viet Nam, *Third Participant*

AB-2008-7

Present:

Hillman, Presiding Member  
Sacerdoti, Member  
Zhang, Member

**I. Introduction**

1. The United States and India each appeals certain issues of law and legal interpretations developed in the Panel Report, *India – Additional and Extra-Additional Duties on Imports from the United States* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by the United States concerning two specific duties—the "Additional Duty"<sup>2</sup> and the "Extra-Additional Duty"<sup>3</sup>—imposed by India at the border on imports of certain products entering its customs territory.<sup>4</sup>

2. The United States challenged the Additional Duty as imposed by India on imports of alcoholic liquor for human consumption (beer, wine, and distilled spirits, collectively "alcoholic

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<sup>1</sup>WT/DS360/R, 9 June 2008.

<sup>2</sup>In our discussion, we use the term "Additional Duty" to describe the customs duties imposed by India on imports of alcoholic beverages pursuant to authority under Section 3(1) of India's Customs Tariff Act of 1975 (Exhibits US-3A and IND-2A submitted by the United States and India, respectively, to the Panel). Further details regarding the Additional Duty may be found in Panel Report, paras. 7.10-7.16.

<sup>3</sup>In our discussion, we use the term "Extra-Additional Duty" to describe the customs duties imposed by India on imports of alcoholic beverages pursuant to authority under Section 3(5) of India's Customs Tariff Act. We note that the Panel and India refer to this measure as "SUAD", an abbreviation based on the phrase "such additional duty" found in Section 3(5) of India's Customs Tariff Act. Further details regarding the Extra-Additional Duty may be found in Panel Report, paras. 7.17-7.24.

<sup>4</sup>Panel Report, para. 7.2. India applies these duties in addition to the basic customs duties it imposes pursuant to authority under Section 12 of India's Customs Act of 1962 (Exhibits US-2 and IND-1 submitted by the United States and India, respectively, to the Panel). In our discussion, we use the term "Basic Customs Duty" to refer to the latter duties imposed under Section 12. Further details regarding India's Basic Customs Duty may be found in Panel Report, paras. 2.2, 7.2, and 7.6-7.9.

beverages").<sup>5</sup> The United States also challenged the Extra-Additional Duty imposed by India on imports of alcoholic beverages and other products, including agricultural products (such as milk, raisins, and orange juice) and industrial products falling mainly under chapters 84, 85, and 90 of the Harmonized Commodity Description and Coding System (the "Harmonized System").<sup>6</sup> The factual aspects of the challenged measures are set out in greater detail in the Panel Report<sup>7</sup> and in Section V of this Report.

3. Before the Panel, the United States claimed that the Additional Duty and the Extra-Additional Duty are inconsistent with India's obligations under Articles II:1(a) and II:1(b) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") because the Additional Duty and the Extra-Additional Duty subject imports to ordinary customs duties ("OCDs") or other duties or charges ("ODCs") in excess of those specified in India's Schedule of Concessions.<sup>8</sup>

4. In response, India contested the characterization of the Additional Duty and the Extra-Additional Duty as an OCD or an ODC within the meaning of Article II:1(b), arguing instead that the Additional Duty and the Extra-Additional Duty are charges equivalent to internal taxes imposed consistently with Article III:2 of the GATT 1994 in respect of like domestic products and, as such, fall within the scope of Article II:2(a).<sup>9</sup> India further claimed that the Additional Duty is levied in lieu of state excise duties imposed in respect of like alcoholic beverages produced or manufactured in the state imposing the duty, while the Extra-Additional Duty is imposed to counterbalance sales taxes, value-added tax ("VAT") and other local taxes and charges.<sup>10</sup>

5. The Panel defined the issue presented in this case as whether the residual category of charges imposed on the importation of a product—ODCs under Article II:1(b), second sentence—should

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<sup>5</sup>Panel Report, para. 7.11. The rates of Additional Duty on alcoholic beverages are specified in India's Customs Notification 32/2003 of 1 March 2003. (Exhibits US-6 and IND-5 submitted by the United States and India, respectively, to the Panel) See also Panel Report, paras. 2.1 and 7.15. On 3 July 2007, India issued Customs Notification 82/2007 (Exhibit IND-6 submitted by India to the Panel). Through this notification, India exempted from the Additional Duty all goods listed in Customs Notification 32/2003. (Panel Report, para. 7.16) The Panel found that its terms of reference did not extend to Customs Notification 82/2007 and, consequently, declined to rule on the Additional Duty on alcoholic liquor as modified by that notification. (Panel Report, paras. 7.71 and 7.72)

<sup>6</sup>Panel Report, para. 7.19. The Extra-Additional Duty is imposed by India at a rate of four per cent *ad valorem* pursuant to Customs Notification 19/2006 of 1 March 2006. (Exhibits US-7 and IND-7 submitted by the United States and India, respectively, to the Panel) See also Panel Report, para. 2.1. On 14 September 2007, India issued Customs Notification 102/2007, that exempted, subject to certain conditions, certain products from the Extra-Additional Duty when imported into India for subsequent sale. (Panel Report, para. 7.24) The Panel found that its terms of reference did not extend to Customs Notification 102/2007 and, consequently, declined to rule on the Extra-Additional Duty as modified by that notification. (Panel Report, paras. 7.99 and 7.100)

<sup>7</sup>Panel Report, paras. 7.2-7.24.

<sup>8</sup>*Ibid.*, para. 7.5.

<sup>9</sup>*Ibid.*, paras. 7.30 and 7.150.

<sup>10</sup>*Ibid.*, para. 7.30.

comprise any and all duties and charges other than OCDs, or only a subset of all such duties and charges.<sup>11</sup> The Panel considered that OCDs discriminate against imports because they inherently disadvantage imports of the subject products vis-à-vis domestic products, and that there is a "readily apparent rationale" of anti-circumvention for subjecting ODCs that are of the same kind as OCDs to the disciplines of Article II:1(b).<sup>12</sup> The Panel then determined that duties and charges identified in Article II:2 differ from OCDs because they "do not inherently discriminate against, or disadvantage, imports".<sup>13</sup> As a result, the Panel concluded that "Article II:2 does not set out exceptions to the positive obligations contained in Article II:1(b)", and that, accordingly, the "sub-paragraphs of Article II:2 do not provide affirmative defences to a claim of violation of Article II:1(b)".<sup>14</sup>

6. The Panel recalled that the United States defined OCDs as applying to goods as a matter of course on their importation, and which typically take the form of *ad valorem* duties, specific duties, or a combination thereof.<sup>15</sup> The Panel considered, however, that the elements of this definition would also apply to ODCs under Article II:1(b) and a "charge equivalent to an internal tax" under Article II:2(a), and that the definition offered by the United States "is not sufficient, by itself" to establish that the relevant charge falls within Article II:1(b), as opposed to Article II:2(a).<sup>16</sup> The Panel found, therefore, that the United States must also show that a charge "inherently discriminates against, or disadvantages, imports".<sup>17</sup> Noting that the United States had not done so, the Panel was of the view that the United States could only establish that a charge is in the nature of an OCD or ODC if it could also demonstrate that the charge "falls outside the scope of Article II:2(a)".<sup>18</sup> The Panel thus found that, "in the circumstances of the present case, it is incumbent upon the United States to make a *prima facie* case that the measures at issue fall outside the scope of Article II:2(a)".<sup>19</sup>

7. The Panel read Article II:2(a) as comprising two elements, namely, "equivalence" and "consistency with Article III:2". The Panel considered that "equivalent" could not mean "having the same effect" or "equal in amount", because this would fail to give separate meaning to the concepts of "equivalence" and "consistency with Article III:2".<sup>20</sup> Instead, the Panel found that "equivalent" means "having the same function" or "corresponding". The Panel also determined that a rate differential

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<sup>11</sup>Panel Report, para. 7.127

<sup>12</sup>*Ibid.*, para. 7.131.

<sup>13</sup>*Ibid.*, para. 7.137.

<sup>14</sup>*Ibid.*, para. 7.148 and footnote 193 thereto.

<sup>15</sup>*Ibid.*, para. 7.151.

<sup>16</sup>*Ibid.*, para. 7.156.

<sup>17</sup>*Ibid.*, para. 7.156.

<sup>18</sup>*Ibid.*, para. 7.159.

<sup>19</sup>*Ibid.*, para. 7.160.

<sup>20</sup>In paragraph 7.179 of the Panel Report, the Panel listed several definitions of the term "equivalent" taken from the *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 851.

between a border charge and an internal tax is permissible under Article II:2(a) and that this "is consistent with the distinction drawn in Article II:2(a) between the concepts of 'equivalence' and 'consistency with Article III:2'" <sup>21</sup>

8. The Panel considered that a border charge equivalent to an internal tax, but imposed inconsistently with Article III:2, would "fall outside the scope of application of Article II:1".<sup>22</sup> Accordingly, the Panel determined that "equivalence is both a necessary and a sufficient condition whereas consistency of the internal tax with the provisions of Article III:2 is not a necessary condition".<sup>23</sup> The Panel further considered that the purpose of the reference to Article III:2 in Article II:2(a) is "to acknowledge, and call attention to, the existence of relevant requirements stipulated elsewhere in the GATT 1994".<sup>24</sup> The Panel explained that a finding of equivalence would not lead it to conduct an inquiry under Article II:2(a) with respect to "consistency with Article III:2". Rather, the Panel noted that, if the complaining party sought to have a panel review an internal tax and an equivalent border charge in the light of the requirements of Article III:2, it was "open to the complaining party to include in its panel request an independent claim of violation of Article III:2".<sup>25</sup>

9. Based on its review of the evidence and arguments before it, the Panel concluded that the United States had failed to establish that the Additional Duty and the Extra-Additional Duty were in the nature of OCDs or ODCs.<sup>26</sup> As a result, the Panel found that the United States had failed to establish that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.<sup>27</sup> In the light of these conclusions, the Panel made no recommendations under Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). However, recalling that India had issued new customs notifications making certain changes to the Additional Duty and the Extra-Additional Duty "to address concerns raised by [India's] trading partners"<sup>28</sup>, the Panel found it "appropriate" to note that its disposition of the United States' claims did not "necessarily imply that it would be consistent with India's WTO obligations for India to withdraw the relevant new customs notifications or otherwise re-establish the *status quo ante*, i.e., the situation as it existed on the date of establishment of the Panel."<sup>29</sup> The Panel further explained that it did not "wish to suggest that the entry into force of

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<sup>21</sup>Panel Report, para. 7.193.

<sup>22</sup>*Ibid.*, para. 7.209.

<sup>23</sup>*Ibid.*, para. 7.210.

<sup>24</sup>*Ibid.*, para. 7.211.

<sup>25</sup>*Ibid.*, para. 7.215.

<sup>26</sup>*Ibid.*, paras. 7.298 and 7.393.

<sup>27</sup>*Ibid.*, para. 8.1(a) and (b).

<sup>28</sup>*Ibid.*, para. 8.2 (quoting India's statement at the second Panel meeting, para. 9.1).

<sup>29</sup>*Ibid.*, para. 8.2.

the new customs notifications necessarily implies that the [Additional Duty] on alcoholic liquor, to the extent it still exists, and the [Extra-Additional Duty] are WTO-consistent."<sup>30</sup>

10. On 1 August 2008, the United States notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Appeal<sup>31</sup> pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").<sup>32</sup> On 8 August 2008, the United States filed an appellant's submission.<sup>33</sup> On 13 August 2008, India notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Other Appeal<sup>34</sup> pursuant to Rule 23(1) and (2) of the *Working Procedures*. On 18 August 2008, India filed an other appellant's submission.<sup>35</sup> On 26 August 2008, India and the United States each filed an appellee's submission.<sup>36</sup> On the same day, Australia, the European Communities and Japan each filed a third participant's submission<sup>37</sup>, and Chile and Viet Nam each notified its intention to appear at the oral hearing as a third participant.<sup>38</sup>

11. By letter dated 20 August 2008, the United States requested authorization from the Appellate Body Division hearing the appeal to correct certain "clerical errors" in its appellant's submission, pursuant to Rule 18(5) of the *Working Procedures*. On 22 August 2008, the Division invited all participants and third participants to comment on the United States' request. None of the participants or third participants objected to the United States' request. On 27 August 2008, the Division authorized the United States to correct the "clerical errors" in its appellant's submission.

12. The oral hearing in this appeal was held on 4 September 2008. The participants and third participants presented oral arguments and responded to questions posed by the Members of the Division hearing the appeal.

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<sup>30</sup>Panel Report, para. 8.2.

<sup>31</sup>WT/DS360/8 (attached as Annex I to this Report).

<sup>32</sup>WT/AB/WP/5, 4 January 2005.

<sup>33</sup>Pursuant to Rule 21 of the *Working Procedures*.

<sup>34</sup>WT/DS360/9 (attached as Annex II to this Report).

<sup>35</sup>Pursuant to Rule 23(3) of the *Working Procedures*.

<sup>36</sup>Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

<sup>37</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>38</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

## II. Arguments of the Participants and the Third Participants

### A. *Claims of Error by the United States – Appellant*

#### 1. Interpretation and Application of Articles II:1(b) and II:2(a) of the GATT 1994

13. The United States claims that the Panel erred in its interpretation and application of Articles II:1(b) and II:2(a) of the GATT 1994, and requests the Appellate Body to reverse the Panel's finding that the United States has failed to establish that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b).

#### (a) Inherent Discrimination

14. The United States argues that the Panel erred in finding that Article II:1(b) applies only to duties or charges that "inherently discriminate against imports", and in doing so failed to give proper meaning to the terms "all", "other", and "of any kind" in the second sentence of Article II:1(b). The United States submits that, "[b]ecause the first sentence of Article II:1(b) refers to 'ordinary customs duties,' the words 'all other' in the second sentence indicates that it concerns a residual category of duties, encompassing 'all' duties or charges 'of any kind' other than 'ordinary customs duties'".<sup>39</sup> The United States adds that a duty or charge imposed on or in connection with importation is either an OCD under the first sentence of Article II:1(b), or an ODC under the second sentence of Article II:1(b), but that "[t]here is no third category".<sup>40</sup>

15. The United States also argues that there is no textual basis in Article II:1(b) to conclude, as the Panel did, that the scope of that provision is limited to duties or charges that "inherently discriminate against imports". In the United States' view, the Panel's finding "reads words, and in turn a limitation, into the text of Article II:1(b) that is not there, contrary to the relevant rule of treaty interpretation".<sup>41</sup> Even if an ordinary customs duty "were defined in relation to whether it 'inherently discriminates against imports'", the United States considers that the phrase "all other duties or charges of any kind" in the second sentence of Article II:1(b) would cover "even those duties or charges that

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<sup>39</sup>United States' appellant's submission, para. 16.

<sup>40</sup>*Ibid.*

<sup>41</sup>*Ibid.*, para. 17 (referring to the *Vienna Convention on the Law of Treaties* done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679).

do not 'inherently discriminate against imports'".<sup>42</sup> As a result, the United States rejects the Panel's conclusion that OCDs, and ODCs, are charges "of the same kind", and believes that the text of the second sentence of Article II:1(b) in fact "indicates precisely the opposite".<sup>43</sup>

16. The United States also challenges other aspects of the Panel's reasoning. The United States submits that customary rules of treaty interpretation do not allow a panel to apply a "readily apparent rationale" (that is, the aim of Members to avoid circumvention of negotiated tariff concessions) in place of a provision's terms as a basis for concluding that all duties and charges subject to Article II:1(b) must "inherently discriminate against imports". Rather, the United States insists, the first sentence of Article II:1(b) does not indicate a rationale for prohibiting OCDs in excess of bound rates and may, in any event, reflect other purposes for imposing tariffs, such as the raising of revenue, or apply in cases where there is no domestic production to protect. In addition, the United States takes issue with the Panel's interpretation that Article II:1(b) charges must be inherently discriminatory because it suggests that a Member is free to impose duties or charges that exceed bound rates so long as they are not "inherently discriminatory". The United States also faults the Panel for creating "considerable uncertainty as to what must be established to prove that a duty or charge breaches Article II:1(b)".<sup>44</sup> The United States finally notes that the Panel cited no prior WTO panel or Appellate Body rulings in support of its interpretation.

17. The United States further argues that the Panel erred in finding that duties and charges described in Article II:2 fall outside the scope of Article II:1(b). Recalling its view that Article II:1(b) comprises OCDs and a "residual category of *all* other duties or charges of *any kind*", the United States argues that the duties or charges referred to in Article II:2 thus fall within the scope of Article II:1(b).<sup>45</sup> The United States also maintains that the relationship between the two provisions demonstrates that Article II:2 is an exception to Article II:1(b). As the United States explains, "while Article II:1(b) prohibits all duties or charges of any kind imposed on or in connection with importation, Article II:2 provides that certain duties shall nonetheless be permitted."<sup>46</sup> The United States thus considers that "Article II:1(b) establishes a rule, and Article II:2 establishes an exception

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<sup>42</sup>United States' appellant's submission, para. 18. The United States also characterizes as "misplaced" the Panel's reliance on the canon of construction *eiusdem generis* in support of its interpretation. (*Ibid.* (referring to Panel Report, para. 7.141)) *Black's Law Dictionary* defines *eiusdem generis* as follows: Latin term meaning "of the same kind" is a canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. (*Black's Law Dictionary*, 7th edn, B.A. Garner (ed.) (West Group, 1999), p. 535)

<sup>43</sup>United States' appellant's submission, para. 18.

<sup>44</sup>*Ibid.*, para. 23.

<sup>45</sup>*Ibid.*, para. 27. (original emphasis)

<sup>46</sup>*Ibid.*, para. 28.

to that rule", and that this relationship is important because "as an exception, Article II:2 is not itself a limitation on the scope of Article II:1(b)."<sup>47</sup>

18. The United States refers to the decisions of two pre-WTO panels (*US – Customs User Fee* and *EEC – Minimum Import Prices*) concerning the relationship between Articles II:1(b) and II:2(c), and asserts that both panels "considered Article II:1(b) to cover all duties and charges imposed on or in connection with importation but that some of these duties or charges may be imposed in excess of bound rates because Article II:2 so permits".<sup>48</sup> The United States also argues that the relationship between Articles II:1(b) and II:2 is "analogous" to the relationship between other provisions that have been addressed by the Appellate Body in *US – FSC* (Article 3.1(a) and the fifth sentence of footnote 59 of the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement")) and in *EC – Tariff Preferences* (Article I:1 of the GATT 1994 and the "Enabling Clause"<sup>49</sup>).<sup>50</sup>

19. Additionally, the United States criticizes the Panel for operating under the assumption that, if Article II:1(b) were understood to include the duties and charges under Article II:2, this would prohibit a Member from imposing such duties or charges unless they were scheduled. This, the United States argues, reflects the Panel's "fundamental misconception of the relationship between Article II:1(b) and Article II:2"<sup>51</sup>, and "risks rendering Article II:2 redundant".<sup>52</sup> The United States submits that none of the authorities relied upon by the Panel support the Panel's position that Article II:2 duties and charges fall outside the scope of Article II:1(b). The United States believes that, contrary to the Panel's finding, the language in a 1955 Working Party report on tariffs<sup>53</sup> in fact supports the United States' view that the scope of Article II:1(b), second sentence, is all-inclusive. Although the United States acknowledges that the passage relied on by the Panel states that Article II:2 charges "do not fall under" Article II:1(b), the United States considers that the Working Party's statement "could equally mean that the 'special charges' do not fall under paragraph 1 [of Article II] because contracting parties are not prohibited from imposing them despite the fact that such charges are not set out in their respective Schedules".<sup>54</sup>

20. The United States also argues that the Panel's finding that Article II:2 charges fall outside the scope of Article II:1(b) is not supported by the statement in a 1980 GATT Council Decision on the

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<sup>47</sup>United States' appellant's submission, para. 28.

<sup>48</sup>*Ibid.*, para. 29.

<sup>49</sup>GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, L/4903, 28 November 1979, BISD 26S/203 (the "Enabling Clause").

<sup>50</sup>United States' appellant's submission, paras. 30 and 31.

<sup>51</sup>*Ibid.*, para. 32.

<sup>52</sup>*Ibid.*, para. 33.

<sup>53</sup>Review Working Party II Report, *Schedules and Customs Administration*, GATT document L/329, adopted 26 February 1955, BISD 3S/205, para. 7.

<sup>54</sup>United States' appellant's submission, para. 36.

*Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions*<sup>55</sup> that "such 'other duties or charges' concern neither charges equivalent to internal taxes, nor anti-dumping or countervailing duties, nor fees or other charges commensurate with the cost of services rendered".<sup>56</sup> In the United States' view, the reference to "such" other duties or charges was limited to those duties or charges that were imposed by legislation of the importing Member on the date of the Agreement, and should therefore be scheduled. Accordingly, the United States argues, "it would be inaccurate to read the cited paragraph of the Council Decision as the Panel does as pronouncing that the duties or charges described in paragraph (a) through (c) of GATT Article II:2 are not 'other duties or charges'".<sup>57</sup>

21. Finally, the United States rejects the Panel's reliance on the statement by the Appellate Body in *Chile – Price Band System* that Article II:2 covers measures that "do not qualify as either 'ordinary customs duties' or 'other duties or charges'".<sup>58</sup> The United States maintains that this statement was "made only in passing", was not relevant to the Appellate Body's inquiry into the meaning of OCD, and was not made "in connection with an examination of either Article II:1(b) or II:2".<sup>59</sup> As such, the United States concludes, it "cannot reasonably be read as an Appellate Body interpretation of either provision".<sup>60</sup>

(b) *Prima Facie* Case

22. The United States claims that the Panel erred in requiring the United States to establish a *prima facie* case by demonstrating that the Additional Duty and Extra-Additional Duty "inherently discriminate against imports", including by demonstrating that the duties fall outside the scope of Article II:2. Recalling its arguments regarding the proper interpretation of the second sentence of Article II:1(b), the United States submits that there is no basis in the text for requiring the United States to demonstrate that either duty "inherently discriminates against imports" or falls outside the scope of Article II:2. The United States maintains that prior WTO panel and Appellate Body reports that address Article II:1(b) do not support the Panel's finding. The United States notes that, in *Argentina – Textiles and Apparel*, for instance, the Appellate Body found that the United States had established a *prima facie* case of inconsistency with Article II:1(b) notwithstanding the fact that neither party had raised Article II:2 or discussed whether the measure at issue inherently discriminated against imports. The United States also notes that, in *US – Certain EC Products*, the

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<sup>55</sup>GATT Council Decision, *Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions*, GATT document C/107/Rev.1, adopted 26 March 1980, BISD 27S/22, para. 9.

<sup>56</sup>United States' appellant's submission, para. 37.

<sup>57</sup>*Ibid.*

<sup>58</sup>*Ibid.*, para. 38 (quoting Appellate Body Report, *Chile – Price Band System*, para. 276).

<sup>59</sup>*Ibid.*

<sup>60</sup>*Ibid.*

panel did not require the European Communities, as the complainant, to establish as part of its *prima facie* case that the measure of the United States was outside the scope of Article II:2(c).

23. The United States remarks that the Panel's finding would seem to require that a complaining party bringing an Article II:1(b) claim would have to prove that the challenged duty or charge falls outside the scope of all of the subparagraphs of Article II:2, "regardless of whether the responding party even raises Article II:2".<sup>61</sup> Moreover, the United States submits that, under the Panel's logic, the complaining party would also have to establish that the measure is not some other duty or charge that does not "inherently discriminate against imports". The United States contends that "[t]here is no basis for the Panel's unprecedented approach".<sup>62</sup>

24. The United States claims that the Panel erred in not requiring India to support its assertion that the Additional Duty and Extra-Additional Duty are justified under Article II:2(a). As the United States submits, even though the complaining party would bear the burden of demonstrating that a measure, which the responding party asserts is covered by Article II:2(a), falls outside the scope of Article II:2(a), this "does not relieve the responding party of its burden of substantiating its own assertions that the exception set out in Article II:2 applies".<sup>63</sup> In this respect, the United States considers that "although Article II:2 is an exception that may be invoked in defense of a measure that would otherwise be inconsistent with Article II, it is not an affirmative defense in the sense that the responding party bears the ultimate burden of proof".<sup>64</sup> Instead, the United States contends, once the responding party asserts and supports a defence under Article II:2, "the ultimate burden would rest with the complaining party to rebut and ultimately disprove that evidence and argument".<sup>65</sup>

(c) Equivalence

25. The United States claims that the Panel erred in its interpretation of the term "equivalent" in Article II:2(a). Specifically, the United States argues that the Panel erred in finding that a charge equivalent to an internal tax is one that "serves the same function (in the sense of purpose)" as an internal tax, regardless of whether the charge "is equivalent in amount, effect or function (in the sense of operation)".<sup>66</sup> The United States challenges the Panel's finding in two respects. First, the United States considers that the Panel "incorrectly focuse[d] on a single attribute" in determining equivalence, ignoring that the term "equivalent" also means "corresponding or virtually identical in

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<sup>61</sup>United States' appellant's submission, para. 42.

<sup>62</sup>*Ibid.*

<sup>63</sup>*Ibid.*, para. 78.

<sup>64</sup>*Ibid.*, para. 80.

<sup>65</sup>*Ibid.*

<sup>66</sup>*Ibid.* (referring to Panel Report, paras. 7.185-7.189).

effect, amount and function".<sup>67</sup> The United States submits that an interpretative approach that arrives at a meaning permissive of more than one attribute is supported by the Appellate Body's treatment of the word "like" in its comparison of imported and domestic products in *EC – Asbestos*. The United States observes that, in that case, the Appellate Body noted that the term "like" does not prejudice what attributes or criteria should be compared in evaluating whether two products are "like", and faulted the panel for focusing on a single criterion. The United States acknowledges that evaluating whether two products are "like" is "somewhat different" than examining whether two products are "equivalent", but nonetheless contends that it is useful to "tak[e] into account various attributes or criteria and supporting evidence that may indicate the relatedness of two things".<sup>68</sup>

26. Secondly, the United States claims that the Panel's focus on "function (in the sense of purpose)" as the meaning of "equivalent" is incorrect. As the United States submits, "whether a charge is equivalent to an internal tax must be based on an examination of the structure, design and application of the two measures (with the relevant attributes for comparison in that examination being amount, effect and function)".<sup>69</sup> Otherwise, the United States continues, a Member would be free to impose duties or charges on importation in excess of those set forth in its Schedule based solely on the reason or purpose it had for imposing them, or because of its characterization of such changes under domestic law. The United States asserts that past panel and Appellate Body reports rejected arguments "that the purpose or characterization of a measure under domestic law is determinative", and focused instead on "an examination of the structure, design and effect of the measure".<sup>70</sup>

27. The United States also rejects the Panel's reliance on the "perfume example" cited by the Legal Drafting Committee to explain the meaning of "equivalent" in Article II:2(a).<sup>71</sup> According to the United States, the Panel appears to have concluded that the Legal Drafting Committee believed that the function or purpose of the charge and the internal tax was the same. The United States, however, submits that the statement does not speak to function or purpose and, moreover, that such a reading would ignore other aspects of the meaning of "equivalent". The United States posits an

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<sup>67</sup>United States' appellant's submission, para. 64.

<sup>68</sup>*Ibid.*, para. 66.

<sup>69</sup>*Ibid.*, para. 69.

<sup>70</sup>*Ibid.*, para. 69 (referring to GATT Panel Report, *EEC – Parts and Components*, paras. 5.6-5.7; Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 149, 162, and 189; Appellate Body Report, *Chile – Price Band System*, paras. 226, 227, 239, and 252; Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 29-31, DSR 1996:I, 97, at 119-123; and Appellate Body Report, *Chile – Alcoholic Beverages*, para. 61).

<sup>71</sup>*Ibid.*, para. 71 (quoting the explanation given by the Chairman of the Legal Drafting Committee at the second session of the Preparatory Committee held in Geneva on 23 September 1947: "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." (Twenty-sixth Meeting of the Tariff Agreement Committee, United Nations Document E/PC/T/TAC/PV/26, p. 21)

example wherein the border charge could be substantially greater than the amount of the internal charge and still satisfy the Panel's definition of "equivalent".

28. In addition, the United States argues that the Panel was wrong to dismiss certain definitions it considered in relation to the meaning of "equivalent"—in particular, the definitions of "having the same effect", "equal in amount", "that is virtually the same thing", and "virtually identical especially in effect or function".<sup>72</sup> As the United States submits, the Panel appears to have reasoned that if it is was obliged to consider whether a charge is equivalent to an internal tax on the basis of effect or amount, the only attributes of the charge that could be considered is its effect or amount. For the United States, however, "there is no basis for limiting the inquiry as to whether a charge is 'equivalent' to an internal tax to a single attribute".<sup>73</sup>

29. The United States notes that the Panel's rejection of these definitions was premised on the view that, if they were to be accepted, this would fail to give separate meaning to the concepts of "equivalence" and "consistency with Article III:2". The United States explains that, whether a border charge is equal in amount to an internal tax does not "prejudge" that tax's consistency with Article III:2. The United States explains that, "while a charge may be 'equivalent' to an internal tax without being exactly or precisely equal in amount to the internal tax, the same is not true for a tax imposed consistently with Article III:2 in respect of a like domestic product, since Article III:2 prohibits *any* amount of taxation of imports in excess of like domestic products."<sup>74</sup>

(d) Consistency with Article III:2 of the GATT 1994

30. The United States claims that the Panel erred in "read[ing] out the requirement under Article II:2(a) that, for a charge to fall within its scope, the internal tax to which the border charge is equivalent must be imposed consistently with Article III:2".<sup>75</sup> According to the United States, the Panel "essentially [found] that a charge equivalent to an internal tax imposed *inconsistently* with Article III:2 would fall within the scope of Article II:2(a)".<sup>76</sup> The United States submits that it is difficult to reconcile the Panel's view that Article II:2 charges do not inherently discriminate against imports when charges imposed inconsistently with Article III:2 would necessarily afford less favourable treatment and thereby discriminate against imports. The United States rejects the Panel's finding that the concept of "consistency with Article III:2" in Article II:2(a) is a "cross-reference or

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<sup>72</sup>See Panel Report, footnote 226 to para. 7.179 (referring to *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 851)

<sup>73</sup>United States' appellant's submission, para. 73.

<sup>74</sup>*Ibid.* (original emphasis)

<sup>75</sup>*Ibid.*, para. 43.

<sup>76</sup>*Ibid.*, para. 45 (referring to Panel Report, para. 7.209). (original emphasis)

'reminder' that a border charge equivalent to an internal tax is subject to Article III:2"<sup>77</sup> because, as the United States insists, the border charges at issue are not subject to Article III:2. The United States adds that this would also render the Panel's interpretation inconsistent with the object and purpose of the GATT 1994, because Members would be free under Article II to impose border charges that are functionally equivalent to internal taxes in excess of those taxes, and in excess of tariff bindings.

31. The United States also claims that the Panel improperly found that a border charge that is "equivalent" to an internal tax is subject to Article III:2. For the United States, the Panel's findings are inconsistent with the text of Article III:2 because "while Article II concerns duties and charges imposed on or in connection with importation, Article III:2 concerns taxes and other charges imposed internally".<sup>78</sup> Moreover, the United States contends that this dispute does not implicate the *Ad Note* to Article III, because that provision applies only to a situation where there is "an internal measure [that] applies to both the imported and the like domestic product"<sup>79</sup>, and thus, despite that charge being collected or enforced at the time of importation, it remains an internal measure. By contrast, the United States posits, this case involves a border measure that is not the same as the measure that applies to products within India's customs territory. The United States submits that, although the Panel appears to have acknowledged that the *Ad Note* to Article III is not applicable to this case, it "nevertheless conclude[d] that a border charge equivalent to an internal tax is subject to Article III:2".<sup>80</sup> In the view of the United States, the reference to consistency with Article III:2 in the text of Article II:2(a) indicates that "for a measure to be permitted under Article II:2(a) it must not only be a charge equivalent to an internal tax but the internal tax to which the charge is equivalent must be imposed consistently with Article III:2".<sup>81</sup> The United States observes that India does not assert that the customs duties at issue were internal taxes, or that the claims of inconsistency should be analyzed under Article III:2.

32. In addition, the United States claims that the Panel erred in determining that it is incumbent upon the complaining party to bring an independent claim under Article III:2. Because "border charges—whether equivalent to an internal tax or otherwise—are not subject to Article III:2", the United States submits, "it would not be possible for a complaining party to pursue a border charge under an independent Article III:2 claim".<sup>82</sup> Moreover, the United States considers that the Panel's reasoning, if coupled with its finding that a complaining party must demonstrate that the measure falls outside the scope of Article II:2 in order to prove a violation of Article II:1(b), would seem to require

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<sup>77</sup>United States' appellant's submission, para. 46 (referring to Panel Report, paras. 7.211-7.213).

<sup>78</sup>*Ibid.*, para. 51.

<sup>79</sup>*Ibid.*, para. 53.

<sup>80</sup>*Ibid.*, para. 54 (referring to Panel Report, para. 7.206).

<sup>81</sup>*Ibid.*, para. 55.

<sup>82</sup>*Ibid.*, para. 58.

not only an independent claim under Article III:2, but also independent claims under Article VI and, potentially, Article VIII in order to disprove the application of Article II:2(b) and (c). The United States asserts that the Panel's finding and its implications are "unprecedented".<sup>83</sup>

(e) Article 11 of the DSU

33. The United States argues that the Panel, in its assessment of the United States' claims under Articles II:1(a) and II:1(b) of the GATT 1994, failed to carry out an objective assessment of the matter before it, as required under Article 11 of the DSU. The United States takes issue with several aspects of the Panel's analysis.

34. First, the United States contends that the Panel failed to require India to identify the state-level excise duties to which the Additional Duty on alcoholic beverages is allegedly equivalent. The Panel also did not require India to support its assertions that such excise duties exist, that each of the 28 Indian states and 7 union territories impose them, or that they operate such that the Additional Duty offsets or counterbalances them.<sup>84</sup> Instead, the Panel assumed that such duties exist and then required the United States to establish that the Additional Duty is not equivalent to them.<sup>85</sup> In so doing, the Panel placed "an impossible burden" on the United States to guess which state-level excise duties India contends the Additional Duty on alcoholic beverages offsets or counterbalances, and then to prove that such duties do not exist or do not operate such that the Additional Duty offsets or counterbalances them.<sup>86</sup> The United States points out, in this regard, that denominations of state taxes may vary and that there is no official definition of what constitutes an excise duty. The United States adds that it had requested India to identify the excise duties that the Additional Duty on alcoholic beverages allegedly offsets on a number of occasions—including during consultations—but that India failed, on each occasion, to identify the relevant excise duties or provide information substantiating its contentions as to their existence or operation. Moreover, the United States submits that the Panel also asked India for this information but that India failed to respond.<sup>87</sup>

35. With respect to the Extra-Additional Duty, the United States similarly argues that India had failed to identify or submit any of the state-level sales taxes on alcoholic beverages or any of the local taxes or charges to which it contends the Extra-Additional Duty is equivalent. Nonetheless, the Panel assumed that such sales taxes or charges exist and then "placed an impossible burden" on the United States to guess the state-level sales taxes and local taxes and charges India contends that the Extra-

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<sup>83</sup>United States' appellant's submission, para. 62.

<sup>84</sup>*Ibid.*, para. 86.

<sup>85</sup>*Ibid.* (referring to Panel Report, paras. 7.271, 7.272, and 7.291).

<sup>86</sup>*Ibid.*

<sup>87</sup>*Ibid.*, para. 85 (referring to Panel Report, footnote 310 to para. 7.270).

Additional Duty offsets or counterbalances, and then to prove that such taxes or charges do not exist or do not operate such that the Extra-Additional Duty offsets or counterbalances them.<sup>88</sup>

36. With respect to the Panel's analysis of the Additional Duty, the United States submits that the Panel erred by drawing inferences that are not supported by the evidence on record about the existence and operation of Indian state-level excise taxes. According to the United States, the Panel found that the evidence before it supported four "inferences": (i) that state-level excise duties on domestic alcoholic beverages exist<sup>89</sup>; (ii) that each of the Indian states impose them<sup>90</sup>; (iii) that the Additional Duty on imports of alcoholic beverages may only be levied if an excise duty is levied on like domestic products<sup>91</sup>; and (iv) that none of the Indian states impose excise duties or other internal charges on imported alcoholic beverages.<sup>92</sup> The United States emphasizes that the Panel failed to discharge its duties under Article 11 of the DSU because it relied on these inferences as a basis for its finding that the evidence before it "supported or was not inconsistent" with India's assertion that the Additional Duty is "equivalent" to state-level excise duties.<sup>93</sup> The United States further argues that the mere fact that the Indian states are authorized to impose excise duties on the manufacture or production of domestic alcoholic beverages does not indicate that those states exercised such authority and that each imposed excise duties on domestic alcoholic beverages.<sup>94</sup>

37. In addition, the United States argues that the Panel erred in its analysis of the Extra-Additional Duty by disregarding the fact that the state-level VAT, Central Sales Tax, and other local taxes and charges already apply to imported products.<sup>95</sup> According to the United States, because these taxes or charges already apply to imported products, it is incorrect to suggest, as the Panel did, that the Extra-Additional Duty offsets or counterbalances them. In addition, the United States contends that the Panel erred in finding that the evidence before it supported three "inferences": (i) that state-level sales taxes on alcoholic beverages and other local taxes or charges exist; (ii) that the Indian states impose them; and (iii) that the Extra-Additional Duty may only be levied on an imported product if relevant internal taxes are levied on a like domestic product. In the United States' view, in drawing and relying on these inferences, the Panel acted inconsistently with its duties under Article 11 of the DSU.<sup>96</sup>

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<sup>88</sup>United States' appellant's submission, para. 91.

<sup>89</sup>*Ibid.*, para. 92 (referring to Panel Report, paras. 7.271, 7.272, and 7.291).

<sup>90</sup>*Ibid.* (referring to Panel Report, paras. 7.271, 7.272, and 7.291).

<sup>91</sup>*Ibid.* (referring to Panel Report, paras. 7.247 and 7.281).

<sup>92</sup>*Ibid.* (referring to Panel Report, paras. 7.287, 7.288, and 7.292).

<sup>93</sup>*Ibid.*

<sup>94</sup>*Ibid.*, para. 93.

<sup>95</sup>*Ibid.*, para. 101 (referring to Panel Report, paras. 7.366 and 7.367).

<sup>96</sup>*Ibid.*, paras. 104 and 105.

(f) Conclusion

38. In the light of these arguments, the United States requests the Appellate Body to reverse the Panel's findings that the United States failed to establish that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

2. Scope of the United States' Challenge to the Additional Duty and the Extra-Additional Duty

39. The United States argues that the Panel erred in finding that the United States is not challenging, as such, Section 12 of India's Customs Act and Section 3(1) of India's Customs Tariff Act with respect to the Additional Duty on alcoholic beverages, and is not challenging Section 12 of the Customs Act and Section 3(5) of the Customs Tariff Act with respect to the Extra-Additional Duty. In addition, the United States asserts that the Panel erred in finding that the United States' challenge to the Additional Duty is "limited" to the Additional Duty as imposed through Customs Notification 32/2003, and that its challenge to the Extra-Additional Duty is "limited" to the Extra-Additional Duty as imposed through Customs Notification 19/2006.<sup>97</sup>

3. Conformity of the Additional Duty and the Extra-Additional Duty with Articles II:1(a) and II:1(b) of the GATT 1994

40. Should the Appellate Body reverse the Panel's interpretation and findings under Articles II:1(a) and II:1(b) of the GATT 1994, the United States requests the Appellate Body to complete the analysis and, applying the correct interpretation of those provisions, find that the Additional Duty on alcoholic beverages and the Extra-Additional Duty are each inconsistent with Articles II:1(a) and II:1(b).<sup>98</sup> The United States also requests the Appellate Body to find that neither the Additional Duty nor the Extra-Additional Duty is justified under Article II:2(a).

(a) Articles II:1(a) and II:1(b) of the GATT 1994

41. The United States maintains that the Additional Duty on alcoholic beverages and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 because they result in OCDs or ODCs that exceed the duties or charges set forth in India's Schedule of Tariff Concessions. In support of its position, the United States refers to evidence and arguments that it presented to the Panel.

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<sup>97</sup>United States' appellant's submission, para. 116 (referring to Panel Report, para. 7.106).

<sup>98</sup>*Ibid.*, para. 124.

42. First, the United States submits that the Additional Duty and the Extra-Additional Duty are OCDs within the meaning of Article II:1(b) because they apply: (i) at the time of importation; (ii) as a matter of course on importation (that is, not on a case-by-case basis); (iii) exclusively to imports (that is, not to domestic products); and (iv) in the form of an *ad valorem* or specific duty, depending on the value of the import.<sup>99</sup> Moreover, the Additional Duty and the Extra-Additional Duty are considered under India's laws as "duties of customs", and are collected and administered by India's customs authorities pursuant to the provisions of India's Customs Act.

43. Secondly, the United States argues, as it did before the Panel, that the Additional Duty and the Extra-Additional Duty, applied in conjunction with the Basic Customs Duty, each results in the imposition of duties on subject products "in excess of" those set forth in India's Schedule.<sup>100</sup> With respect to the Additional Duty, the United States explains that Section 3(1) of the Customs Tariff Act requires the imposition of the Additional Duty on imports, and Customs Notification 32/2003 set out the rates of Additional Duty on imports of alcoholic beverages.<sup>101</sup> In addition, Section 3(2) of the Customs Tariff Act requires that the Additional Duty be calculated based on the value of the import inclusive of the Basic Customs Duty owed.<sup>102</sup> As a result, the Additional Duty required under those measures results in OCDs that exceed the rates bound in India's Schedule. In support of its contention, the United States points to evidence that it presented to the Panel demonstrating that, with respect to beer and wine, "all but the lowest rate" of Additional Duty results in OCDs that exceed India's bound rate and that, with respect to distilled spirits, the Additional Duty "at all rates" results in OCDs that exceed India's WTO bound rates.<sup>103</sup>

44. The United States adds that, before the Panel, India did not contest the fact that the Additional Duty, applied in conjunction with the Basic Customs Duty, results in duties on beer, wine, and distilled spirits that exceed 150 per cent. Instead, India only contested the characterization of the Additional Duty as an OCD or ODC within the meaning of Article II:1(b). According to the United States, the Appellate Body therefore has before it uncontested facts sufficient to complete the Panel's analysis and to find that the Additional Duty, as imposed pursuant to Section 3(1) of the Customs Tariff Act and Customs Notification 32/2003, is, as such, inconsistent with Article II:1(b) as an OCD in excess of those duties specified in India's Schedule.<sup>104</sup>

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<sup>99</sup>United States' appellant's submission, para. 129.

<sup>100</sup>*Ibid.*, para. 134.

<sup>101</sup>*Ibid.*, para. 136 (referring to United States' first written submission to the Panel, paras. 18-19, 22-23, and 50; and Exhibits US-3A and US-6 submitted by the United States to the Panel).

<sup>102</sup>*Ibid.* (referring to United States' first written submission to the Panel, paras. 19 and 50; and Exhibit US-3A submitted by the United States to the Panel).

<sup>103</sup>*Ibid.*, para. 137.

<sup>104</sup>*Ibid.*, para. 138.

45. The United States similarly explains that Section 3(5) of the Customs Tariff Act provides for the imposition of the Extra-Additional Duty exclusively on imports; Section 3(6) requires that the Extra-Additional Duty be calculated on the value of the import inclusive of the Basic Customs Duty and Additional Duty owed; and Customs Notification 19/2006 stipulates that the Extra-Additional Duty be levied on imports at four percent *ad valorem*. In addition, the United States refers to evidence that it presented to the Panel demonstrating that the Extra-Additional Duty, when imposed in conjunction with India's Basic Customs Duty, results in OCDs on imports in excess of India's WTO-bound rates for any product for which the rate of Basic Customs Duty "is at or very near India's WTO-bound rate".<sup>105</sup>

46. The United States further observes before the Panel that India did not contest the fact that the Extra-Additional Duty applied in conjunction with the Basic Customs Duty results in duties on imports from the United States in excess of those set forth in India's Schedule. Instead, India only contested the characterization of the Extra-Additional Duty as an OCD or ODC within the meaning of Article II:1(b). Therefore, according to the United States, the Appellate Body has before it uncontested facts sufficient to complete the Panel's analysis and find that the Extra-Additional Duty, as imposed pursuant to Section 3(5) of the Customs Tariff Act and Customs Notification 19/2006, is, as such, inconsistent with Article II:1(b) as an OCD in excess of those duties specified in India's Schedule.<sup>106</sup>

47. The United States adds that, in any event, if the Additional Duty and the Extra-Additional Duty are found not to constitute OCDs, they are duties imposed on importation of a product and must therefore necessarily constitute ODCs. The United States contends also that resolving whether the Additional Duty and the Extra-Additional Duty constitute OCDs or ODCs is unnecessary, because, either way, they fall within the scope of Article II:1(b) and would result in the imposition of duties in excess of those set out in India's Schedule.<sup>107</sup> On this basis, the United States requests the Appellate Body to find that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.<sup>108</sup>

(b) Article II:2(a) of the GATT 1994

48. The United States requests the Appellate Body to find that neither the Additional Duty nor the Extra-Additional Duty is justified under Article II:2(a). The United States argues that, for a measure

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<sup>105</sup>United States' appellant's submission, footnote 231 to para. 146. The United States notes in this regard that Exhibits US-1A and US-1B submitted by the United States to the Panel contains examples of products for which this would be the case.

<sup>106</sup>*Ibid.*, para. 156.

<sup>107</sup>*Ibid.*, paras. 132, 144, and 150.

<sup>108</sup>*Ibid.*, paras. 139, 140, 157 and 158.

to fall within the scope of Article II:2(a), the measure must be (i) a charge equivalent to an internal tax, and (ii) imposed consistently with Article III:2 in respect of like domestic products.

49. As regards the Additional Duty, the United States argues that the evidence before the Panel indicates that the Additional Duty is an OCD within the meaning of Article II:1(b) and, therefore, not a charge "equivalent" to an internal tax within the meaning of Article II:2(a). Furthermore, the United States observes that the structure and level of state-level excise duties vary from state to state.<sup>109</sup> Therefore, the United States contends that, "even if the [Additional Duty] were virtually identical in structure or amount to the state-level excise duty in one Indian state, it would not be so in relation to another Indian state."<sup>110</sup>

50. Regarding consistency with Article III:2, the United States refers to India's recognition that it arrived at the rates of Additional Duty through "a process of averaging" and that it is therefore possible that in some instances that the Additional Duty may subject imports to charges in excess of those on like domestic products. The United States further points out that the Panel made a finding to this effect.<sup>111</sup> According to the United States, if India averaged the rates of excise duties levied in the various states and the rates of Additional Duty reflect the average rate of those excise duties, this "necessarily means" that the Additional Duty exceeds the excise duties imposed on like domestic products in some Indian states.<sup>112</sup>

51. In addition, the United States notes that, in instances where the like domestic product is subject to various tax rates, Section 3(1) of the Customs Tariff Act 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, and the Additional Duty must be equal to the highest rate of excise duty imposed by any of the Indian states, Section 3(1) subjects imports of alcoholic beverages to rates of Additional Duty that exceed the rate of excise duties on like domestic alcoholic beverages in at least some Indian states. From this, the United States concludes that the Additional Duty is not imposed consistently with Article III:2.<sup>113</sup>

52. As regards the Extra-Additional Duty, the United States recalls India's acknowledgement before the Panel that "the overall burden of taxation on imported products as a result of the [Extra-Additional Duty] may be marginally 'in excess of' the tax on like domestic products."<sup>114</sup> The United States further recalls that India does not dispute that the state-level VATs and the Central Sales Tax

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<sup>109</sup>United States' appellant's submission, para. 165 (referring to Panel Report, paras. 7.271 and 7.272).

<sup>110</sup>*Ibid.*

<sup>111</sup>*Ibid.*, para. 164 (referring to Panel Report, paras. 7.269 and 7.274).

<sup>112</sup>*Ibid.*

<sup>113</sup>*Ibid.*, para. 166.

<sup>114</sup>*Ibid.*, para. 172 (referring to India's first written submission to the Panel, footnote 51 to para. 85).

apply to imported products sold within India and that the Extra-Additional Duty is not eligible as a credit against the state-level VATs or Central Sales Tax owed on that sale.<sup>115</sup> The United States concludes from this that "imported products are subject to the [Extra-Additional Duty] as well as the state-level VATs and [Central Sales Tax] with no offsetting credit against either for the [Extra-Additional Duty] paid."<sup>116</sup> In the United States' view, this indicates that imported products are subject to charges in excess of those on like domestic products and that the Extra-Additional Duty is not imposed consistently with Article III:2.

53. The United States further argues that the Extra-Additional Duty is not "equivalent" to state-level VATs and the Central Sales Tax, "whether in amount, effect or function".<sup>117</sup> The United States notes that, while, according to India, the state-level VATs are set generally at four different rates depending on the product subject to the VAT, the Extra-Additional Duty "is set at a single rate of four percent for all products".<sup>118</sup>

54. In addition, the United States argues that, while the state-level VATs may consist of four rates, there is no requirement that the individual states apply the same rate to the same domestic products. Thus, the United States maintains that "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."<sup>119</sup> The United States points out in this regard that 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.<sup>120</sup> By contrast, the Extra-Additional Duty does not prescribe different rates for different products and does not subject imported products to different rates depending on the Indian state into which the product is imported.

55. Moreover, the United States argues that "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."<sup>121</sup> By contrast, there was, at the time of establishment of the Panel, no mechanism for crediting against the Extra-Additional Duty owed on a product, taxes or charges paid on the product's previous transfers. Nor,

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<sup>115</sup>United States' appellant's submission para. 172 (referring to Panel Report, paras. 7.366 and 7.367).

<sup>116</sup>*Ibid.*

<sup>117</sup>*Ibid.*, para. 176.

<sup>118</sup>*Ibid.*, para. 177.

<sup>119</sup>*Ibid.*, para. 178.

<sup>120</sup>*Ibid.*

<sup>121</sup>*Ibid.*, para. 179.

according to the United States, was there a mechanism for crediting the Extra-Additional Duty paid on a product against the VAT owed on the product's subsequent transfers in India.<sup>122</sup>

56. Regarding the Central Sales Tax, the United States considers that it is not "equivalent" to the Extra-Additional Duty for similar reasons. The United States contends that, like the VAT, the Central Sales Tax is imposed at various rates and may vary from state to state and from product to product. Moreover, depending on the recipient, the Central Sales Tax may be set at a flat 3 per cent 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). By contrast, the Extra-Additional Duty is set at "a flat four percent and does not vary from product to product or based on the recipient or the state into which the product is imported."<sup>123</sup> The United States further submits that, with respect to both the VAT and the Central Sales Tax, the amount of Extra-Additional Duty owed on imports as compared to the amount of VAT or Central Sales Tax owed on like domestic products is not "equivalent", since it does not correspond, and is not "virtually identical to", the VAT or Central Sales Tax, respectively, on like domestic products. For example, the United States argues that, with respect to some products, the rate of state-level VATs and the Central Sales Tax is 12.5 per cent, whereas the Extra-Additional Duty is four per cent.<sup>124</sup>

(c) Article III:2 of the GATT 1994

57. The United States concludes by reiterating its position that the Additional Duty and the Extra-Additional Duty "are border charges and thus subject to Article II, not Article III".<sup>125</sup> However, should the Appellate Body find either the Additional Duty or the Extra-Additional Duty to constitute an internal tax or otherwise be subject to Article III, the United States requests the Appellate Body to "complete the analysis" by finding that the Additional Duty and the Extra-Additional Duty are inconsistent with Article III:2. The United States submits that the legal analysis can be completed on the basis of undisputed facts on the record and the Panel's findings of fact.<sup>126</sup>

(d) Conclusion

58. For all these reasons, the United States requests the Appellate Body to find that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b), and are not justified under Article II:2(a) of the GATT 1994.

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<sup>122</sup>United States' appellant's submission, para. 179.

<sup>123</sup>*Ibid.*, para. 180.

<sup>124</sup>*Ibid.*, para. 181.

<sup>125</sup>*Ibid.*, para. 184.

<sup>126</sup>*Ibid.* At the oral hearing, the United States clarified that it was not requesting a finding under Article III:2 independent of its claim under Articles II:1(a) and II:1(b).

B. *Arguments of India – Appellee*

1. Interpretation and Application of Articles II:1(b) and II:2(a) of the GATT 1994

59. India claims that the Panel was correct in its interpretation and application of Articles II:1(b) and II:2(a) of the GATT 1994, and requests the Appellate Body to uphold the Panel's finding that the United States has failed to establish that the Additional Duty and the Extra-Additional Duty are inconsistent with India's obligations under Articles II:1(a) and II:1(b).

(a) *Inherent Discrimination*

60. India supports the reasoning of the Panel that Article II:1(b) duties and charges "inherently discriminate against imports", and that Article II:2(a) charges do not. India submits that the Panel "paid close attention to the plain language of Article II:1(b)—including the terms "all" and "of any kind" in the second sentence of Article II:1(b)—but "given that both OCDs and ODCs are charges referred to in the same sub-section of Article II:1(b), the Panel chose to utilize the principle of *ejusdem generis* to read the two types of charges in the context of each other".<sup>127</sup> Although it recognizes that "the plain language of Article II:1" does not use the words "inherent" or "discriminate", India refers to the statement of the 1980 GATT Council Decision on *Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions*, quoted by the Panel, that "'other duties or charges' are in principle only those that discriminate against imports".<sup>128</sup> India maintains that "the framers of the GATT had themselves acknowledged that the OCDs and ODCs referred to in Article II:1(b) were to apply only to imports and were to that extent discriminatory charges".<sup>129</sup> Accordingly, India does not consider that the Panel read into Article II:1(b) a requirement that is not there, as the United States contends.

61. India rejects the reliance by the United States on the word "other" in Article II.1(b), second sentence, to suggest that ODCs would include even those duties that do not inherently discriminate against imports. In India's view, the United States fails to recognize that the Panel "acknowledge[d] that OCDs and ODCs are different types of charges, but views them together in the context of their character and ultimate effect".<sup>130</sup> Critical to the Panel's consideration of the issue, India submits, is that OCDs and ODCs, "although different, are applied only on imports and not domestic like

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<sup>127</sup>India's appellee's submission, para. 13. See also *supra*, footnote 42.

<sup>128</sup>*Ibid.* (quoting GATT Council Decision, *Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions*, GATT document C/107/Rev.1, adopted 26 March 1980, BISD 27S/22, para. 9).

<sup>129</sup>*Ibid.*, para. 14.

<sup>130</sup>*Ibid.*, para. 15.

products".<sup>131</sup> India thus maintains that "ODCs as well as OCDs are inherently discriminatory charges that are applied on imports alone and are consequently subjected to a binding which helps preserve the value of tariff concessions".<sup>132</sup> India also defends the Panel's reference to inherent discrimination as a "readily apparent rationale" in Article II:1(b), arguing that it "flows directly from the language and intention of the provisions of GATT Article II:1(b)".<sup>133</sup>

62. In response to the United States' argument that WTO Members may have reasons apart from discrimination for imposing tariffs, India observes that the "discrimination inherent in an OCD or ODC is the *effect* of the imposition of a tariff, and not necessarily the *purpose* behind it".<sup>134</sup> As India maintains, although protecting domestic production may not always be the primary purpose for imposing customs duties, "the effect of such duties irrespective of their purpose, continues to be essentially discriminatory".<sup>135</sup>

63. India further supports the Panel's finding that charges under Article II:1(b), but not under Article II:2(a), "inherently discriminate", and rejects the argument of the United States that such a finding would lead to absurd results since charges that discriminate, but do not inherently do so, would go undisciplined. India argues that use of the word "inherent" does not "take away from the fundamental character of the charge, i.e. it is applied *exclusively on imports*", and that the United States "fails to appreciate that all border charges that apply exclusively to imports will necessarily be intrinsically discriminatory".<sup>136</sup> India also disagrees with the United States' contention that the Panel's ruling provided no clear guidance on how a complaining party could establish that a charge is "inherently discriminatory", arguing that the Panel offered extensive guidance on the analysis a complaining party must undertake.<sup>137</sup>

64. India submits that Article II:2 charges do not represent an exception to Article II:1. India cites the fact that charges falling under Article II:2 are not scheduled by Members as OCDs or ODCs. India also notes that the Panel concluded that charges under Article II:2 "did not in themselves discriminate between imported and domestic products because they are each subjected to the tests prescribed in GATT Articles III:2, VI & VIII:1(a)".<sup>138</sup> India points out that the language of the chapeau of Article II:2 ("Nothing in this Article shall prevent..."), does not necessarily indicate a rule-exception relationship between Article II:1(b) and Article II:2. India argues that the United States

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<sup>131</sup>India's appellee's submission, para. 15.

<sup>132</sup>*Ibid.*

<sup>133</sup>*Ibid.*, para. 16.

<sup>134</sup>*Ibid.*, para. 17. (original emphasis)

<sup>135</sup>*Ibid.*

<sup>136</sup>*Ibid.*, para. 18. (original emphasis)

<sup>137</sup>*Ibid.*, para. 20.

<sup>138</sup>*Ibid.*, para. 23.

"chose to ignore" the statement by the Appellate Body in *Chile – Price Band System* that Article II:2 "sets out examples of measures that do not qualify as either 'ordinary customs duties' or 'other duties or charges'"<sup>139</sup>, and submits that this statement represents "the most comprehensive and unambiguous characterization of the difference between Article II:1(b) charges and Article II:2 charges".<sup>140</sup> India considers significant the Appellate Body's statement in *Chile – Price Band System*, which, India contends, "unequivocally categorized the relationship between Article II:2 and Article II:1(b) charges as being independent of each other".<sup>141</sup>

65. India further supports the Panel's "elaborate analysis devoted to finding whether and why there was a 'readily apparent rationale' for binding OCDs and ODCs, but no corresponding rationale for subjecting Article II:2 charges to a similar discipline".<sup>142</sup> India agrees with the Panel's reliance on various authorities for its distinction between the charges subject to Article II:1(b) and those subject to Article II:2. India argues that the 1955 Working Party report on tariffs<sup>143</sup> cannot be read in the manner sought by the United States, and that the Report "clearly indicated, as the Panel reflects, that Article II:2 charges were special and were designed for a specific purpose and consequently *do not fall* under paragraph 1 [of Article II]".<sup>144</sup> India also maintains that the language in the 1980 GATT Council Decision on *Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions*<sup>145</sup> "can only be read to mean that Article II:1 charges are *not related* to charges" under Article II:2, and that this "reinforces India's contention and the Panel's finding that Articles II:1(b) and II:2 deal with distinct types of charges".<sup>146</sup>

66. In addition, India argues that none of the pre-WTO panel reports cited by the United States "support the proposition that the United States now contends ... that Article II:2(a) is in the nature of an exception to Article II:1(b)".<sup>147</sup> India observes that *US – Customs User Fee* does not support the position of the United States because the GATT panel did not "engage in an analysis of whether Article II:2(c) is in the nature of a positive rule which establishes obligations itself".<sup>148</sup> Similarly, India maintains that the GATT panel in *EEC – Minimum Import Prices* had rejected the argument that Article II:1(b) covers all duties or charges, and instead "viewed Article II:2(c) as constituting a

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<sup>139</sup>India's appellee's submission, paras. 24 and 25 (quoting Appellate Body Report, *Chile – Price Band System*, para. 276).

<sup>140</sup>*Ibid.*, para. 25.

<sup>141</sup>*Ibid.*, para. 30(iii).

<sup>142</sup>*Ibid.*, para. 28.

<sup>143</sup>Review Working Party II Report, *Schedules and Customs Administration*, GATT document L/329, adopted 26 February 1955, BISD 3S/205.

<sup>144</sup>India's appellee's submission, para. 30(i).

<sup>145</sup>GATT Council Decision, *Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions*, GATT document C/107/Rev.1, adopted 26 March 1980, BISD 27S/22, para. 9.

<sup>146</sup>India's appellee's submission, para. 30(ii).

<sup>147</sup>*Ibid.*, para. 35. See also *ibid.*, para. 39.

<sup>148</sup>*Ibid.*, para. 34(ii).

separate category of border charges".<sup>149</sup> India argues that the reliance by the United States on the decision of the Appellate Body in *US – FSC* is inapposite because the relationship between the provisions analyzed in that case (Article 3.1(a) and the fifth sentence of footnote 59 of the *SCM Agreement*) is "fundamentally different" from the relationship between Article II:1(b) and Article II:2 of the GATT 1994.<sup>150</sup> Finally, India considers that the decision of the Appellate Body in *EC – Tariff Preferences* reflects a "fact-specific, special approach" not relevant to the facts of this case and, moreover, that the Appellate Body in that case placed some burden on the complaining party "of raising the 'Enabling Clause' in making a claim of inconsistency under GATT Article I:1".<sup>151</sup>

(b) *Prima Facie* Case

67. India supports the Panel's finding that it was incumbent on the United States as the complaining party to "raise a presumption" that India's duties do not qualify as non-discriminatory charges under Article II:2.<sup>152</sup> India argues that there is no support for the United States' contention that, as a consequence of Article II:2 representing an exception to Article II:1(b), India as the party invoking such an exception bears the burden of establishing a *prima facie* case that its Additional Duty and Extra-Additional Duty are consistent with Article II:2(a). In India's view, the Panel clarified that "[i]n the circumstances of *this case*, where the United States ... had failed to demonstrate that India's duties were inherently discriminatory, it would be incumbent upon it as the complaining party to make a *prima facie* case that the measures at issue fall outside of Article II:2(a)".<sup>153</sup> India asserts that the Panel also clarified that the requirement of making a *prima facie* case that a challenged measure falls outside Article II:2(a) "extends only to an analysis of whether the charge in question is 'equivalent' and does not require the complaining party to show that such a charge is imposed consistently with Article III:2".<sup>154</sup>

68. India submits that the Panel seems to have adequately defined the contours of what is required of a complaining party, in general and with specific reference to the facts of this case, in order to show that the charges fall outside the scope of Article II:2. In addition, India considers that the United States' assertion that the Panel would require a complaining party in all cases involving an Article II:1(b) challenge to establish that a duty or charge is outside the scope of each of the sub-

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<sup>149</sup>India's appellee's submission, para. 38(i).

<sup>150</sup>*Ibid.*, para. 38(ii).

<sup>151</sup>*Ibid.*, para. 38(iii).

<sup>152</sup>*Ibid.*, para. 38.

<sup>153</sup>*Ibid.*, para. 41(i) (referring to Panel Report, para. 7.160). (original emphasis)

<sup>154</sup>*Ibid.*, para. 41(ii). India also views the Panel as having clarified that to establish that a charge falls outside of Article II:2(b), "it would be adequate for a complaining party to show that such a charge is not an anti-dumping or countervailing duty and does not require the complaining party to establish that such charges are imposed consistently with Article VI". (*Ibid.*)

clauses of Article II:2 "is entirely unsupported by the Panel's reasoning or its language".<sup>155</sup> Finally, India agrees with the Panel's characterization that charges that are outside the scope of Article II:2 are charges within the scope of Article II:1(b) and that, since Article II:2(a) is not an exception to Article II:1(b), the burden of making a *prima facie* case "squarely falls" upon the United States as complainant.<sup>156</sup>

69. India further submits that the United States "appears to have taken contradictory positions" on whether Article II:2 represents "an exception that is an affirmative defence to Article II:1".<sup>157</sup> India notes that, although the United States responded to a question from the Panel that Article II:2 was not an exception that is an affirmative defence, the United States now argues on appeal that Article II:2(a) is an exception, but not an affirmative defence. India states that this position "appears to suggest a somewhat different burden of proof requirement that is 'similar' to an affirmative defence, but unlike an affirmative defence did not require the responding party to bear the burden of proof".<sup>158</sup> Because the United States "has taken a diametrically opposite stand in seeking appellate review on this issue", India states that the Appellate Body may "accordingly disregard" the United States' contention that Article II:2(a) is an exception to Article II:1(b).<sup>159</sup>

(c) Equivalence

70. India rejects the United States' argument that the Panel focused on a single attribute of the word "equivalent", and argues that the Panel "in fact examined all attributes of the word".<sup>160</sup> Moreover, India also considers erroneous and misleading the assertion that equivalence relates to effect, amount, and function. India contends that the dictionary meaning suggests that "equivalent" could refer to one of the three attributes, but not all three taken together.

71. India agrees with the Panel's rejection of the definitions of "equivalent" offered by the United States—"having the same effect", "equal in amount", "virtually the same thing", "virtually identical especially in effect or function"—on the grounds that attributing such meanings to the word "equivalent" would fail to give separate meaning to the concept of "consistency with Article III:2".

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<sup>155</sup>India's appellee's submission, para. 40.

<sup>156</sup>*Ibid.*, para. 44.

<sup>157</sup>*Ibid.*, para. 32.

<sup>158</sup>*Ibid.*, para. 34.

<sup>159</sup>*Ibid.*, para. 35.

<sup>160</sup>*Ibid.*, para. 62 (referring to Panel Report, paras. 7.179-7.187).

72. India explains that the Panel considered the phrase "consistently with the provisions of paragraph 2 of Article III" particularly relevant in interpreting the meaning of "equivalent". In India's view, the test under Article III:2 requires "an assessment of the economic impact of taxes and consequently requires an examination of the net tax burdens on imported vis-à-vis domestic like products".<sup>161</sup> India maintains that, by construing the term "equivalent" as meaning "having the same effect" or "equal in amount", the United States failed to distinguish the meaning of "equivalent" under Article II:2(a) from the test of "consistency with Article III:2" under the same provision. Accordingly, in India's view, the interpretation of the United States "renders the cross-reference contained in Article II:2(a) to the consistency with the provisions of Article III:2 redundant and is also contrary to the concept of effective treaty interpretation".<sup>162</sup> India also believes that the Appellate Body's findings in *EC – Asbestos*, do not "suggest that panels are precluded from basing their decision on a single attribute as long as they have based such a decision on a consideration of all possible attributes of an item".<sup>163</sup> In this case, India asserts that the Panel's interpretation was correct because it considered the relevance of all possible interpretations of the term "equivalent". India remarks that the Panel "looked at the applicability and relevance of each of these factors and provided adequate reasons for dismissing them".<sup>164</sup>

73. India rejects the argument of the United States that the Panel's focus on the "purpose or reason that a Member may have for imposing the charge" would permit Members to impose duties in excess of those set out in their Schedules.<sup>165</sup> Instead, the rationale of the Panel was that border charges that are equivalent to internal taxes, but in excess of those taxes, will be disciplined by a separate analysis under Article III:2. As India maintains, "[a]n independent examination under Article III:2 would ensure that the net tax burden on imported and domestic like products are the same".<sup>166</sup> India concludes that the analysis of the United States is "based on an incomplete and incorrect reading of the Panel's findings and should therefore be disregarded".<sup>167</sup>

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<sup>161</sup>India's appellee's submission, para. 63 (referring to Panel Report, *Argentina – Hides and Leather*, para. 11.243).

<sup>162</sup>*Ibid.*

<sup>163</sup>*Ibid.*, para. 65.

<sup>164</sup>*Ibid.*, para. 73.

<sup>165</sup>*Ibid.*, para. 69.

<sup>166</sup>*Ibid.*, para. 70.

<sup>167</sup>*Ibid.*

(d) Consistency with Article III:2 of the GATT 1994

74. India disagrees with the United States that the Panel did not require an examination of consistency with Article III:2 in order to establish a claim under Article II:2(a). For India, the United States' claims that the Panel's interpretation is not consistent with the text of Article II:2(a) and reads out the requirement of consistency with Article III:2 "are based on an erroneous reading of the Panel's findings."<sup>168</sup>

75. India considers that the United States "has not been able to sufficiently appreciate the two-step analysis conducted by the Panel".<sup>169</sup> The Panel first looked into whether the border charge fits within the scope of non-discriminatory Article II:2 charge using the concept of equivalence. The Panel then examined whether the charge satisfied the requirements of Article II:2(a)—that is, whether "it is 'equivalent' to an internal charge, and the internal charge is imposed consistently with GATT Article III:2, using the 'concept of consistency'".<sup>170</sup> In India's view, the Panel's ruling does not imply, as the United States suggests, "that a border charge which is equivalent to an internal tax but which in turn is not imposed consistently with Article III:2 would be compatible with the requirements of Article II:2(a)".<sup>171</sup> Rather, India continues, even if a border charge is determined to be within the scope of Article II:2(a), "the internal charge in question will be subjected to a further Article III:2 scrutiny".<sup>172</sup>

76. India believes the Panel suggested that the ultimate analysis of whether an internal tax is imposed consistently with Article III:2 will involve a comparison of the net tax burden on imported products vis-à-vis domestic like products. Because the Panel found in this case that the border charge is equivalent to an internal tax, the Panel also suggested that the border charge "will effectively be caught by the provisions of Article III:2".<sup>173</sup> India emphasizes that if the "watertight demarcation between border charges and internal taxes" advanced by the United States were adopted, this would not allow the "net tax burden" on imported and domestic like products to be addressed.<sup>174</sup>

77. India disagrees with the United States that the Panel required the complaining party to make an independent claim of violation of Article III:2 in order to challenge a border charge that is found to be equivalent to an internal tax. In India's view, the United States' misinterpretation of the Panel's finding "flows from its failure to distinguish the 'scope' and 'consistency' requirements from each

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<sup>168</sup>India's appellee's submission, para. 47.

<sup>169</sup>*Ibid.*, para. 48 (referring to Panel Report, paras. 7.204 and 7.205).

<sup>170</sup>*Ibid.* (referring to Panel Report, paras. 7.204 and 7.205).

<sup>171</sup>*Ibid.*, para. 50.

<sup>172</sup>*Ibid.*

<sup>173</sup>*Ibid.*, para. 53 (referring to Panel Report, paras. 7.196 and 7.206).

<sup>174</sup>*Ibid.*, para. 55.

other".<sup>175</sup> India acknowledges the Panel's finding that a border charge need not be consistent with Article III:2 for it to fall within the scope of Article II:2(a). However, according to India, the Panel's ruling requires that for a border charge to be imposed consistently with Article II:2(a), it must meet two requirements: the border charge must be equivalent to an internal tax; and the internal tax must be imposed consistently with Article III:2. Thus, India submits, "for the complaining party to establish that the border charge is equivalent to an internal charge, but inconsistent with Article III:2, it must make an independent claim."<sup>176</sup>

78. India also takes issue with the United States' argument that, where the complaining party alleges a violation of Article II:1(b), it must also make an independent claim under Article VI. Instead, India argues, the Panel's finding implies that a complaining party must establish that a challenged measure "is non-discriminatory" by demonstrating "in the case of Article II:2(a) that it is (functionally) equivalent to an internal charge, and in the case of Article II:2(b), that it is an antidumping or countervailing duty".<sup>177</sup> India considers that "[a]n independent claim under Article III and VI in every Article II:1(b) challenge does not appear to be the Panel's suggestion".<sup>178</sup>

(e) Article 11 of the DSU

79. India requests the Appellate Body to reject the United States' claim that the Panel acted inconsistently with its obligations under Article 11 of the DSU. Referring to the Appellate Body Report in *EC – Hormones*, India argues that a panel acts inconsistently with its obligations under Article 11 only when it deliberately or wilfully distorts or disregards evidence before it. According to India, the United States has failed to demonstrate that the Panel in this case acted in such a manner.

80. India emphasizes that the burden of establishing a *prima facie* case under Article II:2(a) rested on the United States as the complaining party, and that it was not incumbent on India, as the responding party, to identify any excise duties or local taxes as would counterbalance the Additional Duty and the Extra-Additional Duty. Rather, it was for the United States to point out the charges that it perceived as being not equivalent to relevant internal taxes so as to sustain its claim under Articles II:1(a) and II:1(b).

81. India further claims that it did not fail to identify the relevant internal taxes to which the Additional Duty and the Extra-Additional Duty are equivalent. Rather, India submits that it explained in detail to the Panel the mechanism, structure, design, and effect of both Additional Duty and Extra-

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<sup>175</sup>India's appellee's submission, para. 58.

<sup>176</sup>*Ibid.*

<sup>177</sup>*Ibid.*, para. 59.

<sup>178</sup>*Ibid.*

Additional Duty. In addition, it provided detailed information of various legal provisions of the Customs Act and Customs Tariff Act and relevant Articles in the Constitution of India, which constitute and establish the system of indirect taxation in India. According to India, this information, together with the Panel's finding that "equivalent" under Article II:2(a) refers to "function", enabled the Panel to conclude that the Additional Duty was "equivalent" to state excise duties and that the Extra-Additional Duty was "equivalent" to state-level VAT, sales taxes, and other local taxes and charges.

82. India submits that the Panel examined all the evidence and "accorded suitable weight to those pieces of evidence upon which it believed that a determination of equivalence would depend".<sup>179</sup> In particular, the Panel considered evidence indicating the possibility of a rate differential between the Extra-Additional Duty and the internal sales taxes. However, India contends that after weighing the evidence the Panel chose to place greater emphasis on the functional equivalence of the Extra-Additional Duty and the state sales taxes.<sup>180</sup> India argues, in this regard, that the relative weight accorded by the Panel to particular evidence on the record cannot form the basis of a challenge under Article 11 of the DSU.<sup>181</sup>

83. India further submits that it was incumbent upon the United States to adduce evidence to substantiate its contention that India's state-level VAT, sales taxes and other local taxes and charges are not "equivalent" to the Extra-Additional Duty.<sup>182</sup> In the absence of such evidence the Panel was "perfectly justified" in relying on available evidence and in concluding that the Extra-Additional Duty and India's state-level VAT and Central Sales Tax performed the same function and were consequently "equivalent".<sup>183</sup> Consequently, in India's view, the United States' claim under Article 11 of the DSU should be rejected.

(f) Conclusion

84. For these reasons, India requests the Appellate Body to uphold the Panel's finding that the United States has failed to establish that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

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<sup>179</sup>India's appellee's submission, para. 101.

<sup>180</sup>*Ibid.*

<sup>181</sup>*Ibid.*

<sup>182</sup>*Ibid.*, para. 103.

<sup>183</sup>*Ibid.*

2. Scope of the United States' Challenge to the Additional Duty and the Extra-Additional Duty

85. India argues that the Panel was correct in concluding that the United States was not challenging the provisions of the Customs Act and the Customs Tariff Act and that, instead, the United States' claims were limited to the relevant customs notifications that imposed the Additional Duty on alcoholic beverages and the Extra-Additional Duty on a broader range of products. India argues that the Panel's finding in this regard was due to the failure of the United States to distinguish between the relevant statutory provisions and the customs notifications imposing the Additional Duty and the Extra-Additional Duty and its failure to draw a distinction between the mandatory and discretionary nature of the statutory provisions and the customs notifications. In any event, even if the scope of the United States' challenge had been broader, India reiterates that the Customs Act and the Customs Tariff Act do not mandate a WTO-inconsistent action. India, therefore, requests that the Appellate Body reject the United States' challenge of the Panel's finding that the United States was not challenging the provisions of the Customs Act and the Customs Tariff Act with respect to the Additional Duty and the Extra-Additional Duty.

3. Conformity of the Additional Duty and the Extra-Additional Duty with Articles II:1(a) and II:1(b) of the GATT 1994

(a) Articles II:1(a) and II:1(b) of the GATT 1994

86. India emphasizes, first, that the Additional Duty is neither an OCD nor an ODC within the meaning of Article II:1(b). Instead, it is a charge imposed at the time of importation of alcoholic liquor in lieu of state level excise duties, and is thus a charge "equivalent" to internal taxes permitted under Article II:2(a).<sup>184</sup> India explains that "the structure, effect and design of the [Additional Duty] is solely to offset the excise duties payable by Indian manufacturers of the like domestic product."<sup>185</sup> Similarly, India submits that the Extra-Additional Duty is imposed on products at the time of importation in lieu of state-level VAT, sales taxes, and other local taxes and charges.

87. Based on its view that the United States has failed to establish that the Additional Duty and the Extra-Additional Duty fall within the scope of Article II:1(b), India requests the Appellate Body to reject the United States' claim that those measures are inconsistent with Articles II:1(a) and II:1(b).

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<sup>184</sup>India's appellee's submission, para. 116 (referring to India's first written submission to the Panel, para. 42).

<sup>185</sup>*Ibid.*

(b) Article II:2(a) of the GATT 1994

88. India further argues that the United States has "misunderstood" the relationship between Articles II:1(b) and II:2(a), and therefore erroneously claims that India has the burden to prove that the Additional Duty is "equivalent" to state-level excise duties.<sup>186</sup> India asserts that, although it was not required to do so, it nonetheless produced sufficient evidence explaining to the Panel the structure, design and effect of the Additional Duty in order to enable the Panel to come to a conclusion that the Additional Duty is "equivalent" to state-level excise duties. India further argues that it provided sufficient evidence to establish the equivalence of the Extra-Additional Duty with relevant internal taxes, including by identifying relevant provisions of the Customs Act and the Customs Tariff Act. According to India, the Panel, based on this evidence and Customs Notification 19/2006, rightly found that the Extra-Additional Duty was equivalent to state-level VAT, sales tax, and other taxes and charges.

89. India notes that, on appeal, the United States makes reference to India's "admission" that the rates of the Additional Duty "are arrived at through a process of averaging" the rates of state-level excise duties, "which in turn indicates that in some instances the [Additional Duty] may subject imports to charges in excess of those on like domestic products."<sup>187</sup> According to India, this "process of averaging" is not indicative of whether the Additional Duty is equivalent to state-level excise duties, because the Additional Duty serves the same "function" as the state-level excise duties.<sup>188</sup> Moreover, India contends that the United States, by relying on India's assertion that different rates of excise duty may exist in Indian states, has "implicitly acknowledged" that Indian states do in fact impose such excise duties.<sup>189</sup>

90. For these reasons, India requests the Appellate Body to reject the United States' claim that the Additional Duty and the Extra-Additional Duty are not justified under Article II:2(a) of the GATT 1994.

(c) Article III:2 of the GATT 1994

91. India submits that the Appellate Body "need not" complete the analysis if it finds the Additional Duty or the Extra-Additional Duty to constitute internal taxes or otherwise to be subject to Article III:2 of the GATT 1994.<sup>190</sup>

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<sup>186</sup>India's appellee's submission,, para. 126.

<sup>187</sup>*Ibid.*, para. 128 (referring to United States' appellant's submission, para. 164).

<sup>188</sup>*Ibid.*

<sup>189</sup>*Ibid.*

<sup>190</sup>*Ibid.*, para. 134.

92. According to India, the United States appears to contend that, while conducting its analysis under Article II:2(a), the Panel failed to examine the consistency of the Additional Duty and the Extra-Additional Duty with Article III:2, and that the Appellate Body should examine this issue if it finds that those measures are otherwise subject to Article III. In this regard, India submits that the Panel was not required to examine the consistency of the Additional Duty and Extra-Additional Duty with Article III:2 in order to dispose of the United States' claims under Articles II:1(a) and II:1(b). Nor, according to India, would there appear to be a "need" for the Appellate Body to complete the analysis because the Panel did not "fail to address" the United States' claim, which was made under Article II and not under Article III:2.<sup>191</sup> India further argues that there are no facts on the record, much less uncontested ones, given that the United States did not produce any evidence in support of its claim.<sup>192</sup>

93. India submits that the United States requests, in the alternative, that the Appellate Body examine the consistency of the Additional Duty and the Extra-Additional Duty under Article III:2 if it concludes that these measures are "internal taxes".<sup>193</sup> India emphasizes that the Panel's analysis in the present case was focused on whether the Additional Duty and the Extra-Additional Duty fall within the scope of Article II:1(b). In particular, the Panel was called upon to examine whether those measures constitute border charges that are "equivalent" to internal taxes under Article II:2(a). India underscores, however, that at no point was the Panel called upon, either by the United States or by India, to characterize the Additional Duty and the Extra-Additional Duty as "internal taxes" within the meaning of Article III:2.<sup>194</sup>

94. India further argues that a claim that the Additional Duty and Extra-Additional Duty are internal taxes under Article III:2 cannot be said to be "closely related" to a claim of inconsistency with Article II:1(b), nor is there a "logical continuum" between the two.<sup>195</sup> In addition, India alleges that the United States presented no arguments or evidence to support its allegation that the Additional Duty and Extra-Additional Duty are inconsistent with Article III:2<sup>196</sup> and that the United States is precluded from raising what is essentially a new claim before the Appellate Body.<sup>197</sup> Accordingly, India submits that the Appellate Body should reject the United States' request to make a finding under Article III:2 of the GATT 1994.

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<sup>191</sup>India's appellee's submission, para. 138.

<sup>192</sup>*Ibid.*

<sup>193</sup>*Ibid.*, para. 133.

<sup>194</sup>*Ibid.*, para. 141.

<sup>195</sup>*Ibid.*, para. 142.

<sup>196</sup>*Ibid.*, para. 143 (referring to Panel Report, paras. 7.403 and 7.415).

<sup>197</sup>*Ibid.*, para. 144.

C. *Claims of Error by India – Other Appellant*

95. India claims that the Panel committed legal error by making certain "concluding remarks" at the end of its Report. India points out that Articles 19.1 and 19.2 of the DSU authorize a panel to make recommendations and suggestions regarding implementation "only when" a measure has been found to be inconsistent with provisions of a covered agreement.<sup>198</sup> India observes that this was not the case in the underlying dispute. On this basis, India takes issue with the Panel's remarks, which it says "appear to be in the nature of policy suggestions to the Government of India".<sup>199</sup> India emphasizes in this regard that it is "well within its rights under the covered agreements ... to continue to impose duties on imports, where such duties have not been found to be inconsistent with its WTO obligations."<sup>200</sup> Viewed in this light, the Panel's "concluding remarks" could, therefore, "add to or diminish such rights and obligations and consequently contravene the provisions of Article 19.2 of the DSU".<sup>201</sup> India submits, moreover, that the Panel's "concluding remarks" would not qualify as "such other findings" as will assist the DSB in making recommendations or rulings within the meaning of Article 11 of the DSU.

96. For these reasons, India requests the Appellate Body to find that the Panel erred in offering "concluding remarks" contrary to the provisions of Articles 3.2, 11, and 19 of the DSU. Accordingly, India requests that the Appellate Body "modify paragraph 8.2 of the Panel Report and remove the Panel's *concluding remarks* commencing from the second sentence of paragraph 8.2 until the end of that paragraph".<sup>202</sup>

D. *Arguments of the United States – Appellee*

97. The United States submits the Panel's "concluding remarks"—contained in the final paragraph of the Panel Report—are simply clarifications of the Panel's conclusions and are not in the nature of suggestions within the meaning of Article 19.1 of the DSU. According to the United States, the Panel's remarks do not add to or diminish India's obligations under the covered agreements and are, therefore, not inconsistent with Article 3.2 or Article 19.2 of the DSU. The United States submits that nothing in the DSU prohibits a panel from offering such remarks. For the United States, this is true, regardless of whether a panel finds or does not find the measure at issue to be WTO-inconsistent.<sup>203</sup>

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<sup>198</sup>India's other appellant's submission, para. 14.

<sup>199</sup>*Ibid.*, para. 21. (referring to Panel Report, para. 8.2)

<sup>200</sup>*Ibid.*, para. 22.

<sup>201</sup>*Ibid.*, para. 22.

<sup>202</sup>*Ibid.*, para. 30.

<sup>203</sup>*Ibid.*, para. 5.

In addition, the United States submits that, "it is difficult to see how, in being clear about its findings and conclusions, the Panel is acting in a manner contrary to Article 11" of the DSU.<sup>204</sup>

98. Accordingly, the United States requests the Appellate Body to dismiss India's claim that the Panel's concluding remarks are inconsistent with Articles 3, 11, and 19 of the DSU and to reject India's request to remove the Panel's concluding remarks commencing with the second sentence of paragraph 8.2 until the end of that paragraph.

E. *Arguments of the Third Participants*

1. Australia

99. Australia submits that the Panel should not have relied on the 1980 GATT Council Decision on the *Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions*<sup>205</sup> as establishing a "strict test" between OCDs and ODCs being discriminatory and charges falling under Article II:2 being non-discriminatory.<sup>206</sup> Australia adds that such a test is not required by the ordinary meaning of the text in context and adds an unnecessary layer of legal complexity to the analysis. According to Australia, while the GATT panel in *US – Customs User Fee* referred to the 1980 GATT Council Decision, that panel also observed that Article II:2(c) charges disadvantage imports. Australia argues that the fact that Article II:2 charges may be "generally non-discriminatory ... should not be extrapolated into an absolute rule".<sup>207</sup> Australia notes that the Panel's test may make it "impossible" for a complaining party to establish that a charge is inherently discriminatory, and that the complaining party may therefore be unable to satisfy the burden of proof.<sup>208</sup> Australia maintains that the better approach to examining whether a charge falls under Article II:1(b) is the "broader framework" suggested by the Appellate Body in *Chile – Price Band System*, which includes an examination "of the charge's overall design, application and structure".<sup>209</sup>

100. Australia contends that the Panel erred in failing to characterize Article II:2 as an exception or defence to Article II:1(b). Australia notes that language in the chapeau of Article II:2 ("Nothing in this Article shall prevent ...") is similar language to Articles XX, XXI, and XXIV:5, which have been found to be affirmative defences. Australia considers that the GATT panel in *US – Customs User Fee* allocated to the responding party the burden of proving consistency with Article II:2(c). Australia

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<sup>204</sup>United States' appellee's submission, para. 7.

<sup>205</sup>GATT Council Decision, *Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions*, GATT document C/107/Rev.1, adopted 26 March 1980, BISD 27S/22, para. 9.

<sup>206</sup>Australia's third participant's submission, para. 4.

<sup>207</sup>*Ibid.*, para. 6.

<sup>208</sup>*Ibid.*, para. 7.

<sup>209</sup>*Ibid.*, para. 8.

submits that the Panel "was incorrect in attempting to distinguish" the GATT panel's reasoning in that case, and that such reasoning applies equally to the other subparagraphs of Article II:2, which share the same chapeau.<sup>210</sup> Australia objects to placing on the complaining party the burden of disproving consistency with Article II:2 because of its potential to lead to difficulties in the resolution of future disputes and to inequitable outcomes.

101. Australia supports the Panel's finding regarding the meaning of "equivalent" in Article II:2(a). The meaning arrived at by the United States is incorrect, Australia submits, because it is "not supported by the ordinary meaning of the words in the first sentence of Article II:2(a) in their context".<sup>211</sup> Australia also contends that, as a practical matter, the United States' test is too strict as it is "unlikely that all such 'equivalent' taxes charged at the border would be found to be 'structured', 'applied' or 'designed' in the same way as a more complex domestic tax."<sup>212</sup>

102. Australia agrees with the Panel's finding that Article II:2 "sets up a two part test" requiring that a border tax has to be both "equivalent" to an internal tax on like products, and "imposed consistently with the provisions of Article III:2".<sup>213</sup> Australia disagrees with the United States' characterization of Article III:2 as confined only to internal taxes and charges. In Australia's view, such an approach "would appear to read down" the meaning of the *Ad Note* to Article III which subjects internal taxes and charges to the disciplines of Article III even if levied at the "time or point of importation" on imported goods.<sup>214</sup> Similarly, such an approach disregards the language of Article II:2(a), which directly links charges "imposed at the time of importation" to the provisions of Article III:2.<sup>215</sup> If, as India concedes, application of the Additional Duty and Extra-Additional Duty results in some imported products incurring charges "in excess of" those imposed on like domestic products, in Australia's view, those charges would be inconsistent with Article III:2 and could not therefore satisfy the test set out in Article II:2(a). Australia submits that Articles II, III, and the *Ad Note* to Article III "describe a system of obligations and affirmative defences, and provide a framework for regulating the range of charges that may be imposed on imports as compensation for the treatment of like domestic products".<sup>216</sup> Australia considers that these provisions "cannot be read in isolation as the United States' approach would appear to require".<sup>217</sup>

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<sup>210</sup> Australia's third participant's submission, para. 13.

<sup>211</sup> *Ibid.*, para. 17a.

<sup>212</sup> *Ibid.*, para. 17b.

<sup>213</sup> *Ibid.*, para. 19.

<sup>214</sup> *Ibid.*, para. 21.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*, para. 23.

<sup>217</sup> *Ibid.*

2. Chile

103. Pursuant to Rule 24(2) of the *Working Procedures*, Chile chose not to submit a third participant's submission but notified its intention to appear at the oral hearing. At the oral hearing, Chile indicated that it had a systemic interest in some of the issues raised in this appeal, including the relationship between Articles II:1(b) and II:2(a) of the GATT 1994.

3. European Communities

104. The European Communities cautions against an "overly formalistic basis" for distinguishing between charges that apply to imported products under Articles II and III of the GATT 1994 and "against widely differing legal consequences depending on which set of provisions are applied".<sup>218</sup> The European Communities adds that "if various measures of similar effect are inconsistent with GATT 1994, then that may be the important finding to reach with relative clarity and simplicity, without getting excessively lost in the detail of precisely which of two or more (perhaps overlapping) provisions has been breached."<sup>219</sup>

105. The European Communities disagrees with the Panel's finding that only measures that "inherently discriminate" against imports fall within the scope of Article II:1(b). The European Communities wonders whether the distinction between rule and exception, on the one hand, and mutually delimiting provisions, on the other hand, may be "excessively rigid, or possibly circular".<sup>220</sup> The European Communities suggests that one alternative would be "to read the relevant provisions constantly together, and to apply some robust common sense when it comes to burden of proof".<sup>221</sup> Referring to the example of an anti-dumping duty that allegedly violates Article VI, the European Communities notes that, while a complaining Member may have the burden of proving inconsistency, the defending Member has some responsibility to refer to the measure and the record of administrative proceedings, and the investigating authority must, with respect to the measure itself, substantiate its findings and resort to facts available only under specific procedural constraints. In the light of these observations, the European Communities submits that, if a defending Member asserts that its measure is "equivalent" to an internal tax, that Member should be in a position to substantiate its assertion. "At the very least", the European Communities adds, "one may reasonably be open to the proposition that once the complaining Member has done what it reasonably can to fairly raise the question of equivalence, the burden shifts to the defending Member."<sup>222</sup>

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<sup>218</sup>European Communities' third participant's submission, para. 7.

<sup>219</sup>*Ibid.*

<sup>220</sup>*Ibid.*, para. 9.

<sup>221</sup>*Ibid.*

<sup>222</sup>*Ibid.*, para. 10.

106. The European Communities disagrees with the Panel's finding that the term "equivalent" in Article II:2(a) means "having the same function" or "corresponding". Instead, the European Communities believes that it means that the amount imposed with respect to an imported product must be the same as the amount imposed with respect to a domestic like product and that "this must be so with respect to each import (or sale)".<sup>223</sup> Moreover, the European Communities submits, the Panel's interpretation appears premised on the notion that it would otherwise deprive Article III:2 of the GATT 1994 of meaning, which erroneously fails to take into account the possibility that Articles II and III may to some extent overlap.

107. The European Communities disagrees with India's claim that the Panel committed legal error by offering "concluding remarks" at the end of its Report. According to the European Communities, the Panel simply noted that, since the establishment of the Panel, India adopted or modified certain measures. The European Communities also notes that the Panel Report does not necessarily mean that the new measures are WTO-consistent, or that the withdrawal of such measures would be WTO-consistent. The European Communities does not consider these remarks to be recommendations or suggestions within the meaning of Article 19 of the DSU. Nor does the European Communities consider the Panel's remarks to add to or diminish the rights or obligations of the parties, or to be inconsistent with Article 11 of the DSU. Rather, the European Communities considers them to be "*obiter dicta* of no legal effect, and thus not susceptible to appeal."<sup>224</sup>

#### 4. Japan

108. Japan submits that Article II:2 sets forth exceptions to the prohibition contained in Article II:1 of the GATT 1994. Japan considers that the prohibition of Article II:1(b) is "key to the GATT system" and "is broadly phrased", underlining "the importance of effective tariff commitments in the GATT system".<sup>225</sup> Japan maintains, however, that "certain duties or charges were taken out of this broad prohibition, and these were listed in Article II:2".<sup>226</sup> Japan refers to the chapeau of Article II:2 ("Nothing in this Article shall prevent ...") in support of its characterization of Article II:2 as an exception. Japan also rejects the Panel's view that this language merely confirms or clarifies what is set out elsewhere in the Agreement. As Japan argues, the final clause in Article II:2(a) (that is, "in respect of an article from which the imported product has been manufactured or produced in whole or in part) is not covered by the *Ad Note* to Article III, and thus could not have been a confirmation or

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<sup>223</sup>European Communities' third participant's submission, para. 11.

<sup>224</sup>*Ibid.*, para. 12.

<sup>225</sup>Japan's third participant's submission, para. 11.

<sup>226</sup>*Ibid.*, para. 12.

clarification that these charges fall outside the prohibition of Article II:1(b). As Japan submits, "[w]ithout the express provision of Article II:2(a), these charges would be covered by the prohibition of Article II:1(b)."<sup>227</sup>

109. Observing that under WTO jurisprudence the party invoking an exception carries the initial burden of showing that its reliance thereon is justified, Japan states that this would require India as the defending Member invoking the exception contained in Article II:2(a) to demonstrate the fulfilment of all its elements. Japan considers, however, that such an approach raises an important concern, "as it would, arguably, reverse the burden of proof" in demonstrating conformity with Article III:2.<sup>228</sup> Japan maintains that it would be reasonable and consistent with WTO and GATT precedents for India to bear the burden of demonstrating that its measure is covered by Article II:2(a). After India has met its burden of showing that Article II:2(a) applies by demonstrating that the charge is "equivalent" to an internal tax, according to Japan, it would be for the United States to assume the burden of demonstrating inconsistency of the measure with Article II:2(a). Japan adds that this interpretation would ensure that independent meaning be given to those elements of Article II:2(a) that are not part of the requirements of Article III:2.<sup>229</sup> Moreover, Japan considers it "contrary to common sense" that in response to India's mere assertion that Article II:2(a) applies, the United States would have to demonstrate that such internal taxes "never exist[ed]", because "it is difficult if not impossible to prove a negative".<sup>230</sup> Finally, Japan argues that the Panel's allocation of the burden of proof would frustrate "fair, prompt and effective" dispute resolution, because the United States as complainant could not be expected to be familiar with a system for internal taxation that does not apply to its imported products.<sup>231</sup>

110. Japan submits that the interpretation advanced by the United States—that India must substantiate its assertions that the measures fall within the scope of Article II:2(a)—might also avoid a reversal of the burden of proof under Article III:2. Japan maintains, however, that such an approach would still impose on the complaining party "the ultimate burden of proving the lack of 'equivalence' with internal taxes", as well as "the burden of proving the inconsistency with Article III:2 of those internal taxes in respect of an article from which the imported product has been manufactured or produced in whole or in part".<sup>232</sup> Japan believes that the allocation of burden of proof in a case involving an Article II:2 defence should not result in a situation where the complaining Member "bears at least part of a *prima facie* burden" with respect to elements specific to a provision that

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<sup>227</sup>Japan's third participant's submission, para. 14.

<sup>228</sup>*Ibid.*, para. 19.

<sup>229</sup>*Ibid.*, para. 21.

<sup>230</sup>*Ibid.*, para. 23.

<sup>231</sup>*Ibid.*, para. 24.

<sup>232</sup>*Ibid.*, para. 28.

functions as an exception.<sup>233</sup> Japan considers the interpretation advanced by the United States as "more balanced and proper" than the one developed by the Panel, pursuant to which the complaining party would carry the full burden of proof.<sup>234</sup>

5. Viet Nam

111. Pursuant to Rule 24(2) of the *Working Procedures*, Viet Nam chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing. In its statement at the oral hearing, Viet Nam addressed the relationship between Articles II:1(b), II:2(a), and III:2 of the GATT 1994, and the meaning of the word "equivalent" in Article II:2(a).

112. With respect to the relationship between Articles II:1(b), II:2(a), and III:2 of the GATT 1994, Viet Nam agrees with the Panel that OCDs or ODCs as defined under Article II:1(b) are to be distinguished from charges imposed under Article II:2(a). In particular, Viet Nam considers that the Panel correctly determined that Article II:1(b) applies only to duties and charges that "inherently discriminate" against imports, and that Article II:2 does not constitute an exception to Article II:1(b). Viet Nam also supports the Panel's interpretation of the word "equivalent" in Article II:2(a). Viet Nam considers that the Panel properly examined all meanings of the word "equivalent" and rightly concluded that the term must be interpreted in its context, which includes the phrase "consistently with the provisions of Article III:2". Viet Nam adds that, to be imposed consistently with Article II:2(a), a border charge must satisfy two requirements: (i) it must be "equivalent" to an internal tax; and (ii) the internal tax must be imposed consistently with Article III:2.

**III. Issues Raised in This Appeal**

113. The following issues are raised in this appeal:

- (a) whether the Panel erred in limiting its findings to the Additional Duty as imposed through Customs Notification 32/2003 and the Extra-Additional Duty as imposed through Customs Notification 19/2006;

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<sup>233</sup>Japan's third participant's submission, para. 27.

<sup>234</sup>*Ibid.*, para. 29.

- (b) whether the Panel erred in its interpretation of Articles II:1(b) and II:2(a) of the GATT 1994, in particular, in finding that:
  - (i) Article II:1(b) covers only duties or charges that "inherently discriminate against imports", while Article II:2 covers only charges that do not "inherently discriminate against imports";
  - (ii) the term "equivalent" in Article II:2(a) relates to the "function" of a border charge and an internal tax, and does not relate to "effect" or "amount"; and
  - (iii) in order to satisfy the conditions of Article II:2(a), it is not necessary to determine whether a charge equivalent to an internal tax is "imposed consistently with the provisions of paragraph 2 of Article III";
- (c) whether the Panel erred in finding that, in the circumstances of the present case, the United States was required to show that the Additional Duty and the Extra-Additional Duty are not justified under Article II:2(a);
- (d) whether the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU;
- (e) whether the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994; and, finally,
- (f) whether the Panel acted contrary to Articles 3.2, 11, and 19 of the DSU by offering "concluding remarks" relating to certain subsequent customs notifications issued by India, and, if so, whether the Appellate Body should declare these remarks to be of no legal effect.

#### IV. Introduction

114. These proceedings concern two types of duties imposed by India on imports of certain products entering its customs territory.<sup>235</sup> In particular, the United States challenges: (i) the "Additional Duty"<sup>236</sup> imposed by India at the border on imports of alcoholic liquor for human consumption (beer, wine, and distilled spirits, collectively "alcoholic beverages"); and (ii) the "Extra-

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<sup>235</sup>Panel Report, para. 7.2.

<sup>236</sup>In our discussion, we use the term "Additional Duty" to describe the customs duties imposed by India on imports of alcoholic beverages pursuant to authority under Section 3(1) of India's Customs Tariff Act, 1975 (Exhibits US-3A and IND-2A submitted by the United States and India, respectively, to the Panel).

Additional Duty"<sup>237</sup> imposed by India at the border on imports of a wider range of products, including certain agricultural and industrial products, as well as alcoholic beverages.<sup>238</sup> India collects these duties in addition to its basic customs duty imposed under Section 12 of India's Customs Act of 1962 (the "Basic Customs Duty").<sup>239</sup> According to India, the Additional Duty and the Extra-Additional Duty are taken to counter-balance various internal taxes or charges.<sup>240</sup>

115. Before the Panel, the United States claimed that the Additional Duty, when imposed in conjunction with the Basic Customs Duty, is inconsistent with India's obligations under Articles II:1(a) and II:1(b) of the GATT 1994 because it results in the imposition of ordinary customs duties ("OCDs") or other duties or charges ("ODCs") that exceed the bound rates set out in India's Schedule of Concessions. The United States brought a similar claim against the Extra-Additional Duty. In response, India argued that the measures challenged by the United States are charges on the importation of products that are equivalent to internal taxes imposed in respect of like domestic products. As such, India argued that they are subject to Article II:2(a) and do not fall within the scope of Article II:1(b).<sup>241</sup>

116. The Panel concluded that the United States had not established that the Additional Duty on alcoholic beverages and the Extra-Additional Duty are OCDs, or alternatively, ODCs, and that they do not fall within the scope of Article II:2(a). As a result, the Panel found that the United States had failed to establish that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b).<sup>242</sup> The United States challenges these findings on appeal.

117. Before examining the issues raised by the participants on appeal, we consider it useful to provide a brief description of India's Basic Customs Duty, the Additional Duty and the Extra-Additional Duty, as well as the legal framework in which they operate.

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<sup>237</sup>In our discussion, we use the term "Extra-Additional Duty" to describe the customs duties imposed by India on imports of alcoholic beverages pursuant to authority under Section 3(5) of India's Customs Tariff Act. We note that the Panel and India referred to this measure as "SUAD", an abbreviation based on the phrase "such additional duty" found in Section 3(5) of India's Customs Tariff Act.

<sup>238</sup>Panel Report, paras. 7.11 and 7.19.

<sup>239</sup>See *ibid.*, paras. 2.2, 7.2 and 7.6-7.9.

<sup>240</sup>*Ibid.*, para. 2.3.

<sup>241</sup>*Ibid.*, para. 7.150.

<sup>242</sup>*Ibid.*, para. 8.1(a) and (b).

## V. The Measures at Issue

118. Several types of duties imposed by India's Central Government on imported products, are relevant to this dispute. These include the Basic Customs Duty, the Additional Duty, and the Extra-Additional Duty.<sup>243</sup>

119. As regards the United States' challenge to the Additional Duty, Part 1 of India's Schedule of Concessions specifies India's tariff binding at 150 per cent for beer, wine, and distilled spirits.<sup>244</sup> As regards the products subject to the Extra-Additional Duty, India's tariff bindings range from 25 per cent to 100 per cent for a range of agricultural products under the Harmonized Commodity Description and Coding System (the "Harmonized System") chapters 02, 04, 07, 08, 09, 11, 15, and 20; and from 0 per cent to 5 per cent in the case of certain industrial products falling mainly under Harmonized System chapters 84, 85, and 90.<sup>245</sup>

120. India indicated to the Panel that there are no recorded ODCs within the meaning of Article II:1(b) of the GATT 1994 in India's Schedule of Concessions that are applicable to any of the products subject to the measures at issue in these proceedings.<sup>246</sup>

### A. *The Basic Customs Duty*

121. The authority to levy the Basic Customs Duty is provided in Section 12 of India's Customs Act of 1962 (the "Customs Act").<sup>247</sup> Regarding the rates at which the Basic Customs Duty is to be levied, Section 2 of India's Customs Tariff Act of 1975 (the "Customs Tariff Act") provides that "[t]he rates at which duties of customs shall be levied under the Customs Act, 1962, are specified in the First and Second Schedules".<sup>248</sup>

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<sup>243</sup>Panel Report, para. 7.3.

<sup>244</sup>*Ibid.*, footnote 115 to para. 7.8.

<sup>245</sup>*Ibid.*, para. 7.19; Exhibits US-1A and US-1B submitted by the United States to the Panel. See also para. 135 of this Report.

<sup>246</sup>*Ibid.*, para. 7.4 (referring to India's response to Question 10 posed by the Panel at the first Panel meeting).

<sup>247</sup>Section 12 of India's Customs Act, 1962 (Act 52 of 1962) (Exhibits US-2 and IND-1 submitted by the United States and India, respectively, to the Panel) is reproduced in paragraph 7.6 of the Panel Report and provides, in relevant part:

Dutiable Goods. (1) 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.

<sup>248</sup>India's Customs Tariff Act, 1975 (Act 51 of 1975) (Exhibits US-3A and IND-2A submitted by the United States and India, respectively, to the Panel).

122. The First Schedule to the Customs Tariff Act specifies "standard rates" of duty for all imports. India has, however, partially exempted imports of certain goods from these "standard rates" through customs notifications.<sup>249</sup> For instance, India has partially exempted certain alcoholic beverages from the standard duty rates through its Customs Notifications 11/2005 and 20/1997, issued on the basis of Section 25 of the Customs Act.<sup>250</sup> As a result, at the date of establishment of the Panel, the applied rate of Basic Customs Duty for imports of distilled spirits was 150 per cent *ad valorem*, and the applied rate of Basic Customs Duty for imports of beer and wine was 100 per cent *ad valorem*.<sup>251</sup> On 3 July 2007, after the date the Panel was established, India increased the applied rate of Basic Customs Duty for imports of wine to 150 per cent *ad valorem* through Customs Notification 81/2007.<sup>252</sup>

B. *The Additional Duty*

123. The Additional Duty is provided for in Section 3(1) of the Customs Tariff Act.<sup>253</sup> The opening paragraph in Section 3(1) sets out that "any article" that is imported into India "shall ... be liable" to a duty, in addition to the Basic Customs Duty, that is "equal to the excise duty for the time being

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<sup>249</sup>Panel Report, para. 7.8.

<sup>250</sup>Section 25 of the Customs Act states as follows:

Power to grant exemption from duty. (1) 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.

<sup>251</sup>Panel Report, para. 7.8.

<sup>252</sup>*Ibid.*

<sup>253</sup>Section 3(1) of the Customs Tariff Act is reproduced in paragraph 7.10 of the Panel Report and provides, in relevant part:

Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article:

Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.

Explanation.— 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 to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

leviable on a like article if produced or manufactured in India." It further indicates that, where an excise duty is assessed as a percentage of the value of an article produced or manufactured in India, the Additional Duty applicable to the corresponding imported article "shall be calculated at that percentage of the value of the imported article".

124. Entry 51 of List II of the Constitution of India empowers individual states, rather than the Central Government, to impose "duties of excise" on alcoholic beverages manufactured or produced in the relevant state.<sup>254</sup> In addition, the same entry of the Constitution empowers states to impose "countervailing duties" on alcoholic beverages manufactured or produced elsewhere in India.<sup>255</sup>

125. Section 3(1) of the Customs Tariff Act includes a proviso governing the imposition of the Additional Duty on alcoholic beverages. Whereas the opening paragraph of Section 3(1) stipulates that for products other than alcoholic beverages the Additional Duty shall be "equal" to the excise duty, the proviso stipulates that the Central Government "may" specify the rate of Additional Duty applicable to imports of alcoholic beverages "having regard" to excise duties leviable on like alcoholic beverages produced or manufactured in different Indian states.<sup>256</sup>

126. Section 3(1) of the Customs Tariff Act also clarifies that the reference to "excise duty" in Section 3(1) is the excise duty for the time being "in force" which would be leviable on a like article if produced or manufactured in India and, where such duty is leviable at different rates, the "highest duty".

127. Section 3(2) of the Customs Tariff Act requires, *inter alia*, that the Basic Customs Duty leviable under Section 12 of the Customs Act is to be included in the calculation of the amount of Additional Duty payable under Section 3(1) of the Customs Tariff Act.<sup>257</sup> Section 3(7) of the Customs Tariff Act stipulates further that the duties imposed under Section 3 shall be in addition to any other duty imposed under the Customs Tariff Act or any other law.<sup>258</sup> Section 3(8) of the

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<sup>254</sup>See Panel Report, paras. 7.271 and 7.284 (referring to Entry 51 of List II of the Constitution of India).

<sup>255</sup>*Ibid.*, 7.284. The relevant entry is silent on the issue of the powers of states in respect of excise duties or countervailing duties on imported alcoholic liquor.

<sup>256</sup>See *ibid.*, paras. 7.11 and 7.280.

<sup>257</sup>*Ibid.*, para. 7.12.

<sup>258</sup>*Ibid.*, para. 7.13.

Customs Tariff Act explains the relationship between the Additional Duty and the provisions of the Customs Act.<sup>259</sup>

128. Customs Notification 32/2003 of 1 March 2003 specifies the rates of Additional Duty for alcoholic beverages that were applicable on the date of establishment of the Panel.<sup>260</sup> These rates were specified by the Central Government "[i]n exercise of the powers conferred by the proviso to sub-section (1) of Section 3 of the Customs Tariff Act".<sup>261</sup>

<sup>259</sup>Section 3(8) of the Customs Tariff Act is reproduced in paragraph 7.14 of the Panel Report and provides, in relevant part:

The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.

<sup>260</sup>Customs Notification 32/2003 creates different price bands and different rates of Additional Duty corresponding to these bands. These rates are reproduced in paragraph 7.15 of the Panel Report. The details are provided in the table below:

	Heading	Description of goods	Rate of additional duty
BEERS AND WINES	2203, 2204, 2205, or 2206	All goods put up in bottles or cans or any other packing, for ultimate sale in retail and having a CIF price, - (a) not exceeding USD 25 per case;  (b) exceeding USD 25 but not exceeding USD 40 per case;  (c) exceeding USD 40 per case	75% <i>ad valorem</i>  50% <i>ad valorem</i> or USD 37 per case, whichever is higher  20% <i>ad valorem</i> or USD 40 per case, whichever is higher
DISTILLED SPIRITS	2208	All goods put up in bottles or cans or any other packing, for ultimate sale in retail and having a CIF price, -  (a) not exceeding USD 10 per case;  (b) exceeding USD 10 but not exceeding USD 20 per case;  (c) exceeding USD 20 but not exceeding USD 40 per case;  (d) exceeding USD 40 per case	150% <i>ad valorem</i>  100% <i>ad valorem</i> or USD 40 per case, whichever is higher  50% <i>ad valorem</i> or USD 53.2 per case, whichever is higher  25% <i>ad valorem</i> or USD 53.2 per case, whichever is higher

<sup>261</sup>Panel Report, para. 7.266. In response to a question posed by the Panel, India stated that the rates of Additional Duty specified in Customs Notification 32/2003 are the result of "a process of averaging, whereby 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." (Panel Report, para. 7.269 (referring to India's response to Question 28 posed by the Panel in the first Panel meeting)). India further explained that, "[w]hile it is possible that in some States and in some price bands, the [Additional Duty] imposed [through CN 32/2003] on imported products may be marginally in 'excess of' the excise duty imposed on like domestic products in that State, it is equally likely that the [Additional Duty] is less than the State excise duty in some other States". (*Ibid.* (referring to India's response to Question 8(c) posed by the Panel at the first Panel meeting))

129. As noted earlier<sup>262</sup>, the United States in this case challenges the Additional Duty only with respect to alcoholic beverages.<sup>263</sup>

130. On 3 July 2007, after the date the Panel was established, India issued Customs Notification 82/2007.<sup>264</sup> Through this notification, India exempted from the Additional Duty all products listed in Customs Notification 32/2003. The Panel found that its terms of reference did not extend to Customs Notification 82/2007 and, consequently, declined to rule on the Additional Duty on alcoholic beverages as modified by Customs Notification 82/2007.<sup>265</sup> Neither party appeals this finding by the Panel.

C. *The Extra-Additional Duty*

131. The Extra-Additional Duty is provided for in Section 3(5) of the Customs Tariff Act.<sup>266</sup> Section 3(5) provides that the Central Government may levy "on any imported article ... such additional duty as would counter-balance 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". Customs Notification 19/2006 of 1 March 2006 prescribes the Extra-Additional Duty "having regard to the sales tax, value added tax, local tax and other taxes or charges leviable on sale or purchase or transportation of like goods in India". Specifically, India maintains that the Extra-Additional Duty is intended to counter-balance three categories of internal taxes: (i) state value-added taxes ("VAT") or

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<sup>262</sup>See *supra*, para. 2 of this Report.

<sup>263</sup>Panel Report, para. 7.11 (referring to United States' first written submission to the Panel, para. 52; and United States' oral statement at the first Panel meeting, para. 12).

<sup>264</sup>Exhibit IND-6 submitted by India to the Panel.

<sup>265</sup>Panel Report, paras. 7.71 and 7.72.

<sup>266</sup>Section 3(5) of the Customs Tariff Act is reproduced in paragraph 7.17 of the Panel Report and provides, in relevant part:

If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under subsection (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance 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, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent. of the value of the imported article as specified in that notification.

Explanation.—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 so 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.

sales taxes, (ii) the Central Sales Tax, and (iii) other local taxes and charges imposed by state or local governments.<sup>267</sup>

132. State sales taxes are imposed on products outside the state VAT system, including on alcoholic liquor, tobacco products, and certain petroleum products.<sup>268</sup> Indian states are prohibited by Article 286(1) of the Indian Constitution from imposing taxes in respect of the importation of products into India's customs territory, and in respect of inter-state sales transactions.<sup>269</sup> Subsequent domestic sales of imported products, however, may be subject to state taxes. For inter-state transactions, the Central Sales Tax applies and, although prescribed by a law of the Central Government, it is assessed and collected by the Indian state where the good being sold originates.<sup>270</sup> Examples of "other local taxes and charges" include Mandi taxes, market committee fees, turnover taxes, and transport fees.<sup>271</sup>

133. According to Section 3(5), the Central Government may specify, through notification in the Official Gazette, the Extra-Additional Duty "at a rate not exceeding four per cent" of the value of the imported products. Customs Notification 19/2006 of 1 March 2006 specifies that the Extra-Additional Duty shall be applied at the rate of four percent *ad valorem*.<sup>272</sup> Customs Notification 19/2006 also provides that the Extra-Additional Duty applies to all imported products "specified under the Chapter, heading, sub-heading or tariff item of the First Schedule to the [Customs Tariff Act]". Customs Notification 20/2006 exempts certain goods from some or all of the Extra-Additional Duty.<sup>273</sup>

134. Section 3(6) of the Customs Tariff Act requires, *inter alia*, that the Basic Customs Duty leviable under Section 12 of the Customs Act and the Additional Duty are to be included in the calculation of the amount of Extra-Additional Duty owed under Section 3(5) of the Customs Tariff Act.<sup>274</sup>

135. The United States' claims regarding the Extra-Additional Duty concern a broader range of products than those in the United States' claims against the Additional Duty, which concern only alcoholic beverages. Although the Extra-Additional Duty applies to all products, the United States

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<sup>267</sup>Panel Report, para. 7.356.

<sup>268</sup>*Ibid.*, para. 7.352.

<sup>269</sup>*Ibid.*, para. 7.379.

<sup>270</sup>*Ibid.*, para. 7.352.

<sup>271</sup>*Ibid.*, para. 7.365.

<sup>272</sup>Exhibits US-7 and IND-7 submitted by the United States and India, respectively, to the Panel.

<sup>273</sup>Panel Report, para. 7.362. Other than "goods of local importance"—which India acknowledges are exempt from state VAT but for which there is no exemption of the Extra-Additional Duty—goods that are nil-rated are exempt from the Extra-Additional Duty, and goods subject to a one per cent state VAT are subject to a corresponding rate of Extra-Additional Duty.

<sup>274</sup>*Ibid.*, para. 7.20.

provided an illustrative list of products to which the application of the Extra-Additional Duty allegedly resulted in violation of India's bound rates.<sup>275</sup> The examples identified by the United States included a range of agricultural products under Harmonized System chapters 02, 04, 07, 08, 09, 11, 15, and 20 (such as certain animal and dairy products, raisins and dried prunes, and orange juice), and certain industrial products falling mainly under Harmonized System chapters 84, 85, and 90 (such as calculating and data processing machines, electrical devices and resistors, printed circuits and semiconductor devices, and instruments and apparatus for measuring, and for physical or chemical analysis).<sup>276</sup>

136. On 14 September 2007, after the date the Panel was established, India issued Customs Notification 102/2007, which, under certain conditions, exempted the products falling within the First Schedule of the Customs Tariff Act from the Extra-Additional Duty when imported into India for subsequent sale.<sup>277</sup> The Panel noted that, pursuant to the notification, the importer would be required to pay the Extra-Additional Duty on the product's importation, but may subsequently file a claim for refund of the Extra-Additional Duty already paid on the imported product.<sup>278</sup> As it did in the case of the Additional Duty, the Panel found that its terms of reference did not extend to Customs Notification 102/2007 and, consequently, declined to rule on the Extra-Additional Duty as modified by that notification.<sup>279</sup> Neither party has appealed this finding by the Panel.

137. We begin our consideration of the claims raised on appeal by examining the United States' claim regarding the scope of its challenge to the Additional Duty and the Extra-Additional Duty.

## **VI. Scope of the United States' Challenge to the Additional Duty and the Extra-Additional Duty**

138. The United States argues that the Panel erred in finding that the United States did not challenge, as such, Section 12 of the Customs Act and Section 3(1) of the Customs Tariff Act with respect to the Additional Duty on alcoholic beverages, and that it did not challenge, as such, Section 12 of the Customs Act and Section 3(5) of the Customs Tariff Act with respect to the Extra-Additional Duty.<sup>280</sup> In addition, the United States asserts that the Panel erred in finding that the United States' challenge to the Additional Duty was "limited" to the Additional Duty as imposed

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<sup>275</sup>Panel Report, para. 7.19; Exhibits US-1A and US-1B submitted by the United States to the Panel.

<sup>276</sup>*Ibid.*

<sup>277</sup>*Ibid.*, para. 7.24.

<sup>278</sup>*Ibid.*

<sup>279</sup>*Ibid.*, paras. 7.99 and 7.100.

<sup>280</sup>United States' appellant's submission, para. 116 (referring to Panel Report, para. 7.106).

through Customs Notification 32/2003, and that its challenge to the Extra-Additional Duty was "limited" to the Extra-Additional Duty as imposed through Customs Notification 19/2006.<sup>281</sup>

139. In response, India argues that the Panel was correct in concluding that the United States did not challenge the aforementioned provisions of the Customs Act and the Customs Tariff Act, respectively, and that, instead, the United States' claims are limited to the relevant customs notifications that imposed the Additional Duty and the Extra-Additional Duty. India argues that the Panel's finding in this regard resulted from the failure of the United States to distinguish between the relevant statutory provisions and the customs notifications imposing the Additional Duty and the Extra-Additional Duty, and its failure to draw a distinction between the mandatory and discretionary nature of the statutory provisions and the customs notifications. In any event, India argues that the provisions of the Customs Act and the Customs Tariff Act merely confer upon the Central Government the discretion to impose the Additional Duty and the Extra-Additional Duty, and do not prescribe the rates at which they may be charged.<sup>282</sup>

140. We begin our evaluation of this aspect of the United States' appeal by examining the Panel's terms of reference, which define the scope of the dispute.<sup>283</sup>

141. Document WT/DS360/5, referred to in the Panel's terms of reference, is the request by the United States for the establishment of a panel. That request mentions the relevant Indian measures as including the Customs Act, Section 3 of the Customs Tariff Act, Customs Notification 32/2003 and Customs Notification 19/2006.<sup>284</sup> Therefore, the United States' panel request includes Section 12 of the Customs Act and Sections 3(1) and 3(5) of the Customs Tariff Act in the scope of the dispute.

142. In its first written submission to the Panel, the United States argued that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) and that India imposes these duties, *inter alia*, through Section 12 of the Customs Act, Section 3 of the Customs Tariff Act, Customs Notification 32/2003, and Customs Notification 19/2006.<sup>285</sup> In addition, the United States' response to a question posed by the Panel reveals that the United States is challenging the Additional Duty and the Extra-Additional Duty "comprising" Section 12 of the Customs Act, Section 3 of the Customs Tariff Act, Customs Notification 32/2003, and Customs Notification 19/2006.<sup>286</sup>

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<sup>281</sup>United States' appellant's submission, para. 116 (referring to Panel Report, para. 7.106).

<sup>282</sup>India's appellee's submission, para. 111.

<sup>283</sup>See Appellate Body Report, *US – Carbon Steel*, para. 126.

<sup>284</sup>WT/DS360/5, pp. 1-2.

<sup>285</sup>See United States' first written submission to the Panel, para. 2.

<sup>286</sup>See United States' response to Question 16 posed by the Panel at the first Panel meeting.

143. As we understand it, the United States contends that the Panel erred to the extent it limited the scope of its challenge to the customs notifications that imposed the Additional Duty and the Extra-Additional Duty.<sup>287</sup> In support of its contention, the United States refers to paragraph 7.106 of the Panel Report:

The United States has described the [Additional Duty] on alcoholic liquor as comprising a number of provisions of Indian law, including Section 3(1) of the Customs Tariff Act and CN 32/2003. Likewise, it has described the [Extra-Additional Duty] as comprising a number of provisions of Indian law, including Section 3(5) of the Customs Tariff Act and CN 19/2006. The various provisions identified by the United States are the provisions which it considers to be the provisions through which the [Additional Duty] on alcoholic liquor and the [Extra-Additional Duty] are levied. We understand that the United States has identified these provisions in an effort to identify the specific measures at issue, which are the [Additional Duty] on alcoholic liquor and the [Extra-Additional Duty]. The United States has never said that it is challenging Section 3(1) or Section 3(5) of the Customs Tariff Act separately from the [Additional Duty] on alcoholic liquor and the [Extra-Additional Duty], as actually imposed through specific customs notifications, nor has it requested the Panel to find that Section 3(1) and Section 3(5) are, as such, inconsistent with Article II:1. It is clear to us, therefore, that this case involves no challenge to Indian statutory provisions as such. In our view, the United States is challenging the [Additional Duty] on alcoholic liquor, as imposed through CN 32/2003, and the [Extra-Additional Duty], as imposed through CN 19/2006.<sup>288</sup> (footnotes omitted)

144. We do not read this paragraph cited by the United States as containing a finding by the Panel that the United States was *not* challenging Section 12 of the Customs Act and Section 3(1) of the Customs Tariff Act with respect to the Additional Duty on alcoholic beverages, and that it was *not* challenging Section 12 of the Customs Act and Section 3(5) of the Customs Tariff Act with respect to the Extra-Additional Duty.<sup>289</sup> Rather, we understand the Panel simply to have concluded that the United States was not challenging Sections 3(1) and 3(5) of the Customs Tariff Act and Section 12 of the Customs Act *in isolation from* the Additional Duty on alcoholic beverages and the Extra-Additional Duty. In fact, the United States confirms, in its appellant's submission, that it is not bringing *separate* challenges to these provisions.<sup>290</sup> We note, moreover, that, in the passage to which the United States refers, the Panel observed that the United States described the Additional Duty and the Extra-Additional Duty as comprising a number of provisions of Indian law, "including" Sections 3(1) and 3(5) of the Customs Tariff Act, and that the United States considered the Additional

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<sup>287</sup>United States' response to questioning at the oral hearing.

<sup>288</sup>Panel Report, para. 7.106.

<sup>289</sup>United States' appellant's submission, para. 116 (referring to Panel Report, para. 7.106).

<sup>290</sup>*Ibid.*, para. 120.

Duty and the Extra-Additional Duty to be levied through these provisions.<sup>291</sup> Furthermore, in its analysis of the function of the measures at issue, the Panel carefully examined the statutory basis of Customs Notifications 32/2003 and 19/2006—including Sections 3(1) and 3(5) of the Customs Tariff Act and Section 12 of the Customs Act—and did not limit its review to the notifications themselves.

145. For these reasons, we do not agree with the United States to the extent it suggests that the Panel improperly limited the scope of its challenge to the customs notifications that imposed the Additional Duty and the Extra-Additional Duty. Instead, as we see it, the Panel's findings relate, on the one hand, to the Additional Duty as imposed through Section 12 of the Customs Act, Section 3(1) of the Customs Tariff Act, and Customs Notification 32/2003, and, on the other hand, the Extra-Additional Duty as imposed through Section 12 of the Customs Act, Section 3(5) of the Customs Tariff Act, and Customs Notification 19/2006.

## VII. Article II:1(b) and Article II:2(a) of the GATT 1994

146. The United States claims that the Additional Duty and the Extra-Additional Duty are each inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.<sup>292</sup> The Panel considered that the United States' claims under Article II:1(a) were consequential to its claims under Article II:1(b), and turned first to interpret Article II:1(b), whereby it also interpreted Article II:2(a).<sup>293</sup> We follow the order of the Panel's analysis.

147. The United States claims that the Panel erred in finding that Article II:1(b) covers only duties and charges that "inherently discriminate against imports", and that the Panel also erred in finding that Article II:2 covers only non-discriminatory charges.<sup>294</sup> The United States also contends that the Panel incorrectly defined the term "equivalent" in Article II:2(a), and, in so doing, disregarded the "effect" and "amount" of the charge.<sup>295</sup> In addition, the United States submits that the Panel read out of Article II:2(a) the requirement of "consistency with Article III:2", and incorrectly concluded that a charge "equivalent" to an internal tax can be challenged only pursuant to an independent claim under Article III:2.<sup>296</sup> Finally, the United States contends that the Panel erred in finding that the *prima facie* case of the United States required a showing that the challenged measures do not fall under

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<sup>291</sup>Panel Report, para. 7.106.

<sup>292</sup>*Ibid.*, para. 7.111.

<sup>293</sup>*Ibid.*, para. 7.400. The Panel also refers to the Appellate Body Report in *Argentina – Textiles and Apparel*, where the Appellate Body conducted its analysis first of Article II:1(b), first sentence, because that provision was "more specific and germane to the case at hand" than Article II:1(a). (Panel Report, para. 7.111 (quoting Appellate Body Report in *Argentina – Textiles and Apparel*, para. 45))

<sup>294</sup>See United States' appellant's submission, paras. 13-38.

<sup>295</sup>See *ibid.*, paras. 63-74.

<sup>296</sup>See *ibid.*, paras. 43-62.

Article II:2(a), in this case, by demonstrating that they do not "inherently discriminate against imports".<sup>297</sup>

148. India supports the reasoning of the Panel that duties or charges falling under Article II:1(b) "inherently discriminate against imports", and that charges falling under Article II:2(a) do not.<sup>298</sup> India likewise believes that the Panel correctly defined the meaning of "equivalent", and that the Panel did not, as the United States contends, read out of Article II:2(a) the requirement of "consistency with Article III:2", or require consideration of that requirement outside of an analysis under Article II:2(a).<sup>299</sup> Finally, India disagrees that the Panel's articulation of the United States' *prima facie* burden was in error.<sup>300</sup>

A. *Interpretation of Article II:1(b) and Article II:2(a)*

149. We begin our analysis by examining Articles II:1(b) and II:2(a) of the GATT 1994. Article II:1(b) provides as follows:

The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

150. The first sentence of Article II:1(b) provides that products described in a Member's Schedule of Concessions shall be exempt from "ordinary customs duties" that are "in excess of" those duties set out in the Schedule. Thus, the principal obligation in the first sentence of Article II:1(b) requires a Member to refrain from imposing OCDs on imported products in excess of those provided for in that Member's Schedule.<sup>301</sup>

151. The second sentence of Article II:1(b) stipulates further that such imported products shall be exempt from "all other duties or charges of any kind" that are imposed "on or in connection with" importation, to the extent that such duties or charges exceed amounts imposed on the date of entry into force of the GATT 1994 (or which are directly and mandatorily required to be imposed by

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<sup>297</sup>See United States' appellant's submission, paras. 39-42 and 75-81.

<sup>298</sup>India's appellee's submission, paras. 10-14, 22-23 and 37.

<sup>299</sup>*Ibid.*, paras. 49-50, 58 and 62.

<sup>300</sup>*Ibid.*, para. 44.

<sup>301</sup>Appellate Body Report, *Argentina – Textiles and Apparel*, para. 46.

legislation in force on that date), as recorded and bound in the Schedules of Concessions annexed to the GATT 1994.<sup>302</sup> As the Panel acknowledged, the duties and charges covered by the second sentence of Article II:1(b) are "defined in relation to" duties covered by the first sentence of Article II:1(b), such that ODCs encompass only duties and charges that are not OCDs.<sup>303</sup>

152. Article II:2 of the GATT 1994 provides as follows:

Nothing in this Article shall prevent any Member from imposing at any time on the importation of any product:

- (a) 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 or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
- (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;
- (c) fees or other charges commensurate with the cost of services rendered.

153. The chapeau to Article II:2 thus makes reference to "this Article", that is, Article II in its entirety. Article II:1(b) clarifies that the tariff binding in the relevant column of a Member's Schedule of Concessions provides an upper limit on the amount of OCDs and ODCs that may be imposed. Article II:2, in turn, clarifies that nothing in Article II, including Article II:1(b), shall prevent a Member from imposing on the importation of a product: (i) a charge equivalent to an internal tax imposed consistently with Article III:2 in respect of a like domestic product; (ii) an anti-dumping or countervailing duty applied consistently with Article VI; or (iii) fees or other charges commensurate with the cost of services rendered. The chapeau of Article II:2, therefore, connects Articles II:1(b) and II:2(a) and indicates that the two provisions are inter-related. Article II:2(a), subject to the conditions stated therein, exempts a charge from the coverage of Article II:1(b). The participants agree that, if a charge satisfies the conditions of Article II:2(a), it would not result in a violation of

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<sup>302</sup>See *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*.

<sup>303</sup>Panel Report, para. 7.125.

Article II:1(b).<sup>304</sup> Thus, we consider that, in the context of this case involving the application of duties that are claimed to correlate to certain internal taxes, Article II:1(b) and Article II:2(a) are closely related and must be interpreted together.

154. We turn now to consider the Panel's interpretation of Articles II:1(b) and II:2(a) and review the participants' arguments on appeal.

1. Scope of Article II:1(b)

155. The United States argues that there is no textual basis in Article II:1(b) to conclude, as the Panel did, that the scope of that provision is limited to duties or charges that "inherently discriminate against imports".<sup>305</sup> India, however, supports the reasoning of the Panel.<sup>306</sup> We note, at the outset, that the Panel's interpretative analysis was guided by what it characterized as the "issue presented in this case": that is, whether the residual category of ODCs reflected in the second sentence of Article II:1(b) includes, as argued by the United States, "any and all charges imposed on the importation of a product" other than ODCs, or whether it was, as India argued, limited to "a subset of all such duties and charges".<sup>307</sup>

156. The Panel acknowledged that the phrase "'other duties and charges of any kind' could conceivably support the interpretation argued for by the United States"<sup>308</sup>, but considered that customary rules of treaty interpretation require that the terms of the treaty also be read in their context and in the light of the treaty's object and purpose. As "immediate context", the Panel noted a "parallelism" between the two sentences of Article II:1(b) and concluded that this parallelism "strongly suggests that ... the charges intended to be covered by the two provisions are charges of the same kind".<sup>309</sup> In addition, the Panel reasoned that ODCs "inherently discriminate against, or disadvantage, imports", and that there is a "readily apparent rationale"—that is, avoiding the circumvention of tariff concessions—for subjecting ODCs that are "of the same kind" as ODCs to the

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<sup>304</sup>The United States' and India's responses to questioning at the oral hearing. The Panel and the participants also agree that the Additional Duty and the Extra-Additional Duty are border charges subject to the terms of Article II, and that they are not disciplined by the provisions of Article III as "internal taxes". The *Ad Note* to Article III provides that "any internal tax or other internal charge" that applies to both domestic and imported products, but which is "collected or enforced" in respect of the imported product "at the time or point of importation", is "nevertheless to be regarded" as subject to the provisions of Article III. Whether a measure is a "charge" to which Article II:2(a) applies, or an "internal tax or other internal charge" referred to in the *Ad Note* to Article III, has to be decided in the light of the characteristics of the measure and the circumstances of the case.

<sup>305</sup>United States' appellant's submission, para. 13.

<sup>306</sup>India's appellee's submission, paras. 13 and 14.

<sup>307</sup>Panel Report, para. 7.127.

<sup>308</sup>*Ibid.*, para. 7.128.

<sup>309</sup>*Ibid.*

same disciplines.<sup>310</sup> Finally, the Panel considered that the charges referred to in Article II:2 differ from OCDs and ODCs because they do not "inherently discriminate against, or disadvantage, imports", and inferred from this that charges falling under Article II:2 are therefore outside the scope of Article II:1(b).

157. We do not agree with the Panel that Article II:1(b) "strongly suggests" that OCDs and ODCs are "of the same kind".<sup>311</sup> As the Panel itself observed, the two sets of charges are described and disciplined in separate sentences of Article II:1(b), and may, by their terms, not pertain to the same event of importation.<sup>312</sup> While both sentences of Article II:1(b) relate to duties or charges applied "on the importation" of certain products, the second sentence of Article II:1(b) also uniquely covers charges imposed "in connection with the importation" of such products. Moreover, the second sentence of Article II:1(b) refers to duties or charges "of any kind", which suggests that, while in some instances ODCs may be of a similar kind to OCDs, in other instances they may be of a different kind. Accordingly, we do not find the language of Article II:1(b) read in its context to be conclusive as to whether OCDs and ODCs are necessarily of a similar or dissimilar kind.

158. We also disagree with the Panel that duties and charges within the meaning of Article II:1(b) must always be considered to "inherently discriminate against imports". We do not see a textual or other basis for the Panel's conclusion that "inherent discrimination" is a relevant or necessary feature of charges covered by Article II:1(b). Article II:1(b) does not set out a specific rationale for imposing duties or charges, and there exist rationales other than "inherent discrimination" for applying such duties or charges. The Panel observed that OCDs "are typically applied so as to afford protection to domestic production" and concluded from this that OCDs are inherently discriminatory.<sup>313</sup> This rationale, however, would not seem to apply in situations where there is no domestic production (or even expectations of future domestic production) to protect. OCDs may be applied for a variety of reasons unrelated to domestic production, including, as the United States observes, the raising of revenue. India argues that the United States fails to appreciate that the Panel's standard of inherent discrimination relates to the effect, not the purpose, of a duty.<sup>314</sup> Even if this were so, we do not consider that the language and context of Article II:1(b) provide a basis for concluding that all duties and charges falling under Article II:1(b) are inherently discriminatory. Moreover, as the United States contends, the language of the second sentence of Article II:1(b) could be read to suggest that, even if OCDs inherently discriminate against imports, ODCs cover *all* duties or charges *of any kind* imposed

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<sup>310</sup>Panel Report, para. 7.131.

<sup>311</sup>See *ibid.*, para. 7.128.

<sup>312</sup>See *ibid.*, paras. 7.125 and 7.126.

<sup>313</sup>*Ibid.*, para. 7.129.

<sup>314</sup>India's appellee's submission, para. 17.

on or in connection with importation other than OCDs, including those duties or charges that *do not* inherently discriminate against imports.

159. We also have concerns with the Panel's characterization of duties or charges under Article II:1(b) as "inherently discriminatory", insofar as this may suggest that the mere application of a tariff by a Member on imports of another Member is somehow unfair or prejudicial. Such a connotation would, in our view, be at odds with negotiations by Members of tariff concessions that allow for the imposition of duties up to a bound level.<sup>315</sup> Tariffs are legitimate instruments to accomplish certain trade policy or other objectives such as to generate fiscal revenue. Indeed, under the GATT 1994, they are the preferred trade policy instrument, whereas quantitative restrictions are in principle prohibited.<sup>316</sup> Irrespective of the underlying objective, tariffs are permissible under Article II:1(b) so long as they do not exceed a Member's bound rates.

160. Moreover, we disagree with the Panel that Articles II:2(b) and II:2(c) provide contextual support for the proposition that duties and charges falling under Article II:2 do not "inherently discriminate against imports". The Panel may have referred to Articles II:2(b) and II:2(c) in order to suggest that charges falling under Article II:2(a) are not "inherently discriminatory" because they are functionally equivalent to certain internal taxes. However, for anti-dumping and countervailing duties under Article II:2(b), there is nominally no domestic charge that would serve as the counterpart to which such duties would correspond. Likewise, charges under Article II:2(c) are, as the Panel admits, imposed exclusively on imports<sup>317</sup>, and also do not have an obvious domestic counterpart. Thus, we do not find contextual support in Articles II:2(b) and II:2(c) for considering Article II:2 duties and charges as universally non-discriminatory in respect of imports.

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<sup>315</sup>As recited in the preamble to the GATT 1994, Members sought through the Agreement to enter into "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade".

<sup>316</sup>We note in this regard that the panel in *Turkey – Textiles* stated:

A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection. Tariffs, to be reduced through reciprocal concessions, ought to be applied in a non-discriminatory manner independent of the origin of the goods (the "most-favoured-nation" (MFN) clause). Article I, which requires MFN treatment, and Article II, which specifies that tariffs must not exceed bound rates, constitute Part I of GATT. Part II contains other related obligations, *inter alia* to ensure that Members do not evade the obligations of Part I. Two fundamental obligations contained in Part II are the national treatment clause and the prohibition against quantitative restrictions. The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection "of choice". (Panel Report, *Turkey – Textiles*, para. 9.63).

<sup>317</sup>Panel Report, para. 7.136.

161. In support of its interpretation of Article II:1(b), the Panel referred to a 1980 proposal of the Director-General, adopted by the GATT Council, regarding the introduction of a loose-leaf system for the Schedules of Concessions. That document contains the following statement:

I wish to point out in this connexion that such "other duties or charges" are in principle only those that discriminate against imports. As can be seen from Article II:2 of the General Agreement, such "other duties or charges" concern neither charges equivalent to internal taxes, nor anti-dumping or countervailing duties, nor fees or other charges commensurate with the cost of services rendered.<sup>318</sup>

162. This was a statement made by the Director-General in proposing a loose-leaf system through which schedules of tariff concessions among GATT Members were to be consolidated, published and updated. We find that this statement is of limited relevance to an interpretation of the relationship between Articles II:1(b) and II:2(a) and, in any event, it does not provide a basis for the Panel to have introduced into those provisions an implicit concept of inherent discrimination.

163. The Panel's reliance on the 1955 Working Party report on tariffs is also misplaced. The Working Party considered whether to amend subparagraphs (b) and (c) of paragraph 1 of Article II to address the possibility that these provisions do not apply to charges on transfers, and noted without elaboration that Article II:2, "which sets out the special charges which do not fall under paragraph 1 [of Article II], does not refer to charges on transfers".<sup>319</sup> It does not appear from this statement that the relationship between Articles II:1(b) and II:2 was central to the issue addressed by the Working Party. Nor did the Appellate Body suggest in *Chile – Price Band System* that Article II:1(b) applies only to duties and charges that "inherently discriminate against imports", while Article II:2 does not.<sup>320</sup> We therefore do not find that these statements provide a sufficient basis for the Panel to devise a reading of Articles II:1(b) and II:2(a) based on whether a duty or charge "inherently discriminates against imports", nor do we believe that they are incompatible with the interpretation we reach above.

164. For these reasons, we find that the Panel erred in its interpretation of Article II:1(b) as covering only duties or charges that "inherently discriminate against imports", and of Article II:2(a) as covering only charges that do not "inherently discriminate against imports".

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<sup>318</sup>Panel Report, para. 7.144. (quoting GATT Council Decision, *Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions*, GATT document C/107/Rev.1, adopted 26 March 1980, BISD 27S/22, para. 9)

<sup>319</sup>*Ibid.*, para. 7.143. (quoting Review Working Party II Report, *Schedules and Customs Administration*, GATT document L/329, adopted 26 February 1955, BISD 3S/205, para. 7)

<sup>320</sup>*Ibid.*, para. 7.146. In *Chile – Price Band System*, the Appellate Body stated that Article II:2 sets out charges that "do not qualify" as ODCs or ODCs, but did so in the context of its consideration of the meaning of the term "ordinary customs duty" in Article 4.2 of the *Agreement on Agriculture*. (Appellate Body Report, *Chile – Price Band System*, para. 276) As we have noted, and all participants to this proceeding agree, charges that are justified under Article II:2(a) are not in breach of Article II:1(b).

2. Article II:2(a)

165. We now turn to consider the Panel's interpretation of Article II:2(a) of the GATT 1994. The United States claims that the Panel erred in both its interpretation of the term "equivalent" and its interpretation of the phrase "consistently with the provisions of paragraph 2 of Article III". We first examine the Panel's consideration of the term "equivalent". Article II:2 of the GATT 1994 reads in relevant part:

Nothing in this Article shall prevent any Member from imposing at any time on the importation of any product:

(a) 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 or in respect of an article from which the imported product has been manufactured or produced in whole or in part.

166. Article III:2 of the GATT 1994, referred to in Article II:2(a), reads in relevant part:

The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

167. The Panel considered several dictionary definitions of the term "equivalent"<sup>321</sup> and concluded that whether a border charge and internal tax are "equivalent" is determined by whether they "have the same function".<sup>322</sup> The United States argues that the Panel erred by "incorrectly focus[ing] on a single attribute to determine whether the charge and the internal tax are 'equivalent'".<sup>323</sup> We agree that all relevant attributes or definitions need to be considered in ascribing to a treaty's terms the ordinary meaning given to those terms in their context and in the light of the treaty's object and purpose.<sup>324</sup> However, we note that the Panel considered various definitions in interpreting the meaning of the term "equivalent" in Article II:2(a), and we do not find the fact that the Panel settled on one attribute of that term to be in error *per se*.

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<sup>321</sup>The Panel identified the following dictionary definitions of the term "equivalent": "equal in power, rank, authority, or excellence"; "equal in value, significance, or meaning"; "that is virtually the same thing; having the same effect"; "having the same relevant position or function; corresponding". (Panel Report, para. 7.179, quoting the *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 851)

<sup>322</sup>Panel Report, para. 7.189.

<sup>323</sup>United States' appellant's submission, para. 64.

<sup>324</sup>We are mindful here of prior statements of the Appellate Body that dictionary definitions are a useful starting point for discerning the ordinary meaning of a treaty term, but that they are not necessarily dispositive. A treaty term cannot be interpreted in isolation from the context in which it appears and in the light of the treaty's object and purpose. (Appellate Body Report, *EC – Chicken Cuts*, para. 175; Appellate Body Report, *US – Softwood Lumber IV*, para. 59)

168. The United States argues that the Panel interpreted "equivalent" to mean "function" only in the sense of "purpose" or "reason for existing", and disregarded the United States' characterization of "function" as meaning "how the charge and the internal tax operate or apply".<sup>325</sup> The Panel considered that a determination of "equivalence" seeks to establish whether separate charges on imported and domestic products "when viewed together, can be considered to form a distinct whole within the relevant Member's customs duty and tax system"<sup>326</sup>, such that "the relevant function fulfilled both by the internal tax on the domestic product and the border charge is to impose a charge on a particular product *qua* product".<sup>327</sup> On this basis, we do not consider that the Panel conveyed an understanding of the word "function" as being exclusively limited to the "purpose" or "reason for existing" of a charge, or as referring only to a Member's aims or intentions associated with the levying of the charge. Rather, the Panel suggested that it would examine whether the border charge and the internal tax in question serve a relative or comparable function or role in imposing a financial assessment on a particular product by virtue of the nature of that product, not because that product happens to be either imported or manufactured domestically.<sup>328</sup>

169. The United States further alleges that the Panel's construction of the term "equivalent" dismisses the definitions of "having the same effect" and "equal in amount".<sup>329</sup> India contends that the Panel "in fact looked at the applicability and relevance of each of these factors and provided adequate reasons for dismissing them".<sup>330</sup> The Panel reasoned that to adopt the definitions "having the same effect" and "equal in amount" would "fail to give separate meaning to the concepts of 'equivalence' and 'consistency with Article III:2'" in Article II:2(a).<sup>331</sup> If it were to adopt these meanings, the Panel explained, "it would be difficult to see any difference between the two concepts", which would run counter to the Panel's view that "equivalence" and "consistency with Article III:2" are separate and distinct elements of Article II:2(a).<sup>332</sup> As a result, the Panel concluded that a border charge and an

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<sup>325</sup>United States' appellant's submission, footnote 87 to para. 67.

<sup>326</sup>Panel Report, para. 7.189.

<sup>327</sup>*Ibid.*, para. 7.190. "Qua" is defined as "in so far as" or "in the capacity of". (*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 2422)

<sup>328</sup>We note, in this regard, that the Panel refers to both the "design or purpose" of the Additional Duty and the Extra-Additional Duty (Panel Report, paras. 7.277 and 7.372) and the "legal framework" of such duties (*Ibid.*, paras. 7.290 and 7.379).

<sup>329</sup>United States' appellant's submission, para. 72. The United States also alleges that the Panel dismissed the definitions of "virtually the same thing" and "virtually identical especially in effect or function". The first was part of one of the definitions the Panel originally cited: "[t]hat is virtually the same thing; having the same effect". (Panel Report, para. 7.179) The Panel then referred to this earlier definition simply as "having the same effect" (*Ibid.*, para. 7.182), but did not give a reason for doing so. The Panel also did not explain why it dismissed the second definition—"virtually identical especially in effect or function". Nonetheless, we do not consider that these definitions impart significance to the term "equivalent" that is different from what we discuss below.

<sup>330</sup>India's appellee's submission, para. 73.

<sup>331</sup>Panel Report, para. 7.185. When referring to "consistency with Article III:2", the Panel was making reference to the phrase "imposed consistently with the provisions of paragraph 2 of Article III" in Article II:2(a).

<sup>332</sup>*Ibid.*

internal tax could be "equivalent" even if there were a "tax burden differential to the detriment of imported products".<sup>333</sup>

170. In our view, these two concepts—"equivalence" and "consistency with Article III:2"—cannot be interpreted in isolation from each other; they impart meaning to each other and need to be interpreted harmoniously. By contrast, the Panel's interpretation was predicated on its understanding that, because the term "equivalent" refers to the border charge, and the phrase "imposed consistently with the provisions of paragraph 2 of Article III" refers to the internal tax, Article II:2(a) draws a distinction between the two concepts. We are not persuaded that the phrase "imposed consistently with the provisions of paragraph 2 of Article III" relates exclusively to the words "internal tax". Determining whether a charge is imposed consistently with Article III:2 necessarily involves a comparison of a border charge with an internal tax in order to determine whether one is "in excess of" the other. Yet, the Panel's statement that the "term 'imposed' in Article II:2(a) relates to the internal tax and not the border charge" leaves nothing with which the internal tax can be compared.<sup>334</sup>

171. Moreover, we disagree with the Panel's conclusion that the term "equivalent" does not require any quantitative comparison of the charge and internal tax. This would mean that a border charge that is significantly greater in amount than an internal tax could still be deemed "equivalent" under Article II:2(a), provided that the two were functionally equivalent. We find that such a result would be incompatible with a proper interpretation of Article II:2(a).

172. To give meaning and effect to the phrase "imposed consistently with the provisions of paragraph 2 of Article III", we consider it necessary, in the light of the structure and context of Article II:2, to read this phrase in a manner that imparts meaning to the assessment of whether the charge and internal tax are "equivalent". We disagree with the Panel that understanding the term "equivalent" as requiring a quantitative comparison would make redundant the reference to consistency with Article III:2. Indeed, as we see it, the reference in Article II:2(a) to consistency with Article III:2 suggests that the concept of equivalence includes elements of "effect" and "amount" that necessarily imply a quantitative comparison.

173. In support of its view, the Panel referred to the explanation of the Chairman of the Legal Drafting Committee during the second session of the Preparatory Committee in 1947 concerning the meaning of the term "equivalent" in Article II:2(a):

[T]he word "equivalent" here means that if a [charge] is imposed on an article because a [charge] is imposed on part of the content of this

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<sup>333</sup>Panel Report, para. 7.187.

<sup>334</sup>*Ibid.*, para. 7.171.

article, then the [charge] should only be imposed regarding the particular content of this article. 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.<sup>335</sup>

174. The Panel considered the Legal Drafting Committee's statement in the context of the Panel's interpretation of the term "equivalent", but did not attribute any significance to the reference to "value". Contrary to what the Panel suggested, we believe that the statement of the Legal Drafting Committee supports the understanding of the term "equivalent" as incorporating consideration of "value". We also note, in this respect, that the Panel referred in its interpretative analysis to a definition of "equivalent" as meaning "equal in value".<sup>336</sup> The Panel, however, dismissed this definition since "charges are not normally considered to have a value" and the reference to "value" was referring to "an exchange situation" not relevant to Article II:2(a).<sup>337</sup> We do not see on what basis the Panel could have excluded the relevance of "value" for purposes of interpreting the meaning of the term "equivalent" in Article II:2(a).

175. We thus consider that the term "equivalent" calls for a comparative assessment that is both qualitative and quantitative in nature. Such an assessment is not limited to the relative function of a charge and an internal tax, but must also include quantitative considerations relating to their effect and amount. For the foregoing reasons, we find that the Panel erred in attributing an overly narrow meaning to the term "equivalent".

176. The second element of the Panel's interpretative analysis concerned the phrase "imposed consistently with the provisions of paragraph 2 of Article III" in Article II:2(a).<sup>338</sup> Article III:2 requires that imported products shall not be subject "to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." The Panel considered that a border charge that is equivalent to an internal tax, but imposed inconsistently with Article III:2, would nonetheless be justified under Article II:2(a), and that the element of "consistency with Article III:2" is therefore "not a necessary condition" for the application of Article II:2(a).<sup>339</sup> In the Panel's view, the reference to Article III:2 in Article II:2(a) was intended "to acknowledge, and call attention to, the existence of relevant requirements stipulated elsewhere in the GATT 1994".<sup>340</sup>

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<sup>335</sup>Panel Report, para. 7.187 (referring to the Twenty Sixth Meeting of the Tariff Agreement Committee, held in Geneva on 23 September 1947, United Nations document E/PC/T/TAC/PV/26, p. 21).

<sup>336</sup>*Ibid.*, para. 7.179.

<sup>337</sup>*Ibid.*, para. 7.181.

<sup>338</sup>As we noted *supra*, at footnote 331, the Panel also referred to this phrase in its report as "consistency with Article III:2".

<sup>339</sup>Panel Report, paras. 7.209 and 7.210.

<sup>340</sup>*Ibid.*, paras. 7.211.

According to the Panel, "if the complaining party wishes a panel to examine the internal tax and an equivalent border charge in the light of the requirements of Article III:2, it is open to the complaining party to include in its panel request an independent claim of violation of Article III:2".<sup>341</sup>

177. The United States contends that the Panel erred in "read[ing] out the requirement under Article II:2(a) that, for a charge to fall within its scope, the internal tax to which the border charge is equivalent must be imposed consistently with Article III:2".<sup>342</sup> The United States argues that the Panel's interpretation renders *inutile* the reference to Article III:2 in Article II:2(a), contrary to the customary rules of treaty interpretation. Although the Panel referred to this phrase, as the United States puts it, as a "cross-reference or 'reminder' that a border charge equivalent to an internal tax is subject to Article III:2", the United States submits that this finding is also in error because "border charges—whether equivalent to an internal tax or otherwise—are not subject to Article III:2".<sup>343</sup> Relying on the distinction between a "charge" in Article II:2(a) and an "internal tax" in Article III:2, the United States posits that, "while Article II concerns duties and charges imposed on or in connection with importation, Article III:2 concerns taxes and other charges imposed internally".<sup>344</sup> Finally, the United States argues that the Panel erred in concluding that, in order to demonstrate that a charge equivalent to an internal tax is "imposed consistently with Article III:2", the United States was required to bring an independent claim under Article III:2.<sup>345</sup>

178. India does not believe that the Panel's interpretation implies, as the United States suggests, "that a border charge which is equivalent to an internal tax but which in turn is not imposed consistently with Article III:2 would be compatible with the requirements of Article II:2(a)".<sup>346</sup> In India's view, the United States' misinterpretation of the Panel's finding "flows from its failure to distinguish the 'scope' and 'consistency' requirements from each other".<sup>347</sup> As India understands the Panel's reasoning, even if a charge is determined to be within the scope of Article II:2(a) because it is "equivalent" in function to an internal tax, consistency with Article III:2 is still required in order to meet the requirements of Article II:2(a).

179. We note, however, the Panel's statement that "for the purposes of an inquiry under Article II:2(a) ... consistency of the internal tax with the provisions of Article III:2 is not a necessary condition".<sup>348</sup> The Panel added that "the reference in Article II:2(a) to 'consistency with Article III:2'

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<sup>341</sup>Panel Report, para. 7.215.

<sup>342</sup>United States' appellant's submission, para. 43.

<sup>343</sup>*Ibid.*, para. 46.

<sup>344</sup>*Ibid.*, para. 51.

<sup>345</sup>*Ibid.*, paras. 57 and 58.

<sup>346</sup>India's appellee's submission, para. 50.

<sup>347</sup>*Ibid.*, para. 58.

<sup>348</sup>Panel Report, para. 7.210.

is not intended to stipulate an additional requirement to be met for a border charge to fall outside the scope of Article II:1."<sup>349</sup> Given these unequivocal statements, we do not consider that the Panel preserved a role for evaluating "consistency with Article III:2" in the context of Article II:2(a).

180. We consider that Article II:2(a) should not be interpreted in a manner that reads out the significance, for purposes of an Article II:2(a) inquiry, of the element of "consistency with Article III:2" or, at most, ascribes to it the purpose of "acknowledg[ing], and call[ing] attention to, the existence of relevant requirements stipulated elsewhere in the GATT 1994."<sup>350</sup> Rather, as we have indicated, we believe that the requirement of "consistency with Article III:2" must be read together with, and imparts meaning to, the requirement that a charge and internal tax be "equivalent". We recall that Article II:2(a) refers to "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". We also recall that the first sentence of Article III:2 prohibits the imposition on imported products of "internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products". We therefore consider that whether a charge is imposed "in excess of" a corresponding internal tax is an integral part of the analysis in determining whether the charge is justified under Article II:2(a).<sup>351</sup> Contrary to what the Panel suggests, a complaining party is not required to file an independent claim of violation of Article III:2 if it wishes to challenge the consistency of a border charge with Article III:2.

181. We thus find that the element "imposed consistently with the provisions of paragraph 2 of Article III" forms an integral part of the assessment under Article II:2(a) of whether a charge and an internal tax are "equivalent". Accordingly, we believe the Panel erred in its interpretation that the element of "consistency with Article III:2" is not a necessary condition in the application of Article II:2(a).

## B. *Conclusion*

182. In sum, we *find* that the Panel erred in its interpretations of Article II:1(b) and Article II:2(a). In particular, the Panel erred in concluding that Article II:1(b) covers only duties or charges that "inherently discriminate against imports", and that Article II:2(a) covers only charges that do not "inherently discriminate against imports". The Panel also incorrectly interpreted the term "equivalent" in Article II:2(a) as requiring only a qualitative comparison of the relative function of a charge and internal tax, and thereby incorrectly excluded quantitative considerations relating to their effect and amount. Moreover, the Panel erred in finding that "consistency with Article III:2" is not a

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<sup>349</sup>Panel Report, para. 7.215.

<sup>350</sup>*Ibid.*, para. 7.211.

<sup>351</sup>See Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 18-19, DSR 1996:I, 97, at 115.

necessary condition in the application of Article II:2(a). Having based its analysis on an erroneous interpretation of Articles II:1(b) and II:2(a), the Panel, in our view, could not have arrived at a proper conclusion regarding whether the Additional Duty and Extra-Additional Duty are consistent with these provisions. For these reasons, we *reverse* the Panel's findings in paragraphs 7.299, 7.394, 7.401, and 8.1 of the Panel Report, that the United States failed to establish that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994. We examine the conformity of the Additional Duty and the Extra-Additional Duty with India's obligations under Article II:1(b) of the GATT 1994 in Section X of this Report.

### VIII. Burden of Proof

183. The United States claims that the Panel erred in finding that, in the circumstances of this case, it was "incumbent upon the United States to make a *prima facie* case that the measures at issue fall outside the scope of Article II:2(a)."<sup>352</sup> According to the United States, "although Article II:2 is an exception that may be invoked in defence of a measure that would otherwise be inconsistent with Article II, it is not an affirmative defence in the sense that the responding party bears the ultimate burden of proof."<sup>353</sup> Rather, if a responding party asserts that the measure does not breach Article II:1(b) because it is a measure described in Article II:2 and "substantiates that assertion, then the complaining party would bear the burden of proving the measure falls outside the scope of Article II:2 and, therefore, cannot be justified by way of Article II:2."<sup>354</sup> The United States emphasizes, however, that the fact that the complaining party would bear the burden of proof in this case does not relieve the responding party of its burden of substantiating its own assertions. According to the United States, "[t]his is consistent with the responsibility that either party has to support the facts and arguments it puts forward."<sup>355</sup>

184. India criticizes the United States' contention that Article II:2(a) represents an exception but not an affirmative defence<sup>356</sup>; asserts that there is no support for the United States' contentions<sup>357</sup>; and supports the reasoning of the Panel by noting that it "adequately defined the contours of what is required of a complaining party" to establish a *prima facie* case.<sup>358</sup> India argues that the Panel "was correct in ruling that the burden of proof must be squarely borne by the United States to make out a

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<sup>352</sup>Panel Report, para. 7.160.

<sup>353</sup>United States' appellant's submission, para. 80.

<sup>354</sup>*Ibid.*, para. 78.

<sup>355</sup>*Ibid.*, para. 80.

<sup>356</sup>India's appellee's submission, para. 34.

<sup>357</sup>*Ibid.*, para. 35.

<sup>358</sup>*Ibid.*, para. 42.

*prima facie* case" that the Additional Duty and Extra-Additional Duty violate Article II:1(b) and are not charges falling within the scope of Article II:2(a).<sup>359</sup>

185. In examining the United States' claims concerning the elements required to establish a *prima facie* showing in this case, we first recall certain features of the Appellate Body's approach to the burden of proof in WTO dispute settlement proceedings. Although the DSU contains no express rules with respect to allocation of the burden of proof in dispute settlement, the Appellate Body has recognized that generally accepted legal principles provide "that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".<sup>360</sup> Where the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing.<sup>361</sup>

186. With respect to legal argumentation and the production of evidence, the Appellate Body has explained that "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."<sup>362</sup> The nature and scope of arguments and evidence required to establish a *prima facie* case "will necessarily vary from measure to measure, provision to provision, and case to case".<sup>363</sup>

187. Importantly, the Appellate Body has also recognized that the principle that a complainant must establish a *prima facie* case of inconsistency does not resolve the question of who bears the burden of proving each specific fact alleged in a dispute. In *Japan – Apples*, the Appellate Body pointed out that "[i]t is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof."<sup>364</sup> The Appellate Body went on to find that, although the complainant must establish the *prima facie* case in support of its complaint, the respondent bears the burden of proving the facts that it asserts in its defence.

188. We recall that, in the context of this dispute, the United States in the first instance sought to establish that the Additional Duty and Extra-Additional Duty are inconsistent with Article II:1(b) as

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<sup>359</sup>India's appellee's submission, para. 36.

<sup>360</sup>Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335.

<sup>361</sup>See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335.

<sup>362</sup>Appellate Body Report, *US – Carbon Steel*, para. 157 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335).

<sup>363</sup>Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335).

<sup>364</sup>Appellate Body Report, *Japan – Apples*, para. 157 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p.14, DSR 1997:1, 323 at 335; Appellate Body Report, *EC – Hormones*, para. 98).

either OCDs or ODCs in excess of those set out in India's Schedule of Concessions. The United States made no reference to Article II:2 in its first written submission to the Panel, nor, it contends, did it need to do so. Rather, the United States considers that all it was required to show in order to establish a *prima facie* case of violation of Article II:1(b) was that the Additional Duty and Extra-Additional Duty are duties or charges falling within Article II:1(b), and that they are in excess of India's bound rates.<sup>365</sup> In the United States' view, it was up to India to show that the charges fall within the scope of Article II:2 as part of its refutation of the United States' *prima facie* case.

189. In considering the responsibilities of the parties with respect to the burden of proof, we recall the Appellate Body's observation in prior reports that the requirements of a *prima facie* case in the context of a particular dispute will be judged case by case, provision by provision, and measure by measure.<sup>366</sup>

190. Not every challenge under Article II:1(b) will require a showing with respect to Article II:2(a). In the circumstances of this dispute, however, where the potential for application of Article II:2(a) is clear from the face of the challenged measures<sup>367</sup>, and in the light of our conclusions above concerning the need to read Articles II:1(b) and II:2(a) together as closely inter-related provisions, we consider that, in order to establish a *prima facie* case of a violation of Article II:1(b), the United States was also required to present arguments and evidence that the Additional Duty and the Extra-Additional Duty are not justified under Article II:2(a).

191. We note that, in any event, India responded in its first written submission to the Panel that the Additional Duty and Extra-Additional Duty are not in violation of Article II:1(b) because they are charges justified under Article II:2(a). Consequently, India was required to adduce arguments and evidence in support of that assertion. Once the responding party seeks to rebut arguments and evidence offered by the complaining party, the complaining party, depending on the nature and content of the rebuttal submission, may need to present additional arguments and evidence in order to prevail on its claim. In this case, following India's rebuttal submission, the United States presented further

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<sup>365</sup>United States' appellant's submission, para. 76.

<sup>366</sup>*Supra*, footnote 363.

<sup>367</sup>We note that Section 3(1) of the Customs Tariff Act provides the authority for the imposition of the Additional Duty "having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States", and that Section 3(5) of the Customs Tariff Act provides the authority for the imposition of the Extra-Additional Duty "as would counter-balance 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." We further note that Customs Notifications 32/2003 and 19/2006, which set out the rates of the Additional Duty and the Extra-Additional Duty, respectively, each indicate that the rates therein are specified "having regard to" the corresponding internal taxation measures that are described in the same manner as they are set out, respectively, in Sections 3(1) and 3(5) of the Customs Tariff Act.

argumentation concerning the issue of whether the Additional Duty and Extra-Additional Duty are justified under Article II:2(a). At that point, it was for the Panel to decide the issues before it based on the arguments and evidence of the parties. We note, in this respect, the statement of the United States that, once a responding party asserts and supports a defence under Article II:2(a), "the ultimate burden would rest with the complaining party to rebut and ultimately disprove that evidence and argument."<sup>368</sup>

192. The United States contends that, if the Panel's *prima facie* standard were accepted, complaining parties alleging a violation of Article II:1(b) would have to prove, first, that the challenged duty or charge falls outside the scope of each of the subparagraphs of Article II:2 (even when the relevance of Article II:2 is not evident), and, secondly, that the measure is not some *other* type of duty or charge not covered by Article II:2.<sup>369</sup> We do not consider that a complaining party alleging a violation of Article II:1(b) must also disprove in all cases that the challenged charge is justified under Article II:2, much less some other hypothetical category of charges. We do consider, however, that if, due to the characteristics of the measures at issue or the arguments presented by the responding party, there is a reasonable basis to understand that the challenged measure may not result in a violation of Article II:1(b) because it satisfies the requirements of Article II:2(a), then the complaining party bears some burden in establishing that the conditions of Article II:2(a) are not met.

193. We do not find unduly burdensome the complaining party's responsibility to establish a *prima facie* showing by adducing evidence and arguments also with respect to Article II:2(a). Consistent with what we have said above, the showing required by the complaining party that the conditions for the application of Article II:2(a) are not met will to some extent vary, depending upon the particular substance of the challenged measure and the extent to which a relationship between the border charge and the corresponding internal taxes is identifiable. In the circumstances of this case, both parties had a responsibility, in our view, to adduce relevant evidence at their disposal, both with respect to Article II:1(b) and Article II:2(a). Failure of a party to prove the facts it asserts leaves that party at risk of losing the case.

194. We further note, in this regard, that the DSU calls on parties to cooperate with panels in dispute settlement proceedings.<sup>370</sup> In the particular circumstances of this case, where the challenged

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<sup>368</sup>United States' appellant's submission, para. 80.

<sup>369</sup>*Ibid.*, para. 42.

<sup>370</sup>Article 13.1 of the DSU provides: "A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate." The Appellate Body has recognized the authority of panels to draw inferences from the facts before it, including refusal by a party to provide information requested by a panel. (Appellate Body Report, *Canada – Aircraft*, para. 203) The Appellate Body has also said that, where a party refuses to provide information requested by a panel pursuant to Article 13.1 of the DSU, "that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn". (Appellate Body Report, *US – Wheat Gluten*, para. 174)

measures refer to certain internal taxes but do not specifically indicate how the border charges and the corresponding internal taxes are equivalent, it was particularly important that both parties respond fully and promptly to requests from the Panel concerning its enquiry as to whether or not the Additional Duty and Extra-Additional Duty are justified under Article II:2(a).

195. We recall our finding that the United States was required, in the circumstances of this case, to present arguments and evidence that the Additional Duty and the Extra-Additional Duty are not justified under Article II:2(a). We also recall our finding that India, in asserting that the Additional Duty and the Extra-Additional Duty are justified under Article II:2(a), was required to adduce arguments and evidence in support of that assertion. In the light of these findings, we conclude that the Panel did not err in considering that, in the circumstances of this case, the United States was required to show that the Additional Duty and the Extra-Additional Duty are not justified under Article II:2(a). In any event, because the Panel relied on an interpretation of Articles II:1(b) and II:2(a) that was in error, the Panel could not have properly reached a conclusion on whether the United States had satisfied its burden of proof in this case.

#### **IX. Article 11 of the DSU**

196. The United States also argues that the Panel, in examining the United States' claims under Articles II:1(a) and II:1(b) of the GATT 1994, failed to carry out an objective assessment of the matter before it, as required under Article 11 of the DSU. The United States takes issue with several aspects of the Panel's analysis.

197. The United States contends that the Panel failed to require that India identify the state-level excise duties to which the Additional Duty on alcoholic beverages is allegedly equivalent. Instead, according to the United States, the Panel "assumed" that such duties exist, and then required the United States to establish that the Additional Duty is not equivalent to them.<sup>371</sup> In so doing, the Panel "placed an impossible burden" on the United States to guess which state-level excise duties that India's Additional Duty purports to offset or counterbalance, and then to prove that such duties do not exist or do not operate such that the Additional Duty offsets or counterbalances them.<sup>372</sup> The United States adds that it had requested India to identify the excise duties that the Additional Duty allegedly offsets. Moreover, the United States submits that the Panel also asked India for this information, but, again, India failed to respond.<sup>373</sup>

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<sup>371</sup>United States' appellant's submission, para. 86 (referring to Panel Report, paras. 7.271, 7.272, and 7.291).

<sup>372</sup>*Ibid.*

<sup>373</sup>*Ibid.*, para. 85 (referring to Panel Report, footnote 310 to para. 7.270).

198. With respect to the Extra-Additional Duty, the United States similarly argues that India failed to identify or submit information on the state-level sales taxes or any of the local taxes or charges to which it contends the Extra-Additional Duty is equivalent. Nonetheless, according to the United States, the Panel assumed that such sales taxes or charges exist, and then "placed an impossible burden" on the United States to guess the state-level sales taxes and local taxes and charges that India's Extra-Additional Duty purportedly offsets or counterbalances, and then to prove that such taxes or charges do not exist or do not operate such that the Extra-Additional Duty offsets or counterbalances them.<sup>374</sup>

199. The United States further contends that the Panel erred in its analysis of the Extra-Additional Duty by disregarding the fact that the state-level VATs, Central Sales Tax, and other local taxes and charges already apply to imported products.<sup>375</sup> According to the United States, because these taxes or charges are applied to imported products, it is incorrect to suggest, as the Panel did, that the Extra-Additional Duty offsets or counterbalances them.

200. India requests the Appellate Body to reject the United States' claim that the Panel failed to comply with its obligations under Article 11. Referring to the ruling of the Appellate Body in *EC – Hormones*, India argues that a panel acts inconsistently with its obligations under Article 11 of the DSU only when it deliberately or wilfully distorts or disregards evidence before it.<sup>376</sup> According to India, the United States has failed to demonstrate that the Panel in this case acted in such a manner. India further emphasizes that, as the responding party, it was not required to identify any excise duties or local taxes that would counterbalance the Additional Duty and the Extra-Additional Duty. India alleges that, in any event, it submitted sufficient information for the Panel to conclude that the Additional Duty was "equivalent" to state excise duties and the Extra-Additional Duty was "equivalent" to state-level VATs, sales taxes, and other local taxes and charges. Finally, India argues that "the relative weight accorded by the Panel to particular evidence on record cannot form the basis of a challenge under Article 11 of the DSU."<sup>377</sup>

201. We are mindful of the scope of appellate review with respect to legal and factual issues.<sup>378</sup> To the extent that the United States' arguments concern the Panel's weighing and appreciation of the evidence before it, we note that the Appellate Body has stated on several occasions that panels enjoy a certain margin of discretion in assessing the credibility and weight to be ascribed to a given piece of

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<sup>374</sup>United States' appellant's submission, para. 91.

<sup>375</sup>*Ibid.*, para. 101 (referring to Panel Report, paras. 7.366 and 7.367).

<sup>376</sup>India's appellee's submission, para. 79.

<sup>377</sup>*Ibid.*, para. 101.

<sup>378</sup>Pursuant to Article 17.6 of the DSU, appeals are "limited to issues of law covered in the panel report and legal interpretations developed by the panel".

evidence.<sup>379</sup> At the same time, the Appellate Body has underscored that Article 11 of the DSU requires panels "to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence."<sup>380</sup>

202. We have already found that the Panel erred in its interpretation of Articles II:1(b) and II:2(a) of the GATT 1994. As a result, we have reversed the Panel's finding that the United States failed to establish that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994. Under these circumstances, we *decline* to make an additional finding on the United States' claim under Article 11 of the DSU.

**X. Conformity of the Additional Duty and the Extra-Additional Duty under Articles II:1(a) and II:1(b) of the GATT 1994**

203. Having reversed the Panel's findings under Articles II:1(a) and II:1(b) of the GATT 1994, we turn to consider the United States' request that we complete the analysis and rule on whether the Additional Duty on alcoholic beverages and the Extra-Additional Duty are inconsistent with these provisions.<sup>381</sup>

204. In previous disputes, the Appellate Body has held that it can complete the analysis only if the factual findings by the panel and the undisputed facts in the panel record provide a sufficient basis for the Appellate Body to do so.<sup>382</sup> Where this has not been the case, the Appellate Body has declined to complete the analysis.<sup>383</sup> Moreover, as Article 17.6 of the DSU limits appeals to "issues of law covered in the panel report and legal interpretations developed by the panel", the Appellate Body has also declined to complete the legal analysis in circumstances where doing so would involve addressing claims "which the panel had not examined at all".<sup>384</sup> In addition, the Appellate Body has indicated that it may complete the analysis only if the provision that a panel has not examined is

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<sup>379</sup>See Appellate Body Report, *EC – Hormones*, para. 132; and Appellate Body Report, *EC – Sardines*, para. 299.

<sup>380</sup>Appellate Body Report, *US – Carbon Steel*, para. 142. See also Appellate Body Report, *EC – Hormones*, para. 133.

<sup>381</sup>United States' appellant's submission, para. 124.

<sup>382</sup>See Appellate Body Report, *EC – Hormones*, paras. 222 ff; Appellate Body Report, *EC – Poultry*, paras. 156 ff; Appellate Body Report, *Australia – Salmon*, paras. 117 ff and 193 ff; Appellate Body Report, *US – Shrimp*, paras. 123 ff; Appellate Body Report, *Japan – Agricultural Products II*, paras. 112 ff; Appellate Body Report, *EC – Asbestos*, paras. 133 ff.

<sup>383</sup>See Appellate Body Report, *Australia – Salmon*, paras. 209 ff, 241 ff and 255; Appellate Body Report, *Korea – Dairy*, paras. 91 ff and 102 ff; Appellate Body Report, *Canada – Autos*, paras. 133 ff and 144 ff; Appellate Body Report, *Korea – Various Measures on Beef*, paras. 128 ff; Appellate Body Report, *EC – Asbestos*, paras. 78 ff; Appellate Body Report, *Canada – Dairy (Article 21.5 New Zealand and US)*, paras. 98 ff.

<sup>384</sup>Appellate Body Report, *EC – Asbestos*, paras. 79 and 82 (cited in Appellate Body Report, *US – Section 211 Appropriations Act*, para. 343). See also Appellate Body Report, *EC – Poultry*, para. 107.

"closely related" to a provision that the panel has examined, and that the two are "part of a logical continuum".<sup>385</sup>

205. Before we begin our analysis, we recall that neither party argues that the Additional Duty and the Extra-Additional Duty constitute "internal taxes" within the meaning of Article III:2 of the GATT 1994.<sup>386</sup> We further recall the Panel's observation—in relation to whether the relevant imported and domestic products are considered "like" for purposes of Article II:2(a)—that the parties had "been arguing or assuming that this is the case."<sup>387</sup> Moreover, we note that India has not contested the United States' assertion that the Additional Duty and the Extra-Additional Duty, when applied in conjunction with the Basic Customs Duty, may subject certain imports to an aggregate amount of duties that is in excess of the rates specified in India's Schedule of Concessions. Instead, India argues that the Additional Duty and the Extra-Additional Duty are charges equivalent to internal taxes imposed consistently with Article III:2 and, consequently, are justified under Article II:2(a) of the GATT 1994. Specifically, India argues that the Additional Duty on alcoholic beverages is "equivalent" to state-level excise duties on alcoholic liquor. India further asserts that the Extra-Additional Duty is "equivalent" to three categories of internal taxes: (i) state VAT or sales taxes, (ii) the Central Sales Tax, and (iii) other local taxes and charges imposed by state or local governments.<sup>388</sup>

206. The task before us in this appeal is, therefore, to examine the relationship (i) between the Additional Duty on alcoholic beverages and state-level excise duties on alcoholic liquor, and (ii) between the Extra-Additional Duty and state sales taxes, value-added taxes, and other local taxes or charges in the light of our interpretation of Article II:2(a). We begin by considering the Panel's findings regarding the Additional Duty and the Extra-Additional Duty imposed by India at the border on imports of certain products entering its customs territory.

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<sup>385</sup>See Appellate body Report, *Canada – Periodicals*, p. 24, DSR 1997:I, 449, at 469. This issue does not arise in the present proceedings given that the United States does not request a separate finding under Article II:2 of the GATT 1994. (United States' response to questioning at the oral hearing)

<sup>386</sup>India's and the United States' responses to questioning at the oral hearing.

<sup>387</sup>This may be due to the fact that Sections 3(1) and 3(5) of India's Customs Tariff Act provide that the Additional Duty and the Extra-Additional Duty are levied on imported products where "like" domestic products are subject to excise taxes, sales taxes, value-added taxes, local taxes, or any other charges. (See Panel Report, para. 7.264 and 7.350 (referring to United States' second written submission to the Panel, para. 30 and India's first written submission to the Panel, para. 84)) See also Panel Report, para. 7.350. The parties confirmed in response to questioning at the oral hearing that they were not contesting that the relevant imported and domestic products were "like" for purposes of Article II:2(a).

<sup>388</sup>See Panel Report, para. 7.356.

A. *The Additional Duty and the Extra-Additional Duty*

207. The Panel found that Section 3(1) of the Customs Tariff Act<sup>389</sup> provides for the Additional Duty; Section 3(2) of the Customs Tariff Act requires, *inter alia*, that the Basic Customs Duty is to be included in the calculation of the amount of Additional Duty due under Section 3(1)<sup>390</sup>; Section 3(7) of the Customs Tariff Act provides that the duty imposed under Section 3 shall be in addition to any other duty imposed under the Customs Tariff Act or any other law<sup>391</sup>; and Customs Notification 32/2003 creates different price bands and different rates of Additional Duty corresponding to these bands.<sup>392</sup> Turning to the Extra-Additional Duty, the Panel found that Section 3(5) of the Customs Tariff Act provides for the imposition of that duty on imports<sup>393</sup>; Section 3(6) of the Customs Tariff Act requires that the Extra-Additional Duty be calculated on the value of the import inclusive of the Basic Customs Duty and Additional Duty owed<sup>394</sup>; and Customs Notification 19/2006 stipulates that the Extra-Additional Duty be levied on imports at a rate of four percent *ad valorem*.<sup>395</sup> The Panel also mentioned that India "confirmed, and accepts, that [Customs Notification] 32/2003, through which the [Additional Duty] on alcoholic liquor was imposed, and [Customs Notification] 19/2006, through which the [Extra-Additional Duty] was imposed, have the force of law and, in that sense, are mandatory."<sup>396</sup> Moreover, the Panel found that the Additional Duty on alcoholic beverages and the Extra-Additional Duty apply to goods that are imported into India; neither applies to domestic goods; they are assessed at the time and point of importation by India's Customs authorities; and they are both payable by the importers of the subject goods or their agents.<sup>397</sup>

B. *Domestic Counterparts to the Additional Duty and the Extra-Additional Duty*

1. State-Level Excise Duties on Alcoholic Beverages

208. The internal taxes that India asserts are "equivalent" to the Additional Duty are state-level excise duties on alcoholic beverages. Under India's Constitution, such excise duties on alcoholic beverages are established and collected by the individual states, not the Central Government, and the

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<sup>389</sup>Panel Report, para. 7.10.

<sup>390</sup>*Ibid.*, para. 7.12.

<sup>391</sup>*Ibid.*, para. 7.13.

<sup>392</sup>*Ibid.*, para. 7.15.

<sup>393</sup>*Ibid.*, para. 7.17.

<sup>394</sup>*Ibid.*, para. 7.20.

<sup>395</sup>*Ibid.*, para. 7.19.

<sup>396</sup>*Ibid.*, para. 7.108 (referring to India's first written submission to the Panel, para. 32).

<sup>397</sup>*Ibid.*, paras. 7.246 and 7.335. Further details regarding the Additional Duty and the Extra-Additional Duty are provided in paragraphs 123-130 and 131-136, respectively, of this Report.

different Indian states are permitted to levy such excise duties at varying rates.<sup>398</sup> Individual states are empowered to levy excise duties on alcoholic liquor "manufactured or produced" in the relevant state.<sup>399</sup> In addition, states are empowered to impose "countervailing duties" on alcoholic liquor manufactured or produced elsewhere in India.<sup>400</sup>

209. Regarding the rates of Additional Duty specified in Customs Notification 32/2003, we note that Section 3(1) of the Customs Tariff Act includes a proviso governing the imposition of the Additional Duty on imports of alcoholic beverages. Whereas the opening paragraph of Section 3(1) stipulates that, for products other than alcoholic beverages the Additional Duty "shall" be "equal" to the excise duty, the proviso stipulates that the Central Government "may" specify the rate of Additional Duty applicable to imports of alcoholic beverages "having regard" to excise duties leviable on like alcoholic products manufactured or produced in different Indian states.<sup>401</sup>

210. Concerning the proviso's phrase "having regard to", India explained to the Panel that this phrase "addresses the specific situation of alcoholic liquor where different States levy varying rates of excise duty and the Central Government is [therefore] unable to fix a single rate of [Additional Duty] which is 'equal to the excise duty'".<sup>402</sup> India further stated that the proviso "requires the Central Government to consider the varying rates of State excise duties pertaining to alcoholic liquor before fixing the rate of [Additional Duty], but does not make it mandatory to adopt any one single rate—this continues to be left to the discretion of the Central Government".<sup>403</sup> Finally, India observed that the proviso "does not require a correlation between the methodology for the calculation of the [Additional Duty] and the respective State excise duties" due to "the inherent difficulties in using the same methodology when different States have different rates of excise duties for alcoholic liquor".<sup>404</sup>

211. As we have explained above, we disagree with the Panel's conclusion that the term "equivalent" in Article II:2(a) does not require any quantitative comparison of the relevant border charge with the corresponding internal tax. We further recall our conclusion that, to give meaning and effect to the phrase "imposed consistently with the provisions of paragraph 2 of Article III", it is necessary to read that phrase in a manner that imparts meaning to the assessment of whether the charge and internal tax are "equivalent". We also stated that the issue of whether a charge is imposed

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<sup>398</sup>India noted that each of its 28 state governments and 7 union territories are empowered to levy their own excise duties. (Panel Report, para. 7.237)

<sup>399</sup>Panel Report, para. 7.271 (referring to Entry 51 of List II of the Constitution of India).

<sup>400</sup>*Ibid.*, para. 7.284.

<sup>401</sup>See *ibid.*, paras. 7.11 and 7.280.

<sup>402</sup>*Ibid.*, para. 7.268 (referring to India's response to Question 27(d) posed by the Panel at the first Panel meeting).

<sup>403</sup>*Ibid.* (referring to India's response to Question 27(d) posed by the Panel at the first Panel meeting).

<sup>404</sup>*Ibid.*

"in excess of" a corresponding internal tax is an integral part of the analysis in determining whether a charge is justified under Article II:2(a). Based on its erroneous interpretation of Article II:2(a), the Panel did not consider relevant for its analysis the extent to which the Additional Duty and the Extra-Additional Duty are "in excess of" the corresponding internal taxes. Applying, instead, the correct interpretation of Article II:2(a), we consider the Panel's findings indicating a difference in amount between the Additional Duty imposed on imported alcoholic beverages and state-level excise taxes on like domestic alcohol to be both relevant and critical to a consideration of whether the Additional Duty and Extra-Additional Duty are charges justified under Article II:2(a).<sup>405</sup>

212. We note, however, that there was no specific information before the Panel regarding the "excise duties actually levied by different States on alcoholic liquor."<sup>406</sup> Nor was there evidence before the Panel regarding the form and structure of the rates of such duties.<sup>407</sup> Moreover, the Panel said that there was no evidence in the record to demonstrate that, on the date of establishment of the Panel, there were Indian states permitting the sale of alcoholic beverages that did not levy an excise duty on alcoholic beverages subject to the Additional Duty; and that there was no evidence in the record to demonstrate that excise duties were, in fact, imposed in the Indian states on imported alcoholic beverages.<sup>408</sup>

213. Despite the failure of both the United States and India to provide specific information about the excise duties, the Panel took note of India's explanations regarding the relationship between the rate of the Additional Duty as established by the Central Government and the rates of excise duties assessed by the states.<sup>409</sup> In particular, the Panel noted India's statement that the rates of Additional Duty specified in Customs Notification 32/2003 are the result of a "process of averaging, whereby 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

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<sup>405</sup>In WTO jurisprudence under Article III, offsetting less favourable treatment of some imported products with more favourable treatment of other imported products has been rejected. See, for example, GATT Panel Report, *US – Section 337 Tariff Act*, paras. 5.13 and 5.14.

<sup>406</sup>Panel Report, para. 7.271.

<sup>407</sup>See *ibid.*, para. 7.273.

<sup>408</sup>*Ibid.*, para. 7.294.

<sup>409</sup>Despite being asked by the Panel for the details of these varying state rates and the averaging process used to establish the Additional Duty, India declined to provide such information. The Panel considered this to be "regrettable" and explained that it had "put the question to India in an effort at obtaining more background information that could have helped" it in its internal deliberations (Panel Report, footnote 310 to para. 7.271). We agree with the Panel given that a critical issue before the Panel was whether India's Additional Duty was equivalent to excise duties with variable rates across the many Indian states. As such, these various rates and the methodology by which the Central Government averaged them in order to establish the corresponding Additional Duty rate were particularly important pieces of evidence at India's disposal that should have been provided to the Panel.

duty payable on alcoholic liquor".<sup>410</sup> The Panel also noted India's statement that "[w]hile it is possible that in some States and in some price bands, the [Additional Duty] imposed [through Customs Notification 32/2003] on imported products may be marginally in 'excess of' the excise duty imposed on like domestic products in that State, it is equally likely that the [Additional Duty] is less than the State excise duty in some other States".<sup>411</sup> For the Panel, this "could have meant that the rate of [Additional Duty] for alcoholic liquor exceeded the rate of excise duty applicable to like domestic alcoholic liquor in some States and in some price bands."<sup>412</sup> The Panel added, however, that India had not provided "further particulars" regarding the averaging process or the fiscal burden imposed in different states on low and high-priced alcoholic liquor.<sup>413</sup>

214. In light of the above, and in view of our interpretation of Article II:2(a), we consider that the Additional Duty would not be justified under Article II:2(a) of the GATT 1994 insofar as it results in the imposition of charges on imports of alcoholic beverages in excess of the excise duties applied on like domestic products. Consequently, this would render the Additional Duty inconsistent with Article II:1(b) to the extent that it results in the imposition of duties on alcoholic beverages in excess of those set forth in India's Schedule of Concessions.

2. The Sales Tax, Value-Added Tax, Local Tax, or Other Charges

215. We recall that the Extra-Additional Duty is provided for in Section 3(5) of the Customs Tariff Act.<sup>414</sup> It provides, in relevant part, that the Central Government may levy "on any imported article ... such additional duty as would counter-balance 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".

216. State sales taxes are imposed on products outside the state VAT system, including on alcoholic liquor, tobacco products, and certain petroleum products.<sup>415</sup> Indian states are prohibited by Article 286(1) of the Indian Constitution from imposing taxes in respect of the importation of products into India's customs territory, and in respect of inter-state transactions.<sup>416</sup> Subsequent

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<sup>410</sup>Panel Report, para. 7.269 (referring to India's response to Question 28 posed by the Panel in the First Meeting Panel).

<sup>411</sup>*Ibid.*, and footnote 308, referring to India's response to Question 8(c) posed by the Panel in the First Meeting. The Panel further noted that "the quoted statement seems consistent with India's argument that in cases where the rates of excise duty in each State vary, the Central Government need not specify the rate of [Additional Duty] at the highest excise duty rate."

<sup>412</sup>Panel Report, para. 7.274.

<sup>413</sup>*Ibid.*, footnotes 306 and 307 to para. 7.269.

<sup>414</sup>See *supra*, footnote 266.

<sup>415</sup>Panel Report, para. 7.352.

<sup>416</sup>*Ibid.*, para. 7.379.

domestic sales of imported products, however, may be subject to state taxes.<sup>417</sup> For inter-state transactions, the Central Sales Tax applies and, although prescribed by a law of the Central Government, it is assessed and collected by the Indian state where the good being sold originates.<sup>418</sup> Examples of "other local taxes and charges" include Mandi taxes, market committee fees, turnover taxes, and transport fees.<sup>419</sup>

217. The Panel found that there was "no evidence" in the record to demonstrate that, on the date of establishment of the Panel, there were states that did not levy internal taxes or charges referred to in Customs Notification 19/2006 on products subject to the Extra-Additional Duty; and that there was "no evidence" in the record to demonstrate that relevant internal taxes or charges were, in fact, imposed on products subject to the Extra-Additional Duty in the course of their import into India's customs territory.<sup>420</sup>

218. However, the Panel found that imported products that are assessed and charged the Extra-Additional Duty and which are subsequently re-sold or used in the manufacture of another product, are subject to state VAT, state sales tax, Central Sales Tax, and/or "other local taxes or charges" in the same way as like domestic products.<sup>421</sup> The Panel further noted that, at the time of the establishment of the Panel, "no refund" of the Extra-Additional Duty "in respect of the import transaction was available against the State VAT, or the [Central Sales Tax], payable in respect of a domestic re-sale transaction"<sup>422</sup>, and that the Extra-Additional Duty was not "creditable against the State VAT, or the [Central Sales Tax], payable in respect of a domestic re-sale transaction."<sup>423</sup> Thus, to the extent that imported products are being assessed the Extra-Additional Duty as well as the state VAT and sales taxes and other local taxes without receiving a credit for the Extra-Additional Duty, such imports would be subject to duties "in excess" of the internal taxes on like domestic products.

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<sup>417</sup>See Panel Report, para. 7.366 (referring to India's first written submission to the Panel, para. 71; India's second written submission to the Panel, para. 2.5; and India's response to Questions 48(e) and 48(f) posed by the Panel at the second Panel meeting).

<sup>418</sup>*Ibid.*, para. 7.352.

<sup>419</sup>*Ibid.*, para. 7.365.

<sup>420</sup>*Ibid.*, para. 7.389.

<sup>421</sup>*Ibid.*, para. 7.366.

<sup>422</sup>*Ibid.*, para. 7.367. The Panel further explained that, in the course of the Panel proceedings, "India issued [Customs Notification] 102/2007 which provides, subject to certain conditions being satisfied, for the possibility of obtaining a refund from the [Extra-Additional Duty] paid in case of a subsequent domestic re-sale transaction subject to state VAT." (*Ibid.*, footnote 426 to para. 7.367)

<sup>423</sup>*Ibid.* (referring to India's response to Question 51(a) posed by the Panel at the second Panel meeting). India further pointed out to the Panel that a credit of the Extra-Additional Duty paid is available when imported raw materials are used for further manufacturing finished products and the finished products are sold. That credit can be used against the central excise duty (CENVAT) payable on the finished manufactured product.

219. As far as imported products are concerned, Section 3(5) of the Customs Tariff Act provides that the Central Government may specify through notification in the Official Gazette the imposition of the Extra-Additional Duty "at a rate not exceeding four per cent". Customs Notification 19/2006 of 1 March 2006 imposes the Extra-Additional Duty at this maximum rate of four per cent *ad valorem*.<sup>424</sup> As far as domestic products are concerned, the Panel noted that the states adopted VAT statutes that largely provide for four applicable *ad valorem* rates of VAT: (i) nil for exempt goods, which include (a) certain natural and unprocessed goods as well as (b) "goods of local importance"; (ii) a special rate of 1 per cent for gold, bullion, jewellery, etc.; (iii) a basic rate of 4 per cent for basic necessities; and (iv) a basic rate of 12.5 per cent for all other goods.<sup>425</sup> India explained to the Panel that the rate of four per cent of the Extra-Additional Duty has been "calibrated" to ensure equivalence between the Extra-Additional Duty and the various state VAT and sales taxes, Central Sales Tax, and other local taxes or charges.<sup>426</sup> India further explained to the Panel that other local taxes or charges increase the tax burden borne by products subject to state VAT or Central Sales Tax, and "effectively raise" the cumulative rate resulting from the imposition of internal taxes to one that is higher than the basic four per cent rate of Extra-Additional Duty.<sup>427</sup> The Panel further noted India's explanation that, where a product is subject to a state VAT rate of nil (or 1 per cent) and, in addition, to other local taxes and charges that are not creditable against state VAT, the Extra-Additional Duty would "be applied at a rate of nil (or 1 per cent), and not at a rate of 4 per cent".<sup>428</sup>

220. Based on its analysis of the arguments and evidence before it, the Panel found that:

... it is clear from the information we have and the explanations India has provided that there could conceivably be circumstances where the [Extra-Additional Duty] is levied at a rate that is higher than the rate resulting from imposition of the relevant internal taxes on like domestic goods, or results in a higher tax burden being imposed on products being imported. Such circumstances might, for example, arise where an equivalent domestic transaction: (i) involves a "good of local importance" for which a particular State has set a rate of State VAT of nil, (ii) involves an inter-State sale to a registered dealer ... with the consequence that, in certain circumstances, products being imported are treated less favourably than like domestic products.<sup>429</sup> (footnotes omitted)

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<sup>424</sup>Exhibits US-7 and IND-7 submitted by the United States and India, respectively, to the Panel. See also Panel Report, paras. 2.1 and 7.359.

<sup>425</sup>Panel Report, para. 7.360.

<sup>426</sup>*Ibid.*, para. 7.359.

<sup>427</sup>*Ibid.*, para. 7.365.

<sup>428</sup>*Ibid.*, para. 7.365.

<sup>429</sup>*Ibid.*, para. 7.369.

221. In light of the above, and in view of our interpretation of Article II:2(a)<sup>430</sup>, we consider that the Extra-Additional Duty would not be justified under Article II:2(a) of the GATT 1994 insofar as it results in the imposition of charges on imports in excess of the sales taxes, value-added taxes, and other local taxes and charges that India alleges are equivalent to the Extra-Additional Duty. Consequently, this would render the Extra-Additional Duty inconsistent with Article II:1(b) to the extent that it results in the imposition of duties in excess of those set forth in India's Schedule of Concessions.

## XI. India's Other Appeal

222. We turn now to India's other appeal relating to certain concluding remarks offered by the Panel.

223. Having found that the United States has failed to establish that the Additional Duty on alcoholic beverages and the Extra-Additional Duty are inconsistent with India's obligations under Articles II:1(a) and II:1 (b) of the GATT 1994, the Panel made "no recommendations under Article 19.1 of the DSU."<sup>431</sup> However, the Panel added:

[w]e find it appropriate, in the particular circumstances of this case, to offer some concluding remarks. To recall, after the establishment of this Panel, India issued new customs notifications making certain changes to the [Additional Duty] on alcoholic liquor and the [Extra-Additional Duty], "to address concerns raised by [India's] trading partners". It is therefore appropriate to note that the Panel's disposition of the [United States] claims under Article II:1(a) and (b) does not necessarily imply that it would be consistent with India's WTO obligations for India to withdraw the relevant new customs notifications or otherwise re-establish the *status quo ante*, i.e., the situation as it existed on the date of establishment of the Panel. By the same token, in making this point, we do not wish to suggest that the entry into force of the new customs notifications necessarily implies that the [Additional Duty] on alcoholic liquor, to the extent it still exists, and the [Extra-Additional Duty] are WTO-consistent.<sup>432</sup>  
(footnotes omitted)

224. On appeal, India claims that the Panel committed legal error by offering these "concluding remarks". In support of its contention, India points to Articles 19.1 and 19.2 of the DSU and asserts that those provisions authorize a panel to make recommendations and suggestions regarding implementation "only when" a measure has been found to be inconsistent with the provisions of a covered agreement.<sup>433</sup> India recalls that, in this case, the Panel did not find the Additional Duty and

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<sup>430</sup>See paragraph 211 of this Report.

<sup>431</sup>Panel Report, para. 8.2.

<sup>432</sup>*Ibid.*

<sup>433</sup>India's other appellant's submission, para. 14.

the Extra-Additional Duty to be inconsistent with India's WTO obligations, and suggests that the Panel's remarks "appear to be in the nature of policy suggestions to the Government of India."<sup>434</sup> India asserts that it is "well within its rights under the covered agreements ... to continue to impose duties on imports, where such duties have not been found to be inconsistent with its WTO obligations."<sup>435</sup> Viewed in this light, the Panel's "concluding remarks" could, therefore, "add to or diminish such rights and obligations and consequently contravene the provisions of Article 19.2 of the DSU."<sup>436</sup> In addition, India argues that the Panel's "concluding remarks" would not qualify as "such other findings" as will assist the DSB in making recommendations or rulings within the meaning of Article 11 of the DSU. Based on these arguments, India requests the Appellate Body to find that the Panel erred in offering "concluding remarks" contrary to the provisions of Articles 3.2, 11, and 19 of the DSU. Accordingly, India requests that the Appellate Body "modify paragraph 8.2 of the Panel Report and remove the Panel's *concluding remarks* commencing from the second sentence of paragraph 8.2 until the end of that paragraph."<sup>437</sup>

225. The United States argues that the Appellate Body should reject India's request. The United States submits that the Panel's "concluding remarks" are simply clarifications of the Panel's conclusions and are not in the nature of suggestions within the meaning of Article 19.1 of the DSU. Therefore, they do not add to or diminish India's obligations under the covered agreements and are, thus, not inconsistent with Article 3.2 or 19.2 of the DSU.<sup>438</sup> The United States adds that nothing in Article 19 or elsewhere in the DSU prohibits a panel from offering such remarks. For the United States, "[t]his is true, regardless of whether a panel finds or does not find the measure at issue WTO-inconsistent."<sup>439</sup> In addition, the United States submits that "it is difficult to see how, in being clear about its findings and conclusions, the Panel is acting in a manner contrary to Article 11 [of the DSU]."<sup>440</sup>

226. In its third participant's submission, the European Communities disagrees with India's contention that the Panel committed legal error by offering "concluding remarks" at the end of its Report. The European Communities does not consider these remarks to be recommendations or suggestions within the meaning of Article 19 of the DSU. Nor does the European Communities consider the Panel's remarks to add to or diminish the rights or obligations of the parties, or to be

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<sup>434</sup>India's other appellant's submission, para. 21. (referring to Panel Report, para. 8.2)

<sup>435</sup>*Ibid.*, para. 22.

<sup>436</sup>*Ibid.*

<sup>437</sup>*Ibid.*, para. 30.

<sup>438</sup>*Ibid.*, para. 6.

<sup>439</sup>*Ibid.*, para. 5.

<sup>440</sup>*Ibid.*, para. 7.

inconsistent with Article 11 of the DSU. Rather, the European Communities considers them to be "*obiter dicta* of no legal effect, and thus not susceptible to appeal."<sup>441</sup>

227. We begin our analysis of this issue by examining the text of Article 19.1 of the DSU:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

228. Article 19.2 of the DSU further states that, "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

229. We do not agree with India's argument that the Panel's "concluding remarks" amount to a legal finding or a recommendation within the meaning of the first sentence of Article 19.1, or a suggestion regarding implementation within the meaning of the second sentence of Article 19.1 of the DSU. Rather, the Panel did not find a breach of Articles II:1(a) and II:1(b), and made it clear that it was making "no recommendation under Article 19.1 of the DSU."<sup>442</sup> As there was nothing to implement, it is difficult to see why the Panel would have made a "suggestion" on implementation. In addition, the Panel recalled its finding that the customs notifications to which it referred in its "concluding remarks" were outside its terms of reference, and that it, therefore, "did not assess their impact upon the WTO-consistency of the [Additional Duty] on alcoholic liquor and the [Extra-Additional Duty]."<sup>443</sup>

230. The Panel's "concluding remarks" do not amount to findings, conclusions, or recommendations regarding the WTO-conformity of the new customs notifications issued by India. Instead, they are simply explanations of the Panel's conclusions, which are permissible, but not findings in and of themselves. We *find* that the Panel did not act contrary to Articles 3.2, 11, and 19 of the DSU in providing "concluding remarks" in paragraph 8.2 of the Panel Report.

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<sup>441</sup>European Communities' third participant's submission, para. 12.

<sup>442</sup>Panel Report, para. 8.2.

<sup>443</sup>*Ibid.*, footnote 482 to para. 8.2

## **XII. Findings and Conclusions**

231. For the reasons set out in this Report, the Appellate Body:

- (a) rejects the United States' claim that the Panel limited the scope of the United States' challenge to the Additional Duty as imposed only through Customs Notification 32/2003, and the Extra-Additional Duty as imposed only through Customs Notification 19/2006;
- (b) as regards the Panel's findings with respect to the interpretation of Articles II:1(b) and II:2(a):
  - (i) finds that the Panel erred in its interpretation that Article II:1(b) covers only duties or charges that "inherently discriminate against imports";
  - (ii) finds that the Panel erred in interpreting the term "equivalent" in Article II:2(a) as requiring only a qualitative comparison of the relative function of a charge and internal tax, thereby incorrectly excluding quantitative considerations relating to their effect and amount;
  - (iii) finds that the Panel erred in finding that "consistency with Article III:2" is not a necessary condition in the application of Article II:2(a); and, consequently
  - (iv) reverses the Panel's findings, in paragraphs 7.299, 7.394, 7.401, and 8.1 of the Panel Report, that the United States failed to establish that the Additional Duty and the Extra-Additional Duty are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994;
- (c) finds, in the circumstances of this case, that the United States was required to present arguments and evidence that the Additional Duty and the Extra-Additional Duty are not justified under Article II:2(a), and that India, in asserting that those duties are justified, was required to adduce arguments and evidence in support of its assertion;
- (d) declines to make an additional finding on the United States' claim under Article 11 of the DSU;
- (e) considers that the Additional Duty would not be justified under Article II:2(a) of the GATT 1994 insofar as it results in the imposition of charges on imports of alcoholic beverages in excess of the excise duties applied on like domestic products; and, consequently, that this would render the Additional Duty inconsistent with

Article II:1(b) to the extent that it results in the imposition of duties in excess of those set forth in India's Schedule of Concessions;

- (f) considers that the Extra-Additional Duty would not be justified under Article II:2(a) of the GATT 1994 insofar as it results in the imposition of charges on imports in excess of the sales taxes, value-added taxes, and other local taxes or charges that India alleges are equivalent to the Extra-Additional Duty; and, consequently, that this would render the Extra-Additional Duty inconsistent with Article II:1(b) to the extent that it results in the imposition of duties in excess of those set forth in India's Schedule of Concessions; and
- (g) finds that the Panel did not act contrary to Articles 3.2, 11, and 19 of the DSU in providing "concluding remarks" in paragraph 8.2 of the Panel Report.

232. Having reversed the Panel's findings in paragraph 8.1 of the Panel Report, and in view of its findings and conclusions above, the Appellate Body makes no recommendation, in this case, to the Dispute Settlement Body pursuant to Article 19.1 of the DSU.

Signed in the original in Geneva this 10th day of October 2008 by:

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Jennifer Hillman  
Presiding Member

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Giorgio Sacerdoti  
Member

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Yuejiao Zhang  
Member

ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS360/8**  
5 August 2008

(08-3697)

Original: English

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

Notification of an Appeal by the United States  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 1 August 2008, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel in *India – Additional and Extra-Additional Duties on Imports from the United States* (WT/DS360/R) (“Panel Report”) and certain legal interpretations developed by the panel in this dispute.

1. The United States seeks review by the Appellate Body of the panel's legal conclusions that the United States failed to establish that:

- (a) India's additional customs duty (AD) on imports of alcoholic beverages from the United States is inconsistent with Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994);<sup>1</sup>
- (b) the AD imposed on imports of alcoholic beverages from the United States is inconsistent with Article II:1(a) of the GATT 1994;<sup>2</sup>
- (c) India's extra-additional customs duty (EAD)<sup>3</sup> on imports from the United States, including alcoholic beverages, is inconsistent with Article II:1(b) of the GATT 1994;<sup>4</sup>
- (d) the EAD imposed on imports from the United States, including alcoholic beverages, is inconsistent with Article II:1(a) of the GATT 1994;<sup>5</sup> and

<sup>1</sup>See, e.g., Panel Report, paras. 7.297-7.299.

<sup>2</sup>See, e.g., Panel Report, para. 7.401.

<sup>3</sup>The panel refers to this measure as the “SUAD.” See, e.g., Panel Report, para. 7.18.

<sup>4</sup>See, e.g., Panel Report, paras. 7.392-7.394.

<sup>5</sup>See, e.g., Panel Report, para. 7.401.

- (e) the AD on alcoholic beverages and the EAD fall outside the scope of Article II:2(a) of the GATT 1994.<sup>6</sup>

These findings are in error and are based *inter alia* on erroneous findings on issues of law and related legal interpretations as described below and the panel's failure to undertake an objective assessment described in paragraph 3.

2. The errors in the panel report include:

- (a) the erroneous interpretation and application of Articles II:1(b), II:2, and III:2 of the GATT 1994;<sup>7</sup> and the following erroneous findings on issues of law and related legal interpretations:
- (b) Article II:1(b) applies only to duties or charges that "inherently discriminate against imports";<sup>8</sup>
- (c) the duties and charges described in Article II:2 fall outside the scope of Article II:1(b);<sup>9</sup>
- (d) establishing a *prima facie* case that the AD and the EAD fall within the scope of Article II:1(b) requires the United States to demonstrate that the measure "inherently discriminates against imports," including by demonstrating that the measures fall outside the scope of Article II:2;<sup>10</sup>
- (e) a charge equivalent to an internal tax falls within the scope of Article II:2(a) regardless of whether the internal tax to which it is equivalent is imposed consistently with Article III:2 of the GATT 1994;<sup>11</sup>
- (f) a border charge equivalent to an internal tax is subject to Article III:2;<sup>12</sup>
- (g) establishing that a duty or charge falls outside the scope of Article II:2(a) requires the complaining party to raise and establish an "independent" claim under Article III:2;<sup>13</sup>
- (h) "equivalent" in Article II:2(a) means having or serving the same function (in the sense of purpose or objective) and does not relate to the amount, effect or function (in the sense of operation) of the charge;<sup>14</sup> and
- (i) a responding party is not required to support its assertions that a measure falls within the scope of Article II:2(a).<sup>15</sup>

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<sup>6</sup>See, e.g., Panel Report, paras. 7.260-7.295, 7.346-7.390.

<sup>7</sup>See, e.g., Panel Report, paras. 7.125-7.172, 7.179-7.215, 7.240-7.299, 7.331-7.394.

<sup>8</sup>See, e.g., Panel Report, paras. 7.141, 7.156; see also, e.g., 7.128-7.164.

<sup>9</sup>See, e.g., Panel Report, paras. 7.133-7.141, 7.156-7.160.

<sup>10</sup>See, e.g., Panel Report, paras. 7.156-7.164, 7.258-7.261, 7.297-7.299, 7.392-7.394.

<sup>11</sup>See, e.g., Panel Report, paras. 7.199-7.215.

<sup>12</sup>See, e.g., Panel Report, paras. 7.196, 7.206-7.215.

<sup>13</sup>See, e.g., Panel Report, para. 7.215.

<sup>14</sup>See, e.g., Panel Report, paras. 7.179-7.198, 7.273-7.274, 7.369.

<sup>15</sup>See, e.g., Panel Report, paras. 7.159-7.164, 7.293-7.297, 7.388-7.390.

3. The United States requests the Appellate Body to find that the panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as required by Article 11 of the DSU with respect to India's assertion that the AD on alcoholic beverages and the EAD constitute "charges equivalent to an internal tax imposed consistently with [Article III:2] in respect of the like domestic product" and fall within the scope of Article II:2(a) of the GATT 1994. The panel failed to undertake an objective assessment, for example, by:

- (a) not requiring India to support its assertions (in particular that the AD on alcoholic beverages and the EAD are "equivalent" to internal taxes on like domestic products), including by finding that India was not required to specify the particular internal taxes to which it asserted the AD and the EAD are equivalent or to substantiate that the Indian states imposed such taxes;<sup>16</sup>
- (b) making inferences that are not supported by evidence before the panel about the existence and operation of Indian state-level excise taxes and the AD on alcoholic beverages, for example by inferring, based on the AD being collected at the time the panel was established and on general references to state-level excise taxes under provisions of Indian law, that state-level excise taxes exist and that the AD is "equivalent" to them,<sup>17</sup> and relying on evidence pertaining to the AD on products other than alcoholic beverages to make findings about the AD on alcoholic beverages that are not supported by evidence before the panel;<sup>18</sup>
- (c) making inferences that are not supported by evidence before the panel about the existence and operation of Indian state-level value-added taxes (VATs), sales taxes and other local taxes and the EAD, for example by inferring, based on the EAD being collected at the time the panel was established and on general references to state-level VATs, sales taxes and other local taxes under provisions of Indian law, that such taxes exist and that the EAD is "equivalent" to them,<sup>19</sup> and relying on evidence pertaining to the AD to make findings about the EAD that are not supported by evidence before the panel;<sup>20</sup> and
- (d) disregarding evidence before the panel that Indian state-level VATs, the Central Sales Tax, and other local taxes apply to imported products.<sup>21</sup>

4. The United States seeks review by the Appellate Body of the panel's legal conclusion that the United States is not challenging Section 12 of the Customs Act and Section 3(1) of the Customs Tariff Act with respect to the AD on alcoholic beverages and its related finding that the United States is only challenging the AD as specified in Customs Notification (CN) 32/2003.

5. The United States seeks review by the Appellate Body of the panel's legal conclusion that the United States is not challenging Section 12 of the Customs Act and Section 3(5) of the Customs Tariff Act with respect to the EAD and its related finding that the United States is only challenging the EAD as specified in Customs Notification (CN) 19/2006.

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<sup>16</sup>See, e.g., Panel Report, paras. 7.160-7.164, 7.270.

<sup>17</sup>See, e.g., Panel Report, paras. 7.247, 7.262-7.295.

<sup>18</sup>See, e.g., Panel Report, paras. 7.247- 7.248, 7.263, 7.279-7.281.

<sup>19</sup>See, e.g., Panel Report, paras. 7.336, 7.346-7.394.

<sup>20</sup>See, e.g., Panel Report, para. 7.336.

<sup>21</sup>See, e.g., Panel Report, para. 7.366-7.367, 7.371, 7.388.

6. In light of the errors in the panel's legal findings, related legal interpretations, and conclusions, as well as its failure to make an objective assessment of the matters elaborated above, the United States requests that the Appellate Body reverse the panel and find that the AD on alcoholic beverages and the EAD are each inconsistent with Article II:1(a) and (b) and are not justified under Article II:2(a).

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ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS360/9**  
15 August 2008

(08-3870)

Original: English

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

Notification of an Other Appeal by India  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 13 August 2008, from the Delegation of India, is being circulated to Members.

1. Pursuant to Article 16.4 and 17.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 (1) of the *Working Procedures for Appellate Review* ("Working Procedures"), India hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/R ("Panel Report") and legal interpretations developed by the Panel in this dispute.

2. India seeks review by the Appellate Body of the issues of law and legal interpretations developed by the Panel in its Report. In India's view, the Panel has erred in its Report by erroneously interpreting the provisions of Article 19 of the DSU Rules and has in its "Conclusions and Recommendations", made certain "concluding remarks"<sup>1</sup> which India submits are without basis and result in an ambiguous and unpredictable interpretation of India's WTO rights and obligations.

3. As a consequence of the errors in the issues of law covered in the Panel Report and the legal interpretations developed therein, the Panel has erred in interpreting and applying the following legal provisions of the covered agreements:

(i) Article 19.1 and 19.2 read with Article 3.2 of the DSU Rules, which authorize the Panel to make recommendations or suggestions pertaining to implementation only if a measure has been found inconsistent with the provisions of a covered agreement, provided that such suggestions or "concluding remarks" do not add to or diminish the rights and obligations contained in the covered agreements.

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<sup>1</sup>See, Panel Report, Section VIII, para 8.2.

(ii) Article 11 of the DSU that *inter alia* authorizes the Panel to make "such other findings" provided that such findings or "concluding remarks" assist the DSB in making its recommendations.

4. The relevant paragraph of the Panel Report in which the Panel has erred in addressing the issues of law and/or the legal interpretations is paragraph 8.2 of the Panel Report pertaining to the misinterpretation of Article 19 of the DSU.

5. In light of the errors in the issues of law covered in the Panel Report and the legal interpretations developed therein, India requests that the Appellate Body rectify the Panel's "concluding remarks" and hold that such remarks are inconsistent with Article 19 of the DSU.

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