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

Report of the Panel

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US – Customs User Fee	Panel Report, *United States – Customs User Fee*, adopted 2 February 1988, BISD 35S/245.
US – Superfund	Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136.

I. INTRODUCTION

1.1 On 6 March 2007, the United States requested consultations with the Government of India pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), with respect to two duties that India applies to imports of certain goods in addition to its basic customs duty. The request was circulated on 12 March 2007.[1]

1.2 On 16 March and 21 March 2007, the European Communities and Australia, respectively, requested to join in the consultations requested by the United States. India accepted the European Communities' request. Consultations were held on 13 April 2007. Those consultations did not resolve the dispute.

1.3 On 24 May 2007, the United States requested that the Dispute Settlement Body ("DSB") establish a panel to examine this matter, pursuant to Article 6 of the DSU, with the standard terms of reference as set out in Article 7.1 of the DSU.[2] At its meeting of 20 June 2007, the DSB established a Panel with the following terms of reference:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS360/5, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[3]

1.4 On 3 July 2007, the parties agreed to the following composition of the Panel:

Chairman: Mr. Luzius Wasescha

Members: Mr. Mateo Diego-Fernández
Mr. Bruce McRae[4]

1.5 Australia, Chile, the European Communities, Japan and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.[5]

1.6 The Panel met with the two parties on 17 and 18 September 2007. It also met with the third parties on 18 September 2007. The Panel met again with the parties on 13 and 14 November 2007.

1.7 Australia, Chile, the European Communities and Japan presented third-party submissions before the first substantive meeting of the Panel. Australia, the European Communities, Japan and Viet Nam made oral statements during the first substantive meeting of the Panel.

1.8 The Panel issued its interim report to the parties on 5 February 2008. The Panel issued its final report to the parties on 20 March 2008.

1.9 It is noted that on 24 April 2007, the DSB also established a panel on a substantially similar matter at the request of the European Communities (WT/DS352/4). That panel was composed by the Director-General before the Panel in this case. The same three individuals serve as panelists in both proceedings. The parties to the two proceedings, i.e., the European Communities, India and the

[1] Document WT/DS360/1.
[2] Document WT/DS360/5.
[3] Document WT/DS360/6, para. 2.
[4] *Ibid.*, para. 3.
[5] *Ibid.*, para. 4.

United States, agreed to harmonize the timetables for the two proceedings. However, at the request of the European Communities, the panel in DS352 as of 16 July 2007 suspended its work indefinitely, subject to the provisions of Article 12.12 of the DSU.

II. FACTUAL ASPECTS

2.1 The present dispute concerns the following measures:

- the AD (the "additional customs duty" as the United States calls it or the "additional duty" as India calls it) on imports of alcoholic liquor for human consumption (beer, wine and distilled spirits, collectively "alcoholic beverages"); and

- the "Extra-Additional Duty" ("EAD" as the United States calls it), or "such additional duty" ("SUAD" as India calls it) on imports such as the agricultural[6] and industrial products[7] identified in Exhibit US-1 and alcoholic beverages.

2.2 Both are measures taken by the Central Government and imposed at the border at the time of importation. Both measures are imposed in addition to India's basic customs duty (BCD).

2.3 According to India, both measures are taken to counter-balance various internal taxes or charges.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The United States claims that:

the AD is:

- inconsistent with Article II:1(b) of the GATT 1994 as an ordinary customs duty that subjects imports of alcoholic beverages to ordinary customs duties in excess of those set forth in India's WTO Schedule; and

- inconsistent with Article II:1(a) of the GATT 1994 as an ordinary customs duty that affords imports of alcoholic beverages from the United States less favourable treatment than that provided for in India's WTO Schedule; and

the EAD/the SUAD is:

- inconsistent with Article II:1(b) of the GATT 1994 as an ordinary customs duty that subjects imports, including alcoholic beverages and agricultural and industrial products listed in Exhibit US-1, to ordinary customs duties in excess of those set forth in India's WTO Schedule; and

- inconsistent with Article II:1(a) of the GATT 1994 as an ordinary customs duty that affords import from the United States, including alcoholic beverages and the products listed in Exhibit US-1, less favourable treatment than that provided for in India's WTO Schedule.[8]

[6] Exhibit US-1A, Extra-Additional Customs Duty on Agricultural Products.
[7] Exhibit US-1B, Extra-Additional Customs Duty on Industrial Products.
[8] US first written submission, para. 72.

3.2 India argues that both measures 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) of the GATT 1994. India submits that, as measures falling within the scope of Article II:2, they are not inconsistent with Article II:1(a) or (b) of the GATT 1994.

IV. ARGUMENTS OF THE PARTIES

4.1 This section is based on executive summaries of the parties' submissions and statements and does not include summaries of the parties' answers to questions posed by the Panel in the context of the first and second substantive meetings.

A. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

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

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

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

2. Legal argument

(a) Introduction

4.5 Article II:1(b) of the GATT 1994 requires India to exempt imports from "ordinary customs duties" or "other duties or charges of any kind imposed on or in connection with ... importation" in excess of those provided for in its Schedule, and Article II:1(a) of the GATT 1994 requires India to afford no less favourable treatment to imports than provided for in its Schedule. Together these provisions serve to "preserve the value of tariff concession negotiated by a Member with its trading partners, and bound in that Member's schedule". Both the additional customs duty and extra-additional customs duty are inconsistent with Article II:1(a) and (b) of the GATT 1994.

4.6 The additional customs duty is imposed in addition to the basic customs duty already levied on imports of alcoholic beverages. The additional customs duty is inconsistent with Article II:1(a) and (b) of the GATT 1994 because the combination of these two duties, as elaborated further below,

results in "ordinary customs duties" on imports of alcoholic beverages that exceed those set forth in India's Schedule.

4.7 The extra-additional customs duty is imposed in addition to the basic customs duty. The extra-additional customs duty is inconsistent with Article II:1(a) and (b) of the GATT 1994 because the combination of these duties results in "ordinary customs duties" on imports that exceed those set forth in India's Schedule. The United States notes that the extra-additional customs duty has been applied in addition to, and has been calculated on top of, the additional customs duty. US claims against the extra-additional customs duty, however, do not rely on imposition of the additional customs duty to demonstrate that the extra-additional customs duty is inconsistent with Article II:1(a) or (b) of the GATT 1994.

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

(b) The Additional Customs Duty on alcoholic beverages is inconsistent with Article II:1(b) and II:1(a) of the GATT 1994

(i) Article II:1(b) of the GATT 1994 – Ordinary Customs Duty or Other Duty or Charge

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

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

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

4.12 With respect to the additional customs duty on alcoholic beverages, it applies (i) at the time of importation, (ii) exclusively to imports (i.e., not to domestic products), and (iii) as an ad valorem or specific duty, depending on the CIF value of the import. In this regard, the additional customs duty is no different than the basic customs duty, which likewise applies at the time of importation, exclusively to imports and as an ad valorem or specific duty. Accordingly, the additional customs

duty appears to be of the kind normally or commonly imposed on imports, and consequently "ordinary" within the meaning of Article II:1(b) of the GATT 1994.

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

4.14 In this regard, it is relevant to note that Section 3(1) of the Customs Tariff Act states that the additional customs duty is to "hav[e] regard to the excise duty for the time being leviable on like alcoholic [beverages] produced ...in India". Customs Tariff Act, Section3(1), Exhibit US-3A. This statement does not change the appropriateness of characterizing the additional customs duty as an ordinary customs duty as the purpose or intent a Member attributes to a tax or duty is not determinative; otherwise a Member could avoid the commitments made in its Schedule simply by its own characterization of the duty under domestic law.

4.15 For each of these reasons, the additional customs duty, like the basic custom duty, is an ordinary customs duty within the meaning of Article II:1(b) of the GATT 1994.

4.16 In any event, the additional customs duty would be inconsistent with Article II:1(b) of the GATT 1994 even if it were an ODC within the meaning of the second sentence of that article. ODCs are defined in relation to ordinary customs duties in that "other duties or charges" mean those duties or charges that are not "ordinary" customs duties but are nonetheless imposed on or in connection a product's importation. With respect to the additional customs duty, the second sentence of Article II:1(b) of the GATT 1994 would ensure that India may not avoid its tariff commitments simply by imposing a duty or other charge on the importation of alcoholic beverages that may not be characterized as an "ordinary" customs duty but nonetheless results in other duties or charges that exceed those set out in its Schedule. In this dispute, determining whether the additional customs duty is either an ordinary customs duty or ODC within the meaning of Article II:1(b) of the GATT 1994, however, is not determinative of the outcome of this dispute, as in either case, the additional customs duty would exceed the rates set out in India's Schedule, as discussed below.

(ii) Article II:1(b) of the GATT 1994 – in excess of

4.17 The additional customs duty subjects imports of alcoholic beverages to ordinary customs duties "in excess of" those provided for in India's Schedule. Part 1 of India's Schedule sets forth the following bound rates of duty on beer, wine and distilled sprits as 150 per cent ad valorem. India's Schedule does not identify any other duties or charges applicable to alcoholic beverages.

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

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

Value	**BC**	**AD** (% or USD)	**BC Owed** (USD)	**AD Owed** (USD)	**Total Duties** (USD)	**Effective Rate of AD**	**Effective Rate of Duty**	**WTO Bound Rate**
Beer and Wine								
41	100%	40*	41.00	40	81.00	97.6%	197.6%	150%
100	100%	20%	100.00	40	140.00	40%	140.0%	150%
26	100%	37*	25.00	37	62.00	148%	248.0%	150%
37	100%	50%	37.00	37	74.00	100%	200.0%	150%
1	100%	75%	1.00	1.5	2.50	150%	250%	150%
Spirits								
41	150%	53.2*	61.50	53.2	114.70	129.8%	279.8%	150%
86	150%	25%	129.00	53.75	182.75	62.5%	212.5%	150%
20	150%	53.2*	30.00	53.2	83.20	266%	416.0%	150%
39	150%	50%	58.50	53.2	111.70	136.4%	286.4%	150%
10	150%	40*	15.00	40	55.00	400%	550.0%	150%
16	150%	100%	24.00	40	64.00	250%	400.0%	150%
1	150%	150%	1.50	3.75	5.25	375%	525.0%	150%

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

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

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

(iii) Article II:1(a) of the GATT 1994

4.22 Article II:1(a) of the GATT 1994 requires each WTO Member to "accord the commerce of [other Members] treatment no less favourable than that provided for in" the Member's Schedule. As explained above, the additional customs duty imposed pursuant to Section 3(1) of the Customs Tariff Act and Customs Notification 32/2003 results in ordinary customs duties on imports of alcoholic beverages that exceed those set out in India's WTO Schedule. By imposing ordinary customs duties on imports of alcoholic beverages from the United States in excess of those set forth in India's Schedule, the additional customs duty accords imports from the United States less favourable treatment than provided for in India's Schedule and, as such, is inconsistent with Article II:1(a) of the GATT 1994.

(c) The Extra-Additional Customs Duty is inconsistent with Article II:1(a) and II:1(b) of the GATT 1994

(i) Article II:1(b) of the GATT 1994 – Ordinary Customs Duty or Other Duty or Charge

4.23 As reviewed above, an "ordinary customs duty" within the meaning of Article II:1(b) of the GATT 1994 is a duty – either ad valorem, specific or mixed – imposed on a good upon its importation (and not on domestic products), and calculated based on the quantity or value of the good at the time of importation, while an ODC (other duty or charge) within the meaning of Article II:1(b) of the GATT 1994 is a duty or charge imposed on the importation of a good other than an ordinary customs duty.

4.24 The extra-additional customs duty is an ordinary customs duty for many of the same reasons as the additional customs duty is. First, the extra-additional customs duty applies (i) at the time of importation, (ii) exclusively to imports, and (iii) as an ad valorem duty on the CIF value of the import. In this regard, the extra-additional customs duty, like the additional customs duty, is no different than the basic customs duty, and likewise appears to be of the kind normally or commonly imposed on imports. The extra-additional customs duty is thus "ordinary" within the meaning of Article II:1(b) of the GATT 1994.

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

4.26 The purpose a Member attributes to a duty or tax is not decisive in determining whether that duty or tax constitutes an ordinary customs duty. Thus, Section 3(5)'s statement that the extra-additional customs duty is to counter-balance sales or other indirect taxes imposed on like domestic products does not affect whether the extra-additional customs duty may be regarded as an ordinary customs duty within the meaning of Article II:1(b) of the GATT 1994.

4.27 For each of these reasons, the extra-additional customs duty, like the basic customs duty and the additional customs duty, is an ordinary customs duty within the meaning of Article II:1(b) of the GATT 1994.

4.28 Similarly, even if the extra-additional customs duty were not an ordinary customs duty but were instead an ODC, it would be in breach of Article II:1(b) of the GATT 1994. As explained above, ODCs are defined in relation to ordinary customs duties in that "other duties or charges" mean those duties or charges that are not "ordinary" customs duties but are nonetheless imposed on or in

connection with a product's importation. With respect to the extra-additional customs duty, the second sentence of Article II:1(b) of the GATT 1994 would ensure that India may not avoid its tariff commitments simply by imposing a duty or other charge on the importation of alcoholic beverages that may not meet the technical definition of an "ordinary" customs duty, but nonetheless results in customs duties or other charges that exceed those set out in India's Schedule. In this dispute, as is the case with the additional customs duty, determining whether the extra-additional customs duty is either an ordinary customs duty or ODC within the meaning of Article II:1(b) of the GATT 1994 is not determinative of the outcome in this dispute as, in either case, the extra-additional customs duty would exceed the rates set out in India's Schedule, as discussed below.

(ii) Article II:1(b) of the GATT 1994 – in excess of

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

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

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

Extra-Additional Customs Duty on Distilled Spirits*

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

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

4.32 As noted, Section 3(6) of the Customs Tariff Act requires that the extra-additional customs duty be calculated on the value of the import inclusive of the basic customs duty owed, such that the

effective rate of the extra-additional customs duty on imports of distilled spirits is 10 per cent and the effective rate of aggregate duties (extra-additional customs duty in conjunction with the basic customs duty) is 160 per cent, ten percentage points over India's 150 per cent WTO bound rate for wine and spirits. This would similarly be the case for other values; 100 USD as the value in the above table is simply illustrative.

4.33 With respect to beer and wine, although imposition of the extra-additional customs duty in conjunction with the basic customs duty on beer and wine has not exceeded India's WTO bound rates of "ordinary customs duty", India's Schedule does not specify any ODCs within the meaning of Article II:1(b) of the GATT 1994 for beer or wine (or for distilled spirits). Thus, to the extent the extra-additional customs duty is an ODC, the extra-additional customs duty on beer and wine would exceed the ODCs set out in India's Schedule. In fact, to the extent the extra-additional customs duty is an ODC, the extra-additional customs duty on beer, wine, spirits and every other product for which India took commitments in its Schedule would exceed the ODCs set out in India's Schedule, as India has not scheduled the extra-additional customs duty for any product included in its Schedule, including those products listed in Exhibit US-1.

4.34 Exhibit US-1 lists a number of agricultural and industrial products. For each product listed, Exhibit US-1 identifies India's WTO bound rate along with the effective ordinary customs duty or ODC that results from application of the extra-additional customs duty in conjunction with the basic customs duty on that product. The WTO bound rates listed reflect India's Uruguay Round commitments inclusive of any subsequent modifications in accordance with Article XXVIII of the GATT 1994.

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

4.36 Exhibit US-1 is an illustrative list; there may be products in addition to those listed in Exhibit US-1 for which imposition of the extra-additional customs duty in conjunction with the basic customs duty results in ordinary customs duties in excess of those set forth in India's Schedule. The United States has challenged the extra-additional customs duty as such. Accordingly, the US claims concern the extra-additional customs duty itself and therefore any instance for which application of the extra-additional customs duty in conjunction with the basic customs duty results in ordinary customs duties in excess of those set forth in India's Schedule.

4.37 As demonstrated above, the extra-additional customs duty, imposed in conjunction with the basic customs duty, subjects alcoholic beverages as well as other products to ordinary customs duties in excess of those set forth in India's WTO Schedule. Article II:1(b) of the GATT 1994, however, requires India to exempt imports from ordinary customs duties or ODCs in excess of those set forth in its Schedule. Accordingly, the extra-additional customs duty as imposed pursuant to Section 3(5) of the Customs Tariff Act and Customs Notification 19/2006 is, as such, inconsistent with India's obligations under Article II:1(b) of the GATT 1994.

(iii) Article II:1(a) of the GATT 1994

4.38 As noted above, Article II:1(a) of the GATT 1994 requires each WTO Member to "accord the commerce of [other Members] treatment no less favourable than that provided for in" the Member's Schedule. Because the extra-additional customs duty results in customs duties on imports of alcoholic beverages and other products (including those in Exhibit US-1) that exceed those set out in India's

Schedule, it accords imports from the United States less favourable treatment than provided for in India's Schedule. Consequently, the extra-additional customs duty imposed pursuant to Section 3(5) of the Customs Tariff Act and Customs Notification 19/2006 is, as such, inconsistent with Article II:1(a) of the GATT 1994.

3. Conclusion

4.39 For the reasons set out above, the United States requests the Panel to find that:

the additional customs duty is:

- inconsistent with Article II:1(b) of the GATT 1994 as an ordinary customs duty that subjects imports of alcoholic beverages to ordinary customs duties in excess of those set forth in India's WTO Schedule; and

- inconsistent with Article II:1(a) of the GATT 1994 as an ordinary customs duty that affords imports of alcoholic beverages from the United States less favourable treatment than that provided for in India's WTO Schedule; and

the extra-additional customs duty is:

- inconsistent with Article II:1(b) of the GATT 1994 as an ordinary customs duty that subjects imports, including alcoholic beverages and products listed in Exhibit US-1, to ordinary customs duties in excess of those set forth in India's WTO Schedule; and

- inconsistent with Article II:1(a) of the GATT 1994 as an ordinary customs duty that affords import from the United States, including alcoholic beverages and products listed in Exhibit US-1, less favourable treatment than that provided for in India's WTO Schedule.

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

B. FIRST WRITTEN SUBMISSION OF INDIA

1. Introduction

4.41 The present dispute concerns the imposition of certain duties on imports of alcoholic liquor for human consumption ("alcoholic beverages") on which India imposes levies in the form of "additional duties" ("AD"); as well as a number of other agricultural[9] and industrial products[10], including alcoholic beverages (collectively the "identified products") on which India imposes duties in the form of "such additional duties as would counter balance taxes such as Sales Tax, Value Added Tax, local tax or any other charges" ("SUAD").

2. Factual background

4.42 India refutes the contentions made by the United States in its first written submission on the following factual grounds:

[9] Exhibit US-1A, Extra-Additional Customs Duty on Agricultural Products.
[10] Exhibit US-1B, Extra-Additional Customs Duty on Industrial Products.

(a) Mischaracterization of Indian duties as OCD and ODC

4.43 The AD and the SUAD, which are levied to offset different kinds of internal taxes, have been wrongly characterized by the United States as being "ordinary customs duties" ("OCD") or in the alternative as "other duties and charges" ("ODC") as understood under Article II:1(b) of the GATT 1994. Based on this mischaracterization, the US has alleged that India is exceeding the commitments contained in its Schedules. Both the AD and the SUAD are duties levied in lieu of internal taxes – the AD on alcoholic beverages is imposed in lieu of state excise duties and the SUAD on the identified products is imposed to counter-balance sales tax, VAT and other local taxes or charges, which are levied on like domestic products. These duties are distinct from the basic customs duty ("BCD") imposed by the Government of India which is the only duty imposed by India as an OCD.

(b) Misinterpretation of the statutory basis for Indian duties

4.44 The United States has failed to distinguish between the duties levied under the Indian Customs Act, 1962 ("Customs Act") and those under the Customs Tariff Act, 1975 ("CTA"). The AD on alcoholic beverages is levied under Section 3(1) of the CTA whereas the SUAD on the identified products is levied under Section 3(5) of the CTA. On the other hand, the BCD is authorized by Section 12 of the Customs Act. The US has identified the provisions of the Customs Act and the Customs Tariff Act as the measures in the present dispute that are collectively responsible for the levy of the BCD, the AD and the SUAD. In doing so, the US has failed to make the intrinsic distinction between the types of duties and the statutory provisions responsible for their imposition.

(c) Failure to distinguish between mandatory and discretionary provisions of Indian law

4.45 The United States has challenged the identified Indian statutory provisions "as such" without accounting for the fundamental distinction between those statutory provisions which authorize the imposition of a duty, and those which actually result in its levy. In doing so, it has blurred the distinction between the empowering provisions of Section 3 of the CTA which give the Central Government the discretion to impose the AD on alcoholic beverages and the SUAD on the identified products, and the relevant Customs Notifications – which are a form of delegated legislation that ultimately determine that the AD on alcoholic beverages and the SUAD on the identified products be levied at a specific rate, if at all.

(d) Failure to acknowledge the valid removal of the AD on alcoholic beverages

4.46 The United States has failed to acknowledge that the AD on alcoholic beverages levied by Customs Notification No. 32/2003, dated March 1, 2003 ("CN 32/2003"), stands duly and validly removed through a subsequent Customs Notification No. 82/2007, dated July 3, 2007 ("CN 82/2007"). In doing so, the US has mounted a challenge on a measure which has ceased to have any effect, on account of a subsequent amendment to the measure despite having included "any amendments, related measures, or implementing measures" in its description of the challenged measures. Without prejudice to India's stand that the earlier measure was also in conformity with India's WTO obligations, the Panel would be well within its rights to take into account the subsequent removal of the AD on alcoholic beverages which was introduced after the Terms of Reference of the Panel were fixed.

3. Legal challenge

4.47 In addition to the factual grounds listed above, the United States has not succeeded in framing a sustainable legal challenge upon the compatibility of the identified Indian duties with provisions of the GATT for the following reasons:

(a) Incorrect challenge of measures "as such"

4.48 The United States has identified Section 12 of the Customs Act and Section 3 of the CTA as two offending measures in the present dispute, and in doing so, it has effectively challenged the empowering provisions in the two legislations as such, independently from the application of that legislation (through the identified Customs Notifications) in specific instances. The threshold consideration in determining when a legislation as such – rather than a specific application of that legislation – is inconsistent with a Contracting Party's obligations under the GATT is based on whether the legislation is *mandatory* as distinguished from *discretionary.*[11] The distinction between mandatory and discretionary legislation turns on whether there is relevant discretion vested in the *executive branch* of the Government.[12] It is clear that neither Section 3(1) nor Section 3(5) of the CTA, enjoin upon the Central Government to necessarily levy the AD on alcoholic beverages or the SUAD on the identified products. Thus they cannot be said to be mandating actions inconsistent with the GATT Agreement. The two statutes on the other hand, *empower* the Central Government with the *discretion* to charge such duties, fix the rates at which they will be levied, and to issue Customs Notifications to give effect to such decisions.

(b) Neither the AD nor the SUAD is inconsistent with Article II:1(a) and (b) of the GATT 1994

4.49 The AD on alcoholic beverages is levied under Section 3(1) of the CTA and is a charge expressed in *ad valorem* terms that is equivalent to the internal state *excise duty* leviable on like domestic products. The SUAD on the identified products is an *ad valorem* duty that is levied under Section 3(5) of the CTA with the sole objective of offsetting the incidence of certain internal taxes that are directly levied on domestic like products, i.e. sales tax, value added tax (VAT) and other local taxes and charges. The nature, intent and design of the AD on alcoholic beverages and the SUAD on the identified products is solely to offset the incidence of certain internal taxes levied on like domestic products and these duties are validly imposed in accordance with Article II:2(a) of the GATT 1994. Neither the AD on alcoholic beverages nor the SUAD on the identified products is an OCD or an ODC as understood under Article II:1 of the GATT 1994 for the following reasons:

(i) The AD and the SUAD are not OCDs

4.50 The term OCD used in Article II:1(b) has been described by a WTO Panel as being a duty "of the usual kind, not singular or exceptional; commonplace, mundane".[13] A duty may be imposed on imports at the border and expressed in ad valorem terms but it is not necessary that each and every duty that is calculated on the basis of the value and/or volume of imports is necessarily an "ordinary customs duty".[14] Both the AD and the SUAD are expressed in ad valorem terms but that does not necessarily make them OCDs. Instead, the purpose and design of the AD on alcoholic beverages and the SUAD on the identified products is solely to offset the incidence of certain internal taxes, i.e. in the case of the AD, state excise duties that are levied only on alcoholic beverages manufactured in India, and the SUAD – certain sales tax, value added tax (VAT) and other local taxes and charges. Both such duties are charges imposed in accordance with Article II:2(a) and are distinct from the OCD envisaged under Article II:1(b). This distinction has been acknowledged by the Appellate Body in *Chile – Price Band System* where it held that:

> "Article II:2 of the GATT 1994 sets out examples of measures that do not qualify as either "ordinary customs duties" or "other duties or charges". These measures include charges equivalent to internal taxes, anti-dumping and countervailing duties, and fees

[11] Appellate Body Report, *US – 1916 Act*, paras. 88-91.
[12] *Ibid*, para. 100
[13] Panel Report, *Chile – Price Band System*, para. 7.51.
[14] Appellate Body Report, *Chile – Price Band System*, para. 274.

> or other charges commensurate with the cost of services rendered. They too may be based on the value and/or volume of imports, and yet Article II:2 distinguishes them from "ordinary customs duties" by providing that "[n]othing in [Article II] shall prevent any Member from imposing" them "at any time on the importation of any product".[15]

4.51 As noted earlier, the Indian statutory provisions that authorize the levy of the AD on alcoholic beverages (Section 3(1) of the CTA) and the SUAD on the identified products (Section 3(5) of the CTA) are clearly distinct from the provisions that authorize the levy of the BCD (Section 12 of the Customs Act). The BCD is the only duty imposed on importation into India by way of an OCD as understood under Article II:1 of the GATT 1994. The AD and the SUAD are on the other hand, duties that are intended to be in the nature of a levy imposed at the border to offset various internal taxes in accordance with Article II:2(a) of the GATT 1994.

(ii) *Failure to discharge burden of proof*

4.52 The United States has failed to adequately describe the grounds on which either the AD on alcoholic beverages or the SUAD on the identified products would qualify as an "other duty of charge" which was imposed inconsistently with India's Schedules. In doing so, the US has failed to adequately make out a legal argument and has not discharged its burden of proof.[16]

(iii) The AD and the SUAD are not ODCs

4.53 Notwithstanding the US failure to discharge its burden of proof, neither the AD on alcoholic beverages nor the SUAD on the identified products satisfy the Article II:1(b) second sentence test for determining whether a levy is an "other duty or charge". The AD on alcoholic beverages and the SUAD on the identified products are imposed at the time of import but are not imposed on, or in connection with importation; instead, they are imposed in lieu of state excise duties and sales tax, VAT, other taxes and charges respectively. Further, while both duties are expressed in ad valorem terms, the Appellate Body in *Chile – Price Band System* has held that this does not, make them "other duties and charges" under the second sentence of Article II:1(b).[17] The AD on alcoholic beverages and the SUAD on the identified products are both "charges equivalent to internal taxes imposed consistently with the provisions of Article III:2" and India is permitted to impose such charges under Article II:2 of the GATT 1994, but they do not amount to an ODC.[18]

(iv) The AD and the SUAD are not "in excess of" the rates in India's Schedules

4.54 As noted above, neither the AD nor the SUAD are OCDs or ODCs that are required to be listed in India's Schedules and are not therefore to be included for determining whether India's duties are "in excess of" those provided in its Schedules. The only charge that India levies by way of an OCD, is the basic customs duty under Section 12 of the Customs Act which is in conformity with the commitments contained in its Schedules. As noted earlier, the AD and the SUAD are distinct from the basic customs duty and are imposed with the specific purpose of off-setting certain internal taxes and charges. The AD and the SUAD are imposed in accordance with Article II:2(a) of the GATT 1994 and are not "in excess of" India's Scheduled commitments.

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[15] Appellate Body Report, *Chile – Price Band System*, para. 276.

[16] The United States notes that, as a general rule, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[17] Appellate Body Report, *Chile – Price Band System*, para. 275.

[18] *Ibid*, para. 276.

(v) The AD and the SUAD are not inconsistent with Article II:1(a) of the GATT 1994

4.55 As noted above, neither the AD nor the SUAD are OCDs or ODCs as defined under Article II:1(b), and are consequently not required to be listed as part of India's Schedules. Instead, the AD on alcoholic beverages and the SUAD on the identified products are charges levied at the border in lieu of internal taxes and in accordance with Section II:2(a) of the GATT. India has "preserved the value of tariff concessions" listed in its Schedules and its "ordinary customs duty" applied on the importation of certain alcoholic beverages and other identified industrial and agricultural products are well within the limits prescribed in its Schedules.

(c) The AD and the SUAD are equivalent to internal taxes under Article II:2(a) of the GATT 1994

4.56 WTO Members are permitted by Article II:2(a) to levy certain charges at the border, notwithstanding the restrictions contained in Article II:1(a) and (b), provided that such charges are: (a) "equivalent" to an "internal tax"; (b) imposed in a manner that is consistent with Article III:2; and (c) in respect of a "like domestic product". The AD on alcoholic beverages and the SUAD on the identified products are such charges which are levied in accordance with Article II:2(a) of the GATT 1994.[19] The SUAD on the identified products is equivalent to *the sales tax, value added tax, local tax and other taxes or charges leviable on the sale or purchase or transportation of like goods in India, when imported into India* and it imposes the same fiscal burden on imported products as on like domestic products. The SUAD on the identified products was introduced to "counter-balance" internal taxes and charges at a rate not exceeding 4 per cent and is equivalent to the:

- Value Added Tax (VAT) imposed by state governments on the *intra*-state sale of domestic products, from which imported like products at the time of importation are exempt[20], and/or

- the Central Sales Tax (CST) imposed by the Central Government on the *inter*-state sale of domestic products, from which imported like products at the time of importation are exempt[21];

- and/or other local taxes and charges on the sale, purchase and transport of domestic products.

4.57 The Indian system of tax administration has been carefully calibrated in a manner such that if certain specified domestic products are exempt from any or all of these abovementioned internal taxes, then the imported like products are also exempt from the payment of the SUAD.[22] This effectively ensures that the SUAD on imported products is at all times equivalent to the internal taxes charged by way of VAT, CST or other taxes and charges. Furthermore, to ensure complete parity and an equality of taxation for imported and like domestic products, the methodology for calculation of the SUAD on the identified products is similar to the methodology used to calculate the state VAT and is in accordance with accepted international practices. The internal taxes that the SUAD is intended to counter-balance are described below:

[19] Since the rate at which the AD on alcoholic beverages was charged has been effectively removed through CN 82/2007, arguments in support of its equivalence with the state excise duties which it was introduced to counter – balance, are not being offered at this stage, without prejudice to India's rights offer such details at a later stage.

[20] Article 286 of the Constitution precludes the state government from imposing taxes of sale on imports.

[21] Section 6(1) of the Central Sales Tax Act, 1956 authorizes the imposition of CST only on the inter – state sale of products, and not on products imported from outside the country.

[22] Notification No. 20/2006 – Cus., dated 1 March 2006.

(i) The SUAD is equivalent to the Sales Tax/Value Added Tax (collectively referred to as "VAT")

4.58 The VAT is imposed by state governments under their respective state VAT statutes on domestic products and not on the importation of like products from outside India since they are precluded by the Constitution of India from levying VAT on the import of goods.[23] Since domestic manufacturers have to bear the incidence of VAT, which is not equally imposed on the import of products into India, the Central Government has sought to counter-balance the incidence of the VAT (and CST and other taxes and charges) by imposing the SUAD. Appropriate tax credit and exemption mechanisms ensure that if certain domestic products are exempt from the payment of VAT, then the like imported products are also correspondingly exempted from the payment of the SUAD . Similarly, products that are charged at a nominal rate of 1 per cent under the relevant state VAT legislations, are charged SUAD for imported like products at a corresponding rate of 1 per cent ad valorem.[24] Therefore, the SUAD is designed to be equivalent to the state VAT.

(ii) SUAD is equivalent to the Central Sales Tax (CST)

4.59 The CST is levied only on the inter-state movement of domestically manufactured products by the Central Government under the Central Sales Tax Act, 1956 ("CST Act").[25] Since domestic manufacturers have to bear the incidence of CST (on inter-state sales) which are not equally imposed on imported products, the Central Government has sought to counter-balance the incidence of these taxes by imposing a 4 per cent SUAD. The rate at which the CST is charged on a product is determined in accordance with the laws of the state from where the movement originates i.e. the rate of CST will be equivalent to the prescribed rate of sales tax/VAT of the state of origination. Therefore, the rate at which CST is levied on inter-state sales is inter-connected with the VAT rates listed above and CST is levied at a basic rate of 4 per cent on certain products[26] and a standard rate of 12.5 per cent on all other products, unless the product is jewellery and gold (in which case it is charged a nominal CST of 1 per cent) or if the product is exempted altogether from the payment of VAT. Accordingly in order to counter-balance the incidence of CST, the SUAD on imported products is levied at nil rate or at the rate of 1 per cent, or 4 per cent to ensure that imported products are not taxed in excess of Indian like products. Appropriate tax credit and exemption mechanisms ensure that domestic goods that are exempt from the payment of VAT in the state from where it originates are also exempt from the payment of CST. Simultaneously, their like imported products are also exempted from the payment of the SUAD when they are imported into India.[27] Similarly, products such as gold, jewellery, etc. that are eligible to be charged at the nominal rate of 1 per cent CST, then their like imported products are correspondingly subject to the SUAD at the (reduced) rate of 1 per cent ad valorem.[28] Therefore, the SUAD on the identified products is designed not to exceed the CST and be equivalent to the CST.

(iii) The SUAD is equivalent to other local taxes and charges

4.60 In addition to the local taxes enumerated above, each state government is empowered by the Constitution of India to collect a variety of local levies on goods and the raw materials used in their manufacture, such as transport fees, various type of surcharges, cess etc. The cumulative effect of all state-level internal taxes imposed only on domestic products, from the raw material stage to its

[23] Article 286 of the Constitution precludes the state government from imposing taxes of sale on imports.

[24] Introduced by Notification No. 20/2006 – Cus., dated 1 March 2006.

[25] Section 5(1) of the Central Sales Tax

[26] In some limited instances, the CST chargeable has recently been reduced to 3 per cent as of the 1 April, 2007, i.e. in the case of inter-state sale of goods by a dealer to another registered dealer. (Section 8 (1) of the Central Sales Tax, 1956).

[27] Notification No. 20/2006 – Cus., dated 1 March 2006.

[28] *Ibid.*

finished state, have to be counter-balanced on imported like products. The SUAD was introduced with the objective of off-setting such internal taxes which may vary in nomenclature, quantum and character from state-to-state and the SUAD has been levied at the lowest rate possible to counterbalance these state levies that are not imposed on like imported products.

(iv) The AD and SUAD are imposed consistently with Article III:2 of the GATT 1994

4.61 The AD on alcoholic beverages and the SUAD on the identified products are both imposed on the import of goods at the customs border, and are equivalent to and not "in excess of" the taxes and charges imposed upon like domestic goods. The structure, design and implementation of the AD on alcoholic beverages and the SUAD on the identified products clearly indicates that they are duties that are intended to counter-balance internal taxes and to ensure the equality of taxation between domestic and imported like products and not to afford protection to the domestic industry.[29]

- *The SUAD is imposed on "like products"*: The products identified in the present dispute are certain alcoholic beverages and other identified industrial and agricultural products, listed by the United States These alcoholic beverages and the identified products are imported into India on the basis of the Harmonized System (HS) of nomenclature used to describe them at the customs border and the SUAD is levied in accordance with this nomenclature. As noted earlier, the imported products are treated as being alike their domestic counterparts and therefore, exemptions granted to domestic products from local taxes and charges will also result in an exemption for like imported products. In other words, for the purposes of the imposition (and exemption) of the SUAD, the Government of India treats products identified by the US, as being treated like their domestically manufactured counterparts.

- *The SUAD does not tax imported products "in excess of" domestic products:* The SUAD is a charge imposed at the border that is equivalent to the VAT, CST or other local charges and duties paid by like domestic products and the imposition of the SUAD equalizes the tax burden imposed on the imported product with its like domestic product.[30] Since domestic taxes and charges (VAT and CST) are levied at a minimum rate of 4 per cent, which is equivalent to the 4 per cent SUAD imposed on imported like products, the tax burden on an imported product on account of SUAD cannot be said to be in excess of the tax burden on like domestic products. Further, under Indian law, the benefit of an exemption or reduction from a local tax such as VAT or CST results in a parallel exemption or reduction from the payment of the SUAD for like imported products, thus ensuring an overall equality of tax burdens on imported and like domestic products.[31]. Further, the methodology for the calculation of the SUAD is in accordance with international best practices and is designed in a manner such that the SUAD and the domestic VAT which, amongst other things it seeks to counter-balance, are both levied uniformly on the value of the product, inclusive of duties and taxes as applicable. This ensures complete parity and equality of taxation for imported and like domestic products.

[29] Since the rate at which the AD on alcoholic beverages was charged has been effectively removed through CN 82/2007, arguments in support of its equivalence with the state excise duties which it was introduced to counter – balance, are not being offered at this stage, without prejudice to India's rights offer such details at a later stage.

[30] Although the SUAD results in the imposition of an equivalent tax burden on imported and like domestic products it is possible that, without prejudice to its earlier contentions, the overall burden of taxation on imported products as a result of the SUAD may be marginally "in excess of" the tax on like domestic products which is below the "*de minimis*" level permissible under GATT Ad Article III, paragraph 3.

[31] Customs Notification No. 20/2006 – Custs., dated 1 March, 2006.

- *Directly competitive or substitutable products:* As noted above, the SUAD is imposed on the identified imported products at the border on the basis of their HSN classification to counter-balance internal taxes on like domestic products, including those identified by the US in its complaint. Therefore, by definition the SUAD is also imposed on products that are "directly competitive or substitutable".

- *The SUAD is not charged "so as to afford protection" to the domestic industry:* The purpose of imposing the SUAD as manifested in its design and intent[32] on the identified products is to counter-balance certain local taxes and charges suffered by like domestic products and not to afford any measure of protection to the domestic industry. The SUAD is designed to impose a minimum rate of tax on imports to counterbalance the tax burden borne by like domestic products by way of sales tax, VAT and other internal taxes and charges and does not result in dissimilar taxation of any magnitude between imported products and domestic products[33]. The SUAD mechanism is calibrated with the internal tax mechanism such that the benefit of any exemption or concessional rate made available to the domestic industry is equally extended to imports and has not been applied in a manner so as to afford protection to the domestic industry.

(d) The SUAD is consistent with Article III:2 of the GATT 1994

(i) The US has failed to discharge its burden of proof

4.62 The US has argued in the alternative that the AD and the SUAD are inconsistent with Article III:2 of the GATT 1994 as they exceed those taxes that are applied to like domestic products or directly competitive or substitutable domestic products. However, the US has failed to provide any basis for advancing such an argument and thus has failed to discharge its burden of proof.[34]

(ii) Notwithstanding the US failure to discharge its burden of proof

4.63 As a complaining party in the dispute, the SUAD is imposed consistently with the provisions of Article III:2 of the GATT 1994 as noted above.

4. Conclusion

4.64 For the above reasons, the India requests the Panel to dismiss all the claims brought by the United States in this dispute.

C. ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

4.65 This dispute concerns two customs duties that India imposes on imports from the United States, including on beer, wine and distilled spirits. These duties are the additional customs duty (AD) and the extra-additional customs duty (EAD). The AD and the EAD constitute ordinary customs duties, and India applies them at rates that exceed the bound rates to which it committed in its WTO Schedule. As a consequence, the AD and the EAD are each inconsistent with India's obligations under Article II:1(a) and II:1(b) of the GATT 1994.

[32] Appellate Body Report, *Chile – Alcoholic Beverages*, paras. 71-72.
[33] Appellate Body Report, *Canada – Periodicals*, p. 32.
[34] The United States notes that, as a general rule, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". *US – Wool Shirts and Blouses*, p. 14.

4.66 India contends that the AD and the EAD are intended to offset or counterbalance internal taxes applied to like domestic products and as such are not ordinary customs duties subject to Article II:1(a) or II:1(b). India contends they are "charges equivalent to an internal tax" within the meaning of Article II:2(a) of the GATT 1994. However, there is no evidence that either duty is in fact equal to, or offsets, internal taxes applied to like domestic products.

1. Ordinary Customs Duties

4.67 Article II:1(b) of the GATT 1994 obligates each Member to exempt imports from ordinary customs duties in excess of the bound rates set out in that Member's WTO Schedule. India's view of why the AD and the EAD do not constitute ordinary customs duties boils down to three reasons. One, India does not intend the AD or the EAD to be an ordinary customs duty. Two, the "nature and purpose" of the AD and the EAD are "extra-ordinary". Three, the AD and the EAD are distinct from India's basic customs duty and, therefore, cannot be ordinary customs duties. None of these reasons demonstrates that the AD or the EAD is *not* an ordinary customs duty.

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

4.69 Examination of the structure, design and effect of the AD and the EAD reveals that both are ordinary customs duties. Both are structured and designed to, and in fact do, apply (i) at the time of importation, (ii) exclusively to imports, and (iii) as an *ad valorem* or specific duty. The rate of AD varies depending on the CIF value of the product, and the rate of EAD is a flat four per cent. The AD and the EAD also each apply as a matter of course upon a good's importation, and their application does not depend on any outside factors. In each of these respects, the AD and the EAD are in structure and effect very much like India's basic customs duty.

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

4.71 In any event, even if the AD and the EAD were not considered ordinary customs duties, they would nonetheless fall under Article II:1(b) of the GATT 1994 because Article II:1(b) also prohibits "other duties or charges" that are not set out in the Member's Schedule. An "other duty or charge" is defined in relation to an ordinary customs duty, in that the term "other duties or charges" means those duties or charges that are not "ordinary" customs duties but are nonetheless imposed on, or in connection with, a product's importation. The AD and the EAD are customs duties applied on products on their importation. As such, if the AD or the EAD are not considered "ordinary customs duties", either would nonetheless constitute an "other duty or charge" within the meaning of Article II:1(b) of the GATT 1994.

2. AD and EAD exceed WTO-bound rates

4.72 Because the AD and the EAD are ordinary customs duties, or in the alternative other duties or charges, within the meaning of Article II:1(b) of the GATT 1994, India is obligated not to impose them in excess of the WTO-bound rates set out in its WTO Schedule. India has failed to meet that obligation. Starting with the AD, as detailed in paragraph 50 of the US submission, imposition of the AD on top of India's basic customs duty results in ordinary customs duties on imports of beer, wine and distilled spirits (collectively, "alcoholic beverages") that range from approximately 200 to 550 per cent. India's WTO Schedule specifies a bound rate of 150 per cent for alcoholic beverages. The AD, thus, results in ordinary custom duties that are between 48 to 400 percentage points over India's WTO-bound rates. And, were the AD to be considered an other duty or charge, it would result in "other duties or charges" that exceed those set out in India's Schedule as India's Schedule does not specify any other duties or charges for any product.

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

4.74 India does not dispute the fact that the AD and the EAD each result in customs duties in excess of the bound rates set forth in India's Schedule. Instead, India simply reiterates its contention that the AD and the EAD are not ordinary customs duties. However, for the reasons the United States has presented, the AD and the EAD are properly considered ordinary customs duties, or in the alternative other duties or charges. And, because India imposes each of the AD and the EAD in excess of the ordinary customs duties, or other duties or charges, set forth in its WTO Schedule, each is inconsistent with Article II:1(b) and, as a consequence, also Article II:1(a) of the GATT 1994.

3. Article II:2(a) of the GATT 1994 – general

4.75 Article II:2(a) consists of two elements, each of which must be met for a charge on the importation of a product to fall within the meaning of that provision. First, the charge must be "equivalent to an internal tax" imposed in respect of like domestic products. Second, the charge must be imposed in a manner consistent with Article III:2 of the GATT 1994 in respect of like domestic products. That is, the charge applied to imported products must not exceed the internal taxes on like domestic products to which they are asserted to be equivalent. The first element appears to focus on the qualitative aspects of the measure, whereas the latter appears to focus on its quantitative aspects.

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

4. Article II:2(a) of the GATT 1994 – EAD

4.77 India asserts the EAD is "equal to" or "offset" three categories of internal taxes: (i) state-level value-added taxes or VATs; (ii) a Central Sales Tax; and (iii) unspecified "other local taxes and charges". India cites language in its Customs Tariff Act that the Central Government may impose a duty on imports "as would counter-balance" certain internal taxes on domestic products. While India's Customs Tariff Act may indeed state that, India fails to present, any evidence, however, that

the EAD is equivalent to either the state-level VATs – which can vary from state to state for the same product – or the Central Sales Tax.

4.78 India's explanation of the "principle applied by the Government of India in imposting" the EAD is equally uncompelling. The stated purpose or intention of the EAD is not determinative of whether it constitutes an ordinary customs duty or some other type of duty or charge. Instead, it is important to examine the structure, design and effect of the EAD. And, nothing in terms of the structure, design or effect of the EAD appears equivalent to the state-level VATs or the Central Sales Tax. First, as India explains the state-level VATs apply "broadly under ... four different rates of tax": zero, 1, 4, and 12.5 per cent. Second, while state-level VATs may broadly break down into these four rates, there is no requirement that each of the 28 individual Indian states apply the same rate to the same domestic products. Thus, one state may apply a VAT of four per cent on a particular product, whereas another state may apply no VAT on that same product. The same two points are true for the Central Sales Tax as well may similarly vary from product to product and from state to state. In contrast, the EAD is set at a flat four per cent rate; it does not vary from product to product nor does it vary based on the state into which it is imported. In fact, the Customs Tariff Act appears to expressly prohibit that, as the proviso to Section 3(5) states that where the internal taxes at issue are "leviable at different rates" the statute means to authorize imposition of a duty at a level so as to offset the "highest such tax".

4.79 India's explanations of how it "calibrates" the EAD to ensure that products exempt from the state-level VATs, and in turn the Central Sales Tax, are inapposite. The US claims concern imports for which India imposes the EAD, not products that are exempt from the EAD. Finally, in terms of the unnamed "other local taxes and charges", India provides no details on any such other local taxes or charges.

4.80 With respect to the second element – imposed in a manner consistent with Article III:2 of the GATT 1994 – India asserts that the EAD is "equal to" the state-level VATs or the Central Sales Tax imposed on domestic products "from which imported like products *at the time of importation* are exempt". However, both the state-level VATs and the Central Sales Tax apply to imported products. It is difficult to understand how the EAD offsets taxes that already apply to imported products or how it results in duties on imported products that are "equal to" those applied to like domestic products, when imported products are subject to the EAD *in addition to* the same state-level VATs and the Central Sales Tax that apply to like domestic products. Like domestic products are not subject to the EAD and thus are subject to taxes that are less than those applied to imported products. The EAD is therefore not a charge imposed in manner consistent with Article III:2 of the GATT 1994.

4.81 The EAD results in charges on imported products "in excess" of those on like domestic products, even if it leads to such excess taxation in just one Indian state. The fact remains that some imported products are treated less favourably than their domestic like products, and that is inconsistent with Article III:2.

4.82 A final point on the EAD to note is that, for purposes of responding to India's arguments today the United States has assumed that the imported products on the one hand – both alcoholic beverages and the products listed in Exhibit US-1 – and the domestic products subject to the internal taxes at issue on the other, are – as India contends – "like" within the meaning of Article III:2 of the GATT 1994. The United States has assumed the same for the same purposes with respect to the AD.

5. Article II:2(a) of the GATT 1994 – AD

4.83 In terms of whether the AD is "equivalent to an internal tax" or imposed in a manner consistent with Article III:2 of the GATT 1994, India provides very little in support of its assertions. India cites language in its Customs Tariff Act that directs the imposition of a duty on imports "equal

to the excise duty" for the time being leviable on domestic alcoholic beverages in the different Indian states and asserts that the nature, intent and design of the AD is to offset state excises taxes. Yet, India does not identify any such state excise duties much less explain how the AD is "equivalent" to such unidentified state excise taxes or imposed in a manner consistent with Article III of the GATT 1994.

4.84 Thus, with respect to both the AD and the EAD India has failed to rebut the US prima facie case that both the AD and the EAD are ordinary customs duties within the meaning of Article II:1(b) of the GATT 1994 and that India applies these duties to imports in excess of its WTO-bound rates.

6. Terms of reference

4.85 After the DSB established this Panel with standard terms of reference, India's Central Government issued Customs Notification 82-2007 which "exempts" alcoholic beverages from the rates of AD specified in Customs Notification 32/2003. Customs Notification 82-2007 is not within this Panel's terms of reference, and the Panel should not undertake to examine it in the course of this dispute.

4.86 First, it is not clear as a factual matter that Customs Notification 82-2007 eliminates the AD. For example, Customs Notification 82-2007 states that it "effectively overrides" Customs Notification 32-2003. India does not assert that Customs Notification 32-2003 has been revoked.

4.87 Second, even if India has eliminated the AD, Customs Notification 82-2007 is not within this Panel's terms of reference because it is not referenced in the US request for establishment. To the extent Customs Notification 82-2007 has an impact on the AD would be a matter for the compliance stage of this dispute.

4.88 Third, the United States shares the Appellate Body's concern that if a panel takes into account measures introduced after the date of establishment, this creates a "moving target". The United States would be particularly concerned if Customs Notification 82-2007 had the effect of shielding the AD from scrutiny. For example, in the event that, after conclusion of these proceedings, India's Central Government exercised what it characterized its "complete discretion" to impose (or re-impose) the AD or the Indian states introduce measures similar to the AD, as India's submission suggests is their intent.

7. AD – M/D

4.89 The United States disagrees with India's interpretation of the AD, in particular of its reading of the statutory words "shall be liable" to suggest imposition of the AD rests completely at the discretion of the Central Government. The United States notes that non-enforcement of a mandatory measure – which in the US view the AD is – does not save the measure from being subject to challenge under the DSU. In any event, to the extent the Panel were to find the relevant statutory provisions did not mandate imposition of the AD, India freely admits Customs Notification 32-2003 does. Customs Notification 32-2003 is clearly a measure within the Panel's terms of reference, and changes made with respect to the AD subsequent to the Panel's establishment should not be taken into account. Therefore, the Panel need not undertake an examination of the mandatory-discretionary principle that India invites in its written submission.

8. Concluding remarks

4.90 For the reasons presented in its written submission and reviewed and elaborated in its oral statement and responses to questions, the United States has firmly established its prima facie case that

the AD and the EAD are inconsistent with India's obligations under Article II:1(a) and (b) of the GATT 1994. India has failed to rebut this case.

4.91 Rather than present a point by point analysis, the United States focuses its closing remarks on a few key points that go to the heart of why the Panel should rejects India's attempts to defend the AD and the EAD under Article II:2(a) .

4.92 First, India has not contested that the AD or EAD result in duties or charges that exceed its WTO-bound rates. Thus, if the Panel finds that the AD is an ordinary customs duty, or in the alternative an other duty or charge, then it should on the basis of the US prima facie case find that the AD results in a breach of India's tariff bindings and is, therefore, inconsistent with Article II:1(a) and (b). The same is true with respect to the EAD.

4.93 Second, with respect to its arguments under Article II:2(a), India has not provided any evidence that either the AD or the EAD is "equal to" or offsets internal taxes imposed on like products. Reliance on the stated or intended purpose of the duties is insufficient to establish that such duties are not imposed in excess of taxes or charges on like domestic products. The United States is struck by how – throughout India's written submission and oral statement – India refers to the AD or the EAD as being "designed to" or "intended to" offset certain internal taxes, or that the "nature, intent and design" of the AD or the EAD is to offset such taxes, but has yet to make a showing or provide an accounting of how the AD and the EAD are in fact "equal to" or not levied in excess of taxes on like domestic products. And as a result, India has failed to provide evidence in support of its contention that either the AD or the EAD is applied in a manner consistent with Article III:2 of the GATT 1994.

4.94 Third, India's identification of state-level VATs and the Central Sales Tax as two of the internal charges that the EAD is intended to offset is simply not credible. Those taxes already apply to imported products, and the EAD's application to imported products only results in imported products being subject to the EAD in addition to the state-level VATs and Central Sales Tax that the EAD allegedly offsets.

4.95 Fourth, the United States is troubled that at this stage in the Panel proceeding, India has identified none of the internal taxes the AD allegedly offsets, and with the exception of the state VATs and the Central Sales Tax, India has identified none of the internal taxes the EAD allegedly offsets. The United States has requested India on a number of occasions, including in course of consultations and prior to initiating this dispute and in India's recent Trade Policy Review, to identify such taxes and provide an accounting of how they are "equal to" to or offset the AD and EAD respectively. On each occasion, India has failed to meet that request. The United States hopes that India will keep its commitment to the Panel in this meeting to identify these taxes that the duties allegedly offset.

4.96 The United States stresses that providing such an accounting is critical. Without it, India cannot sustain its arguments under Article II:2(a), and in turn cannot support its defence of the AD and the EAD under Article II:1(a) or (b). But, more broadly, the United States is concerned that if Article II:2(a) does not demand such an accounting, that this creates enormous potential for Members to undermine the value of their tariff commitments. The United States recalls the Appellate Body's discussion in *Argentina – Textiles and Apparel* that together Article II:1(a) and (b) serve "to preserve the value of tariff concessions negotiated by Members with its trading partners, and bound in that Member's schedule". An interpretation of Article II:2(a) that would permit the stated or intended purpose of a charge to demonstrate that the charge meets the requirements of Article II:2(a), would make it all too easy for Members to undermine the value of those concessions: Members could simply ensure that the stated purpose of a duty is to offset internal taxes on like domestic products and, then, be free to impose that duty at any level, regardless of whether that level exceeds its WTO-bound rates.

4.97 That is in essence what India is requesting this Panel to do with respect to the AD and the EAD – that is, to accept the stated or intended purposes of the AD and the EAD alone as proof that the duties meet the required elements of Article II:2(a). The United States urges the Panel not to heed India's request in this regard and to demand an accounting that the AD and the EAD do not exceed the internal taxes on like domestic products to which they are allegedly equivalent if India is to sustain its Article II:2(a) contentions.

D. ORAL STATEMENT OF INDIA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

1. Factual issues

4.98 The United States has challenged the imposition of "additional duty" ("AD") on alcoholic beverages and the "such additional duties as would counter balance the sales tax, value added tax, local tax or any other charges leviable on like domestic products" ("SUAD") on the identified products by India. It has based its challenge on what it calls "the most basic of WTO claims" – a breach of the bound rates of customs duty set forth in a Member's Schedule to the GATT. In doing so, the United States has misunderstood the character, purpose, structure and design of the AD on alcoholic beverages and the SUAD on the identified products as being an OCD or ODC. This basic misconception is on account of its failure to understand the Indian tax system – pertaining to customs and off-setting duties, including the exemption and refund mechanisms for taxes imposed on imported products.

(a) Mischaracterization of AD and SUAD as OCD and ODC

4.99 There is a clear demarcation under Indian law between an ordinary (referred to as a basic customs duty or "BCD") and the AD and the SUAD. The BCD is the only duty imposed on imports which is in the nature of an "ordinary customs duties" ("OCD") as understood under Article II:1(b) of the GATT 1994 and are accordingly bound to the levels prescribed in India's Schedules. India does not levy "other duties and charges" ("ODC") as understood under Article II:1(b) of the GATT 1994 on alcoholic beverages or the identified products. The BCD is distinct from the AD and the SUAD, which are both levied on imported products in lieu of different internal taxes. The United States has incorrectly equated the BCD with the AD on alcoholic beverages and the SUAD on the identified products. As a result, it has mischaracterized three fundamentally different duties as being OCD or alternatively ODC, which are collectively in excess of India's bound rates in the Schedule.

(b) Misinterpretation of the statutory basis for Indian duties

4.100 The United States has misinterpreted the duties levied under the Customs Act and those under the Customs Tariff Act. The BCD is levied under Section 12 of the Customs Act, whereas the AD and the SUAD are imposed to counterbalance certain internal taxes and charges and are levied under Section 3(1) and 3(5) of the CTA respectively. The US has identified the provisions of the Customs Act and the Customs Tariff Act interchangeably as being the measures in the present dispute that are collectively responsible for the levy of the BCD, the AD and the SUAD. In doing so, the US has failed to make the intrinsic distinction between the types of duties and the statutory provisions responsible for their imposition. The US has also misinterpreted the cross-reference provisions contained in the CTA and the Customs Act to mean that both statutes essentially administer the same duties that are in the nature of OCDs or ODCs.

4.101 The statutory provisions and the interpretation by Indian courts make it very clear that the nature and character of the BCD, the AD on alcoholic beverages and the SUAD on "identified products" are fundamentally distinct. Therefore the AD and the SUAD shall neither be confused with the BCD imposed under Section 12 of the Customs Act nor be interpreted as being an OCD or an ODC as understood by Article II:1(b) of the GATT 1994.

(c) Distinction between mandatory and discretionary provisions of Indian law

4.102 The US has also failed to appreciate the difference between those statutory provisions, which authorize the imposition of a duty, namely Sections 3(1) and 3(5) of the CTA and those that actually result in its levy, i.e. the relevant Customs Notification. The provisions of Section 3 of the CTA give the Central Government the *discretion* to impose the AD on alcoholic beverages and the SUAD on the identified products respectively. The Customs Notifications in contrast, are a form of delegated legislation through which the Central Government determines the specific rate at which the AD on alcoholic beverages and the SUAD on the identified products is to be levied. The Statute lays down that the duties cannot exceed the highest rate. It does not mean that the Central Government is obliged to impose the duties at the highest rate.

(d) Failure to acknowledge the valid removal of the AD on alcoholic beverages-

4.103 The United States has also failed to take into account recent amendments made to Indian law, which have an immediate bearing on this dispute. The Government of India decided to exempt the AD on alcoholic beverages levied by Customs Notification No. 32/2003, dated March 1, 2003 ("CN 32/2003"), through a subsequent Customs Notification No. 82/2007, dated July 3, 2007 ("CN 82/2007"). The CN 82/2007 effectively overrides the rates of AD imposed by its predecessor CN 32/2003 thereby ensuring that imported alcoholic beverages are no longer charged the AD. Consequently, the US present challenge is partially based on a measure which has ceased to have any effect.

2. Legal challenge

(a) Neither the AD nor the SUAD is inconsistent with Article II:1(a) and (b) of the GATT 1994

4.104 The US has characterized the AD on alcoholic beverages and the SUAD on the identified products as being an OCD or in the alternative as an ODC. As explained earlier, the AD on alcoholic beverages and the SUAD on the identified products are distinct duties and are not to be confused for being OCDs or ODCs as understood under Article II:1(b) of the GATT 1994. The AD is equivalent to the internal state *excise duty* leviable on like domestic products whereas the SUAD is equivalent to certain internal taxes that are levied on like domestic products, i.e. sales tax, value added tax (VAT) and other local taxes and charges. The structure, intent and design of the AD on alcoholic beverages and the SUAD on the identified products is solely to counterbalance the incidence of certain internal taxes levied on like domestic products and these duties are validly imposed in accordance with Article II:2(a) of the GATT 1994.

(i) Ordinary Customs Duty

4.105 The United States has failed to demonstrate that either the AD on alcoholic beverages or the SUAD on the identified products are OCDs. While it is true that both duties are imposed on imports at the border and are expressed in *ad valorem* terms, the Appellate Body in *Chile – Price Band System* has in the past held that this does not mean that such duties are "ordinary customs duties".[35] The basic purpose of the AD on alcoholic beverages and the SUAD on the identified products is to counter-balance certain internal taxes and the Appellate Body in *Chile – Price Band System* has confirmed that such duties do not qualify as OCDs envisaged under Article II:1(b) of the GATT 1994.

[35] Appellate Body Report, *Chile – Price Band System*, paras. 271-272 and 274.

(ii) Other Duties and Charges (ODC)

4.106 The United States has raised an argument in the alternative that the AD on alcoholic beverages and the SUAD on the identified products may qualify as an "other duty or charge" without providing any reasons or basis for its contention. In doing so, the US has failed to discharge its burden of proof.[36] India's AD on alcoholic beverages or the SUAD on the identified products are not in the nature of an ODC as understood by the second sentence test imposed in Article II:1(b). The AD on alcoholic beverages and the SUAD on the identified products as discussed earlier are imposed to counter balance certain internal taxes on like domestic products and the mere fact that they are expressed in *ad valorem* terms does not make them "other duties and charges" under the second sentence of Article II:1(b).[37]

4.107 It is clear that neither the AD nor the SUAD fulfil the requirements for an OCD or ODC as understood under Article II:1(b) of the GATT 1994 and consequently, the question of whether they are "in excess of" the committed rates in India's Schedules does not arise.

(b) The AD and the SUAD are equivalent to internal taxes under Article II:2(a) of the GATT 1994

4.108 India levies the AD on alcoholic beverages and the SUAD on the identified products in accordance with the provisions of Article II:2(a) of the GATT 1994 which permits WTO Members to levy certain charges at the border, provided that such charges are: (a) "equivalent" to an "internal tax"; (b) imposed in a manner that is consistent with Article III:2; and (c) in respect of a "like domestic product". Since the AD on alcoholic beverages is no longer being charged, no detailed arguments in support of its equivalence with the state excise duties are being presented at this juncture, without prejudice to India's rights to offer such details at a later stage.

4.109 The SUAD on the identified products was designed to counter-balance the incidence of certain internal taxes from which imported like products at the time of importation are exempt, i.e. the Value Added Tax (VAT) imposed by state governments on the i*ntra*-state sale of domestic products; and/or the Central Sales Tax (CST) imposed by the Central Government on the *inter*-state sale of domestic products; and/or other local taxes and charges on the sale, purchase and transport of domestic products. India ensures at all times that imported products are not taxed in excess of domestic products and makes provisions to exempt imported products from the SUAD if corresponding like domestic products are exempt from any or all of these internal taxes.[38] Furthermore, to ensure the equality of taxation for imported and like domestic products, the methodology for calculation of the SUAD on the identified products is similar to the methodology used to calculate the state VAT and is in accordance with accepted international practices.

(c) The AD and the SUAD are imposed consistently with Article III:2 of the GATT 1994

4.110 The structure, design and implementation of the AD on alcoholic beverages and the SUAD on the identified products clearly indicates that they are duties that are intended to counter-balance internal taxes and to ensure the equality of taxation between domestic and imported like products and not to afford protection to the domestic industry. Since the rate at which the AD on alcoholic beverages was charged has been effectively removed through CN 82/2007, arguments in support of its

[36] The United States notes that, as a general rule, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[37] Appellate Body Report, *Chile – Price Band System*, para. 275.

[38] Notification No. 20/2006 – Cus., dated 1 March 2006.

equivalence with the state excise duties which it was introduced to counter-balance, are not being offered at this stage, without prejudice to India's rights to offer such details at a later stage.

4.111 Additionally, the SUAD does not tax imported products "in excess of" domestic products since it is equivalent to the internal taxes and charges paid by like domestic products. The imposition of the SUAD merely equalizes the tax burden imposed on the imported product with its like domestic product. Since domestic taxes and charges (VAT and CST) are levied at a minimum rate of 4 per cent, which is equivalent to the 4 per cent SUAD imposed on imported like products, the tax burden on an imported product on account of SUAD cannot be said to be in excess of the tax burden on like domestic products. Further, under Indian law, the benefit of an exemption or reduction from a local tax such as VAT or CST results in a parallel exemption or reduction from the payment of the SUAD for like imported products. Further, a refund scheme has been recently introduced through Customs Notification No. 102/2007 – Customs where goods once imported, are subsequently sold by the importer in India to a consumer, the importer is entitled to claim a full refund of the SUAD paid by him at the time of the importation, subject to the condition that on re-sale appropriate sales tax or VAT is paid and no credit is taken of the SUAD. This ensures an overall equality of tax burdens on imported and like domestic products since the Indian system of tax administration has been carefully calibrated such that where VAT on domestic products is 1 per cent, SUAD is levied at 1 per cent; where the levy is nil, SUAD is nil; where the VAT rate is 4 per cent SUAD is 4 per cent and even where VAT is 12.5 per cent, SUAD is levied at 4 per cent. Finally, the methodology for the calculation of the SUAD is in accordance with international practice and is designed to ensure parity and equality of taxation for imported and like domestic products.

(d) The SUAD is consistent with Article III:2 of the GATT 1994

4.112 The US has raised an argument in the alternative that the AD and the SUAD are inconsistent with Article III:2 of the GATT 1994. Such a contention changes the nature of the US challenge since the US has characterized the AD on alcoholic beverages and the SUAD on the identified products as being duties under Article II of the GATT 1994 and not as internal taxes and charges under Article III. It is incumbent upon the United States to explain the basis for its contention and by not doing so, the US has failed to discharge its burden of proof.

(e) Incorrect challenge of measures

4.113 The US has incorrectly challenged the empowering provisions in the Customs Act and the CTA, as opposed to the mandatory Customs Notifications, which ultimately levy the respective duty.

4.114 The WTO Panel and Appellate Body have in the past held that the threshold consideration in determining when a legislation as such – rather than a specific application of that legislation – is inconsistent with a Contracting Party's obligations under the GATT is based on whether the legislation is *mandatory* as distinguished from *discretionary.*[39] The distinction between mandatory and discretionary legislation rests on whether there is relevant discretion vested in the *executive branch* of the Government.[40] In the present dispute, it is clear that neither Section 3(1) nor Section 3(5) of the CTA, enjoin upon the Central Government to necessarily levy the AD on alcoholic beverages or the SUAD on the identified products. Thus they cannot be said to be mandating actions inconsistent with the GATT Agreement. The two statutes on the other hand, *empower* the Central Government with the *discretion* to charge such duties, fix the rates at which they will be levied, and to issue Customs Notifications to give effect to such decisions.

[39] Appellate Body Report, *US – 1916 Act*, paras. 88-91.
[40] *Ibid*, para. 100.

4.115 Therefore, the US challenge has to be confined to the relevant Customs Notifications through which the AD on alcoholic beverages and the SUAD on the identified products have been levied and not to the empowering statutory provisions of the Customs Act and the CTA.

E. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

4.116 India's additional customs duty (AD) and extra-additional customs duty (EAD) on imports from the United States are inconsistent with Article II:1(a) and (b) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994). The AD and the EAD are both ordinary customs duties, and by imposing them, India is exceeding the rates specified in its Schedule to the GATT 1994 (WTO-bound rates).

2. The AD and EAD are each inconsistent with Article II:1(b) of the GATT 1994

4.117 Article II:1(b) of the GATT 1994 prohibits a Member from levying "ordinary customs duties" or "other duties or charges imposed on or in connection with importation" (ODCs) in excess of the rates established in the Member's Schedule. The term "ordinary customs duty" means a duty applied as a matter of course on the importation of a good into the customs territory of a Member at the time of importation that is either *ad valorem*, specific, or a combination thereof. An "ordinary" customs duty is a duty that is "normal, customary or usual".

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

4.119 The AD and EAD are both "ordinary customs duties" within the meaning of Article II:1(b) of the GATT 1994. The AD is an "ordinary customs duty" because it applies: (i) at the time of importation (and, in this connection, it must be paid by the importer before the good may clear customs); (ii) as a matter of course upon a good's importation (and, in this connection, it applies generally on the importation of alcoholic beverages into India and the event for which liability ensues is importation); and (iii) as a combination of *ad valorem* and specific duties.

4.120 The EAD is likewise an "ordinary customs duty" because it applies: (i) at the time of importation (and, in this connection, it must be paid by the importer before the good may clear customs); (ii) as a matter of course upon a good's importation (and, in this connection, it applies generally on the importation of products into India and the event for which liability ensues is importation); and (iii) as an *ad valorem* duty.

4.121 In this regard the AD and the EAD are no different than India's basic customs duty (BCD). India has already conceded that the BCD is ordinary customs duty within the meaning of Article II:1(b) of the GATT 1994. Like the AD and the EAD, the BCD applies: (i) at the time of importation; (ii) as a matter of course upon a good's importation; and (iii) as a combination of *ad valorem* and specific duties. In addition to these similarities, there are a number of additional similarities which are reviewed in the US first written submission, oral statement and responses to the Panel's questions.

4.122 India, however, contends the AD and the EAD are "fundamentally distinct" from the BCD, and, on that basis, that the AD and the EAD are not ordinary customs duties. The principle distinction India draws between the BCD and the AD and the EAD is that the latter are intended to offset internal taxes imposed on like domestic products. However, whether the AD and the EAD constitute ordinary customs duties must be based on an examination of their structure, design and effect; the stated purpose or intent of the duties does not determine whether either is or is not an ordinary customs duty. The situation in the GATT Panel, *EEC – Parts and Components*, is analogous to the present dispute. The *EEC – Parts and Components* Panel rejected the notion that the stated purpose of the anti-circumvention duty under domestic law provided sufficient basis to characterize the measure as an internal tax rather than a customs duty.

4.123 An interpretation of Article II:1(b) of the GATT 1994 that would permit the stated purpose or intent of a measure to determine whether it fell within the scope of that Article would permit Members to avoid or manipulate WTO commitments simply by attributing a particular purpose to a measure (regardless of what the measure in fact does) or by calling a measure by one name versus another. In this dispute, India may attribute a different purpose to the BCD on the one hand and the AD and EAD on the other, but all three constitute "ordinary customs duties" and neither the AD nor the EAD offset or counterbalance internal taxes on like domestic products.

4.124 India's focus on the "distinctions" between the BCD and the AD and the EAD suggests that in its view a Member may only impose one duty that may properly be characterized as an "ordinary customs duty" under Article II:1(b) of the GATT 1994. However, nothing in the text of Article II:1(b) of the GATT 1994 suggests Members are limited to a single "ordinary customs duty" and, in fact, the text refers to "ordinary customs duties". Use of the plural "duties" suggests that Article II:1(b) of the GATT 1994 prohibits "ordinary customs duties" on the importation of products – whether resulting from the application of one or more individual duties – in excess of those specified in the relevant Member's Schedule.

4.125 Even if the AD or the EAD were not an "ordinary customs duty", each would constitute an "other duty or charge" (ODC) within the meaning of Article II:1(b) of the GATT 1994. The AD and the EAD would each necessarily constitute an ODC if it were not an ordinary customs duty. This is because the word "other" as used in Article II:1(b) of the GATT 1994 means duties or charges that are not ordinary customs duties that are applied on or in connection with importation. If the AD and EAD are not an ordinary customs duty, then they must necessarily be something other than an ordinary custom duty. The AD and the EAD apply at the time of importation and as a consequence of importation. Moreover, in asserting that the AD and the EAD are charges equivalent to an internal tax within the meaning of Article II:2(a) of the GATT 1994, India has implicitly characterized both as charges "imposed on importation" since the chapeau to Article II:2 of the GATT 1994 makes clear that it concerns measures "imposed on importation".

4.126 The AD when imposed with India's BCD results in ordinary customs duties on imports of alcoholic beverages in excess of India's WTO-bound rate by amounts ranging from 48-400 percentage points. With respect to the EAD when imposed with India's BCD it results in ordinary customs duties on imports in excess of India's WTO-bound rate. The EAD also results in ordinary customs duties on imports in excess of WTO-bound rates in any situation where the BCD is already at or very near India's WTO-bound rate. Were either the AD or the EAD to be considered an ODC, it would exceed the ODCs specified in India's Schedule as India's Schedule does not specify any ODCs for alcoholic beverages or any other product.

4.127 India has not contested the US prima facie case that the AD and the EAD each result in duties on imports in excess of those specified in India's Schedule. Therefore, if the Panel finds the AD and the EAD are ordinary customs duties or ODCs within the meaning of Article II:1(b) of the GATT 1994 it should also find on the basis of the US prima facie case that the AD and the EAD

exceed India's WTO-bound rates. The AD and the EAD are therefore each as such inconsistent with Article II:1(b) of the GATT 1994.

4.128 Because the AD and the EAD are each inconsistent with Article II:1(b) of the GATT 1994, they are also each inconsistent with Article II:1(a) of the GATT 1994. By imposing ordinary customs duties on imports of alcoholic beverages from the US in excess of those set forth in India's Schedule, the AD accords imports from the United States less favourable treatment than provided for in India's Schedule and, as such, is inconsistent with Article II:1(a) of the GATT 1994. Because the EAD results in customs duties on imports that exceed those set out in India's Schedule, it accords imports from the United States less favourable treatment than provided for in India's Schedule.

3. Neither the AD nor the EAD are charges within the meaning of Article II:2(a) of the GATT 1994

4.129 India asserts that the AD and the EAD are charges imposed in accordance with Article II:2(a) of the GATT 1994 and describes Article II:2(a) as comprising three elements: "Article II:2(a) ... permits WTO Members to levy certain charges at the border, provided that such charges are (a) 'equivalent' to an 'internal tax'; (b) imposed in a manner that is consistent with Article III:2; and (c) in respect of a 'like domestic product'". These are the same elements the United States identified in its oral statement at the first Panel meeting.

4.130 With respect to the first element, a charge "equivalent to an internal tax" means a charge imposed on the importation of a product that is "equal in force, amount, or value" and corresponds or is "virtually identical especially in effect or function" to an internal tax imposed on like domestic products. India appears to focus on only one aspect of "equivalence", the amount of the charge in relation to the internal tax. While the amount of the respective liability is certainly a factor, the ordinary meaning of the word "equivalent" does not appear to prejudge the aspects of two measures that might be examined to determine whether they correspond or are virtually identical. Accordingly, the analysis should review the structure, design and effect of the two measures.

4.131 The United States assumes that India's assertion that the imports subject to the AD and the EAD and the domestic products subject to various internal taxes (to which the AD and the EAD are allegedly equivalent) are "like" is correct. Accordingly, for the AD and the EAD to be imposed consistently with Article III:2 of the GATT 1994, the AD and the EAD must be applied in a manner consistent with the first sentence which concerns "like" products and requires that internal taxes on imported products not be "in excess" of internal taxes on like domestic products by any amount. The requirement applies to each import in respect of each like domestic product. The AD and the EAD result in charges on imported products in excess of those on like domestic products if it leads to excess taxation in even one Indian state.

4.132 India asserts that the AD is equivalent to state excise duties imposed on like domestic products. India admits that the AD "could in some cases, have been less than the excise duty being charged on like domestic products in some States, and in other cases equal to or perhaps slightly in excess of the excise duty being charged in some other States".

4.133 On the basis of this admission alone the Panel may find that the AD is not imposed in accordance with Article II:2(a) of the GATT 1994. Any amount by which a tax on imports is in excess of that tax on like domestic products results in a breach of Article III:2 of the GATT 1994, and, in relation to like domestic products, less taxation of some imports does not remove the breach resulting from excess taxation other imports. Although India's admission alone provides sufficient reason to reject its assertion under Article II:2(a) of the GATT 1994, there are other grounds as well.

4.134 First, the AD is an ordinary customs duty and, therefore, it is not a charge equivalent to an internal tax within the meaning of Article II:2(a) of the GATT 1994. Second, even if the AD were not considered an ordinary customs duty but an other duty or charge on importation, India has presented no evidence that it is "equivalent" to an any internal tax on like domestic alcoholic beverages or imposed consistently with Article III:2 of the GATT 1994. To accept the stated or intended purpose of the AD as proof that it is "equivalent" to state excise taxes without factual evidence to support that assertion would lead to the result that Members could very easily undermine the value of their tariff concessions by simply asserting that duties in excess of WTO-bound rates are intended to offset internal taxes (regardless whether they actually do).

4.135 Third, the United States recalls that explanatory note to Section 3(1). The plain reading of this explanatory note is that where the like domestic product is subject to various tax rates, the "excise duty for the time being leviable on a like Article if produced or manufactured in India" means the highest rate of excise duty imposed. Because the rate of excise duty on like domestic alcoholic beverages varies from state to state, this means that with respect to alcoholic beverages Section 3(1) provides that imports of alcoholic beverage shall be liable to an additional duty that is equal to the highest rate of excise duty imposed by any of the Indian states. Accordingly, Section 3(1) read with the explanatory note subjects imports of alcoholic beverages to rates of AD that exceed the rate of excise duties on like domestic alcoholic beverages in at least some Indian states and, therefore, the AD is not imposed consistently with Article III:2 of the GATT 1994.

4.136 The United States further notes the evidence referred to in the EC's third party submission that the taxation resulting from the AD on imports "exceeds by a large margin the taxation resulting from taxes denominated 'excise duty' in the legislation of most Indian States".

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

4.138 India also seeks to justify the EAD by asserting that it is imposed in accordance with Article II:2(a) of the GATT 1994 and identifies state level VATs and the CST in addition to unnamed other local duties and charges as the internal taxes to which EAD is allegedly equivalent.

4.139 As an initial matter, India also acknowledges that the EAD may in some instances be "marginally 'in excess'" of the tax on like domestic products. India argues that this "marginal" amount in excess would be "below the 'de minimis' level permissible" under the Ad Note to Article III of the GATT 1994. However, the relevant inquiry with respect to the EAD concerns the first sentence to Article III of the GATT 1994 (to which the Ad Note does not apply) because the EAD and internal taxes to which the EAD is allegedly equivalent concern "like" products. There is no "permissible" de minimis level of excess taxation permitted under the first sentence of Article III:2 of the GATT 1994. Therefore, India has disproved its own assertions that the EAD is imposed consistently with Article III of the GATT 1994. In any event, there is ample reason to reject India's assertions that the EAD is justified under Article II:2(a) of the GATT 1994.

4.140 Foremost, the EAD is not "a charge equivalent to an internal tax" because it is an "ordinary customs duty". It therefore cannot be a charge equivalent to an internal tax. In addition, with respect to its assertions that the EAD is equivalent to other local taxes and charges, India has not identified any such other local taxes or charges. As a consequence, India cannot sustain its assertion that the EAD is "equivalent" to other local taxes or charges on like domestic products.

4.141 Starting with the state level VATs, these internal taxes imposed by the various Indian states are not, in terms of their structure, design or effect, "equivalent" to the EAD. First, according to India

the state level VATs are set generally at four different rates whereas the EAD is set at a single rate of four per cent for all products.

4.142 Second, while the state level VATs may generally breakdown into these four rates, there is no requirement that the individual states apply the same rate to the same domestic products. Thus, one state may apply a VAT of four or 12.5 per cent on a particular product, whereas another state may apply no VAT on that same product whereas the EAD prescribes for all products, and on the importation of a product into any state, a rate of four per cent.

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

4.144 The CST is not equivalent to the EAD for similar reasons. Like the VAT, the CST is imposed at various rates and may vary from state to state and from product to product whereas the EAD prescribes a flat four per cent rate that does not vary from product to product or based on the recipient or the state into which the product is imported.

4.145 Further, with respect to both the VAT and the CST, the amount of EAD owed on imports as compared to the amount of VAT or CST owed on like domestic products is not equivalent, since it does not correspond and is not virtually identical to the VAT or CST respectively on like domestic products.

4.146 Finally, the United States reiterates that the stated purpose of the EAD is not sufficient to support India's assertion that it is a charge equivalent to an internal tax.

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

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

4.149 Moreover, the explanatory note to Section 3(5) appears to indicate that the rate of EAD may not vary on the same product based on the applicable VAT or CST rate. The plain reading of this explanatory note means that where the like domestic product is subject to various tax rates, the "sales tax, value added tax, local tax or any other charges for the time being leviable on a like Article on its sale, purchase or transportation in India" means the highest rate of such tax or charge imposed. Section 3(5) calls for a single rate of EAD for each product. As a consequence, where the like domestic product is subject to various rates of state level VAT or CST, the EAD on imports will necessarily exceed the rate of state level VAT or CST on at least some like domestic products.

4.150 India's assertions that it has "calibrated" the EAD with the state level VATs and CST also wrongly suggests that the rate of EAD on the one hand and the rates of state level VATs and the CST on the other are the same. They are not.

4.151 India also suggest that the EAD is calibrated to the CST and VAT because the EAD paid on an input for a finished product may be credited against the central excise tax (abbreviated "CENVAT") owed on the finished product. Taxes owed under the central excise tax, however, would not appear relevant to the question of whether the EAD results in charges on imports in excess of those imposed by the state level VATs or CST on like domestic products. And, India has acknowledged there is no mechanism for crediting the EAD paid against the state level VAT or CST owed.

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

4. Terms of reference

4.153 India has invited this Panel to make findings with respect to two Customs Notifications issued after the date of this Panel's establishment on June 20, 2007. The Panel should not accept India's invitation because these measures are not within the Panel's terms of reference.

4.154 As an initial matter, it is not clear that either customs notification accomplishes what India contends it does. First, contrary to India's assertions, Customs Notification 82/2007 does not appear to "effectively remove" or "effectively override" the AD. Section 3(1) is mandatory, providing that imports "shall . . . be liable" to the AD, and remains in force. In addition, as India acknowledges, Customs Notification 32/2003 also "'remains in force' in as much as it contemplates an AD on alcoholic liquor".

4.155 Second, Customs Notification 102/2007 raises a number of questions as to its effect on the EAD. In addition, Customs Notification 19/2006, requiring imposition of the EAD, remains in force.

4.156 In any event, neither of these measures are within this Panel's terms of reference and, accordingly the Panel, may not take their effect on the AD and EAD into account in making findings on the latter. In this regard, the US request for the establishment of a panel in this dispute forms the basis of this Panel's terms of reference. The US panel request does not include Customs Notification 82/2007 or Customs Notification 102/2007 as neither of these measures existed at the time. This Panel's term of reference were fixed on the date of its establishment, June 20, 2007. Accordingly, this Panel's terms of reference are limited to those measures existing on the date of establishment and cited in the US panel request. Because Customs Notification 82/2007 and Customs Notification 102/2007 are not cited in the US panel request, and did not even exist on the date of establishment, they are outside this Panel's terms of reference and the Panel, therefore, may not make findings with respect to them.

4.157 India contends that Customs Notification 82/2007 "effectively removes the AD on alcoholic liquor imposed by [Customs Notification] 32/2003" and that as a result imports of alcoholic beverages are "not liable to an additional duty within the meaning of Section 3(1) of the [Customs Tariff Act]". If this is true, it would not seem tenable for India to also argue that Customs Notification 82/2007 does not "change the essence" of Customs Notification 32/2003. A measure effectively removing liability for another measure would seem to necessarily change the essence of the latter measure.

4.158 In *Chile – Price Band System*, the Appellate Body found that "if the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measure as amended in coming to a decision in a dispute". The parameters the Appellate Body described in *Chile – Price Band System* do not exist with respect to this dispute. Considering Customs Notification 82/2007 (or Customs Notification 102/2007) would be contrary to the objective of securing a positive solution in this dispute. The United States notes that the Appellate Body in *Chile – Price Band System* prefaced its finding quoted above by stating that it did not mean to condone amending measures during proceedings to shield a measure from scrutiny and that the complaining party should not have to adjust its pleadings to deal with a measure as a "moving target". That concern is particularly acute in this dispute.

4.159 First, the "amendments" at issue are customs notifications that India contends "effectively remove" the AD and "effectively addresses the issue of double taxation" of the EAD. India has already acknowledged that its Central Government can, at its discretion, withdraw Customs Notification 82/2007 and reinstate Customs Notification 32/2003. The United States understands this same discretion to exist with respect to Customs Notification 102/2007. India has also acknowledged that it contemplates that "subsequent to the removal of the AD", the Indian states will impose measures similar to the AD. And, the United States further notes that Section 3(1) of the Customs Tariff Act mandates imposition of the AD. It is also unclear, as noted above, whether Customs Notification 102/2007 in fact resolves the issue of "double taxation" of imports. Accordingly, there is a very real possibility that after conclusion of these proceedings, Customs Notification 82/2007 or Customs Notification 102/2007 may be withdrawn, that the Indian states may introduce measures similar to the AD, or that Customs Notification 102/2007 may not in fact eliminate charges on imports in excess of those on like domestic products. The United States offers that consideration of these notifications in relation to AD and EAD would not contribute to securing a positive solution in this dispute given the uncertainty today as to what the measures accomplish or how long they will remain in effect and that possibility that the AD may be reimposed.

4.160 Second, as explained above, it is not clear the effect either Customs Notification 82/2007 or Customs Notification 102/2007 have on the measures in dispute. Were they to have the effect India contends, this could demand an adjustment in the US arguments in this dispute. Given the limited time the United States has had to review and understand either measure, and the India's Central Government's asserted "complete discretion" to issue customs notifications, this appears to be a "moving target" situation. The extent to which either Customs Notification 82/2007 or Customs Notification 102/2007 has an effect on the AD or EAD would be a matter for the compliance stage of this dispute, as India itself noted in its arguments in *India – Autos*.

5. The AD and EAD are mandatory, not discretionary

4.161 India asserts that Section 3 of the Customs Tariff Act and Section 12 of the Customs Act are not mandatory and as a consequence that they "may not be characterized as 'measures' subject to challenge by the United States". The Panel should reject India's argument.

4.162 First, Section 3(1) and 3(5) of the Customs Tariff Act and Section 12 of the Customs Act are mandatory. Section 3(1) of the Customs Tariff Act and Section 12 of the Customs Act require both imposition of the AD and its imposition at the "highest rate". Section 3(5) of the Customs Tariff Act requires that if the EAD is imposed it shall be levied at the "highest rate". Sections 3(2), 3(6) and 3(7) of the Customs Tariff Act are also mandatory, requiring that the AD and EAD shall be calculated on top of and in addition to the BCD.

4.163 Second, on account of these requirements, Section 12 of the Customs Act and Section 3(1), 3(2) and 3(7) of the Customs Tariff Act when imposed together with the BCD mandate a breach of

Article II:1(a) and (b) of the GATT 1994 with respect to the AD. None of these measures provide the Central Government the discretion to act in a manner consistent with Article II:1(a) or (b) of the GATT 1994. Although Customs Notification 32/2003 specifies the rate of AD on alcoholic beverages, the statutory provisions mandating its imposition result in a breach regardless of the rate of AD specified in a customs notification. Because India already imposes the BCD on imports of alcoholic beverages at its WTO-bound rate, imposition of the AD at any rate in addition to the BCD results in ordinary customs duties in excess of India's WTO-bound rate.

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

4.165 Section 12 of the Customs Act and Section 3(5), 3(6) and 3(7) of the Customs Tariff Act also mean that the EAD is not justified under Article II:2(a) of the GATT 1994 because, as explained above, the EAD is not "equivalent" to any internal charges and these provisions require that, where internal taxes are imposed on like domestic products at different rates, the rate of EAD on imports shall be the highest of those rates. Therefore, if the EAD is imposed, Section 12 of the Customs Act and Section 3(5), 3(6) and 3(7) of the Customs Tariff Act necessarily result in charges on imports that are not equivalent to any internal charge and are in excess of internal taxes on like domestic products.

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

6. Conclusion

4.167 The United States requests the Panel to find that: (1) the AD is: (a) inconsistent with Article II:1(b) of the GATT 1994 as an ordinary customs duty that subjects imports of alcoholic beverages to ordinary customs duties in excess of those set forth in India's WTO Schedule; and (b) inconsistent with Article II:1(a) of the GATT 1994 as an ordinary customs duty that affords imports of alcoholic beverages from the United States less favourable treatment than that provided for in India's WTO Schedule; and (2) the EAD: (a) inconsistent with Article II:1(b) of the GATT 1994 as an ordinary customs duty that subjects imports, including alcoholic beverages and products listed in Exhibit US-1, to ordinary customs duties in excess of those set forth in India's WTO Schedule; and (b) inconsistent with Article II:1(a) of the GATT 1994 as an ordinary customs duty that affords import from the United States, including alcoholic beverages and products listed in Exhibit US-1, less

favourable treatment than that provided for in India's WTO Schedule. Accordingly, the United States also respectfully requests that the Panel recommend, pursuant to Article 19.1 of the DSU, that India bring its measures into conformity with the covered agreements.

F. SECOND WRITTEN SUBMISSION OF INDIA

4.168 In its first written submission and subsequent responses to the Panel's questions, India has explained in detail that the AD and the SUAD are not "ordinary customs duties" (OCD) or "other duties and charges" (ODC) as understood by Article II:1(b) of the GATT 1994 and are instead, charges equivalent to internal taxes imposed in accordance with Article II:2(a) of the GATT 1994. India stands by the arguments on this issue put forward by it earlier but sees no reason to repeat them in this submission. Instead, India will focus on four key issues, which form the basis of the US misunderstanding in the course of these proceedings: the first issue pertains to equivalence between the AD, SUAD and the internal taxes that they are intended to counterbalance; the second issue pertains to the AD on alcoholic beverages and the Panel's Terms of Reference; the third issue pertains to the distinction between mandatory and discretionary measures; and the fourth issue is the US failure to discharge its burden of proof in making out a prima facie case.

1. SUAD is equivalent to the VAT, CST and other taxes and charges

4.169 The US has claimed that the SUAD on the identified products does not meet the requirements of Article II:2(a) of the GATT 1994. The reasons for the US assertion seems to be on account of: (a) India's failure to provide any evidence – either "showing or providing accounting" of how the SUAD is equal to internal taxes; and (b) an analysis of the structure, design and effect of the SUAD, which the US believes is not equivalent to that of the internal taxes and charges that the SUAD is aimed at counter-balancing.[41]

(a) The SUAD is quantitatively equivalent to VAT, CST and other internal taxes and charges

4.170 India has previously highlighted that: (i) the SUAD is levied at 4 per cent which represents the minimum state VAT or CST imposed, and wherever the VAT or CTS is lower than 4 per cent (that is charged at 1 per cent or is exempt) then the SUAD is correspondingly levied at the lower rate; (ii) any general exemptions provided for under the state VAT or CST legislations have been built into a corresponding exemption for imported like products from the SUAD; and (iii) if the imported product is subject to further VAT and/or CST and other local taxes and charges when it enters the Indian market, the importer is eligible to either claim a refund[42] or obtain a credit for the SUAD paid to ensure that the goods are not taxed again.

4.171 In this manner, the Indian tax system is calibrated to ensure equivalence between internal taxes and charges imposed on domestic products and the SUAD imposed on imported products. India is providing detailed accounting to further explain how it ensures that the SUAD imposed on imported products is equivalent to the VAT and/or CST or other taxes and charges imposed on like domestic products.

4.172 In order to determine this "equivalence" between the SUAD and the internal taxes it is intended to counterbalance, a comparison of the net tax burden on imported and domestic products in each type of sale transaction is required. There are broadly three types of sales transactions: the first being when a product is imported into India for direct consumption; the second being where a product is imported into India for further manufacture; and the third being where a product is imported into India for the purpose of further re-sale. An analysis of the taxes payable in each of these three types of

[41] US oral statement at the first meeting of the Panel, paras. 18-24.
[42] Customs Notification No. 102/2007 – Customs dated 14.09.2007.

transaction, reveals that in no transaction is the tax burden on imported products in excess of that borne by like domestic products. In the first type of transaction, the domestic consumer bears a net tax burden, which is either equal to or higher than the 4 per cent tax cost borne by the importer. In the second type of transaction, the net incidence of taxation for an importer manufacturer is nil as he is entitled to a CENVAT credit for the SUAD paid. And finally, in the third type of transaction too, the total incidence of tax borne by the importer-trader in a transaction of this type is nil since he is entitled to a full refund for the SUAD paid. In other words, the existing system of credit and refunds ensures that imported products are not double taxed or taxed in excess of domestic like products.

4.173 It is clear from the above analysis that the SUAD imposed on each of the Identified Products shall not result in an incidence of taxation for imported products, which exceeds that for like domestic products. The explanation offered above will apply equally to alcoholic products as well, and thus even with respect to alcoholic beverages, a comparison of the total tax burden will reveal that the tax burden imposed on imported products is not in excess of the burden imposed on like domestic products.

(b) The structure, design and effect of the SUAD

4.174 The United States observes "nothing in terms of the structure, design, or effect of the SUAD appears equivalent to the state level VAT or the CST".[43] Its observation seems to be based on three reasons: (i) VAT and CST are broadly levied at four different rates, which may differ from product to product and from state to state, whereas the SUAD is levied at a flat rate of 4 per cent; (ii) the mechanism for providing exemptions from the SUAD has shortcomings and is unable to ensure parity of taxation for imported and like domestic goods; and (iii) India has not provided any details of the "other taxes and charges" or substantiated that the SUAD is equivalent to such other taxes and charges.

4.175 Different rates of VAT and CST: VAT is imposed by state governments under their respective state VAT statutes. While it is possible that there exist different VAT rates in different States for the same product, the lowest VAT rate in every state is 4 per cent, unless the product is exempted from VAT altogether, or is a product such as gold, in which case the state VAT is 1 per cent in every State. The SUAD has accordingly been pegged to the lowest possible VAT rate on any product as applied in each Indian State.

4.176 Further, the Central Government has made an effort to ensure that the VAT rates on products are to the extent possible, harmonized across States. Each Indian state has implemented its own VAT statute based on the recommendations of the "Empowered Committee" and the rates of VAT are largely the same in all the States.

4.177 The difference in the VAT rates is also true of the rate at which CST is levied and the net tax burden imposed on account of CST is 4 per cent at the very minimum (other than registered dealers). Thus, as was the case with the VAT, it is equally possible that there exist different CST rates for the same product, but the SUAD is equivalent to the lowest rate of CST (other than registered dealers for whom a full refund is available on re-sale).

4.178 And finally, India has been able to establish an equivalence of the net tax burden imposed on imported and domestic like products. As elaborated in its responses to the Panel's questions, equivalence as contemplated under Article II:2(a) must be determined with reference to the overall fiscal burden placed on imported and domestic like products. The SUAD is imposed at a single rate of 4 per cent because amongst other things, it is difficult to foretell which state the imported product will eventually be sold in and consequently, the applicable rate of taxation on the product in that State.

[43] US oral statement at the first meeting of the Panel, para. 19.

Since the SUAD on imported products is pegged to the lowest rate of VAT/CST imposed on like domestic products, the fiscal burden on an imported product cannot exceed that of a like domestic product.

4.179 Exemption mechanisms for the SUAD: The United States has pointed out that the "exemption mechanisms for the SUAD" have shortcomings and are unable to ensure parity without identifying what these shortcomings are.[44] India would like to reiterate that the SUAD is carefully calibrated with the VAT/CST rates and wherever the domestic goods are exempt from payment of state VAT even the like imported products are exempt from SUAD. Similarly if a reduced rate of VAT is applicable to domestic goods then the SUAD on the like imported products is also levied at the reduced rate.[45] Thus India has ensured equivalence of fiscal burden on both domestic and like imported products.

4.180 Other taxes and charges: The other taxes and charges that India has consistently referred to, includes local and municipal taxes and charges which vary from state to state and from product to product. These taxes and charges are imposed on the sale, purchase or transportation of a domestically manufactured product (or the inputs used to manufacture such products) in a manner such that the price of the domestic product is loaded with such taxes, for which no credit or refund is available to a local manufacturer or dealer. On the other hand, such local taxes and charges are not imposed on imported like products. The objective of the SUAD is in part, to counterbalance the incidence of such local taxes and charges as well, which is not borne by imported like products. These local taxes and charges could take the form of a "Mandi Tax"[46], a "Turnover Tax"[47], a "Marketing Committee Fee"[48] etc.

4.181 Notwithstanding these local taxes and charges, the equivalence required by Article II:2(a) with reference to the SUAD and the VAT and the CST is clearly established and SUAD being pegged at the lowest rate of VAT/CST i.e. 4 per cent cannot result in an excessive fiscal burden for imported products. Any local taxes and charges that the SUAD is in part intended to counterbalance will only add to the fiscal burden for domestic products and not to similar imported products and as such, their identification would not have a bearing on the outcome of this dispute.

(c) The SUAD is applied in a manner consistent with Article III:2 of the GATT 1994

4.182 The United States asserts that India has neglected to inform the Panel that both the state level VAT and the CST apply to imported products[49] thereby resulting in taxes on imported products "in excess" of like domestic products and thus not fulfilling the condition under Article III:2. India has consistently informed the Panel that the SUAD is intended to counterbalance the state VAT and CST and to the extent that an imported product is charged the SUAD as well as the state VAT and CST, it shall be entitled either to a refund to the extent of the SUAD so paid or claim a credit for the full amount of SUAD thereby ensuring that no imported product can be ultimately subjected to both the SUAD and the CST/VAT.

[44] US oral statement at the first meeting of the Panel, para. 20.
[45] Customs Notification No. 20/2006 – Custs., dated March 1, 2006 (CN 20/2006)
[46] Mandi Tax is levied in the State of Bihar (8 per cent), Orissa (1 per cent – 2 per cent), Rajasthan (1.6 per cent) and a "Mandi Samiti Tax" is levied by the State of Uttar Pradesh (1 per cent for leather products and different rates for others).
[47] Turnover tax is levied in the State of Maharashtra (1 per cent) and the City Corporation of Chennai (Rs.1000/ – half yearly).
[48] A Marketing Committee Fee is levied by the State of West Bengal (1 per cent).
[49] US oral statement at the first meeting of the Panel, para. 22.

2. AD is equal to the excise duty

4.183 The United States claims that the AD is not equivalent to an internal tax or imposed in a manner consistent with Article III:2 of the GATT 1994, as required by Article II:2(a).[50] The AD charged on all imported products is equivalent to the excise duties charged on like domestic products. The equivalence is ensured for alcoholic beverages and all other imports other than alcoholic beverages in a different manner.

4.184 For all products other than alcoholic beverages, the AD is equivalent to the central excise duties imposed on like domestic products on account of three basic reasons: Firstly, Section 3(1) of the CTA requires that AD shall be "equal to the excise duty for the time being leviable on a like article"; Secondly, the AD is charged with reference to and is equal to the rates of central excise duty charged on like domestic products under the Central Excise Tariff Act, 1985; Thirdly, excise duties are levied exclusively on the manufacture of domestic products and not on imported goods and therefore the AD is imposed on imports in lieu of such excise duties. Therefore, the validity of the Additional Duties imposed under Section 3(1) of the CTA per se cannot be challenged.

4.185 In the case of alcoholic beverages, each of India's States and Union Territories are empowered to levy their own excise duties. Consequently, the Additional Duty could not be fixed with reference to any one single rate of excise duty and the Central Government decided in its discretion to adopt a method of imposing the Additional Duty through a process of averaging, and arrived at an approximation of the excise duty rates paid by different States on alcoholic liquor. This rate could in some cases, be less than the excise duty being charged on like domestic products in some States, and in other cases be different from the excise duty being charged in some other States. However, the Central Government tried to ensure that to the extent possible, the rate was a reasonable approximation of the net fiscal burden imposed on like domestic products on account of the excise duty payable.

4.186 Therefore the AD imposed under Section 3(1) of the CTA on all imported goods into India is per se equivalent to the excise duties charged on like domestic products and is entirely compatible with the provisions of Article II:2(a) of the GATT 1994. Alcoholic beverages on the other hand, are the only product, on which the AD is fixed with reference to the state excise duties through CN 32/2003 and has been subsequently exempted through CN 82/2007.

3. AD is validly removed

4.187 The United States contends first, that CN 82/2007 is not within the Panel's Terms of Reference and it is unclear as a factual matter whether it constitutes a revocation of the measure. Additionally, it submits that the analysis CN 82/2007 will create a moving target and will "shield" the AD from the Panel's scrutiny.[51]

4.188 As noted in India's first written submission, CN 82/2007 is within the Panel's terms of reference since it is "an amendment that does not change the essence of the identified measure" and a panel has the authority to examine a legal instrument enacted after the establishment of the Panel that amends a measure identified in the panel request.[52] Further, it seems that the United States had itself requested that such subsequent amendments be included within the Panel's Terms of Reference when

[50] US oral statement at the first meeting of the Panel, para. 25.
[51] US oral statement at the first meeting of the Panel, paras 27-31.
[52] Appellate Body Report, *Chile – Price Band System*, para. 144.

it included within its Request for the Establishment of the Panel.[53] Therefore, the Panel is well within its rights to take into account CN 82/2007.

4.189 Whether CN 82/2007 results in the revocation of the AD on alcoholic beverages as imposed through CN 32/2003 must be a matter of fact which is to be determined with reference to its ultimate effect. If CN 82/2007 has resulted in the complete withdrawal of the AD on alcoholic beverages as of that date, the allegedly offending measure CN 32/2003 must be said to stand validly revoked. The Arbitrator in *Argentina – Hides and Leather (Article 21.3)* has held that a Member may use any appropriate means to achieve effective compliance with its WTO obligations – including the complete withdrawal of the offending measure, its partial modification or correction of the offending portion.[54] In the present dispute, India has chosen to remove the AD on alcoholic beverages through CN 82/2003 and the imports of alcoholic beverages are no longer liable to pay any AD. There are no residuary or "lingering effect" of the AD on alcoholic beverages and therefore the instrument used to remove the AD is not relevant.[55]

4.190 The United States seems to contend that the mere possibility that a measure although effectively removed at the time, may subsequently be re-introduced must mean that it has not been validly revoked. The Panel may assume that Members will perform their treaty obligations in good faith and would not re-introduce the removed measure.[56] India has effectively and in good faith removed the AD on alcoholic beverages through CN 82/2007 with immediate effect and should be treated as such.

4.191 And finally, the US contention that CN 82/2007 will constitute a "moving target" designed to shield the AD from scrutiny is without merit. CN 82/2007 is a validly enacted piece of delegated legislation. The Appellate Body in *Chile – Price Band System* did not condone the practice of amending measures during dispute settlement proceedings or setting "moving targets", but nevertheless acknowledged that if the terms of reference in a dispute are broad enough to include amendments to a measure it would be necessary to consider them to secure a positive solution of the dispute.[57]

4. The distinction between mandatory vs. discretionary

4.192 The United States has contended that the effect of Section 3(1) of the CTA is mandatory and that even if it were not so, the measure is not saved from a challenge under the DSU.[58] The United States concludes that in either situation, India's averments on this issue are irrelevant, since even if the relevant statutory provision does not mandate the imposition of AD on alcoholic beverages, CN 32/2003 does. The US arguments on this issue appear to be contradictory. On the one hand it makes an "as such" challenge[59] and on the other it points out that the distinction between measures "as such" and "as applied" is "largely irrelevant"[60]. In another apparent contradiction, the United States frames its challenge of the AD "as such"[61], but examines the WTO compatibility of the AD "as applied" to alcoholic beverages.[62]

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[53] *India – Additional and Extra-Additional Duties on Imports from the United States*, Request for the Establishment of a Panel by the United States, WT/DS360/5, 25 May 2007.
[54] Award of the Abitrator, *Argentina – Hides and Leather (Article 21.3)*, paras. 40-41.
[55] Panel Report, *EC – Poultry*, para. 252.
[56] Panel Report, *Argentina – Textiles and Apparel*, para. 6.14.
[57] Appellate Body Report, *Chile – Price Band System*, para. 144.
[58] US oral statement at the first meeting of the Panel, para. 34.
[59] Question 16, para. 3 in the US response to Panel's questions.
[60] US oral statement at the first meeting of the Panel, para. 34.
[61] Question 16, para. 3 in the US response to Panel's questions.
[62] US first written submission, para. 31.

4.193 India has highlighted the discretionary nature of Sections 3(1) of the CTA in order to point out that the statutory provision does not mandate a WTO inconsistency and therefore any investigation must be limited to the provisions of the relevant Customs Notification. This distinction has been observed in previous Panel and Appellate Body decisions where it has been viewed as being a "threshold consideration".[63]

4.194 India has consistently maintained that the rate at which the AD is imposed is specified by the Central Government through relevant Customs Notifications. The AD on alcoholic beverages was earlier imposed by CN 32/2003 and subsequently removed through CN 82/2007. To that extent, India submits that any analysis of the WTO compatibility of the AD on alcoholic beverages may be limited to an examination of the provisions of CN 32/2003, which is an identified measure in the present dispute. In other words, in order to determine the WTO compatibility of the measures in question, the Panel may look into the rate at which the AD is levied and not whether India has the authority to levy the AD itself. Further, any examination of CN 32/2003 would be incomplete without considering CN 82/2007, which removes the AD on alcoholic beverages.

5. The United States has failed to make out a prima facie case

4.195 The United States alleges that both the AD on alcoholic beverages as well as the SUAD on the identified products are OCDs or ODCs and are contrary to India's obligations contained in Article II:1(a) and (b) of the GATT 1994. In making its claims, the United States has failed to demonstrate that the AD or the SUAD are indeed taxes that qualify as an OCD or an ODC and has instead sought to discharge its burden of proof by arguing that India has not adequately demonstrated that the AD or the SUAD is not an OCD or ODC. In doing so, the United States has failed to discharge its burden of proof as the complaining party to make out a prima facie case.[64]

(a) Definition of an OCD as applied to the AD and the SUAD

4.196 The definition of the term OCD may not be construed in its negative and Appellate Body has itself noted, that "it is not necessary that each and every duty that is calculated on the basis of the value and/or volume of imports is necessarily an "ordinary customs duty".[65] Therefore, the United States must establish in the affirmative that the AD and the SUAD are OCD. In order to make such an affirmative claim, the United States as the complaining party in this dispute must look beyond the mere point at which the duty is levied and the manner in which the duty is expressed, since neither of them will necessarily mean or indicate that the duty is an OCD. In addition, the United States must substantiate in the affirmative that the "structure, design and effect" of the AD and the SUAD make it an OCD.[66] The United States has failed to take into account any such relevant factors in framing its claim, and has instead observed that India has failed to demonstrate that the AD or the SUAD is not an OCD.[67]

(b) Definition of an ODC as applied to the AD and the SUAD

4.197 The United States has at no stage substantiated how the AD or the SUAD qualify as an ODC or explained how the AD or the SUAD could inter-changeably belong to two fundamentally different categories of import duties defined by Article II:1(b) of the GATT 1994 and has effectively blurred the distinction between an OCD and ODC. Such an interpretation is contrary to the text of

[63] Appellate Body Report, *US – 1916 Act*, paras. 88-91.

[64] The United States notes that, as a general rule, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". Appellate Body Report, *US – Wool Shirts and Blouse*, p. 14.

[65] Appellate Body Report, *Chile – Price Band System*, paras. 271-272 and 274.

[66] Panel Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 189.

[67] US oral statement at the first meeting of the Panel, para. 6.

Article II:1(b) of the GATT 1994 and past interpretation of the OCD and ODC as being two distinct charges by previous WTO Panels.[68]

4.198 Therefore, with respect to both its fundamental claims, the United States has failed to discharge its burden of proof in making out a prima facie case that the AD and the SUAD are either OCD or ODC as defined under Article II:1(b) of the GATT 1994. The Panel may not make a finding on the validity of India's defence without having first established the fact that the United States has duly discharged its burden of establishing its claim.

G. ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

1. Opening statement

4.199 The United States has established a prima facie case that India's AD and EAD are inconsistent with Article II:1(a) and (b) of the GATT 1994. India has not rebutted the US prima facie case. Nor has India sustained its own assertions that the AD and the EAD may be justified under Article II:2(a) of the GATT 1994. The US prima facie case and India's failure to rebut that case, or to sustain its assertions under Article II:2(a) of the GATT 1994, are detailed in the US written submissions and prior statements. As such, the US remarks focus on selected points that bear emphasizing in light of India's second written submission.

(a) Point 1

4.200 The AD and the EAD are ordinary customs duties. The United States has established a prima facie case that the AD and the EAD are ordinary customs duties. The United States has demonstrated that the AD is an ordinary customs duty because it applies: as a combination of *ad valorem* and specific duties, at the time of importation, and as a matter of course upon a product's importation. Importation of alcoholic beverages is the event for which liability for the AD ensues, and the AD applies at the prescribed rate on each importation of alcoholic beverages. These features make the AD a "usual," "common" and "ordinary" kind of "customs duty." And in this regard, the AD is "usual," "common" and "ordinary" in the same way as India's basic customs duty is. That is, each feature of the AD that makes it an ordinary customs duty is shared by India's basic custom duty (or BCD) – a duty India concedes is an ordinary customs duty.

4.201 The similarities reviewed in the US prior submissions between the AD on the one hand and the BCD on the other disprove India's contentions that the AD and the BCD are "entirely distinct" and instead indicate that the AD is structured and designed in much the same way as the BCD, and likewise is an ordinary customs duty.

4.202 The United States has also demonstrated that the EAD is an ordinary customs duty because it applies: as an *ad valorem* duty, at the time of importation, and as a matter of course upon a product's importation. The EAD applies at the prescribed rate on each importation of products, unless separately exempt, and importation of a product is the event for which liability for the EAD ensues. These features make the EAD a "usual," "common" or "ordinary" kind of "customs duty." And in this regard, the EAD is "usual," "common" and "ordinary" in the same way as India's basic customs duty is. The EAD and the BCD also bear a number of similarities that disprove India's contentions that the EAD and the BCD are "entirely distinct," and indicate instead that the EAD, like the BCD, is an ordinary customs duty.

[68] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.113.

4.203 India has not rebutted the prima facie case established by the United States. In particular, India has not identified any feature of the AD or the EAD that is not "ordinary" in relation to the BCD, which India concedes is an ordinary customs duty. India's only arguments in support of its contentions that the AD and EAD are not ordinary customs duties are that the AD and EAD are governed by distinct legal provisions and that the AD and the EAD are intended to be charges equivalent to an internal tax. With respect to India's first argument, the collection of the AD, EAD, and BCD are authorized under the same constitutional provision, required to be collected under the same section of the Customs Act (Section 12), and privy to exemptions under the same section of the Customs Act (Section 25). With respect to India's second argument, a Member could simply ascribe a particular purpose or name to a duty, or categorize it under a particular provision of domestic law, and avoid its commitments with respect to ordinary customs duties. This is why it is critical to focus on the structure, design and effect of a measure.

4.204 In the context of this dispute, simply imposing the AD and the EAD under separate sections of the Customs Tariff Act, as compared to the BCD, or ascribing a particular policy objective to the AD or EAD cannot change the fact that all three duties – on account of their structure, design and effect – are ordinary customs duties.

(b) Point 2

4.205 And in the end, even if the AD and the EAD were not ordinary customs duties, they would nonetheless breach Article II:1(b) of the GATT 1994, because if not ordinary customs duties, the AD or the EAD would necessarily constitute an "other duty or charge imposed on or in connection with importation." First, it is not disputed that either the AD or the EAD constitute a "duty" or "charge" on products. Second, both are imposed on or in connection with importation. The AD and the EAD are imposed on or in connection with importation because they are imposed at the time of importation and as a consequence of importation. Contrary to India's assertions the phrase "on or in connection with importation" does not concern the policy objective associated with the duty; it concerns the relationship between the duty and importation. Moreover, India implicitly concedes the AD and the EAD are "imposed on importation." Indeed, India could not advance a defence under Article II:2(a) of the GATT 1994 otherwise since that Article concerns charges "imposed on importation."

(c) Point 3

4.206 In its second written submission, India explains that the AD is not "virtually identical" to the state excise duties but instead an "approximation" of those duties arrived at "through a process of averaging," and that in some cases the AD could be "in excess of the excise duty being charged in some states" on like domestic alcoholic beverages. Even if India's explanation were true – which the United States cannot ascertain because India has submitted no evidence in support of it – the explanation would not mean the AD is "*per se* equivalent" to state excises taxes nor that it is "entirely compatible with the provisions of Article II:2(a)." In fact, India's explanation disproves its own defence. Under Article III:2 any amount of excess charges on imports is "too much" and imports are entitled to treatment no less favourable than the most-favoured domestic products. A charge on imports equal to the average of the various rates of internal taxes imposed on like domestic products will necessarily result in charges on imports in excess of internal taxes on some like domestic products.

(d) Point 4

4.207 Turning to the three scenarios India describes as demonstrating the "quantitative equivalence" of the EAD, none of these scenarios demonstrate that the EAD is "quantitatively equivalent" to the state-level VATs or the CST that it allegedly offsets. Nor do these scenarios demonstrate that the EAD ensures that charges on imports do not exceed the state-level VATs or the CST on like domestic

products. With respect to the first scenario India describes, a domestic product sold by a registered dealer in one state to a registered dealer in another state is subject to a CST rate of 3 per cent; whereas like imports are subject to an EAD rate of 4 per cent. Moreover, imports are subject to the 4 per cent EAD even in cases where the like domestic product is subject to a zero rate by virtue of a state deviating from the Empowered Committee suggested rate. With respect to the second scenario India describes, whether India's CENVAT subjects imports to charges in excess of those on like domestic products does not address the issue of whether the EAD subjects imports to charges that exceed the charges imposed by the state-level VATs and the CST.

4.208 India's third scenario relies solely on a measure that is not within this Panel's terms of reference – Customs Notification 102/2007 – to support its contention that the EAD does not result in charges on imports in excess of those on like domestic products. Examination of the EAD comprising the measures within this Panel's terms of reference shows that imported products are subject to the EAD in addition to the state-level VATs and CST, whereas like domestic products are only subject to the state-level VATs and CST.

(e) Point 5

4.209 None of India's points support the conclusion that the EAD is equivalent to the state-level VATs or CST. In fact a number of them suggest the contrary: (a) the state-level VATs and CST vary from product to product and from state to state and, with respect to the CST, from one purchaser to another, when the EAD is imposed at a flat 4 per cent rate for all imports; (b) the EAD is not set at the "lowest VAT rate" or corresponding lowest CST rate since the lowest VAT or CST rate is zero and in transactions between registered dealers the CST rate is 3 per cent; (c) imports are not necessarily exempt from the EAD when like domestic products are exempt from a state-level VAT or the CST since states may exempt products from the VAT rate suggested by the Empowered Committee, and there is no mechanism to adjust the EAD correspondingly when states exercise such discretion.

4.210 India provides no evidence that the other local taxes or charges to which it refers exist, much less any evidence that the EAD results in charges on imports that do not exceed such taxes or charges – e.g., that such taxes or charges do not apply in addition to the EAD.

(f) Point 6

4.211 Customs Notification 82/2007 and Customs Notification 102/2007 are not within this Panel's terms of reference, and India's attempts to justify the AD or the EAD on account of either notification's effect on the AD or the EAD should be rejected accordingly.

4.212 India offers little new in support of its contention that Customs Notification 82/2007 is within the Panel's terms of reference and, in terms of Customs Notification 102/2007, does not even assert that it is within the Panel's terms of reference. India misreads the US panel request's reference to "amendments, related measures, or implementing measures", which is a reference to any amendments or measures in existence at the time of the US panel request. There is no official compilation or searchable database of India's applied customs rates, and ascertaining the official applied customs rate for any particular product requires knowing whether the rate set out in the First Schedule to India's Customs Tariff Act has been modified. The Panel will appreciate that with such a system, it may become apparent during the course of the dispute that a relevant citation to one of the measures identified, in existence at the time of the panel request, was overlooked (though that does not appear to be the case here). But, the panel request's reference to "amendments, related measures or implementing measures" did not extend to measures not even in existence at the time.

4.213 Whether the United States, in India's view, has had sufficient time or not to review Customs Notification 82/2007 does not bring that measure within the Panel's terms of reference. And, India

only introduced Customs Notification 102/2007 during the last Panel meeting. In the time the United States has had to analyze Customs Notification 82/2007, it appears that (1) it does not revoke or rescind Customs Notification 32/2003, (2) that Customs Notification 32/2003 remains in force; and (3) that the statutory provision mandating imposition of the AD, and at the highest excise duty rate of any Indian state, remains in place.

4.214 What Customs Notification 102/2007 accomplishes, or does not accomplish, is unclear. The refund mechanism it appears to establish subjects eligibility for a refund to a number of conditions and procedures that appear – based on initial reports from US industry – to undermine the value of any applicable refund. Furthermore, domestic products do not have to go through the additional step of requesting a refund, so it is not established that imported products are being treated no less favourably than like domestic products. Moreover, Customs Notification 102/2007 would only appear to address India's "second scenario"; it would not appear to address India's "first scenario" where imported products are consumed by the importer.

4.215 India's contention in this regard that "a Member may use any appropriate means to achieve effective compliance" is simply inapposite. The appropriate means to achieve compliance and whether such compliance is effective would be a matter for the compliance stage of this dispute.

4.216 India has yet to explain how taking into account Customs Notification 82/2007 (or Customs Notification 102/2007 for that matter) "is necessary ... in order to secure a positive solution to the dispute." Doing so would not contribute to securing a positive solution in this dispute, and, instead would put the United States in the position of having to deal with the AD (or the EAD) as a "moving target." These issues are particularly acute in this dispute given the uncertainty today as to either customs notifications' effect on the AD and the EAD respectively, and the ease with which either customs notification may be rescinded or otherwise removed. India has also indicated that collection of the AD may resume at either the central or state level.

4.217 India contends that Customs Notification 102/2007 does not change the essence of Customs Notification 19/2006 and again refers to the US panel request's reference to "any amendments, related measures or implementing measures." The latter has already been addressed in this statement. With respect to the former, if Customs Notification 102/2007 does what India contends, it appears fundamentally to change the essence of the EAD. That is, according to India, prior to Customs Notification 102/2007 imports subsequently sold within India were subject to the EAD in addition to the state-level VATs and CST, whereas with Customs Notification 102/2007 in place, such imports are no longer liable for the EAD, provided certain conditions are met. A measure that allegedly removes liability for another measure would seem to necessarily change the essence of the latter measure. In this regard, the United States points out that the facts in *Chile – Price Band System* differ significantly from the facts in this dispute.

(g) Point 7

4.218 The AD and the EAD are each "as such" inconsistent with Article II:1(a) and (b) of the GATT 1994. The AD comprises a number of measures that apply cumulatively and when imposed with the basic customs duty, result in ordinary customs duties on alcoholic beverages that exceed India's WTO-bound rate. Each of these measures mandates the actions it describes, for the reasons the United States clearly sets out in the US second written submission.

4.219 And in any event, even if any of the cited statutory provisions had been discretionary, Customs Notification 32/2003, as India acknowledges, is not. Customs Notification 32/2003 mandates the collection of the AD at specified rates, and collection of the AD at those rates result in ordinary customs duties on imports of alcoholic beverages in excess of India's WTO-bound rates.

4.220 India contends the United States has set out an "as applied" claim with respect to the AD because it has "examined the WTO compatibility of the AD 'as applied' to alcoholic beverages." Any reading of the US panel request, responses to the Panel's questions and first and second written submissions, makes quite clear that the United States is challenging the AD "as such," but only as it pertains to alcoholic beverages. The statutory provisions and customs notifications comprising the AD on their face mandate a breach of India's WTO-bound rate for alcoholic beverages.

4.221 With respect to the EAD, it is also mandatory. While Section 3(5) provides that the Central Government may levy the EAD, Customs Notification 19/2006 mandates its collection. Moreover, Section 3(5) requires that if imposed the EAD shall be at the highest rate of internal taxes imposed on like domestic products up to a maximum of four per cent.

(h) Conclusion

4.222 The AD and the EAD are each ordinary customs duties that India imposes on imports in excess of WTO-bound rates. Neither duty is charge equivalent to an internal tax that is imposed consistently with Article III:2 of the GATT 1994. Consistent with this Panel's terms of reference under DSU Article 7.1, the United States requests the Panel to find that the AD and EAD are inconsistent with Article II:1(a) and (b) of the GATT 1994, and consistent with DSU Article 19.1, to recommend that India bring these measures into conformity with the GATT 1994.

2. Concluding remarks

4.223 The United States has established a prima facie case that the AD and the EAD are each ordinary customs duties that India imposes in excess of its WTO-bound rate and are therefore inconsistent with Article II:1(a) and (b) of the GATT 1994.

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

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

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

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

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

4.229 India's contention is simply a repackaging of its earlier arguments that the stated purpose of the AD and EAD is sufficient to qualify those duties as in fact equivalent to an internal tax. As the

United States has mentioned, the Panel should look at the structure, design, and effect of a duty and not its stated purpose.

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

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

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

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

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

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

4.234 Today, the United States would like to draw attention to two additional points.

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

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

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

4.238 Second, as the United States has noted, India's invitation for the Panel to take Customs Notification 82 and 102 into account in making findings on the AD and the EAD as set out in the Panel's terms of reference renders this dispute a "moving target". India could take yet another measure later in this proceeding, or the Indian states could impose new charges to replace the AD.

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

H. ORAL STATEMENT OF INDIA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

4.240 India in its oral submissions at the second substantive meetings with the parties has refrained from repeating the submissions made by it earlier in the proceedings and has instead limited its submissions to clarifying the key misconceptions in the US submissions before the Panel and explaining the issues raised by the US in its second written submissions.

1. OCD/ODC or charge equivalent to internal taxes?

4.241 The United States has alleged that India levies Additional Duty (AD) under Section 3(1) of the Customs Tariff Act (CTA) and such other Additional Duties (SUAD) under Section 3(5) of the CTA in excess of its bound rates. The United States' allegation is based on an erroneous characterization of the AD and the SUAD as "ordinary customs duty" (OCD) or "other duties and charges" (ODC) under Article II: 1 of the GATT 1994.

4.242 Based on this premise the United States has further misinterpreted the statutory basis for the duties and has argued that the structure, design and effect of the AD and the SUAD are such that they are nothing but "basic customs duties" (BCD). However in doing so, the United States has ignored the judicial interpretation, the purpose of the levy, the methodology of calculation, and the actual imposition and co-relation of the AD and the SUAD with the internal taxes that they are intended to counter-balance. These factors clearly establish that these latter duties are distinct from each other, meant to serve separate purpose and have distinct effect and thereby can not be treated as BCD.

4.243 The United States argues that the stated policy purpose or intent of a measure does not determine whether a duty is an OCD or an ODC and should therefore be disregarded. India offers an explanation of the purpose behind its duties to support its averments on the structure, design and effect of the duties and submits that the Panel is not precluded from considering the policy purpose of the duties while determining whether AD and the SUAD are OCDs/ODCs.[69]

4.244 The United States in the alternative argues that the AD and the SUAD are ODCs. It contends that since the AD and the SUAD are applied at the time of importation and as a "consequence of importation"[70] they must automatically qualify as an ODC if they are not characterized as OCD. India submits that even though the two duties are imposed at the time of importation, they are not levied as a "consequence of importation"; instead the liability arises as a consequence of the levy of internal duties and charges on the like domestic products. Since both the AD and the SUAD are imposed in lieu of internal taxes and charges, they are permitted under Article II: 2(a) of the GATT 1994.

[69] Previous WTO Panels have considered the stated purpose of a measure while characterizing a measure under the WTO law. See Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.41

[70] US second written submission, para 19 where the US seems to define "at the time of importation" as "the event for which liability for a duty ensues".

2. The AD and the SUAD are equivalent to internal taxes

4.245 India has consistently maintained that both the AD and the SUAD are equivalent to the internal charges that they are intended to offset, and are imposed in accordance with Article III: 2 of the GATT 1994. With the revocation of the AD on alcoholic beverages through CN 82/2007 and the introduction of the full refund mechanism for the SUAD paid through CN 102/2007 the possibility that imported products are taxed in excess of domestic like products on account of the AD or the SUAD has been removed.[71]

(a) AD is equal to the excise duty

4.246 India has made every effort to demonstrate that the AD imposed under Section 3(1) of the CTA is equivalent to the excise duty imposed on like domestic products. For all products other than alcoholic beverages the AD is charged at the same rates as the central excise duty on the like domestic products.[72] For alcoholic beverages on the other hand, the AD was intended to offset the multiple levels of State excise duty imposed on them[73] and since it could not be identical to any one single rate of State excise duty, it was imposed at a rate arrived at by reasonable approximation of the excise duty rates payable in different States.

4.247 The United States argues that the relevant portion of India's CTA mandates the imposition of the AD the highest rate where there are multiple rates of domestic excise duty. India has shown that Section 3(1) of the CTA does not necessarily mandate the imposition of AD at the highest rate; the Central Government retains the discretion to either exempt a product from the levy or impose the duty at a reduced rate. For instance, when the AD on alcoholic beverages was in effect prior to 3 July 2007 it was lower than the corresponding excise rates in several states.

4.248 However in view of the concerns raised by its trading partners that this method of arriving at the rate of AD had resulted in some inconsistencies in the way it was implemented through CN 32/2003, India decided to remove it through CN 82/2007. The United States argues that CN 82/2007 does not result in complete removal of the AD and moreover since the customs notification was brought in after the constitution of the Panel, it shall not be considered. India submits that the CN 82/2007, by exempting the goods from the levy of duty imposed under CN 32/2003 as a matter of fact results in complete removal of the AD on alcoholic beverages. India also submits that the Panel may consider CN 82/2007 as being within its Terms of Reference and such a consideration would effectively bring about a resolution of the dispute.

(b) SUAD is equivalent to the VAT, CST and other taxes and charges

4.249 Contrary to the US submission , the SUAD is equivalent to the VAT, CST and other taxes and charges (internal taxes & charges) and has been imposed in accordance with Article II: 2(a) of the GATT 1994. The structure of the SUAD is calibrated with the internal taxes and charges levied on domestic products so that it does not result in a heavier tax burden on imported like products. There are generally four rates of a VAT/CST levy in India: "nil", 1 per cent, 4 per cent and 12.5 per cent.

[71] The United States has relied on India "admissions" that there may be some limited instances in which the AD on alcoholic beverages (Para 33 of US second written submission) and the SUAD on the Identified Products (Para 44 of US second written submission) could be "in excess" without considering that the revocation of the AD on alcoholic beverages and the introduction of the refund mechanism for the SUAD have resulted in the removal of any possible situation of excessive taxation. This is contrary to the very objective for which the Panel was constituted, i.e. achieving a satisfactory settlement of the matter.

[72] The rates of AD as per Section 3(1) of the CTA are equal to rates of central excise provided in First Schedule to the Central Excise Tariff Act.

[73] Under the Constitution pf India, excise duty on alcoholic beverages can be imposed only by the Sates.

Correspondingly the SUAD is levied either at "nil" rate or at the rate of 1 per cent or 4 per cent. For all products where the VAT/CST is charged at 12.5 per cent above, the SUAD remains 4 per cent. In addition, the system of refunds ensures that in no situations the imported products are charged a SUAD in excess of the like domestic product.[74]

4.250 Secondly, the comparison of the net tax burden on imported and domestic like products in each type of sale transaction shows that the two are mathematically equivalent in each type of transaction of sale, i.e. when a product is imported into India (a) for direct consumption; (b) for further manufacture; and (c) for the purpose of further re-sale. An analysis of the taxes payable in each of these three types of transaction, reveals that in no transaction is the tax burden on imported products in excess of that borne by domestic like products. In addition, the credit and refund mechanism as introduced through CN 102/207 ensures that no imported products can be subjected to both the SUAD and the CST/VAT. The mechanism for refund is clear, simple and transparent and the US apprehensions on the efficacy of the refund mechanism are completely misplaced.

4.251 In addition to being "equivalent" to internal taxes, the SUAD and the AD are applied in a manner consistent with Article III: 2 of the GATT 1994 since neither result in the taxation of imported products "in excess" of domestic like products.

(c) The AD and the SUAD are applied in a manner consistent with Article III:2 of the GATT 1994

4.252 In addition to being "equivalent" to internal taxes, the SUAD and the AD are applied in a manner consistent with Article III:2 of the GATT 1994 since neither result in the taxation of imported products "in excess of" domestic like products.[75] Article III:2 of the GATT 1994 requires a comparison of the "actual tax burden" imposed on imported and domestic like products[76] and as of date, India's taxation system is calibrated to ensure that the burden of taxation on imported products does not exceed the burden placed on domestic like products in any transaction of sale.

3. Terms of reference

4.253 The United States contends that CN 82/2007 and 102/2007 are not within the Panel's Terms of References since they were introduced after the Panel's establishment and the analysis of these measures will create a moving target and will "shield" the AD from the Panel's scrutiny. It is submitted that the Panel is well within its mandate to look into CN 82/2007 and CN 102/2007 even though they were introduced after the establishment of the Panel since: (a) a panel has the authority to examine a legal instrument enacted after the establishment of the Panel that amends a measure identified in the Panel request[77]; and (b) the United States had itself requested that "any amendments, related measures, or implementing measures"[78] be included within the Panel's Terms of Reference. The two notifications issued after the constitution of the Panel were not intended to create a moving

[74] For example, where the CST is paid at 3 per cent (in the case of sale from one registered dealer to another) the importers can claim a refund of the excess SUAD paid as per the mechanism introduced through CN 102/2007

[75] The United States submissions commenting on Footnote 51 of India's First Written Submission pertaining to the permissible "*de minimis"* level (US second written submission, para 32 and footnote 44), is no longer relevant since the revocation of the AD on alcoholic beverages through CN 82/2007 and the introduction of the refund mechanism for the SUAD through CN 102/2007 have effectively removed any possibility that the AD or the SUAD imposed on imported products are "in excess of" internal taxes. India is therefore not addressing this issue in any further detail.

[76] Panel Report, *Argentina – Hides and Leather*, para. 11.183 to 11.185.

[77] Appellate Body Report, *Chile – Price Band System*, para. 144

[78] *India – Additional and Extra-Additional Duties on Imports from the United States*, Request for the Establishment of a Panel by the United States, WT/DS360/5, 25 May, 2007.

target, but to address the concerns raised by India's trading partners. Also, the notifications in question do not "change the essence" of the measures in question and the mechanism for the levy of AD and SUAD on imports continues to subsist.

4. The distinction between mandatory vs. discretionary

4.254 The United States seems to suggest that the distinction between mandatory and discretionary measures is not relevant to its claims.[79] India however and has consistently highlighted the discretionary nature of Section 3(1) and 3(5) of the CTA in order to point out that the statutory provisions do not mandate a WTO inconsistency and the Panel's investigation, if any, may be limited to the Customs Notifications. This distinction between mandatory and discretionary provisions has been observed in previous Panel and Appellate body decisions where it has been viewed as being a "threshold consideration".

5. The United States has failed to make out a prima facie case

4.255 Throughout these proceedings, the United States has failed to demonstrate that the AD or the SUAD are taxes that qualify as an OCD or an ODC as defined in the second sentence of Article II:1(b) of the GATT 1994. Instead, it has sought to discharge its burden of proof by arguing that India has *not* adequately demonstrated that the AD or the SUAD is not an OCD. In order to make an affirmative claim that the AD and the SUAD are OCDs, the United States must look beyond the mere point at which the duty is levied and the manner in which the duty is expressed, since neither of them will necessarily mean or indicate that the duty is an OCD. In addition, the United States must substantiate in the affirmative that the "structure, design and effect" of the AD and the SUAD make it an OCD.[80] The United States has failed to take into account any such relevant factors in framing its claim, and has instead observed that India has failed to demonstrate that the AD or the SUAD is *not* an OCD.[81]

6. Conclusion

4.256 In conclusion India would like to emphasize that both the levies under the CTA – AD and SUAD are legitimately imposed to offset domestic taxes imposed on like domestic goods in India and such a levy is permissible under Article II.(2)(a) of the GATT 1994. India has demonstrated at length how neither duty can be misconstrued as being either an OCD or and ODC and that the rates of the duties are implemented through customs notifications. The statutory provisions of the CTA are purely discretionary and do not in themselves mandate a WTO inconsistency and are consequently not to be treated as measures in the present dispute. India has always complied with its international obligations and the enactment of CN 82/2007 and 102/2007 to address concerns raised by its trading partners is indicative of this fact India wishes to unequivocally and emphatically reiterate its commitment to abide by its WTO commitments.

V. ARGUMENTS OF THE THIRD PARTIES

A. AUSTRALIA

1. Introduction

5.1 Australia reserves its position in relation to any issue not addressed in its written submission or oral statement.

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[79] US second written submission, para.80.
[80] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 189.
[81] US oral statement at the first meeting of the Panel, para. 6.

2. Removal of the additional duties

5.2 The Panel is not precluded from making findings on measures which are properly within its terms of reference, even where those measures have ceased to exist. However, a panel need only consider those claims which must be addressed to resolve the matter at issue in the dispute.

5.3 If the Panel considers that India's additional duty (AD) on alcoholic beverages has indeed been withdrawn and has "ceased to exist", it should nevertheless consider whether, in the particular circumstances of this dispute, it is necessary to make findings on the AD in order to resolve the dispute.

3. Consistency of the AD and "such additional duties" as would counterbalance taxes such as Sales Tax, Value-Added Tax, local tax or any other charges ("SUAD") with Article II:1 of the GATT 1994

5.4 A threshold issue is whether (as claimed by the United States) the AD and the SUAD are "ordinary customs duties'" (OCDs) or "other duties and charges'"(ODCs) within the meaning of Article II:1(b) of the GATT 1994 or whether (as claimed by India) the AD and SUAD instead fall into a separate category of duties permitted under Article II:2(a).

5.5 There is no definition of either "ordinary customs duty" or "other duty or charge" in the GATT. In addition to considering the ordinary meaning of the terms, the Appellate Body has suggested that determination of whether a measure constitutes an OCD or ODC should be based on the structure, design and application of the specific measure in question. The name or stated purpose the Member imposing the measure ascribes to it is not determinative. Australia agrees with India that Article II:2 of the GATT 1994 measures may be based on value or volume and still be distinct from OCDs and ODCs within the meaning of Article II:1(b) of the GATT 1994. Australia therefore submits that further consideration by the Panel of the measures' overall design, application and structure is necessary in order to decide whether the AD and SUAD fall within the scope of Article II:1(b) or alternatively Article II:2(a).

5.6 In the event that the Panel accepts India's argument that its measures are properly within the terms of Article II:2 of the GATT 1994, it follows that they are neither OCDs or ODCs and therefore would be exempt from bound commitments.

4. Article II:2 of the GATT 1994

5.7 Article II:2(a) of the GATT 1994 permits Members to impose duties in excess of their bound commitments where necessary to counterbalance internal taxes from which imported products are exempt, provided that such charges on imports are "equivalent" to the internal taxes in question.

5.8 Article II:2(a) of the GATT 1994 requires that, in order to be categorised as "equivalent" to internal taxes within the meaning of that provision, measures must also be applied in a manner consistent with Article III:2 of the GATT 1994. The United States claims in the alternative that the Indian measures are inconsistent with this requirement.

5.9 On the face of India's legislation, including Section 3(1) and Section 3(5) of the Customs Tariff Act, the AD and SUAD could be charges "equivalent" to internal taxes and within the scope of Article II:2(a). In Australia's view, however, this question remains an open one, to be answered by further consideration of the measures' overall design, application and structure. In particular, if imported products are being taxed upon their arrival in an Indian state on the same basis as locally produced products, they cannot also be subject to AD and SUAD imposed at the border.

5.10 In addition, the application of India's measures may result in some imported products incurring charges "in excess of" those imposed on some like domestic products (counter to the requirements of Article III:2 of the GATT 1994). The "Explanation" to sub-section 3(1) of India's Customs Tariff Act (under which AD is applied to alcoholic beverages) expressly states that where excise duty is leviable at different rates, AD shall be calculated at the highest (excise) duty. Similarly, the "Explanation" to sub-section 3(5) of India's Customs Tariff Act expressly states that where internal taxes are leviable at different rates, SUAD will be fixed at the highest rate. On its face, the legislation under which the AD and SUAD are imposed mandates charges in excess of internal taxes and charges on like domestic products, at least in some parts of the territory of India.

5. Mandatory vs. discretionary legislation and "as such" claims

5.11 It is clear that legislation having general application may be challenged "as such". The Appellate Body has identified the importance of this facet of the dispute settlement system in protecting "not only existing trade but also the security and predictability needed to conduct future trade".

5.12 However, Australia disagrees with India's application of a mandatory and discretionary distinction in determining whether measures are challengeable "as such". In *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body found that "the import of the 'mandatory/discretionary distinction' may vary from case to case"; cautioned against "the application of this distinction in a mechanistic fashion" ; and stated that there is no reason why "in principle, non-mandatory measures cannot be challenged 'as such'". The Appellate Body concluded that whether a challenged measure is mandatory is not a preliminary jurisdictional matter but is "relevant, if at all, only as part of the Panel's assessment of whether the measure is, as such, inconsistent with particular obligations".

5.13 Australia therefore submits that a mandatory/discretionary distinction is not determinative of whether a Panel has jurisdiction to consider the relevant measures. Further, the Appellate Body has left open the possibility that discretionary legislation could be found to be inconsistent with WTO obligations.

B. CHILE

5.14 Chile would like to thank the Panel for the opportunity to present its views in this dispute between the United States and India concerning the application by India of additional and extra-additional duties on certain imports from the United States.

5.15 Chile reserved its rights as a third party in this dispute in order to safeguard the interests of its alcoholic beverages industry, chiefly its wine industry. In view of the increasing importance of the Indian market for Chile's wine and spirits exports, it is important that the recommendations and rulings of the Panel provide legal certainty with respect to the treatment granted by the Indian authorities to imports of such products.

1. The measures in force prior to 3 July 2007 and amendments thereto

5.16 On the basis of what the two parties themselves claimed in their respective submissions, Chile considers that the Panel should begin by ruling on whether or not the Indian measures in force prior to 3 July 2007 violate its obligations under Article II of the GATT 1994.

5.17 Regarding India's new measure of 3 July 2007 withdrawing the additional duty on alcoholic beverages, the United States contends that this measure is outside the Panel's terms of reference, since it should only be examined at the implementation stage, where applicable. India, on the other hand,

argues that the Panel is competent to rule on this issue, in that the new measure is an amendment that does not alter the essence of the measure identified in the request for a panel, as confirmed by the Appellate Body in *Chile – Price Band System*.

5.18 In this connection, Chile would like to stress what it has already stated, namely that the Panel should, as an initial matter, rule on the Indian measures before the recent amendment, considering the actual requests of the parties in that respect, after which it will need to decide on the subsequent measure amending them, and the conformity of that measure with India's international obligations. Here, Chile agrees with the United States, and reaffirm the need for the Panel to rule definitively on the consistency of the said measures.

5.19 Without prejudice to the Panel's ruling, neither India nor any other WTO Member is under any obligation to keep its measures suspended or unchanged pending the future ruling of the Dispute Settlement Body – a Member may revise its measures at any time, and adjust them as it sees fit, provided they are consistent with its obligations under the WTO Agreements. Thus, such measures cannot remain outside the scrutiny of a panel. A ruling in this respect, and in particular in this dispute, would contribute to the certainty that Chile hopes to obtain with respect to access to the Indian market for its products.

2. India's arguments with respect to Article II of the GATT 1994

5.20 India maintains that the extra-additional duties fall into the categories described in Article II:2(b) of the GATT 1994[82], and are not therefore inconsistent with Article II:1 of that Agreement. To substantiate its claim, India refers to reports of the Appellate Body, in particular *Chile – Price Band System*. Chile would like to make two remarks in that respect.

5.21 Firstly, India argues[83] that duties that are imposed at the time of import may be expressed in *ad valorem* or specific terms, but that this does not make them "other duties and charges" under the second sentence of Article II:1(b) of the GATT 1994. India's reference to paragraph 275 of the Report of the Appellate Body in *Chile – Price Band System* is inappropriate, since that paragraph merely states that the fact that "other duties or charges" take the form of an *ad valorem* or a specific duty does not make them "ordinary customs duties", which may also be *ad valorem* or specific. It should be recalled that in that case, what was being discussed was the application of Article II:1 of the GATT 1994, and not Article II:2 as in this case.

5.22 Secondly, the final point in the preceding paragraph is particularly important to the analysis of India's second argument, namely that Article II:2 of the GATT 1994 authorizes the application of charges equivalent to internal taxes, and that are imposed at the time of import. Chile submits that in paragraph 276 of the above-mentioned report, the Appellate Body is referring to the situation regulated by Article II:2 for referential and illustrative purposes or as an example, but that this does not mean that the report is actually ruling on Article II:2.

3. Conclusion

5.23 In Chile's view, the Panel should rule in such a way as to reinforce one of the fundamental pillars of the GATT 1994, i.e. the principle of market access as reflected in the commitments specified in a Member's Schedule of Commitments.

[82] India's first written submission, paragraph 52.
[83] India's first written submission, paragraph 57.

C. EUROPEAN COMMUNITIES

1. Introduction

5.24 The intervention of the EC in this dispute is about the discriminatory taxation imposed by India on wine and spirits originating in third countries, by means of the measures which will be referred to as the Additional Duty (the "AD") and the Extra-Additional Duty (the "EAD").

2. Review of a measure withdrawn after panel establishment

5.25 The European Communities considers that a preliminary question that should be resolved is whether this Panel must assess and, if so, make recommendations on the AD, considering that it has apparently been withdrawn by India.

5.26 It is the opinion of the European Communities that the Panel ought to consider the claims made by the United States on the AD, and thus assess this measure as it existed at the time of the establishment of the Panel. In fact, if a WTO Member could avoid the examination of its measures by simply withdrawing or suspending those measures, this could result in the paralysis of the Dispute Settlement system.

5.27 However, as the measure is no longer in force, the European Communities believes that the Panel does not need to make a recommendation on the AD, unless the United States can provide a reasonable explanation of why it considers that such a recommendation on a withdrawn measure can be fruitful.

3. Border duty or internal taxes?

5.28 In order to assess the legality, as a matter of WTO law, of the AD and of the EAD it is necessary, first of all, to determine whether they are import tariffs (customs duties) falling within the scope of Article II of the GATT 1994 or internal taxes within the meaning of Article III of the GATT 1994.

5.29 The European Communities observes that these duties are due on importation and as a condition for importation. They appear to be calculated and collected by the Central Indian customs authorities – pursuant to the basic Indian legislation on customs duties – exclusively on imported products.

5.30 For these reasons, it is the view of the European Communities that the AD and the EAD must be regarded as customs duties within the meaning of Article II:1 of the GATT 1994, and not, as India argues, as border tax adjustments intended to offset various internal taxes. More specifically, these measures appear to constitute "ordinary customs duties" within the meaning of Article II:1(b) of the GATT 1994.

4. Article II:1 of the GATT 1994

5.31 India's tariff schedule specifies as regards wines and spirits a bound rate of ordinary customs duty of 150 per cent *ad valorem*. This means that the combination of the basic customs duty and the AD and/or the EAD will often lead to an imposition of customs duties in excess of that set forth in the tariff schedule, thereby violating Article II:1 of the GATT 1994.

5.32 However, even if the contested measures were to be regarded as "other duties or charges", they would still be in breach of the said provision, since India's tariff schedule lists no "other duties or charges" as regards wines and spirits.

5. Articles II:2(a) and III:2 of the GATT 1994

5.33 According to Article II:2(a) of the GATT 1994, WTO Members may impose on the importation of any product "a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an Article from which the imported products has been manufactured or produced in whole or in part".

5.34 India contends that the AD and EAD are in fact internal taxes intended to offset, respectively, the excise duty and various other taxes (sales tax, VAT and other local taxes) which weigh on internally produced alcoholic beverages but not on imported ones.

5.35 However, even if one were to follow India's arguments (quod non), the contested measures would still violate WTO rules, and in particular Article III:2 of the GATT 1994.

5.36 First of all, the evidence gathered from the European Communities suggests that the AD exceeds the taxation resulting from taxes denominated "excise duty" in the legislation of most Indian States. Moreover, it appears that imported wines and spirits are not systematically exempted from the plethora of different sales taxes, value added taxes, and other indirect taxes which the EAD allegedly offsets.

5.37 In any event, India has not been able to illustrate and explain any mechanism designed to ensure that, in all cases, the contested measures are not applied in excess of the internal taxes they are supposed to offset. In this regard it should be observed that it is undisputed that some of the taxes allegedly offset by the AD and the EAD vary greatly from one Indian state to another and that in some States they are not even levied.

6. Conclusions

5.38 In the light of the above considerations, the European Communities believes that the contested measures constitute customs duties, and are thus incompatible with Article II:1 of the GATT 1994.

5.39 However, even if they were regarded as internal taxes, and thus simple border tax adjustments, they would still be WTO incompatible. Indeed, India has not proven that under all circumstances there is a mechanism ensuring that the AD and the EAD are not in excess of the plethora of internal taxes, which greatly vary from one Indian state to another, and which are imposed on alcoholic beverages produced in India.

D. JAPAN

1. Customs duty or internal tax?

5.40 In order to assess the consistency of the SUAD with the GATT, it is necessary, first of all, to determine whether it is a customs duty within the scope of Article II of the GATT 1994 or an internal tax within the scope of Article III of the GATT 1994.

5.41 In order to be identified as internal tax within the scope of Article III of the GATT 1994, the Ad Note to Article III requires a concerned measure to fulfil two conditions; (i) the measure is applied to both imported products and the like domestic products, and (ii) is collected at the time of importation. Whilst Japan does not have any intent to develop its argument on this point nor to take any particular position, Japan considers that the SUAD could be highly possible to violate either Article III or Article II of the GATT 1994, depending on the characterization of the SUAD as customs duty or internal tax as discussed below.

2. Article III of the GATT 1994 applies to the SUAD

5.42 India has claimed that the SUAD falls into a separate category of duties described in Article II:2(a) of the GATT 1994.[84] In addition, India mentioned at the Trade Policy Review held in June 2007, in response to Japan's question that countervailing duty (which consists of the AD and the SUAD) is categorized as internal tax.

5.43 So long as the SUAD is categorized as internal tax, it needs to be consistent with Article III:2 of the GATT 1994. With regard to the requirement of Article III:2 of the GATT 1994, the Appellate Body in *Canada – Periodicals* held that two questions need to be answered to determine whether there is violation of Article III:2 of the GATT 1994: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. And if the answers to both questions are affirmative, there is a violation of Article III:2, first sentence. If the answer to one question is negative, there is a need to examine further.

5.44 With regard to the first element, India does not contend, and Japan agrees, on the point that imported products, on which the SUAD is imposed, and domestic products, on which the concerned internal taxes are imposed, are like products.[85]

5.45 With regard to the second element, India insisted that the SUAD does not tax imported products "in excess of" of domestic like products.[86] Japan finds, however, several uncertainties exist between the arguments made by India and the articles quoted by India as its legal basis.

5.46 Contrary to the explanation of the India, the SUAD seems not to offset the Sales Tax/Value Added Tax by state governments (VAT), or the Central Sales Tax by the Central Government (CST), and/or other local taxes and charges on the sale of domestic products. As India stated exactly, imported goods are exempted from the imposition of these duties "at the time of importation"[87], however, once products are imported and put into domestic marketing channels, it is quite unclear whether these duties are imposed on the "imported" products or not.

5.47 First, States Governments could impose VAT on imported goods after their importation. Article 286 of the Constitution of India ("the Constitution") provides that "No law of a state shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place … (b) in the course of the import of the goods into, or export of the goods out of, the territory of India".

5.48 It is clear that the Constitution does not prohibit state governments to impose VAT on imported products, but restrict them to impose VAT just on the sale of goods where such sale or purchase takes place "in the course of the import", or following to India's expression, "on the importation of goods from foreign countries".[88] In other words, in any re-sale situation, the imported products could remain subject to domestic VAT and importers are unable to claim credits for the SUAD paid. If that is the case, the SUAD is applied in addition to, and not in substitute for, the VAT and imported products are taxed "in excess of" domestic like products.

5.49 Second, the plain reading of the text of the Central Sales Tax Act of 1956 ("CST Act") indicates that CST is levied on the inter-state movement both of imported and domestic products. Section 6(1) of CST Act provides that "[p]rovided that a dealer shall not be liable to pay tax under this

[84] India's first written submission, para. 52.
[85] India's first written submission, paras. 83-84.
[86] *Ibid*, paras. 85-91.
[87] *Ibid*, para. 67.
[88] *Ibid*, para. 71.

Act on any sale of goods which, in accordance with the provisions of sub-section (3) of section 5, is a sale in the course of export of those goods out of the territory of India".

5.50 By quoting Section 6(1) of CST Act, India insists that imported products are exempted from CST.[89] However, Section 6(1) does not provide to exempt imported products from the imposition of CST, but only goods for exports from India are exempted. In addition, Section 5(1) of the CST Act, another legal basis quoted by India for the justification of the SUAD, just provides the definition for when a sale or purchase of goods be deemed to take place "in the course of the export of the goods"[90] and not provides any legal justification to show that "CST is levied only on the inter-state movement of domestically manufactured products".[91]

5.51 Even proved that imported products are exempted from CST "at the time of importation", as stated by India[92], the SUAD could not counter-balance CST. In the case where an importer imports, discharges and sells a product within one state in India, the SUAD is imposed on the imported products at the time of importation. On the contrary, if a manufacturer produces and sells a like product within the same State, he is not liable for any CST, since the domestic like product is not sold "in the course of Inter-State trade".[93] In that case, the SUAD is imposed on the imported products "in excess of" the taxes and charges imposed upon like domestic products.

5.52 Third, the SUAD does not necessarily offset other local taxes and charges, such as transport fees, various types of surcharges, cess etc. The Constitution prohibits state governments to impose "a tax on the sale or purchase of goods where such sale or purchase takes place in the course of the import of the goods".[94] State governments could impose other local taxes and charges not on the sale or purchase of goods, but on other economic activities, such as transportations. For example, octroi is levied by Municipalities on "entry of goods"[95] which is out of the restriction of the Constitution.

5.53 As pointed out by India, "the quantum and character of these local taxes and charges may change from State-to-State".[96] In other words, some local taxes may not be imposed on imported products, but the others would be on imported products as in the same manner for domestic like products. Examining the Argentine minimum specific duty system, the Appellate Body of *Argentina – Textiles and Apparel* found that the concerned system is in violation of Article II of the GATT 1994, for the reason that its structure and design remains the possibility that the ad valorem equivalent of the customs duty collected would be in excess of the bound ad valorem rate.[97] By analogy, since the structure and design of the SUAD remains the possibility that the SUAD may not offset these local taxations, the SUAD should be found as the violation of Article III of the GATT 1994.

5.54 In addition to the above, Japan would like to point out there is a factual basis supporting Japan's legal argument. Japanese industries are facing great difficulties in India because of the SUAD. According to the industries, internal taxes such as VAT, CST and local tax or charges such as Octroi are levied on imported goods after customs clearance and therefore SUAD is applied in addition to, and does not offset, such internal taxes. Japan cannot emphasize enough the point that the India's theoretical arguments totally contradict actual experience of various Japanese companies.

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[89] *Ibid*, para. 67.
[90] Article 5(1) of CST Act.
[91] India's first written submission, para. 71.
[92] *Ibid*. para. 67.
[93] Article 6(1) of CST Act.
[94] Article 286 of the Constitution of India.
[95] WTO Trade Policy Review Report of India, Reply to Japan's question on Special Additional Duty, WT/TPR/M/182/Add.1, p.188.
[96] India's first written submission, para. 79.
[97] Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 48-54.

5.55 Based on the above stated reasons, Japan requests the Panel to examine whether the SUAD offset VAT, CST, and/or other local taxes charges or not, and if the SUAD does not counter-balance these internal duties, to find that the SUAD is imposed on the imported goods "in excess of" the taxes and charges imposed upon like domestic goods in violation of Article III:2 of the GATT 1994.

3. Alternatively, Article II of the GATT 1994 applies to the SUAD

5.56 Considering the possibility that the SUAD is categorized as customs duties rather than internal duties, Japan also would like to present its view on its consistency with Article II of the GATT 1994.

5.57 As pointed out by India, the key provision for the discussion on the consistency of the SUAD with Article II of the GATT 1994 is Article II:2(a).[98] Following Article II:2(a), if the SUAD is "imposed consistently with the provisions of paragraph 2 of Article III", Article II would not be applied to the SUAD.

5.58 As discussed above[99], Japan concerns that the SUAD would not offset VAT, CST, and/or other local taxes charges, and would violate Article III:2 of the GATT 1994. If that is the case, Article II of the GATT 1994 will be applied to the SUAD. In other words, the SUAD does not fall into "a separate category of duties" described in Article II:2(a) of the GATT 1994 and should be qualified either as "Ordinary Customs Duties (OCDs)" or as "Other Duties or Charges (ODCs)".[100]

5.59 The Panel in *Chile – Price Band System* found that OCDs differ from ODCs, which applied on the basis of factors of an exogenous nature such as fluctuating world prices.[101] Although there could be some spaces for discussions on the characterization of the SUAD, Japan considers that the SUAD is inconsistent with Article II of the GATT 1994, regardless of whether it is characterized as OCDs or as ODCs.

5.60 As claimed by United States, the SUAD is imposed on the broad range of products including those products covered by Ministerial Declaration on Trade in Information Technology Products (ITA).[102] The ITA provides for participants, including India, to "bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994"[103] with respect to all the IT products covered by the ITA (ITA products). In other words, they are to eliminate the duties, either in the form of OCDs or ODCs, on ITA products.

5.61 Admittedly the basic tariff rates of India for ITA products are zero and no duties or charges is described in its Schedule as ODCs. On the other hand, the Customs Tariff Act, 1975 and its related customs notifications do not exempt ITA products from the SUAD. As a result, importation of ITA products into India is subject to customs duty i.e. 4 per cent of the assessable value of imported products. In case that the SUAD, regardless of its characterization either as OCDs or as ODCs, does not counter-balance VAT, CST and other local duties and is inconsistent with Article III:2 of the

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[98] Article II:2(a) of the GATT 1994 provides that "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" shall be exempted from the obligation of Article II of the GATT 1994.

[99] Third party submission of Japan, para. 9.17.

[100] India's first written submission, para. 52.

[101] Panel Report, *Chile – Price Band System*, paras. 7.51-7.52.

[102] Exhibit US-1A of US first written submission.

[103] Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16, 13 December 1996, para. 2.

GATT 1994, the imposition of the SUAD on ITA products is inconsistent with Article II of the GATT 1994.

4. Conclusion

5.62 For the foregoing reasons, Japan concerns that India's SUAD could be highly possibly inconsistent either with Article II or with Article III:2 of the GATT 1994.

E. VIET NAM

5.63 Viet Nam confirms that it has a systematic interest on the interpretation and application of the GATT, in particular, to the Indian tariff system under the review of this Panel. Viet Nam will focus on the following three questions, without prejudice to its position on any other one not addressed on this occasion.[104]

- Should the Panel have the authority to rule on Additional Duties (AD) which India claims have been removed in practice;
- The distinction between mandatory and discretionary legislation subject to challenge; and
- Indian Additional Duties in relation to the provision of Article II:2(a).

1. Withdrawal of additional duties after Panel establishment

5.64 Viet Nam is of the opinion that, although the Panel is not precluded from considering the measure, within its terms of reference, as it existed at the time of the establishment of the Panel, the ultimate objective of this Panel is to recommend that the Dispute Settlement Body request the defendant to bring such measure, if and only if inconsistent with the WTO Agreement, into conformity with its obligations under the GATT 1994. Hence, where the measure in question has actually ceased to exist, the Panel should consider whether it is worth making findings, in the particular case of Additional Duties, for the purposes of resolving this current dispute.

2. Challengeable nature of mandatory vs. discretionary legislation

5.65 As indicated by India in its first written submission dated 31 August 2007, the Appellate Body held in its report on *US – 1916 Act* that:

> "[W]hereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge."

5.66 It is obvious that those statutes *empowering* solely the Central Government with the discretion to charge such duties, fix the rate and to issue Customs Notifications to give effect to the discretionary power vested in the executive branch, cannot be considered mandating actions inconsistent with the GATT Agreement. Therefore, it would be appropriate to request the Panel to limit its examination to the identified Customs Notifications that impose the AD and the SUAD in line with the practice followed by GATT Panels' and Appellate Body's jurisprudences.

[104] Viet Nam's oral statement.

3. Indian additional duties in relation to the provision of Article II:2(a)

5.67 In the view of Viet Nam, it is clear that Article II:2(a) allows Member to impose duties in excess of their bound commitments if such duties are equivalent to internal taxes which are also applied in a manner consistent with Article III:2 of the GATT 1994: not in excess of those applied to like domestic products and, moreover, not affording protection to domestic production. The consideration of the respective duties in question in relation to Article II:2(a) should be based on the findings of the actual mechanism operating such duties in practice. Given the removal of AD in reality, the question is how the Panel is going to judge a measure in violation of the GATT Agreement based just on the descriptive facts from the past, while the objective of the judgment is to put an end to the measure if found not to be consistent with the GATT Agreement. For the SUAD, with the duties subject to legal binding of less than or equal to 4 per cent of the assessable price, to counter balance taxes such as Sales Tax, Value Added Tax, local tax or any other charges as defined under the Indian Law, it merits revisiting the current jurisprudences on the *de minimis* level of dissimilarity taxation or the *de minimis* level allowed by Notes and Supplementary Provisions to Article III of the GATT, Ad Article III, paragraph 3 – as noted in footnote 51 of the first written submission of India of 31 August 2007. For the argument that the AD ceased to have an effect in practice and the SUAD is within the *de minimis* level of dissimilar taxation, if exact equivalence is challenged, it is not necessary to consider the criteria of affording protection to domestic production under Article III:1 – second sentence. Therefore, it seems to Viet Nam that the SUAD, which is in turn the only measure for this Panel's reflection, should be found consistent with Article II:2(a) of the GATT 1994.

VI. INTERIM REVIEW

6.1 Pursuant to Article 15.3 of the DSU, the findings of the final panel report must include a discussion of the arguments made by the parties at the interim review stage. This Section of the Panel Report provides such a discussion. As Article 15.3 makes clear, this Section forms part of the Panel's findings.

A. BACKGROUND

6.2 The United States and India separately requested an interim review by the Panel of certain aspects of the Interim Report issued to the Parties on 5 February 2008.[105] Neither Party requested an interim review meeting. However, the Parties made use of the opportunity to submit further written comments on each others' requests.[106] On 20 March 2008, the Panel issued its Final Report to the Parties on a confidential basis.

B. PARTIES' REQUESTS FOR CHANGES TO THE INTERIM REPORT

6.3 Below, the **Panel** will address the Parties' requests for changes to the Interim Report. Unless otherwise indicated, the references below are to paragraph or footnote numbers appearing the in the Interim Report.

1. Comments by the United States

6.4 As an initial matter, the **Panel** observes that the United States in its comments has made a number of incorrect or misleading statements about the Panel's interim findings. The Panel has clarified its findings in response to comments where it found it appropriate to do so, but otherwise considers that they are sufficiently clear and speak for themselves. The fact that the Panel has chosen not to respond to relevant statements each time obviously does not imply that the Panel agrees with

[105] Letters of the Parties of 19 February 2008.
[106] Letters of the Parties of 4 March 2008.

these statements. Separately, the Panel notes that India has commented on some, but not all of the US comments.

6.5 The **United States** requests that at para. 1.2 the Panel add a sentence to reflect which Members requested to be joined in the consultations and which Members were accepted. **India** opposes the change, noting that the United States was already given an opportunity to comment on this previously.

6.6 The **Panel** has made appropriate changes at para. 1.2, even though this type of information is rarely included in panel reports.

6.7 The **United States** requests that immediately following para. 1.5 the Panel refer to the panel established by the DSB in DS352 at the request of the European Communities. **India** opposes the change, noting that the United States was already given an opportunity to comment on this previously.

6.8 The **Panel** has added a new para. 1.9.

6.9 The **United States** requests that at para. 2.1 the Panel modify the second bullet point.

6.10 The **Panel** has made appropriate changes to para. 2.1.

6.11 The **United States** requests an addition to para. 7.3 for clarification. **India** opposes the US request.

6.12 The **Panel** has made appropriate changes to the paragraph in question.

6.13 The **United States** requests the Panel to provide further details on its allegation at para. 7.5. **India** opposes the US request.

6.14 The **Panel** has made appropriate changes to the paragraph in question.

6.15 The **United States** requests additions to para. 7.8, asserting that the paragraph appears incomplete and could be read to suggest that the applied rates of BCD for imports other than alcoholic beverages are typically set out in the First Schedule. **India** opposes the US request, arguing that the Panel has correctly recorded the factual position.

6.16 The **Panel** has made appropriate changes to the paragraph in question.

6.17 The **United States** requests that in the first sentence of para. 7.9 the Panel refer to "any duty of customs". **India** opposes the US request.

6.18 The **Panel** does not find it appropriate to make the change requested. The paragraph in question deals with the BCD, as is made clear at para. 7.8, and the relevance of Section 25 to the AD and the SUAD is discussed later in the findings.

6.19 The **United States** requests that at para. 7.11 the Panel refer to the relevant statutory basis. **India** opposes the US request.

6.20 The **Panel** has made appropriate changes to the paragraph in question.

6.21 The **United States** requests additions to the second and last sentence of para. 7.19 in order to reflect more accurately the US claims. **India** opposes the US request.

6.22 The **Panel** has made appropriate changes to the paragraph in question.

6.23 The **United States** requests that for accuracy and completeness the Panel modify the last sentence of para. 7.24 and add a new sentence at the end of that paragraph. **India** opposes the US request.

6.24 For greater clarity, the **Panel** has made an addition to the last sentence but does not see a need to add the proposed additional sentence.

6.25 The **United States** requests that para. 7.26 refer to India's acknowledgement that Customs Notification 32/2003 remains in force despite the fact that by virtue of Customs Notification 82/2007 the AD on alcoholic liquor is no longer collected. **India** opposes the US request.

6.26 The **Panel** has made an appropriate addition to the paragraph in question.

6.27 The **United States** requests the Panel to clarify at para. 7.28 that it has challenged the AD on alcoholic liquor and the SUAD "as such". **India** opposes the US request.

6.28 The **Panel** notes that para. 7.28 corresponds almost literally to the language used by the United States in its own submissions.[107] Nonetheless, the Panel has made appropriate changes to paras. 7.26 and 7.27.

6.29 The **United States** requests that the Panel add to the summaries of the US position provided by the Panel at paras. 7.40, 7.45 and 7.51, to reflect fully the US position. **India** opposes the US requests.

6.30 The **Panel** recalls that the paragraphs in question are intended to be summaries of the US position. It is clear, therefore, that they do not reflect each and every argument and statement made by the United States. At any rate, the Panel does not consider it appropriate to add the new sentences suggested by the United States.

6.31 The **United States** requests that the Panel change, and add to, the summary of the US position provided by the Panel at para. 7.52, to clarify and reflect fully the US position. **India** opposes the US request.

6.32 The **Panel** has made appropriate changes to clarify the existing summary but does not find it appropriate to add the new sentence suggested by the United States.

6.33 The **United States** requests that at para. 7.54 the Panel add a reference to Section 3(1) of the Customs Tariff Act and clarify that the AD on alcoholic liquor could also be levied at specific rather than *ad valorem* rates. **India** opposes the US request.

6.34 The **Panel** does not find it necessary, in the specific context of para. 7.54, to refer to Section 3(1). The Panel has made the suggested clarification.

6.35 The **United States** requests that the Panel add to its summary of the US position at para. 7.81. **India** opposes the US request.

6.36 The **Panel** does not find it appropriate to add the suggested new sentence to its argument summary. At any rate, the United States has not provided any supporting evidence.

[107] US first written submission, para. 72; US second written submission, para. 92.

6.37 The **United States** requests that the Panel change the summary of the US position provided by the Panel at para. 7.84, to clarify the US position. This request is similar to the request regarding para. 7.52. **India** opposes the US request.

6.38 The **Panel** has made appropriate changes to clarify the summary.

6.39 The **United States** requests that in the second sentence of para. 7.90 the Panel add "according to India", to avoid confusion. **India** opposes the US request.

6.40 The **Panel** has made appropriate changes to the paragraph in question. For greater correctness, the Panel also added a clarification at para. 7.91.

6.41 The **United States** requests that in order to reflect more accurately the US argument, the Panel modify the fourth and fifth sentences of para. 7.104. **India** opposes the US request.

6.42 The **Panel** does not find it appropriate to make the requested changes at the paragraph in question. The Panel considers that its summary of the US argument is not misleading and adequately reflects the US position.

6.43 The **United States** requests that the Panel add the phrase "as such" a second time in the second sentence to para. 7.105. **India** opposes the US request.

6.44 The **Panel** sees no need to make the requested change.

6.45 The **United States** requests that the Panel add the phrase "as such" a second time in the second sentence to para. 7.106. **India** opposes the US request.

6.46 The **Panel** sees no need to make the requested change.

6.47 The **United States** suggests that the Panel move the abbreviation "ODCs" to the end of the first sentence of para. 7.125. **India** opposes the US suggestion.

6.48 The **Panel** does not find it appropriate to make the suggested change.

6.49 The **United States** requests that at para. 7.145 the Panel essentially add the US reply to Panel Question No. 68 in its entirety. **India** opposes the US request.

6.50 The **Panel** does not consider that it is warranted to reflect the US reply in full. This said, in analyzing the US interpretation, the Panel has considered, and kept in mind, the full US reply to Panel Question No. 68.

6.51 The **United States** requests that at para. 7.148 the Panel modify footnote 187 by adding a clarification and an additional sentence at the end. **India** opposes the US request.

6.52 In view of the US comment, the **Panel** has found it appropriate to merge footnotes 187 and 188. The Panel finds it unnecessary to add the suggested new sentence. At any rate, the US view is already reflected at para. 7.120.

6.53 The **United States** requests the Panel to modify para. 7.161 as it allegedly suggests, incorrectly in the US view, that the United States did not seek to establish that the AD on alcoholic liquor and the SUAD fall outside the scope of Article II:2(a). The United States also notes that it collected Exhibits US-23, -27, -28 and -29 relating to State VATs after India had identified the particular State-level taxes that the SUAD allegedly offset. **India** opposes the US request.

6.54 The **Panel** has made appropriate changes to para. 7.161 in response to the US comments. Regarding the US assertion that it was able to collect information on State-level VAT only after India had identified this type of tax as being one of those the SUAD is applied to offset, we recall that CN 19/2006 and Section 3(5) explicitly refer to "value added tax". We have already explained that this reference cannot reasonably be read to include the so-called Central VAT. In addition, the Panel notes that the findings already address the US argument that the AD on alcoholic liquor and the SUAD do not identify internal taxes to which they are equivalent.

6.55 The **United States** requests that the Panel delete footnote 207 which is attached to para. 7.162. Further, the United States requests that the Panel add a new sentence to para. 7.162 to reflect the US position more accurately. **India** opposes the US request.

6.56 In response to the United States' request, the **Panel** has deleted elements of footnote 207. The Panel did not find it appropriate to add a new sentence to para. 7.162, but has added an appropriate sentence to para. 7.160. Additionally, in response to this US comment, it might be useful to point out that this Panel's approach is consistent with that of the Article III:2 panel in *Argentina – Hides and Leather*. Footnote 229 of the Interim Report addresses in what way that case presented relevant similarities to this case. The panel in that case did not require Argentina initially to make a prima facie case that RG 2784 was "equivalent in nature" to RG 3543. Rather, in that case the European Communities failed to persuade the panel that RG 2784 was not "equivalent in nature" and the panel proceeded on the basis of the European Communities' alternative claim. See Panel Report, *Argentina – Hides and Leather*, paras. 11.146 – 11.154.

6.57 The **United States** requests that the Panel add a new sentence to para. 7.164 to better reflect what the United States has argued. **India** opposes the US request.

6.58 The **Panel** does not find it appropriate to add the suggested sentence to the paragraph in question. The Panel also notes that it has added a new sentence to para. 7.160.

6.59 The **United States** requests that the Panel add an identical new sentence at the end of both paras. 7.175 and 7.200.

6.60 The **Panel** does not find it appropriate to make the suggested additions. In any event, para. 7.174 already reflects the relevant US point.

6.61 The **United States** comments upon para. 7.215, requesting that the Panel offer specifically suggested new findings of fact which would, in the US view, allow for an evaluation, in the alternative, of India's contention that the AD on alcoholic liquor and the SUAD are imposed consistently with Article III:2 and the US rebuttal to that contention. **India** opposes the US request, considering it unwarranted and unsupported by any legal obligation.

6.62 The **Panel** declines the US request. In the circumstances of the present case, the Panel does not consider it appropriate to make the suggested new and abstract findings of fact.[108] To begin with, the United States has not explained why and how the specific findings it is seeking would in fact be sufficient. Even if they were, some of the suggested findings appear to concern issues which the findings section of the Interim Report already touches upon. Other suggested findings concern issues upon which the Parties have expressed contrary views. As a result, the Panel would need to provide additional analysis to support any new factual findings, and the Parties would have no opportunity to seek a review of that additional analysis and/or of the new factual findings reached by the Panel.

[108] The Panel notes, however, that some of the information the United States requests the Panel to add is already contained in the findings section of the Interim Report.

6.63 The **United States** requests that the Panel make a small clarification at para. 7.218 and add a new sentence at the end. **India** opposes the US request.

6.64 The **Panel** has made the requested clarification, but does not consider it appropriate to add the new suggested sentence.

6.65 The **United States** requests that the Panel add new sentences to its summary of the US position at para. 7.224. **India** opposes the US request.

6.66 The **Panel** does not find it appropriate to add the suggested new sentences at para. 7.224. At any rate, the point is already noted at para. 7.201.

6.67 The **United States** requests that the Panel add new sentences to its summary of the US position at para. 7.226. **India** opposes the US request.

6.68 The **Panel** does not find it appropriate to add the suggested new sentences at para. 7.226. The Panel notes that the point concerning the stated purpose is already noted at para. 7.220. Nevertheless, the Panel has added a new footnote to para. 7.226 and made requested editorial changes.

6.69 The **United States** requests that the Panel add new sentences to its summary of the US position at para. 7.227. **India** opposes the US request.

6.70 The **Panel** does not find it appropriate to add the suggested new sentences. Nevertheless, the Panel has made an appropriate change at the paragraph in question.

6.71 The **United States** requests that the Panel clarify para. 7.238.

6.72 The **Panel** has made appropriate changes to para. 7.238.

6.73 The **United States** requests that at para. 7.247 the Panel revise its analysis of whether the AD on alcoholic liquor may be levied only if excise duty is leviable on like domestic products. The United States considers that the current analysis is not supported by the evidence before the Panel. The United States further argues that there is information other than that relied upon by the Panel to support the conclusion that the AD on alcoholic liquor is applied as a matter of course on importation. **India** opposes the US request, arguing that the analysis is supported by evidence before the Panel.

6.74 The **Panel** does not find it appropriate to revise the analysis in question. The United States asserts that the Panel relies upon statements by India which do not concern the AD on alcoholic liquor but the AD on other products. As an initial matter, it should be recalled, in response to the US assertion concerning "reliance", that the Panel "notes" the relevant statements of India and then states that these statements appear to be consistent with CN 32/2003 and the proviso to Section 3(1). Furthermore, at para. 3.5 of India's second oral statement and para. 5 of India's comments on the US reply to Panel Question No. 43 India is referring to the "AD". Since the United States is challenging the AD on alcoholic liquor and not the AD on other products, the Panel finds unconvincing the US interpretation of India's statements. It is highly implausible that India would seek to rebut US arguments concerning the AD on alcoholic liquor by making counter-arguments that exclusively concern the AD on other products. Consistently with the fact that India referred to the "AD" without qualification, the Panel thinks that in the specific context of the aforementioned paragraphs India is referring to the AD in general, because in relation to the point it has made at the relevant paragraphs there is no difference, in India's view, between the AD on alcoholic liquor and the AD on other products. In this connection, the Panel has already addressed the relevance of India's reference to the Supreme Court decision in *Hyderabad Industries Ltd*. However, in the light of the US comments, the Panel found it appropriate to clarify its discussion of the Supreme Court decision at para. 7.247 as

well as at para. 7.280. The Panel also found it appropriate, in view of the US comments, further to clarify the introductory sentence of para. 7.247. Additionally, in response to US comments, the Panel has made more explicit, at para. 7.247, other elements supporting the Panel's conclusion. On the other hand, the Panel does not find it appropriate to accede to the US requests that it delete the references to India's statements or to indicate that they concern products other than alcoholic liquor.

6.75 The United States alleges that there are key differences in terms of text and operation between the AD on alcoholic liquor as compared to the AD on other products. According to the United States, while there appears to be a built-in mechanism for India to ensure that the AD on products other than alcoholic liquor is "equal to" the rate of central excise duty on like domestic products and levied only in instances where like domestic products are subject to the central excise duty, there is no mechanism ensuring that the AD on alcoholic liquor "has regard to" to the rate of State excise duty on a like domestic products and is levied only in instances where the like domestic product is subject to State excise duty. The Panel is not persuaded by this argument. The fact that the rate of the AD on alcoholic liquor is specified "having regard to" the State excise duty for the time being leviable on a like State-manufactured alcoholic liquor neither demonstrates nor logically implies that the AD on alcoholic liquor may be levied even where no excise duty is leviable on a like domestically manufactured alcoholic liquor. The issue of the conditions under which the AD may be levied on alcoholic liquor or other products and the issue of the rate at which it may be levied, once the relevant conditions are satisfied, are separate, sequential issues. In relation to the former issue, as indicated at para. 7.247, both the opening paragraph of Section 3(1) and the proviso refer to "the excise duty for the time being leviable". Similarly, the fact that there may not be a mechanism in place which "ensures" that India's Central Government could not, in fact, impose the AD on alcoholic liquor even where no State excise duty is leviable on like domestically manufactured alcoholic liquor obviously does not imply that the Central Government would have the right, as a matter of Indian law, to impose the AD on alcoholic liquor in such situations.

6.76 The **United States** requests that at para. 7.248 the Panel make consequential changes based upon the US comments on para. 7.247. **India** opposes the US request, arguing that the paragraph reflects a correct interpretation of Indian law.

6.77 The **Panel** does not find it appropriate to make changes at para. 7.248. This is in view of the Panel's response to the US comments on para. 7.247.

6.78 The **United States** requests that the Panel add new sentences to para. 7.252. **India** opposes the US request.

6.79 The **Panel** does not consider it appropriate to add the sentences suggested by the United States. Nevertheless, the Panel has added new sentences at the end of para. 7.252 in response to the US request.

6.80 The **United States** requests that between para. 7.251 and para. 7.252 the Panel add a new paragraph to set the context for the Panel's discussion of Sections 12 and 25 of the Customs Act. **India** opposes the US request.

6.81 The **Panel** does not find it necessary to add the suggested paragraph to set the context. At any rate, the relevant paragraph appears to duplicate what is already contained at paras. 7.252 and following.

6.82 The **United States** requests that the Panel delete the reference in para. 7.253 to the United States since, in its view, the paragraph misstates the US position. **India** opposes the US request, saying that the United States seems to be distancing itself from the position taken during the course of the proceedings.

6.83 The **Panel** does not find it appropriate to make the suggested change. The Panel does not consider that it has misstated the US position since the paragraph in question reflects a US argument set out at para. 45 of the US first written submission. Nevertheless, the Panel has made a small editorial change. In view of the change made to para. 7.252, the Panel has also made a consequential change at the beginning of para. 7.253. Furthermore, the Panel noticed an omission by oversight in the footnote to para. 7.253, which has been corrected.

6.84 The **United States** requests that at para. 7.263 the Panel clarify the reference to the US reply to Panel Question No. 19. The United States also requests that the Panel modify the last footnote of the paragraph. **India** opposes the US request.

6.85 The **Panel** has made appropriate changes at para. 7.263 and in the footnote in question.

6.86 The **United States** requests that the Panel at para. 7.277 complement its reference to the purpose a Member attributes to a measure. **India** opposes the US request.

6.87 The **Panel** does not consider it appropriate, in the specific context of para. 7.277, to refer to the characterization of a duty under domestic law. In fact, neither did the United States when making the relevant point in its first written submission, at footnote 71. At footnote 71 the United States refers to avoiding commitments, not through attribution of an appropriate purpose, but rather through a Member's own characterization of a duty under its domestic law. However, the relevant US argument relates to the purpose of the AD on alcoholic liquor and not its characterization under Indian law. Nonetheless, the Panel has made a clarification in the paragraph in question.

6.88 The **United States** requests that the Panel modify para. 7.278 as it is allegedly based on the assumption that the proviso to Section 3(1) merely authorizes the Central Government to levy the AD on alcoholic liquor. **India** opposes the US request.

6.89 The **Panel** has made an appropriate change to the paragraph in question.

6.90 The **United States** requests that at para. 7.281 the Panel make consequential changes based upon the changes requested by the United States at paras. 7.247 and 7.248. **India** opposes the US request.

6.91 Since the **Panel** has not substantively revised its analysis at para. 7.247, the Panel does not find it appropriate to modify para. 7.281.

6.92 The **United States** offers a comment on para. 7.284. Based upon that comment, the United States requests changes to paras. 7.285 and 7.287. The United States requests the Panel to reflect that, in the US view, States have the power to impose duties and taxes on alcoholic liquor other than excise duties. **India** opposes the US request.

6.93 The **Panel** begins with the US comment on para. 7.284. The first point to be made in response is that it is clear from context that the Panel uses the term "duties of excise", or "excise duties", to refer to those at issue in CN 32/2003 and the proviso to Section 3(1). Furthermore, since the United States now comments on an aspect of Indian constitutional law to which the Parties had not paid much attention before, the Panel has found it appropriate to address this aspect in two new paragraphs added immediately after para. 7.286. The Panel has also made consequential changes at paras. 7.286 and 7.287. In addition, for consistency, the Panel has made small adjustments at paras. 7.288 (in view of para. 7.290) and 7.287 (in view of para. 7.292). The latter change resulted in a parallel change to para. 7.381 (in view of para. 7.387). The Panel has also made an appropriate change to para. 7.285 and a consequential change to para. 7.284. Furthermore, having made changes to this section of the findings dealing with the AD on alcoholic liquor, the Panel found it appropriate

to make corresponding changes to the parallel section dealing with the SUAD. Such changes have been made at paras. 7.378 and 7.387.

6.94 The **United States** requests that the Panel modify para. 7.288 in accordance with the modifications it has requested in relation to paras. 7.247 and 7.248. **India** opposes the US request.

6.95 The **Panel** does not agree with how the United States has characterized the contents of para. 7.287, but has nonetheless made a small change for clarification.

6.96 The **United States** requests that the Panel clarify or eliminate the reference to "corresponding taxes or charges" at paras. 7.290 and 7.292. **India** opposes the US request.

6.97 The **Panel** has removed the reference in question at paras. 7.288, 7.290 and 7.292 and added a new footnote to para. 7.290. The Panel has made parallel changes in the section dealing with the SUAD, at paras. 7.382, 7.385 and 7.387.

6.98 The **United States** comments on paras. 7.296 and 7.297, requesting that the Panel offer specifically suggested new findings of fact which would, in the US view, allow for an evaluation, in the alternative, of the United States' contention that the AD on alcoholic liquor results in ordinary customs duties or ODCs in excess of those set out in India's Schedule of Concessions. **India** opposes the US request, arguing it would be "futile" for the Panel to continue with the analysis of facts after having found that the United States had not established that the AD on alcoholic constituted an ordinary customs duty.

6.99 The **Panel** declines the US request. In the circumstances of the present case, the Panel does not consider it appropriate to make the specifically suggested new findings of fact.[109] The Panel notes the fact that the requested new findings of fact relate to claims based upon WTO provisions the Panel has determined are not applicable as well as the late stage in the proceedings.

6.100 The **United States** requests that at para. 7.300 the Panel make a clarification to its summary of the US position and add a new sentence. **India** opposes the US request.

6.101 The **Panel** has added the requested clarification, but does not find it appropriate to add the suggested new sentence.

6.102 The **United States** requests that the Panel add new sentences to its summary of the US position at para. 7.306. **India** opposes the US request.

6.103 The **Panel** does not find it appropriate to add the suggested new sentences at para. 7.306. At any rate, the point is already noted at para. 7.201.

6.104 The **United States** requests that the Panel add several additional sentences to its summary of the US position at para. 7.308. **India** opposes the US request.

6.105 The **Panel** has added to its summary of the US position at para. 7.308, as appropriate.

6.106 The **United States** requests that at para. 7.314 the Panel add an additional sentence to its summary of the US position. **India** opposes the US request.

[109] The Panel notes that some of the information the United States requests the Panel to add is already contained in the findings section of the Interim Report.

6.107 The **Panel** does not find it appropriate to add the suggested sentence at para. 7.314. The point concerns replies by India to Panel questions.

6.108 The **United States** requests that between paras. 7.314 and 7.315 the Panel add a new paragraph to its summary of the US position. **India** opposes the US request.

6.109 The **Panel** does not find it appropriate to add the suggested new paragraph after para. 7.314. The Panel refers to Section C.2 where it has stated that it sees no need to examine whether the relevant statutory provisions are mandatory.

6.110 The **United States** requests that at para. 7.324 the Panel add a new sentence to its summary of India's position. **India** opposes the US request if not appropriately supplemented.

6.111 The **Panel** does not find it appropriate to add the suggested new sentence at para. 7.324. The relevant point is already reflected at para. 7.364.

6.112 The **United States** requests that at para. 7.325 the Panel make a clarification and add a new sentence to its summary of India's position. **India** opposes the US request if not appropriately supplemented.

6.113 The **Panel** has made the requested clarification at para. 7.325, but does not find it appropriate to add the suggested new sentence. The relevant point is already reflected at para. 7.364.

6.114 The **United States** requests that at para. 7.334 the Panel revise its analysis of whether the SUAD may be levied only if relevant internal taxes are leviable on a like domestic product. The United States further argues that there is information other than that relied upon by the Panel to support the conclusion that the SUAD is applied as a matter of course on importation. **India** opposes the US request, arguing that the United States has not accurately reflected the position.

6.115 The **Panel** does not find it appropriate to revise the conclusion of the analysis in question. In response to the US assertion that the Panel's references to para. 3.5 of India's second oral statement and para. 5 of India's comments on the US reply to Panel Question No. 43 are in error, because they allegedly do not refer to the SUAD, the Panel notes that at the paragraphs in question India is clearly referring to the "AD" and the "SUAD". The fact that the last sentences of these paragraphs talk about the "AD" only is linked to the fact that the attached footnotes refer to the Supreme Court decision in *Hyderabad Industries Ltd*. which dealt with the "AD". The United States further asserts that there are situations where the SUAD is imposed on imports when State VAT or the CST is not imposed on like domestic products. The Panel notes in this respect that the Panel at para. 7.334 refers to "relevant internal taxes" and not merely to State VAT or the CST. Furthermore, footnote 351 indicates that it may be sufficient for one State to levy relevant internal taxes. As an additional matter, the references provided by the United States (US second written submission, para. 58; US second oral statement, para. 13) concern hypothetical examples involving a rate of State VAT, or CST, of nil (or "zero"). The United States has not provided any evidence that the SUAD was actually imposed in a situation where no State VAT or CST was imposed on the like domestic product. As the Panel has already indicated, there is no evidence on the record that as of the date of establishment of the Panel any State has nil-rated one or more products included in the list of "goods of local importance". Nor has the United States offered evidence of a product not on that list, but nil-rated by any State and not subject to CN 20/2006. Finally, the United States assumes that for purposes of Indian law a nil (or "zero") rate of State VAT or CST would mean that no State VAT or CST is "leviable". There is, however, no evidence on the record to support such a conclusion. Indeed, to us, a nil rate rather suggests that the relevant tax is leviable though no tax would be collected because the rate for the time being is nil. It is perhaps arguable that in the case of products outside the VAT system, like tobacco products, no State VAT is leviable, but India has said that in respect of such products a State sales tax is leviable.

Notwithstanding the foregoing, the Panel has made changes at para. 7.334 which correspond to those it has made in response to US comments on para. 7.247.

6.116 The **United States** requests that at para. 7.335 the Panel make consequential changes based upon the US comments on para. 7.334. **India** opposes the US request.

6.117 The **Panel** does not find it appropriate to make changes at para. 7.335. This is in view of the Panel's response to the US comments on para. 7.334.

6.118 The **United States** requests that between paras. 7.337 and 7.338 the Panel add a new paragraph to set the context for the Panel's discussion of Section 25 and Section 12 of the Customs Act. **India** opposes the US request, unless India's position is also presented.

6.119 The **Panel** does not find it necessary to add the suggested new paragraph to set the context. At any rate, the relevant paragraph appears to duplicate what is already contained at paras. 7.338 and following.

6.120 The **United States** requests that the Panel add new sentences to para. 7.338. The United States further requests that the Panel delete the reference in the penultimate sentence to the United States since, in its view, the paragraph misstates the US position. **India** opposes the US request, unless India's position is also presented.

6.121 The **Panel** does not consider it appropriate to add the sentences suggested by the United States. Nevertheless, the Panel has added new sentences at the end of para. 7.338 in response to the US request. Furthermore, the Panel does not consider that it has misstated the US position since the paragraph in question reflects a US argument set out at para. 45 of the US first written submission. Nevertheless, the Panel has made small editorial changes.

6.122 The **United States** requests that at para. 7.347 the Panel clarify the reference to the US reply to Panel Question No. 19. **India** opposes the US request.

6.123 The **Panel** has made appropriate changes at para. 7.347.

6.124 The **United States** requests that at para. 7.350 the Panel modify the fifth and sixth sentences and that at para. 7.351 the Panel modify the second sentence. **India** opposes the US request, unless it is appropriately supplemented.

6.125 The **Panel** does not find it appropriate to make the suggested modifications. At any rate, the relevant point is already made elsewhere in the findings.

6.126 The **United States** requests that at para. 7.357 the Panel modify the reference to India's term "pegged". **India** opposes the US request.

6.127 The **Panel** has made appropriate changes at para. 7.357. A consequential change has been made to the penultimate footnote as well as at para. 7.360.

6.128 The **United States** requests that in footnote 391 to para. 7.358 the Panel add a new sentence immediately preceding the penultimate sentence. **India** opposes the US request.

6.129 The **Panel** does not find it appropriate to add the suggested sentence to footnote 391. Nevertheless, the Panel has made an appropriate clarification in the last sentence of the footnote in question and added a new sentence at the end of the footnote.

6.130 The **United States** requests that at para. 7.361 the Panel add several new sentences. **India** opposes the US request.

6.131 The **Panel** does not find it appropriate to add the suggested additional text at para. 7.361. At any rate, the basic point is already covered in the same paragraph. Nevertheless, the Panel has made a clarification in the last sentence.

6.132 The **United States** requests that at para. 7.363 the Panel add additional points to reflect fully the record. **India** opposes the US request.

6.133 The **Panel** does not find it appropriate to add the suggested points at para. 7.363. The Panel notes that one of the points is already reflected at para. 7.364.

6.134 The **United States** requests that at para. 7.364 the Panel add two additional points. **India** opposes the US request.

6.135 The **Panel** does not find it appropriate to add the two points suggested by the United States. At any rate, para. 7.367 already addresses the relevant issue. The Panel has made editorial changes at para. 7.367.

6.136 The **United States** requests that at para. 7.365 the Panel add two additional points. **India** opposes the US request.

6.137 The **Panel** does not find it appropriate to add the two points suggested by the United States. Indeed, it is unclear what these points would add to the existing paragraph.

6.138 The **United States** requests that the Panel modify para. 7.368 to reflect the US assertion that there are, in fact, situations where the SUAD is imposed on imported products when relevant internal taxes are not leviable on the like domestic products. **India** opposes the US request.

6.139 The **Panel** does not find it appropriate to change the paragraph in question. At any rate, as para. 7.368 itself states, the issue is already further addressed elsewhere, including at para. 7.383.

6.140 The **United States** requests that at para. 7.370 the Panel complement its reference to the purpose of a duty in the second sentence. **India** opposes the US request.

6.141 The **Panel** does not find it appropriate, in the specific context of para. 7.370, to add the suggested text relating to the characterization of a duty under domestic law to the second sentence. In fact, the United States itself dispensed with the text it now requests to be added when it made the relevant point in its first written submission, at footnote 82.

6.142 The **United States** requests that at paras. 7.378, 7.380 and 7.381 the Panel clarify the situation to which the Panel's findings refer. **India** opposes the US requests.

6.143 The **Panel** does not see a need to clarify the paragraphs in question. At any rate, relevant discussion is already contained in previous paragraphs, including paras. 7.364 and 7.365.

6.144 The **United States** requests that at para. 7.382 the Panel clarify the reference to "equivalent transactions". **India** opposes the US request.

6.145 The **Panel** does not see a need to clarify the paragraph in question. At any rate, the concept is already discussed at para. 7.364.

6.146 The **United States** comments upon paras. 7.391 and 7.392, requesting that the Panel offer specifically suggested new findings of fact which would, in the US view, allow for an evaluation, in the alternative, of the United States' contention that the SUAD results in ordinary customs duties or ODCs in excess of those set out in India's Schedule of Concessions. **India** opposes the US request, arguing that further factual findings are unnecessary in the light of the Panel's findings.

6.147 The **Panel** declines the US request. In the circumstances of the present case, the Panel does not consider it appropriate to make the specifically suggested new findings of fact.[110] The Panel notes the fact that the requested new findings of fact relate to claims based upon WTO provisions the Panel has determined are not applicable as well as the late stage in the proceedings.

6.148 The **United States** requests, finally, that the Panel correct three clerical errors.

6.149 The **Panel** has made appropriate changes.

2. Comments by India

6.150 **India** requests that at para. 8.2 the Panel delete the fourth sentence and the remainder of that paragraph. India asserts that the relevant sentences, which contain concluding remarks, appear not to be in conformity with Article 19.2 of the DSU, in that they allegedly diminish the rights of India, or add to its obligations. India further asserts that the concluding remarks appear to be at variance with the Panel's conclusion at para. 8.1 and give scope for misinterpretation of that conclusion. India also alleges that the concluding remarks might be interpreted to suggest that India would not implement its obligations in good faith or to circumscribe India's policy choices in implementing its WTO obligations. The **United States** opposes India's request, saying the concluding remarks clarify the Panel's conclusion at para. 8.1.

6.151 The **Panel** fails to see how its concluding remarks could be said to diminish India's rights, or to add to its obligations, or how they could be said to circumscribe the policy choices of India in respect of implementation of India's WTO obligations. Nor does the Panel agree that the concluding remarks are liable to result in the Panel's conclusions being misinterpreted. Nonetheless, in response to India's comments, the Panel has made appropriate changes to the paragraph in question, including by adding a new footnote and deleting the last three sentences.

C. OTHER CHANGES TO THE INTERIM REPORT

6.152 The **Panel** has made a number of other changes which were not specifically requested by the Parties. These changes were made to eliminate typographical errors or to edit the Report.

VII. FINDINGS

7.1 The Panel will begin its assessment of the matter before it by providing a brief description of the measures at issue, followed by an overview of the claims and arguments of the Parties.

A. MEASURES AT ISSUE

7.2 These proceedings concern two different types of duties imposed by India at the border on certain products entering its customs territory. These duties are levied in addition to India's so-called basic customs duty.

[110] The Panel notes that some of the information the United States requests the Panel to add is already contained in the findings section of the Interim Report.

1. General

7.3 India's Central Government imposes several types of border charges ("duties"), including: the basic customs duty (hereinafter the "BCD"); the additional duty (hereinafter the "AD"), which its statutory basis states is related to the excise duty for the time being leviable on like domestic products in India; as well as "such additional duties as would counter-balance the sales tax, value added tax, local tax or any other charges" (hereinafter the "SUAD") for the time being leviable on a like domestic product in India.

7.4 India has indicated that there are no recorded "other duties or charges", within the meaning of Article II:1(b) of the GATT 1994 in India's Schedule of Concessions, which are applicable to any of the products subject to the measures at issue in these proceedings.[111]

7.5 The measures being challenged in this case are the AD and the SUAD[112], respectively. The United States alleges that the AD, when imposed in conjunction with the BCD, results in a breach of India's obligations under Article II:1(a) and (b) of the GATT 1994 because it results in ordinary customs duties or other duties or charges imposed on or in connection with importation that exceed those set out in India's Schedule of Concessions The United States similarly alleges that the SUAD, when imposed in conjunction with the BCD, results in a breach of India's obligations under Article II:1(a) and (b) of the GATT 1994 because it results in ordinary customs duties or other duties or charges imposed on or in connection with importation that exceed those set out in India's Schedule of Concessions.[113] Accordingly, there follows a brief description of the BCD, the AD and the SUAD as well as the provisions of Indian law identified by the United States as those through which India levies these duties.

2. The Basic Customs Duty ("BCD")

7.6 The authority to levy the basic customs duty is provided in Section 12 of India's Customs Act of 1962. It states:

> "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."

7.7 Regarding the rates at which the BCD is to be levied, Section 2 of India's Customs Tariff Act of 1975 provides:

> "The rates at which duties of customs shall be levied under the Customs Act, 1962, are specified in the First and Second Schedules."[114]

7.8 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. In the case of certain alcoholic beverages, for instance, India has done so through Customs Notifications 11/2005 and 20/1997. They were issued on the basis of Section 25 of the Customs Act, a provision which is further explained in the following paragraph. As a result of issuance of the aforementioned Customs Notifications, as of the date of establishment of the Panel,

[111] India's reply to Panel Question No. 10.
[112] E.g., US first written submission, para. 72.
[113] US reply to Panel Question No. 16.
[114] Footnote 4 to Section 2 provides that the "First Schedule to the Act was substituted by the Customs Tariff (Amendment) Act, 1985 (8 of 1986) and further amended from time to time by subsequent amendment Acts; the substituted schedule came in force on 8.2.1986."

the applied rate of BCD for imports of distilled spirits was 150 per cent *ad valorem* and the applied rate of BCD for imports of beer and wine was 100 per cent *ad valorem*. On 3 July 2007, i.e., after the date of establishment of the Panel, India increased the applied rate of BCD for wine to 150 per cent *ad valorem* through Customs Notification 81/2007.[115]

7.9 Section 25 of the Customs Act confers upon the Central Government the power to grant exemptions "from the whole or any part of" the BCD. It reads:

> "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."

3. The Additional Duty ("AD")

7.10 The additional duty[116] is provided for in Section 3(1) of the Customs Tariff Act. The text of Section 3(1) reads:

> "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."

7.11 The United States in this case only challenges the AD on alcoholic liquor for human consumption such as beer, wine and distilled spirits.[117] The proviso to Section 3(1) relates the AD on alcoholic liquor to excise duties leviable on alcoholic liquor in different States.

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[115] US first written submission, footnote 75. The WTO-bound rate for wine is 150 per cent *ad valorem*, as is that for beer and distilled spirits.

[116] As pointed out by the United States, the AD is sometimes also referred to as the "countervailing duty".

[117] US first written submission, para.52; US first oral statement, para. 12.

7.12 Section 3(2) of the Customs Tariff Act requires, *inter alia*, that the BCD leviable under Section 12 of the Customs Act is to be included in the calculation of the amount of AD due under Section 3(1) of the Customs Tariff Act.

7.13 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.

7.14 Section 3(8) of the Customs Tariff Act explains the relationship between the AD and the provisions of the Customs Act, including the above-mentioned Section 25 thereof. It reads:

> "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."

7.15 Customs Notification 32/2003[118] of 1 March 2003 specifies the rates of AD for alcoholic liquor as applied on the date of establishment of the Panel. 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;	75% *ad valorem*
		(b) exceeding USD 25 but not exceeding USD 40 per case;	50% *ad valorem* or USD 37 per case, whichever is higher
		(c) exceeding USD 40 per case	20% *ad valorem* or USD 40 per case[119], 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;	150% *ad valorem*
		(b) exceeding USD 10 but not exceeding USD 20 per case;	100% *ad valorem* or USD 40 per case, whichever is higher
		(c) exceeding USD 20 but not exceeding USD 40 per case;	50% *ad valorem* or USD 53.2 per case, whichever is higher
		(d)exceeding USD 40 per case	25% *ad valorem* or USD 53.2 per case, whichever is higher

7.16 Soon after the establishment of this Panel, on 3 July 2007, India issued Customs Notification 82/2007, based upon Section 25 of the Customs Act read together with Section 3(8) of the Customs Tariff Act. Through this notification, the Central Government of India exempted all the goods from the whole of the duties leviable under Customs Notification 32/2003.

[118] Exhibit US-6.

[119] "Case" means a packing containing a total volume of nine litres of liquor (e.g., 12 bottles of 750ml capacity).

4. The SUAD

7.17 The SUAD is provided for in Section 3(5) of the Customs Tariff Act. The text of Section 3(5) is as follows:

> "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."

7.18 The United States has referred to this particular additional duty as the "Extra-Additional Duty" ("EAD") while India has referred to it as the "SUAD". The term "SUAD" is an abbreviation based on the phrase "such additional duty" which appears in Section 3(5). Neither "EAD" nor "SUAD" is an official denomination.[120] India considers the term "EAD" misleading as, in its view, it suggests that the relevant duty is in some ways "extra".[121] In view of the fact that the term used by India reflects the terms used in Section 3(5), the Panel has adopted the term "SUAD" and will use it throughout.

7.19 Based upon Section 3(5), the Central Government of India issued Customs Notification 19/2006[122] of 1 March 2006 to impose a 4 per cent *ad valorem* duty of SUAD on imported goods "specified under the Chapter, heading, sub-heading, or tariff item of the First Schedule to the [Customs Tariff Act]". The US claims in respect of the SUAD concern imports of all goods subject to the SUAD for which imposition of the SUAD in combination with the BCD exceeds India's WTO-bound rates, with the exception of those that have been exempted through a customs notification.[123] Thus, the US claims against the SUAD concern a broader range of products than the US claims against the AD, which concern only alcoholic liquor. The US claims against the SUAD concern not only alcoholic liquor but also other products, including agricultural products (such as milk, raisins and orange juice) and industrial products falling mainly under HS chapters 84, 85 and 90.

7.20 Section 3(6) of the Customs Tariff Act requires, *inter alia*, that the BCD leviable under Section 12 of the Customs Act and the AD are to be included in the calculation of the amount of SUAD owed under Section 3(5) of the Customs Tariff Act.

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[120] India's reply to Panel Question No. 4; India's first written submission, para. 5. As pointed out by the United States, the duty in question is sometimes also referred to as the "special countervailing duty".

[121] India's reply to Panel Question No. 4.

[122] Exhibit US-7.

[123] US reply to Panel Question No. 1; US first oral statement, para. 20.

7.21 As already noted, 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.

7.22 As also noted, Section 3(8) of the Customs Tariff Act explains the relationship between, on the one hand, the AD and the SUAD, and, on the other hand, the provisions of the Customs Act, including the above-mentioned Section 25 thereof.

7.23 Based upon Section 25 of the Customs Act[124], India issued Customs Notification 20/2006[125] which exempts specified goods from so much of the SUAD as is in excess of the amount calculated at the rate indicated in the Notification. For all but one of the specified goods (for which a rate of 1 per cent *ad valorem* is indicated), the SUAD rate indicated is "nil".

7.24 During the Panel's first substantive meeting, India informed the Panel that its Central Government had just issued Customs Notification 102/2007 [126] of 14 September 2007. That notification, also based upon Section 25 of the Customs Act, exempted, subject to certain conditions, the products falling within the First Schedule to the Customs Tariff Act, from the whole of the SUAD when imported into India for subsequent sale. Pursuant to the Notification, the importer must pay the SUAD on the product's importation, but may subsequently file a claim for refund of the SUAD already paid on the imported products.

B. OVERVIEW OF THE PARTIES' CLAIMS AND ARGUMENTS

7.25 Having described the measures at issue, the Panel now provides a brief overview of the Parties' claims and arguments.

7.26 The **United States** separately challenges the AD on alcoholic liquor, as such, and the SUAD, as such.[127] In relation to the AD on alcoholic liquor, the United States notes that it is imposed in addition to the BCD already levied on alcoholic liquor. The United States considers that the AD on alcoholic liquor qualifies as an "ordinary customs duty" or, in the alternative, as an "other duty or charge" within the meaning of Article II:1(b) of the GATT 1994. The United States submits that, in the light of this, the AD on alcoholic liquor is inconsistent, as such, with Article II:1(a) and (b) of the GATT 1994 because the combination of the AD and the BCD results in ordinary customs duties on imports of alcoholic liquor that exceed those set forth in India's Schedule of Concessions. Specifically, the AD on alcoholic liquor, when imposed with the BCD, results in ordinary customs duties on imports of alcoholic liquor that exceed India's bound rates by amounts ranging from 48 to 400 percentage points. Alternatively, to the extent the AD on alcoholic liquor is considered an "other duty or charge", the United States submits that it would exceed the "other duties or charges" set out in India's Schedule of Concessions, as India has not recorded the AD for alcoholic liquor in its Schedule. The United States is challenging the AD on alcoholic liquor as in force on the date of establishment of the Panel. The United States considers that the modifications introduced by Customs Notification 82/2007 are outside the Panel's terms of reference.

7.27 In relation to the SUAD, the United States notes that it is imposed in addition to the BCD already levied on the products subject to the SUAD. The United States considers that the SUAD

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[124] According to India, even though Customs Notification 20/2006 does not refer to Section 3(8) of the Customs Tariff Act, a reference to Section 3(8) is implicit in Customs Notification 20/2006. India's reply to Panel Question No. 39(a).

[125] Exhibit US-11.

[126] Exhibit IND-17.

[127] The United States points out that the SUAD has been applied in addition to, and has been calculated on top of, the AD but that its claims against the SUAD do not rely upon imposition of the AD to demonstrate that the SUAD is inconsistent with India's WTO obligations.

qualifies as an "ordinary customs duty" or, in the alternative, as an "other duty or charge" within the meaning of Article II:1(b) of the GATT 1994. The United States submits that, in the light of this, the SUAD is inconsistent, as such, with Article II:1(a) and (b) of the GATT 1994 because the combination of the SUAD and the BCD results in ordinary customs duties on imports that exceed those set forth in India's Schedule of Concessions. More specifically, the SUAD results in ordinary customs duties on imports in excess of India's bound rates in any situation where the BCD is already at or near India's bound rate.[128] Alternatively, to the extent the SUAD is considered an "other duty or charge", the United States submits that it would exceed the "other duties or charges" set out in India's Schedule of Concessions, as India has not scheduled the SUAD for any product included in its Schedule.

7.28 The United States requests the Panel to find that:

(a) the AD on alcoholic liquor is:

(i) inconsistent with Article II:1(b) of the GATT 1994 as an ordinary customs duty that subjects imports of alcoholic liquor to ordinary customs duties in excess of those set forth in India's WTO Schedule of Concessions; and

(ii) inconsistent with Article II:1(a) of the GATT 1994 as an ordinary customs duty that affords imports of alcoholic liquor from the United States less favourable treatment than that provided for in India's WTO Schedule of Concessions; and

(b) the SUAD is:

(i) inconsistent with Article II:1(b) of the GATT 1994 as an ordinary customs duty that subjects imports, including alcoholic liquor and products listed in Exhibit US-1, to ordinary customs duties in excess of those set forth in India's WTO Schedule; and

(ii) inconsistent with Article II:1(a) of the GATT 1994 as an ordinary customs duty that affords imports from the United States, including alcoholic liquor and products listed in Exhibit US-1, less favourable treatment than that provided for in India's WTO Schedule of Concessions.

7.29 The United States has not requested any findings under Article III:2 of the GATT 1994 even though an alternative claim under Article III:2 is put forward in the US request for the establishment of a panel.[129]

7.30 **India** submits that the AD on alcoholic liquor and the SUAD have been mischaracterized by the United States as being ordinary customs duties or, in the alternative, "other duties or charges" within the meaning of Article II:1(b). India argues that the United States has based its identification and characterization of the AD on alcoholic liquor and the SUAD on an erroneous understanding of the scheme and provisions of law pertaining to customs and off-setting duties and taxes in India. According to India, both the AD on alcoholic liquor and the SUAD are duties levied in lieu of internal taxes – the AD on alcoholic liquor is levied in lieu of excise duties and the SUAD is imposed to counterbalance sales tax, VAT and other local taxes or charges. India points out that these duties are

[128] The United States notes that Exhibit US-1 contains a number of examples in addition to alcoholic liquor where this is the case.

[129] We will revert to this point later on. See *infra*, Section F.

distinct from the BCD and submits that they have been levied in accordance with the provisions of Article II:2(a) of the GATT 1994.

7.31 India further notes that the AD on alcoholic liquor has been withdrawn through Customs Notification 82/2007 on 3 July 2007. In India's view, there therefore no longer exists any valid basis to challenge the AD on alcoholic liquor.

7.32 India therefore requests that the Panel reject all claims made by the United States, since, in its view:

(a) the AD on alcoholic liquor has been validly removed through Customs Notification 82/2007; and

(b) the SUAD is a charge "equivalent to an internal tax" within the meaning of Article II:2(a) and imposed consistently with Article III:2 of the GATT 1994.

C. PRELIMINARY MATTERS

7.33 Before addressing the US claims of violation under Article II:1 of the GATT 1994, it is useful to address two preliminary matters. The first concerns two new Indian customs notifications concerning the AD on alcoholic liquor and the SUAD, both adopted after the establishment of the Panel. The other preliminary matter concerns whether the measures before the Panel may be challenged, as such, and if so, whether they may be determined to be inconsistent, as such, with WTO rules. The Panel will address these two preliminary issues in turn.

1. New measures adopted by India after the establishment of the Panel

7.34 The first preliminary matter to be addressed by us was raised by India and concerns two new customs notifications issued by India after the date of establishment of the Panel. India requests that the Panel not only take these new customs notifications into account, but that it rule on the measures as modified by the new customs notifications. Below, the Panel will address Customs Notification ("CN") 82/2007, which concerns the AD on alcoholic liquor. After that, the Panel will address Customs Notification ("CN") 102/2007.

(a) Customs Notification 82/2007

(i) Arguments of the Parties

7.35 **India** argues that the Central Government has complete discretion in the exercise of power granted to it under Section 3(1) of the Customs Tariff Act. The Central Government issued CN 32/2003 on 1 March 2003 to levy additional duties on alcoholic beverage pursuant to Section 3(1) of the Customs Tariff Act. The Central Government issued CN 82/2007 on 3 July 2007 pursuant to Section 3(8) of the CTA and Section 25(1) of the Customs Act. This Notification exempted all the goods from the whole of the additional duty leviable under CN 32/2003.

7.36 India claims that the nature of a Custom Notification is not merely an executive order but a delegated legislation. It has the force of law and is effective as of the date it is notified in the Official Gazette of India. India argues that CN82/2007 has effectively overridden CN 32/2003.

7.37 India argues that CN 82/2007 must be viewed as being "an amendment that does not change the essence of the identified measure" and, is therefore well within the Panel's terms of reference. India contends that the Appellate Body has previously held that "a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the

panel request"[130]. It also considers that the United States had envisaged such a subsequent amendment in its request for establishment of this Panel, when it included "any amendments, related measures, or implementing measures" in its panel request.

7.38 India argues that the measure of levying AD at the rate specified in CN 32/2003 has ceased to have any effect because of the recent amendment made in CN 82/2007.

7.39 The **United States** argues that because CN 82/2007 was issued after the Panel was established, it is outside the Panel's term of reference. In addition, CN 32/2003 remains in force and Section 3(1) of the CTA directs that "[a]ny article which is imported into India *shall*… be liable " for the AD. Therefore, the measures identified in the US panel request, i.e. CN 32/2003, remain in force and should be considered by the Panel.

7.40 The United States argues that India does not assert that CN 32/2003 has been revoked. The later Customs Notification, CN 82/2007, is not within the Panel's mandate. Rather, it is a matter to be considered at the compliance stage of the dispute. Citing the Appellate Body's statement in *Chile – Price Band System*, the United States also considers that a practice of amending measures during proceedings is not to be condoned, if such changes are made with a view to shielding a measure from scrutiny by a panel and that a complaining party should not have to adjust their pleadings during the proceedings in order to deal with a moving target. The United States is concerned that CN82/2007 could have the effect of shielding the AD from scrutiny as the Indian Central Government has complete discretion to re-impose the AD afterwards.

7.41 **India** replied to the Panel's question regarding the effect of CN 32/2007. It indicated that the CTA empowers the Central Government to either impose AD on alcoholic liquor pursuant to Section 3(1) of CTA read with the proviso, or to exempt imported alcoholic liquor from the AD according to Section 3(8) of CTA read together with Section 25 of CA. Therefore, the AD imposed by CN 32/2003 was removed as of 3 July 2007 through exemption notification CN 82/2007. If the Central government were to withdraw CN 82/2007, it could do so through a new notification in the future to remove the exemption. In that case, the effect of CN 32/2003 could be reinstated.

7.42 In India's view, it has effectively and in good faith removed the AD as of 3 July 2007. The mere possibility that subsequent legislation could theoretically re-introduce the AD on imported alcoholic beverages does not mean that the measure has not been revoked. India also argues that CN 82/2007 is not a moving target; rather, the Panel's terms of reference is broad enough to include "any amendments, related measures, or implementing measures", and consequently, the Panel should consider CN 82/2007.

7.43 The **United States** argues that it is not clear whether CN 82/2007 does remove the AD. The fact is that Section 3(1) mandates that imports "shall… be liable" to the AD and that CN 32/2003 remains in force.

7.44 The United States also contends that if CN 82/2007 does what India contends – i.e. effectively removes the AD – then it would seem to fundamentally change the essence of the AD. In its view, this dispute is distinguishable from the *Chile – Price Band System* case. In that dispute, the amendment of the measure made explicit a requirement already considered implicit under original measure, whereas in this case, the amendment at issue allegedly removes the AD, that is, permits something (exemption) that was not permitted under Indian law as of the date of the Panel's establishment.

[130] Appellate Body Report, *EC – Selected Customs Matters*, para. 184.

7.45 The United States also considers that it is not necessary to consider CN 82/2007 in order to secure a positive solution in this dispute. If the Panel were to take into account this customs notification introduced after the establishment of this Panel, it would create a moving target and result in shielding a measure from panel scrutiny. In the US view, the fact that CN32/2003 may be reinstated and that the Central Government has a complete discretion to issue customs notifications create a possibility that after the conclusion of these proceedings, CN82/2007 may be withdrawn hence the measure would constitute a moving target as the Appellate Body stated.

7.46 **India** argues that the US understanding of the statement of the Appellate Body in *Chile – Price Band System* that an amendment which merely made explicit a requirement that was implicit under Chilean Law and which therefore did not change the essence is incorrect. In India's view, the amendment to Chilean Law – Article 12 of Law 18.525, "puts in place a cap on the Chilean PBS duties to avoid that those duties, in conjunction with the 8 percent applied rate, exceed the 31.5 per cent bound rate." In other words, rather than making an implicit requirement explicit, that amendment effectively placed a ceiling on the rates of duties in the PBS. Similarly, the CN 82/2007 is to bring AD on alcoholic beverages to zero and does not change the essence of the measure.

7.47 India also points out that the words "any amendments, related measures or implementing measures" used in the US panel request can include amendments made after the Panel's establishment, just as the Appellate Body stated in *Chile – Price Band System.* The Appellate Body stated that if the terms of reference are broad enough to include amendments and if it is necessary to consider an amendment in order to secure a positive solution to the dispute, then it is appropriate to consider the measure as amended. In India's view, this is also the situation in this dispute.

7.48 India argues that it has chosen to remove the AD, by reducing the rate of AD on alcoholic beverages to nil through CN 82/2007. There are no lingering effects of the AD. Furthermore, the specific way in which India achieved this policy objective is irrelevant. Concerning the possibility that the AD may be re-introduced at any time, India argues that previous panels have assumed that Members would perform their treaty obligation in good faith and would not re-introduce the removed measure. India further argues that CN 82/2007 was introduced to address the trade concerns, not to create a moving target.

7.49 India considers that the two new notifications were not intended to create a moving target, but to address concerns raised by trading partners. They do not change the essence of the measure. Also, India should be entitled to the benefit of the assumption of good faith principle.

7.50 The **United States** argues that the reference to "amendments, related measures, or implementing measures "in the US panel request is a reference to any amendments or measures in existence at the time of the establishment of the Panel. The reason for such inclusive language is due to the fact that there is no compilation or database of India's applied custom rates it may become apparent that a relevant citation to one of the measures identified in existence at the time of the Panel's establishment, was overlooked. But, the US argues this phrase does not extend to measures not even in existence at the time.

7.51 The United States also argues that given the uncertainty as to the two notifications' effect on AD and SUAD and the ease with which either custom notification may be rescinded or otherwise removed, they could be used as a moving target that the US has to deal with. Therefore, consideration of the two notifications would not, in US view contribute to the positive solution of the dispute.

7.52 In the US view, the modifications effected through CN 82/2007 would, if at all, be a matter for consideration at the compliance stage, but not for consideration by this Panel. Examining the measures as set out in the US panel request will provide a benchmark by which India and the United States may judge whether the new customs notification may bring the measure into conformity with

the WTO rules. The United States also considers that CN 82/2007 does not affect the statutory provisions imposing the AD nor does it rescind or remove CN 32/2003 which specifies the rates of AD on alcoholic beverages.

(ii) Analysis of the Panel

7.53 India requests the Panel to make a ruling on the AD on alcoholic liquor as modified by CN 82/2007, which was issued after the establishment of this Panel. The United States objects to such request. The Panel considers that in order to determine whether it could rule upon the AD on alcoholic liquor as modified by the new customs notification, it is useful to understand the particular situation of this dispute and compare it with relevant rulings of previous panels and the Appellate Body.

7.54 In this regard, we note that the AD on alcoholic liquor as in force on the date of establishment of the Panel was imposed through the original Customs Notification ("CN") 32/2003 of 1 March 2003 which specifies rates of additional duty for alcoholic liquor. For beer and wines, the rates vary from 75 per cent *ad valorem* to 20 per cent *ad valorem* depending on the CIF value of the products, and for certain CIF values the rates are set out as specific rates. For spirits, the rates vary from 150 per cent to 25 per cent, for products with different values respectively, and for certain CIF values the rates are set out as specific rates.[131] By contrast, CN 82/2007, issued on 3 July 2007, exempts all the goods covered by CN 32/2003 from the whole of the duties leviable under CN 32/2003.[132]

7.55 The Panel notes India's argument that CN 32/2003 has been effectively overridden by CN 82/2007, and that the former "has ceased to have any effect" due to the exemption made in CN 82/2007.[133] However, it also notes India's subsequent clarification that, legally speaking, CN 32/2003 "remains in force", though it has ceased to have any effect on account of the exemption notification CN 82/2007.[134] Furthermore, the Panel understands that India's Central Government has complete discretion under Section 3(1) of the Customs Tariff Act to issue new custom notifications specifying rates of additional duty on alcoholic liquor.[135] Thus, the Central Government could issue a new notification to withdraw CN 82/2007 or to specify the same rates as those specified in CN 32/2003. In that case, the effect of CN 32/2003 could be reinstated.[136] Based on these explanations by India, the Panel considers that the AD on alcoholic liquor, as imposed through CN 32/2003, has not "ceased to exist"; rather, the AD on alcoholic liquor has been modified by the new CN 82/2007 after the Panel was established. The Panel notes that the *Chile – Price Band System* dispute concerned an amendment of a measure after the establishment of the panel and, to that extent is similar to the situation we are considering here. The Panel in its analysis below is therefore guided by the approach followed by the Appellate Body in *Chile – Price Band System*.

Whether the Panel's terms of reference are sufficiently broad to include the new measure

7.56 In *Chile – Price Band System*, the Appellate Body considered a number of factors to determine whether it could rule on a measure as amended in a case where the amendment was adopted after the establishment of the panel. The first of these factors is whether a panel's terms of reference are sufficiently broad to include the new measure. In this regard, the Panel recalls that the new notification CN 82/2007 was not identified in the US panel request. As explained, it was issued after the establishment of the Panel. Nevertheless, there is a phrase in the US panel request to indicate that

[131] Exhibit US-6.
[132] Exhibit IND-6.
[133] India's first oral statement, para. 17.
[134] India's reply to Panel Question No. 40(c).
[135] India's first written submission, paras. 34-35.
[136] India's reply to Panel Question No. 40(c).

the measures include those specifically identified "as well as any amendments, related measures, or implementing measures".

7.57 The Panel notes that in *Chile – Price Band System*, the Appellate Body stated that the general phrase "as well as the regulations and complementary provisions and /or amendments" included in Argentina's panel request "suggests that Argentina *intended* the request to cover the measure even as amended".[137] On that basis, Argentina's panel request was found to be broad enough to include the amendment adopted after the establishment of the panel.

7.58 In the present dispute, the United States argues that the phrase it used in its panel request "is a reference to any amendments or measures in existence at the time of the US panel request" and that the phrase does "not extend to measures not even in existence at the time".[138] The United States explained that the intention behind the phrase "as well as any amendments, related measures, or implementing measures" was that in case the applied rate of customs duty had been modified in a customs notification of which the United States was not aware at the time it drafted its panel request, any such modifications in existence at the time of the establishment of the Panel would be included in the Panel request.[139] In the United States' view, the Panel's terms of reference are limited to measures that existed at the time of establishment of the Panel and, therefore, CN 82/2007 falls outside the Panel's terms of reference.[140]

7.59 The Panel is of the view that the phrase "as well as any amendments, related measures, or implementing measures" is objectively open to the interpretation argued for by the United States. Moreover, we find plausible the United States' explanation of its intention behind the reference to amendments and related or implementing measures in the US panel request. After all, it is well-established that a panel's terms of reference are set on the date of establishment of that panel and that, but for certain exceptional situations, measures adopted, or coming into force, after that date are outside a panel's terms of reference. The fact that the Appellate Body in *Chile – Price Band System* found that a similar phrase revealed an intention by the complaining party to include a measure not yet in existence on the date of establishment of a panel does not mean that the United States in this case could not have intended its phrase to cover only measures in existence on the date of establishment of the Panel, particularly when that phrase can be so interpreted. Furthermore, as a panel, we must be careful not to rule upon a measure that the complaining party never intended to be included within our terms of reference and is not requesting to be included. The Panel therefore sees no reason to reject the United States' interpretation of the reference "*as well as any amendments, related measures, or implementing measures*".

7.60 Accordingly, the Panel considers that the reference to "*any amendments, related measures, or implementing measures*" in the US panel request does not include measures adopted after the establishment of the Panel and that the US panel request is therefore not sufficiently broad to include CN 82/2007, which was issued after the establishment of the Panel.

Whether CN 82/2007 changed the essence of the old measure

7.61 Another factor considered by the Appellate Body in *Chile – Price Band System* is whether "the essence of the old measure" has been changed by the new measure. In that dispute, the Appellate

[137] Appellate Body Report, *Chile – Price Band System*, para. 135 (emphasis added).
[138] US second oral statement, para. 20.
[139] The United States notes in this respect that it found it difficult to determine India's applicable rates of customs duty as there was no compilation or searchable database of India's applied customs rate for any particular product. *See US* second oral statement, para. 20.
[140] US second written submission, para. 58.

Body appears to have considered that the amendment adopted after the establishment of the panel made explicit an implicit cap on the amount of the tariff that could be applied:

> "We understand the Amendment as having clarified the legislation that established Chile's price band system. However, the Amendment does not change the price band system into a measure *different* from the price band system that was in force before the Amendment. Rather, as we have pointed out, Article 2 of Law No. 19.772 simply amends Article 12 of Law No. 18.525 by *adding* a final paragraph to that provision. In its amended form, Law No. 18.525 incorporates the additional paragraph, making explicit that there is a cap on the amount of the total tariff that can be applied under the system at the tariff rate of 31.5 per cent *ad valorem*, which has been bound in Chile's Schedule since the entry into force of the *WTO Agreement*."[141]

7.62 This statement of the Appellate Body suggests that the requirement in the amendment (i.e., Law 19.772) had existed before the amendment was made. The explicit requirement of Law 19.772 was that the combination of duties resulting from the Chilean price band system and the *ad valorem* duty was not to exceed the rate of 31.5 per cent as bound in Chile's WTO Schedule. The Appellate Body noted that under Chilean Law, WTO commitments override domestic statutes even without the explicit requirement in law 19.772.[142] The Appellate Body appears to have concluded that Law 19.772 did not change the essence of the old measure for this reason.

7.63 In the present case, the situation is different. First, CN 32/2003 specifies the rates at which the additional duties on imported alcoholic beverages have to be imposed, whereas the new customs notification exempts all the goods from the whole of the duties leviable under CN 32/2003. Thus, the two notifications have opposite legal effect – CN 32/2003 specifies positive duty rates for certain products, CN 82/2007 exempts those same products from these duty rates. Secondly, before issuance of CN 82/2007, the AD, as imposed through CN 32/2003, affected trade by imposing various and often high rates of additional duty on the relevant imported products, whereas after issuance of CN 82/2007, the AD should no longer affect trade in alcoholic liquor since CN 82/2007 completely exempted relevant imported alcoholic liquor from the duties specified in CN 32/2003.[143] Therefore, both the legal and practical effects resulting from the old measure and the new measure are substantially different.[144] The fact that India argues that the reason for issuing CN 82/2007 was to address the concerns of trading partners and that it effectively removed the additional duty[145] also supports the understanding that CN 82/2007 changed the essence of the old measure. Indeed, were it otherwise, it would be difficult to see how the new measure could be said to respond to the concerns of trading partners.

Whether one or both Parties object to a ruling on the new measure

7.64 The Appellate Body in *Chile – Price Band System* also noted that the parties had not objected to it ruling on the measure as amended. It sated that "as we observed, the participants to this dispute do not object to our doing so", i.e., to the Appellate Body ruling on the price band system as amended

[141] Appellate Body Report, *Chile – Price Band System*, para. 137.
[142] *Ibid*, para. 126.
[143] As noted by India, the effect of CN 82/2007 is to bring the rate of AD down to zero. India's second oral statement, para. 5.3.
[144] A specific example can demonstrate the difference. According to the old CN 32/2003, for bottled spirit with a CIF price not exceeding USD 25 per case, the additional duty was imposed at a rate of "150% *ad valorem"*, whereas with the new CN 82/2007 the additional duty is imposed on such imported spirit product at a rate of "nil". The Panel considers that such a drastic change in the rate of additional duty indicates that the AD after issuance of CN 82/2007 is not essentially the same as the AD before issuance of CN 82/2007.
[145] India 's second oral statement, para. 6.1.

by Law 19.772.[146] In this dispute however, the Parties disagree on whether the Panel should rule on the AD on alcoholic liquor as modified by CN 82/2007. In fact, the United States explicitly objects to our doing so. Thus, in relation to this factor the situation is again different from the *Chile– Price Band System* dispute.

Whether a ruling on the new measure is appropriate to secure a positive solution to the dispute

7.65 The Panel notes that the Appellate Body also considered in *Chile – Price Band System* whether a ruling on the measure as amended was appropriate in order to secure a positive solution to the dispute.

> "We consider it appropriate for us to rule on the price band system as currently in force in Chile, that is, as amended by Law 19.772, to 'secure a positive solution to the dispute" and to make 'sufficiently precise recommendations and rulings so as to allow for prompt compliance'."[147]

7.66 The Parties in this case hold different views on whether a ruling on the AD on alcoholic liquor as modified by CN 82/2007 would be appropriate to secure a positive solution to the dispute. The United States argues that given the uncertainty as to the precise legal effect of CN 82/2007 and the ease with which customs notifications may be rescinded or otherwise removed by the Indian Central Government, it would be useful for the Panel to consider the original measures set out in the US panel request as this would provide a benchmark by which India and the United States may judge whether the CN 82/2007 may bring the AD on alcoholic liquor into conformity with WTO rules.[148] In contrast, a ruling by the Panel on the situation as it exists after issuance of CN 82/ 2007 would not, in the United States' view, contribute to a positive solution of the dispute concerning the AD.[149] The impact of CN 82/2007 should be considered at the compliance panel stage.

7.67 India contends that previous panels have assumed that Members would perform their treaty obligations in good faith and would not re-introduce measures that had been removed. India also recalls that CN 82/2007 was introduced to address trade concerns of its trade partners, not to create a moving target for the complaining party.[150] India therefore contends that it should be entitled to the presumption of good faith compliance with its WTO obligations.[151] India also argues that the AD has been validly removed by CN 82/2007 and that it is, therefore, appropriate for the Panel to consider the AD on alcoholic liquor as amended in coming to a decision in a dispute.[152]

7.68 The Panel is sympathetic to the US argument that a ruling on the original AD on alcoholic liquor and not the AD as modified could contribute to a positive solution of the dispute. India has explained that, legally speaking, CN 32/2003 has not been revoked. Rather, it has been effectively overridden by the new CN 82/2007. India has also clarified that the Central Government has complete discretion to issue new customs notifications or withdraw CN 82/2007. As a matter of Indian domestic law, the previous legal situation could thus be reinstated easily and quickly.

7.69 The Panel also notes India's argument that its objective was not to create a "moving target" or to shield the AD from scrutiny, but to address trade concerns of its trading partners and that India has

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[146] Appellate Body Report, *Chile – Price Band System*, para. 143.
[147] *Ibid.*
[148] US second oral statement, closing statement para. 17.
[149] US second oral statement para. 24.
[150] India's second oral statement, para. 6.2. India's second oral statement, closing statement, para. 23.
[151] India's second oral statement, closing statement, paras. 23-24.
[152] India's second oral statement, paras. 5.5, 6.1, 6.2.

effectively "removed" the AD on alcoholic liquor as of 3 July 2007.[153] The Panel does not question the good faith of India in trying to address concerns of its trading partners by issuing CN 82/2007. In fact, the Panel recognizes the significant efforts undertaken by India in this regard. However, the Panel must also note that India has never stated that the reason for the issuance of CN 82/2007 was to address a perceived WTO-inconsistency. To the contrary, India has described the AD on alcoholic liquor prior to issuance of CN 82/2007 as a measure compatible with India's WTO obligations and as an "allegedly offending measure". As a result, we need to assume that CN 82/2007 was issued, not because India considered it necessary to bring itself into conformity with its WTO obligations, but rather voluntarily, in order to be responsive to concerns expressed by its trading partners. At this point, even though India has indicated that it has no intention of re-introducing the *status quo ante*, it seems that India is maintaining that it would not be precluded by WTO rules from doing so in good faith.

7.70 Under these circumstances, that is to say, in a situation where India faces no meaningful obstacles in reinstating the *status quo ante* (i.e., the AD on alcoholic liquor as it existed before issuance of CN 82/2007) and where India apparently believes the *status quo ante* was WTO-consistent while the United States believes it was WTO-inconsistent, we consider that ruling on the AD on alcoholic liquor as it existed before issuance of CN 82/2007 could contribute to securing a positive solution to this dispute, whereas ruling on the AD on alcoholic liquor as modified by CN 82/2007 would not adequately do so, given that the modification has, in our view, changed the essence of the old measure. Therefore, we find it neither necessary nor appropriate to rule on the AD on alcoholic liquor as modified by CN 82/2007 in order to secure a positive solution to this dispute.

(iii) Conclusion

7.71 To summarize the above considerations, the Panel finds that: (i) the Panel's terms of reference do not extend to CN 82/2007; (ii) the AD on alcoholic liquor as modified by CN 82/2007 is not essentially the same as the original AD on alcoholic liquor; (iii) one Party objects to the Panel ruling on the AD on alcoholic liquor as modified by CN 82/2007; (iv) it is neither necessary nor appropriate to rule on the AD on alcoholic liquor as modified by CN 82/2007 in order to secure a positive solution to the dispute.

7.72 In the light of, and based upon, the totality of these findings, the Panel declines to rule on the AD on alcoholic liquor as modified by CN 82/2007.

(b) Customs Notification 102/2007

(i) Arguments of the Parties

7.73 **India** argues that it has issued CN 102/2007[154] establishing a credit and refund mechanism whereby imported products on which SUAD has already been paid receive either a full credit or a refund of the SUAD if a VAT/sales tax is paid on the resale. In this way, the possibility of double taxation is eliminated.

7.74 The **United States** argues that neither CN 82/2007, nor CN 102/2007 existed at the time the Panel was established, the Panel's terms of reference are limited to those measures existing on the date of establishment and cited in the US Panel request. Therefore, these two notifications are outside of the Panel's terms of reference.

[153] India's second oral statement para. 6.2.
[154] Exhibit IND-17.

7.75 With respect to CN 102/2007, the United States considers that the importer must pay the SUAD at the time of importation and may only thereafter seek a refund of the SUAD paid if certain documentation can be provided. In the US view, conditions to which exemption from the EAD is subject may effectively undermine the exemption itself.

7.76 The United States also considers that it is not necessary to consider CN 82/2007 and CN 102/2007 in order to secure a positive solution in this dispute. Rather, in the US view, doing so would be contrary to that objective, as the Appellate Body found in *Chile – Price Band System*, that "we do not mean to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel". Therefore, if the Panel were to take into account these two customs notifications introduced after the establishment of this Panel, it would create a moving target and result in shielding a measure from panel scrutiny. In the US view, the fact that the Central Government has a complete discretion to issue customs notifications create a possibility that after the conclusion of these proceedings, CN 102/2007 may be withdrawn hence the measure would constitute a moving target as the Appellate Body stated.

7.77 **India** points out that the words "any amendments, related measures or implementing measures" used in the US panel request can include amendments made after the Panel's establishment, just as the Appellate Body stated in *Chile – Price Band System.* The Appellate Body stated that if the terms of reference are broad enough to include amendments and if it is necessary to consider an amendment in order to secure a positive solution to the dispute, then it is appropriate to consider the measure as amended. In India's view, this is also the situation in this dispute.

7.78 India argues that Customs Notification 102/2007 does not change the essence of the measure, rather it only addresses certain concerns raised by trading partners, in particular, to make sure that any excess tax paid and not addressed by way of a credit/offset mechanism would be refunded upon fulfilment of certain conditions. Therefore, India considers that the two new notifications were not intended to create a moving target, but to address concerns raised by trading partners. They do not change the essence of the measure. Also, India should be entitled to the benefit of the assumption of good faith principle.

7.79 India also argues that the United States' understanding of the statement of the Appellate Body in *Chile – Price Band System* that an amendment which merely made explicit a requirement that was implicit under Chilean Law and which therefore did not change the essence is incorrect. In India's view, the amendment to Chilean Law – Article 12 of Law 18.525, "puts in place a cap on the Chilean PBS duties to avoid that those duties, in conjunction with the 8 per cent applied rate, exceed the 31.5 per cent bound rate".

7.80 The **United States** argues that the reference to "amendments, related measures, or implementing measures "in the US panel request is a reference to any amendments or measures in existence at the time of the establishment of the Panel. The reason for such inclusive language is due to the fact that there is no compilation or database of India's applied custom rates it may become apparent that a relevant citation to one of the measures identified in existence at the time of the Panel's establishment, was overlooked. But, the US argues this phrase does not extend to measures not even in existence at the time.

7.81 With respect to CN 102/2007, the United States argues that it does not address the situation where goods are imported to the importer as the end consumer who has to pay the full SUAD. Also, the conditions for requesting refund at the resale stage may render the measure less favourable for imports comparing to the treatment given to domestic products.

7.82 The United States also argues that given the uncertainty as to the two notifications' effect on AD and SUAD and the ease with which either custom notification may be rescinded or otherwise

removed, they could be used as a moving target that the US has to deal with. Therefore, consideration of the two notifications would not, in US view contribute to the positive solution of the dispute.

7.83 The United States argues that CN 102/2007 also change the essence of the SUAD if it does what India claims to do, that is, by virtue of CN 102/2007, imports are no longer liable to SUAD provided certain conditions are met. In such case, as with the AD, a measure that allegedly removes liability for another measures would seem to necessarily change the essence of the latter measure. This is different from the situation in *Chile – Price Band System*, where both parties agreed to take the amendment into account and that the amendment simply made explicit something already implicit under the Chilean law.

7.84 In the US view, the modifications effected through CN 102/2007 would, if at all, be a matter for consideration at the compliance stage, but not for consideration by this Panel. Examining the measures as set out in the US panel request will provide a benchmark by which India and the United States may judge whether the new customs notification may bring the measure into conformity with the WTO rules.

(ii) Analysis of the Panel

7.85 India requests the Panel to make a ruling on the SUAD as modified by CN 102/2007, whereas the United States requests that the Panel rule on the SUAD as it existed at the time the Panel was established and that it not rule on the modification effected through CN 102/2007.

7.86 The Panel recalls that based on Section 3(5) of the Customs Tariff Act, the Central Government of India issued Customs Notification ("CN") 19/2006 on 1 March 2006 to impose the SUAD at a rate of 4 per cent *ad valorem* on certain imported products. Section 3(5) and CN 19/2006 are identified in the US panel request.

7.87 During the Panel's first substantive meeting, India informed the Panel that it had just issued a new customs notification, CN 102/2007, providing for the possibility to claim a refund of the SUAD already paid on imported goods in case of subsequent internal re-sale of the imported goods. The refund is not automatic but subject to certain conditions. Thus, CN 102/2007 introduces a refund mechanism available only in specified circumstances. It is clear, therefore, that CN 102/2007 complements, and modifies, but does not replace the SUAD as imposed through CN 19/2006. In other words, the SUAD has not "ceased to exist" as a result of issuance of CN 102/2007. Accordingly, the situation with respect to the modification of the SUAD after the establishment of the Panel is similar to the situation in the *Chile – Price Band System* dispute and, hence, the Panel in its analysis will again be guided by the approach followed by the Appellate Body in that dispute. As the Panel's analysis of the modification of the SUAD is similar in a number of ways to that of the modification of the AD on alcoholic liquor, it is not necessary to repeat certain explanations already provided. The analysis below should therefore be read together with the preceding analysis concerning CN 82/2007.

Whether the Panel's terms of reference are sufficiently broad to include the new measure

7.88 Since CN 102/2007 was issued after the establishment of the Panel, it is not identified in the US panel request. As we have noted earlier, however, the US panel request contains the phrase "as well as any amendments, related measures, or implementing measures." Nevertheless, in the United States' view, the Panel's terms of reference are limited to measures that existed at the time of the

establishment of the Panel and, therefore, the new CN 102/2007 falls outside the Panel's terms of reference.[155]

7.89 The Panel has previously explained its view that the phrase "as well as any amendments, related measures, or implementing measures" in the US panel request should not be interpreted so as to cover measures adopted after the establishment of the Panel. It follows that the US panel request is not sufficiently broad to include CN 102/2007 since it was issued after the Panel's establishment.

Whether CN 102/2007 changed the essence of the old measure

7.90 As explained by India, CN 102/2007 provides that imported products on which the SUAD has already been paid are eligible, upon fulfilment of certain conditions, to receive a full refund of the SUAD on the re-sale of such imported products and thereby eliminates the possibility of double taxation of imported goods, as re-sale transactions may be subject to State VAT.[156] Thus, according to India, it is clear that the refund mechanism introduced by CN 102/2007 eliminated, in whole or in part, what India refers to as possible double taxation of imported goods. The Panel is of the view that this modification of the SUAD, viewed in its context, is not just a minor and marginal change. Based upon India's explanation, we think it is a significant change since it in whole or in part removed an element of possible less favourable treatment of re-sale transactions involving imported products *vis-à-vis* re-sale transactions involving like domestic products.[157] In respect of the latter transactions, a credit is available for the State VAT paid on prior-stage sale transactions.

7.91 Moreover, we note that, in terms of Indian law, CN 102/2007 is an exemption notification. Subject to certain conditions, it exempts from the SUAD goods imported into India for subsequent sale, by creating a refund possibility. Thus, the old measure and the new measure have different legal effects, as otherwise there would have been no need to provide for an exemption from the old measure. Also, the practical effects resulting from the old measure and the new measure are different in that in the case of the old measure the importer needed to pay the SUAD at 4 per cent *ad valorem*, whereas in the case of the new measure the importer can, subject to meeting relevant conditions, get the SUAD already paid fully refunded. Therefore, we consider that the SUAD as modified by CN 102/2007 is not essentially the same as the original SUAD. We further note in this regard that India has stated that it introduced CN 102/2007 in response to concerns expressed by trading partners.[158] If the SUAD after issuance of CN 102/2007 were essentially the same as before, it is difficult to see how the modification could make a difference for India's trading partners.

7.92 Finally, even if CN 102/2007 were considered not to have changed the essence of the SUAD, we note that this factor by itself would not be dispositive of whether the Panel should rule on the SUAD as modified by CN 102/2007. The Panel's conclusion in this regard is based on an overall assessment of all factors relevant to this issue.

Whether one or both Parties object to a ruling on the new measure

7.93 In this dispute, the Parties disagree on whether the Panel should rule on the SUAD as modified by CN 102/2007. India requests that we do, while the United States objects to our doing so. To that extent, the circumstances in this dispute are different from those in the *Chile– Price Band System* dispute.

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[155] US second written submission, para. 58.

[156] India's first oral statement, paras. 12-13.

[157] We note that India itself stated that "[a]spects of [the SUAD] which raised doubts on its being 'in excess' of domestic taxes now stand addressed and there is no question of any excess tax being retained". India's second closing statement, para. 21

[158] India's second closing statement, para. 23.

Whether a ruling on the new measure is appropriate to secure a positive solution to the dispute

7.94 The Parties in this case hold different views on whether a ruling on the SUAD as modified by CN 102/2007 would be appropriate to secure a positive solution to the dispute. The United States argues that given the uncertainty as to the precise legal effect of CN 102/2007, and the conditions attached thereto, and the ease with which customs notifications may be rescinded or otherwise removed by India's Central Government, it would be useful for the Panel to consider the original measures set out in the US panel request as this would provide a benchmark by which India and the United States may judge whether the new CN 102/2007 may bring the SUAD into conformity with WTO rules.[159] In contrast, a ruling by the Panel on the situation as it exists after issuance of CN 102/2007 would not, in the United States' view, contribute to a positive solution of the dispute.[160] The impact of CN 102/2007 should be considered at the compliance panel stage.

7.95 India contends that previous panels have assumed that Members would perform their treaty obligations in good faith and would not withdraw corrective measures that had been introduced. India also argues that CN 102/2007 was introduced to address concerns of its trade partners, not to create a moving target for the complaining party.[161] India therefore contends that it should be entitled to a presumption of good faith compliance with its WTO obligations.[162]

7.96 The Panel is sympathetic to the US argument that a ruling on the original SUAD and not the SUAD as modified could contribute to a positive solution of the dispute. India has clarified that the Central Government has complete discretion to issue new customs notifications or to withdraw CN 102/2007. As a matter of Indian domestic law, the previous legal situation could thus be reinstated easily and quickly.

7.97 The Panel also notes India's argument that its objective was not to create a "moving target" or to shield the SUAD from scrutiny, but to address concerns of its trading partners.[163] The Panel does not question the good faith of India in trying to address trade concerns of its trading partners by issuing CN 102/2007. In fact, as already stated, the Panel recognizes the significant efforts undertaken by India in this regard. However, the Panel must also note that India has never stated that the reason for the issuance of CN 102/2007 was to address a perceived WTO-inconsistency. To the contrary, India has described the SUAD prior to issuance of CN 102/2007 as a measure compatible with India's WTO obligations. In particular, in its first written submission India has claimed that the old SUAD was consistent with Article III:2 of the GATT 1994, and subsequently it indicated that it issued CN 102/2007 to remove "ambiguity".[164] As a result, we need to assume that CN 102/2007 was issued, not because India considered it necessary to bring itself into conformity with its WTO obligations, but rather voluntarily, in order to be responsive to concerns expressed by its trading partners. At this point, even though India has indicated that it has no intention of re-introducing the *status quo ante*, it seems that India is maintaining that it would not be precluded by WTO rules from doing so in good faith.

7.98 Under these circumstances, i.e., in a situation where India faces no meaningful obstacles in reinstating the *status quo ante* (i.e., the SUAD as it was before issuance of CN 102/2007) and where India apparently believes the *status quo ante* was WTO-consistent while the United States believes it was WTO-inconsistent, we consider that ruling on the SUAD as it was before issuance of

[159] US second closing statement, para. 17.
[160] US second oral statement, para. 24.
[161] India's second oral statement, para. 6.2; India's second closing statement, para. 23.
[162] India's second closing statement, paras. 23-24.
[163] India's second oral statement, para. 4.7; India's second closing statement, paras. 23-24.
[164] India's first written submission, para. 99; India's second closing statement, para. 19.

CN 102/2007 could contribute to securing a positive solution to this dispute, whereas ruling on the SUAD as modified by CN 102/2007 would not adequately do so, given that, in our view, the modification has changed the essence of the old measure. Therefore, we find it neither necessary nor appropriate to rule on the SUAD as modified by CN 102/2007 to secure a positive solution to this dispute.

(iii) Conclusion

7.99 To summarize the above considerations, the Panel finds that: (i) the Panel's terms of reference do not extend to CN 102/2007; (ii) the SUAD as modified by CN 102/2007 is not essentially the same as the original SUAD; (iii) one Party objects to the Panel ruling on the SUAD as modified by CN 102/2007; (iv) it is neither necessary nor appropriate to rule on the SUAD as modified by CN 102/2007 in order to secure a positive solution to the dispute.

7.100 In the light of, and based upon, the totality of these findings, the Panel declines to rule on the SUAD as modified by CN 102/2007.

2. Discretionary vs. mandatory nature of the measures at issue

7.101 As indicated, the other preliminary matter to be addressed by us was also raised by India and concerns whether the measures before the Panel may be challenged, as such, and if so, whether they may be determined to be inconsistent, as such, with WTO rules.

7.102 **India** submits that the United States fails to appreciate the distinction made under Indian law between the provisions of the Customs Act and the Customs Tariff Act, which empower the Central Government to impose the BCD, the AD on alcoholic liquor and the SUAD, and the customs notifications pursuant to which the Central Government may fix the rates of such duties. India argues that the statutory provisions merely confer upon the Central Government the discretion to impose the duties and do not themselves prescribe the rates at which such duties may be charged. The statutory provisions also confer upon the Central Government the discretion to exempt imports from the duties. India considers that the United States has mischaracterized the provisions of Section 3(1) of the Customs Tariff Act, which authorizes the imposition of the AD, and Section 3(5) of the Customs Tariff Act, which authorizes the imposition of the SUAD, as being mandatory and consequently as being challenged measures in the present dispute.

7.103 India further submits that while the Customs Act and the Customs Tariff Act are empowering statutes, the customs notifications issued by the Central Government in the exercise of its powers under these statutes are a form of delegated legislation under Indian law. According to India, they are the mechanisms through which the executive branch, i.e., the Central Government, imposes, or exempts, a good from the levy of a duty. India states that the customs notifications, once issued, have the force of law and so are mandatory. Therefore, India maintains, the United States' challenge, and the Panel's investigation, has to be confined to the relevant customs notifications through which the AD and the SUAD have been levied.

7.104 The **United States** does not agree that, under the relevant statutes, the imposition of the AD or the SUAD rests completely at the discretion of the Central Government. In its view, Section 3(1) and 3(5) of the Customs Tariff Act and Section 12 of the Customs Act are mandatory.[165] The United States further submits that, in any event, India's arguments on this issue are largely irrelevant to the outcome of this dispute, and the Panel therefore need not undertake an elaborate analysis of whether

[165] In relation to Section 3(5) the United States argues that although it is discretionary in terms of whether the Central Government imposes the SUAD, it is mandatory with respect to the rate at which the SUAD is to be imposed should the Central Government choose to exercise its discretion.

Section 12 of the Customs Act or Sections 3(1) and 3(5) of the Customs Tariff Act are mandatory or discretionary. The United States points out in this respect that the US claims concerning the AD relate to a number of provisions of Indian law (including Section 3(1) of the Customs Tariff Act and CN 32/2003) that when imposed together with the BCD result in ordinary customs duties on alcoholic liquor that exceed India's WTO-bound rate. Similarly, the US claims concerning the SUAD relate to a number of provisions of Indian law (including Section 3(5) of the Customs Tariff Act and CN 19/2006) that when imposed together with the BCD result in ordinary customs duties on alcoholic liquor that exceed India's WTO-bound rate. The United States submits that the provisions of Indian law comprising the AD and the SUAD, when applied together with the BCD, mandate a breach of Article II:1 of the GATT 1994. The United States notes that India itself acknowledges that the AD and the SUAD are mandatory insofar as CN 32/2003 and CN 19/2006 specify the rates at which imports shall be liable to the AD and the SUAD, respectively.

7.105 The **Panel** recalls that the US claims concern the AD on alcoholic liquor and the SUAD. The United States is challenging the AD on alcoholic liquor and the SUAD as such. It is not challenging the AD or the SUAD on any particular shipment of goods entering India's customs territory.

7.106 The United States has described the AD 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 SUAD 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 AD on alcoholic liquor and the SUAD are levied.[166] We understand that the United States has identified these provisions in an effort to identify the specific measures at issue, which are the AD on alcoholic liquor and the SUAD. 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 AD on alcoholic liquor and the SUAD, 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.[167] 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 AD on alcoholic liquor, as imposed through CN 32/2003, and the SUAD, as imposed through CN 19/2006.

7.107 Regarding whether the AD on alcoholic liquor, as imposed through CN 32/2003, and the SUAD, as imposed through CN 19/2006, may be challenged, we note, as an initial matter, that it is uncontested that on the date of establishment of this Panel both the AD on alcoholic liquor and the SUAD were measures in force that were actually applied by the Central Government of India to imports of subject goods. We further note that the Appellate Body has stated that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[168] Plainly, the AD on alcoholic liquor, as imposed through CN 32/2003, and the SUAD, as imposed through CN 19/2006, are acts attributable to India's Central Government and, as such, measures of India for the purposes of WTO dispute settlement proceedings. Accordingly, they may be the subject of a challenge by the United States.

7.108 As to whether the AD on alcoholic liquor, as imposed through CN 32/2003, and the SUAD, as imposed through CN 19/2006, are the kind of measures that we could possibly find to be

[166] US first written submission, para. 2.

[167] US reply to Panel Question No. 16. Indeed, if the United States had intended to challenge Sections 3(1) and 3(5) separately, it would not have been logical for the United States to have told the Panel that it is not necessary for the Panel to engage in elaborate analysis of whether Sections 3(1) or 3(5) are mandatory or discretionary, particularly since the United States considers that the mandatory vs. discretionary distinction is a relevant distinction in this case. US second written submission, para. 80 and note 110.

[168] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

inconsistent, as such, with applicable WTO rules, we note that both Parties in their submissions on this issue have attached importance to the distinction between mandatory and discretionary measures.[169] In the specific circumstances of this case, we see no reason not to apply this distinction. India has confirmed, and accepts, that CN 32/2003, through which the AD on alcoholic liquor was imposed, and CN 19/2006, through which the SUAD was imposed, have the force of law and, in that sense, are mandatory.[170] Since under the relevant customs notifications in force on the date of establishment of this Panel the AD on alcoholic liquor and the SUAD were required to be applied by the Central Government to imports of subject goods, it is of no particular importance whether the statutory provisions upon which the customs notifications are based are also mandatory. We therefore see no need to examine the relevant statutory provisions in this light.

7.109 Having regard to the above considerations, we are of the view that the AD on alcoholic liquor, as imposed through CN 32/2003, and the SUAD, as imposed through CN 19/2006, being measures which on the date of establishment of this Panel were required to be applied and enforced, are the kind of measures which we could possibly find to be inconsistent, as such, with applicable WTO rules.

7.110 As a consequence, we continue with our analysis of the US claims that both the AD on alcoholic liquor, as imposed through CN 32/2003, and the SUAD, as imposed through CN 19/2006, are inconsistent, as such, with Article II:1 of the GATT 1994.

D. US CLAIMS OF VIOLATION OF ARTICLE II:1(B) OF THE GATT 1994

7.111 As previously mentioned, the United States claims that the AD and the SUAD are each inconsistent, as such, with Article II:1(a) and (b) of the GATT 1994. In terms of the order of our assessment of the separate US claims under Article II:1(a) and Article II:1(b), we begin with the latter, as the Appellate Body did in *Argentina – Textiles and Apparel*:[171]

> "Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule. Because the language of Article II:1(b), first sentence, is more specific and germane to the case at hand, our interpretative analysis begins with, and focuses on, that provision."

7.112 We, too, focus on issues of interpretation, before examining the measures at issue in the light of Article II:1(b).

1. Relationship between Articles II:1(b) and II:2 of the GATT 1994

7.113 The **Panel** notes that Article II:1(b) of the GATT 1994 provides:

> The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, 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

[169] Pursuant to that distinction in principle only mandatory measures may be found to be inconsistent, as such, with applicable WTO rules.
[170] India's first written submission, para. 32.
[171] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.

> 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.

7.114 However, Article II:2 of the GATT 1994 provides:[172]

> Nothing in this Article shall prevent any contracting party 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.

7.115 We note the United States' argument that the AD and the SUAD are ordinary customs duties within the meaning of the first sentence of Article II:1(b) or, in the alternative, "other duties or charges of any kind imposed on or in connection with the importation" (hereafter "ODCs") within the meaning of the second sentence of Article II:1(b). We also note that India disagrees, arguing that they are neither ordinary customs duties nor ODCs within the meaning of Article II:1(b), but charges equivalent to internal taxes imposed in respect of the like domestic product, as contemplated in Article II:2(a). Accordingly, we initially need to analyze the relationship between Articles II:1(b) and II:2.

7.116 The **United States** submits that the ordinary meaning of the term "customs duty" as it appears in Article II:1(b) is a duty imposed on a product upon its importation into the customs territory of a Member. According to the United States, the term "ordinary" suggests a customs duty that is "normal, customary, usual", "belonging to or occurring in regular custom or practice", "of the usual kind, not singular or exceptional; commonplace, mundane."[173] For the United States, an ordinary customs duty is thus a type of customs duty that is common and occurring most regularly. Determination of whether a measure constitutes an ordinary customs duty should be based on the structure, design and application of the measure; the name or stated purpose the Member imposing it may have ascribed to it is not determinative.

7.117 The United States submits that by far the most common and regularly occurring types of customs duties in terms of structure, design and application are *ad valorem*, specific or a combination thereof, calculated on the value or quantity respectively of a good at the time of importation. The United States considers that ordinary customs duties are not applied on a case-by-case basis or in response to a singular or exceptional event or set of circumstances. Instead, Members apply ordinary customs duties as a matter of course upon importation of a product into its customs territory. For the United States it follows that an "ordinary customs duty" means a duty that applies to a good at the time of importation – not on a case-by-case basis or in response to a singular or exceptional event or set of circumstances – but as a matter of course on, or in connection with, the good's importation. An

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[172] *Ad* Notes omitted.

[173] The United States refers to *The New Shorter Oxford English Dictionary*, L. Brown (ed) (Clarendon Press), 1993, Vol., 2, p. 2018.

ordinary customs duty is typically *ad valorem* (that is, calculated on the value of the good), specific (for example, calculated based on the quantity of the good), or a combination thereof.

7.118 The United States considers that there is no basis in the *WTO Agreement* for the proposition that a Member may impose only one customs duty properly categorized as an "ordinary customs duty" and that any other customs duty that the Member might impose is simply something other than an ordinary customs duty. In fact, the text refers to "ordinary customs duties". Use of the plural "duties" suggests that Article II:1(b) prohibits "ordinary customs duties" on the importation of products – whether resulting from the application of one or more individual duties – in excess of those specified in the relevant Member's Schedule.

7.119 In addition, the United States argues that ODCs are defined in relation to ordinary customs duties in that "other duties or charges" mean those duties or charges that are not "ordinary" customs duties but are nonetheless imposed on or in connection with a product's importation. The United States considers that a charge imposed on importation would necessarily constitute an ODC if it were not an ordinary customs duty. This is because, in the United States' view, the word "other" as used in Article II:1(b) means duties or charges other than ordinary customs duties that are applied on or in connection with importation.

7.120 In relation to the case at hand, the United States considers that having made a prima facie case that the AD and the SUAD are ordinary customs duties, the necessary corollary of that showing is that neither the AD nor the SUAD is a "charge equivalent to an internal tax". The United States further submits that in asserting that the AD and the SUAD are charges equivalent to an internal tax within the meaning of Article II:2(a), India has implicitly characterized the AD and the SUAD as charges "imposed on importation", since the chapeau to Article II:2 makes clear that it concerns measures "imposed on importation". Therefore, if the AD and the SUAD are not ordinary customs duties, they must, in the United States' view, be "other duties or charges" within the meaning of Article II:1(b). Thus, the United States considers that the measures specified in Article II:2(a) are specific types of "other ... charges applied on or in connection with importation" that Members have agreed are permissible. For the United States, it follows that, in effect, India in this case is asserting that, even though the AD and the SUAD are not specified in its WTO Schedule, the AD and the SUAD are nonetheless justified as charges equivalent to an internal tax under Article II:2(a).

7.121 **India** understands the term "ordinary customs duty" in consonance with the language of Article II:1(b) and in light of its interpretation in prior decisions of the Appellate Body and the panel in *Chile – Price Band System*. India notes that the panel in *Chile – Price Band System* defined the term "ordinary customs duty" as being a duty "of the usual kind, not singular or exceptional; commonplace, mundane".[174] An ordinary customs duty is usually expressed in *ad valorem* or specific duty terms. However, India maintains, this does not mean that every duty that is imposed at the time of importation on an imported product and is expressed in *ad valorem* terms will necessarily qualify as an ordinary customs duty. The Appellate Body has itself noted that "it is not necessary that each and every duty that is calculated on the basis of the value and/or volume of imports is necessarily an 'ordinary customs duty'".[175] Likewise, the Appellate Body in *Chile-Price Band System* has held that the fact that duties are expressed in *ad valorem* terms does not make them ODCs under the second sentence of Article II:1(b).[176]

7.122 India points out in this regard that there is a separate category of duties described in Article II:2(a) that is imposed at the border and that is based on the value and/or volume of imports and yet, according to the Appellate Body, does not qualify either as "ordinary customs duties" or as

[174] Panel Report, *Chile – Price Band System*, para. 7.51.
[175] Appellate Body Report, *Chile – Price Band System*, paras. 271-272 and 274.
[176] *Ibid*., para. 275.

ODCs.[177] In particular, India notes, the Appellate Body has acknowledged that Article II:2 permits charges such as those that are equivalent to internal taxes, which are imposed at the time of importation, but do not amount to ODCs.[178] India submits, therefore, that the United States must look beyond the mere point at which a duty is levied and the manner in which it is expressed, since neither of them will necessarily mean or indicate that the duty is an ordinary customs duty or ODC.

7.123 India further argues that the United States has effectively blurred the distinction between an ordinary customs duty and ODCs by suggesting that if an import duty is not one, then it must be the other. Such an interpretation is contrary to the text of Article II:1(b) and past interpretation of ordinary customs duties and ODCs as being two distinct charges.[179]

7.124 Regarding the case at hand, India submits that the United States must establish in the affirmative that the AD and the SUAD are ordinary customs duties. In addition, the United States must substantiate in the affirmative that the "structure, design and effect" of the AD and the SUAD make them ordinary customs duties.

(a) General

7.125 The **Panel** notes that Article II:1(b) identifies two categories of charges: (1) ordinary customs duties imposed on the importation of a product and (2) "other duties or charges of any kind" (ODCs) imposed on, or in connection with, the importation of a product. We agree with the United States that the term "other" in the phrase "other duties or charges of any kind" indicates that the second category of charges, which is identified in the second sentence of Article II:1(b), is defined in relation to the first category, which is covered by the first sentence of Article II:1(b). The second category of charges thus encompasses duties and charges other than ordinary customs duties.

7.126 The second category of charges is itself subdivided into two categories. It includes ODCs imposed on the importation of a product. In this respect, the terms "other" and "of any kind" would appear to indicate that this category is intended to constitute a residual category of charges which, like ordinary customs duties, are imposed on the importation of a product. In addition, the second category of charges includes a further type of ODCs, namely, those which are imposed, not on the importation of a product, but in connection with the importation of a product.

7.127 The issue presented in this case is whether the residual category of charges imposed on the importation of a product – i.e., ODCs imposed on the importation of a product – should be considered as comprising any and all duties and charges imposed on the importation of a product, other than ordinary customs duties, or whether that category should be considered instead as encompassing only a subset of all such duties and charges. The United States argues for the former view, India for the latter.

7.128 As an initial matter, we note that, read in isolation, the terms "other" and "of any kind" in the phrase "other duties or charges of any kind" could conceivably support the interpretation argued for by the United States. However, under the customary rules of treaty interpretation, it is necessary to read the terms of a provision in their context. The immediate context of the phrase "other duties or charges of any kind" includes the first sentence of Article II:1(b) which relates to ordinary customs duties. Reading the provisions of the first and second sentence of Article II:1(b) together, we are struck by the parallelism between the two. Both provisions are part of one and the same paragraph of Article II and both stipulate that, for scheduled products (i.e., the products described in Part I of a

[177] *Ibid*., para. 276.
[178] India refers to the Appellate Body Report on *Chile – Price Band System.*
[179] India refers to the Panel Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 7.113.

Member's Schedule of Concessions), the level of the charges identified in each sentence may not exceed a certain level. To us, this parallelism strongly suggests that the two provisions bind the relevant categories of charges against increase because the charges intended to be covered by the two provisions are charges of the same kind.

7.129 Ordinary customs duties are typically applied so as to afford protection to domestic production.[180] This is because, by their nature, they discriminate against imports of the products subject to the duty. Or to put it another way, they inherently disadvantage imports of the subject products *vis-à-vis* domestic products. Indeed, this is precisely why exporting Members seek tariff concessions. And it is in order "to preserve the value of tariff concessions negotiated by a Member with its trading partners"[181] that the provisions of the first sentence of Article II:1(b) make such concessions legally binding.

7.130 The first sentence of Article II:1(b) could not effectively serve its purpose of preserving the value of tariff concessions if Members were not subject to any legal constraint when imposing ODCs that are of the same kind as ordinary customs duties, that is to say, ODCs that inherently discriminate against, or disadvantage, imports of the products subject to bound ordinary customs duties. Of course, the provisions of the second sentence of Article II:1(b) do introduce a relevant constraint, by requiring that ODCs imposed on, or in connection with, the importation of products subject to bound ordinary customs duties may not exceed a defined level. In this way, the second sentence of Article II:1(b) helps prevent tariff concessions from being circumvented.[182]

7.131 The foregoing considerations demonstrate that there is a readily apparent rationale – anti-circumvention – for subjecting "other duties or charges" that are of the same kind as ordinary customs duties to disciplines that parallel those contemplated by the first sentence of Article II:1(b). Accordingly, we need to proceed to analyze whether there would likewise be a rationale for subjecting different kinds of "other duties or charges" to disciplines that parallel those contained in Article II:1(b), first sentence, and more specifically, "other duties or charges" imposed on the importation of a product but of a kind that is different from ordinary customs duties.

7.132 In undertaking this analysis, it is useful once again to look to the context of the phrase "other duties or charges of any kind" contained in Article II:1(b), second sentence. In particular, it is instructive to look to Article II:2, which identifies three distinct categories of charges. The three categories are: (1) charges equivalent to internal taxes imposed in respect of domestic products or articles from which the imported products have been manufactured or produced, (2) anti-dumping or countervailing duties and (3) charges for services rendered.

7.133 The chapeau of Article II:2 makes clear that all three categories of charges (hereafter the "Article II:2 charges") have in common the fact that they are imposed "on the importation of [a] product". In addition, we consider that the three categories of Article II:2 charges are all of a kind different from ordinary customs duties. As already noted, ordinary customs duties by their nature

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[180] We note that Article II:4, first sentence, of the GATT 1994 confirms that Schedules of Concessions provide "protection". We also note that according to the Appellate Body, during the course of the Uruguay Round, negotiators of Article 4 of the *Agreement on Agriculture* envisioned that "ordinary customs duties would, in principle, become the only form of border protection". Appellate Body Report, *Chile – Price Band System*, para. 200.

[181] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

[182] It is worth noting at this point that we are, of course, aware of the provisions of the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994* as well as of the provisions of Article II:1(c) of the GATT 1994, both of which also form part of the context of Article II:1(b). While we have taken these provisions into account in our analysis, we did not find it necessary separately to refer to them in support of our findings. Having said this, we think our interpretation of Article II:1(b) and II:2 is consistent with these provisions.

discriminate against, or disadvantage, imports of the product subject to the duty. This is true even where they are applied consistently with the provisions of Article II:1(b), first sentence. In contrast, the charges contemplated in Article II:2 do not, in our view, inherently discriminate against, or disadvantage, imports of a product which is subject to one or more of these charges.

7.134 Beginning with the charges identified in Article II:2(a), they are charges equivalent to internal taxes imposed in respect of domestic products. Such charges would discriminate against, or disadvantage, imports only if the internal taxes to which they are equivalent were not applied consistently with the provisions of Article III:2 of the GATT 1994. However, as Article II:2(a) itself makes clear, the relevant internal taxes must be imposed consistently with the provisions of Article III:2. This indicates that this category of charges does not inherently discriminate against, or disadvantage, imports.

7.135 In relation to anti-dumping or countervailing duties, referred to in Article II:2(b), it is true that they are applied exclusively to qualifying imports. Nonetheless, it would be incorrect, in our view, to infer from this that they inherently discriminate against, or disadvantage, imports. In Article VI:1 of the GATT 1994 Members "recognize" that dumping is to be "condemned" if it causes or threatens to cause material injury to a domestic industry or materially retards the establishment of a domestic industry, and Article VI:2 therefore permits, in principle, the levying of an anti-dumping duty in order to offset or prevent dumping. Article VI:3 deals with countervailing duties. It defines the term "countervailing duty" as meaning a special duty levied for the purpose of offsetting any bounty or subsidy bestowed upon the manufacture, production or export of a product. It is clear to us from these provisions of Article VI that when a Member levies an anti-dumping or countervailing duty on qualifying imports, and does so consistently with the provisions of Article VI – which it must do, as Article II:2(b) also makes clear – it should not be considered to discriminate against, or disadvantage, such imports. As we understand it, the concept underlying Article VI is that importing Members may levy anti-dumping and countervailing duties in order to protect domestic industries against the consequences of specified unfair trade practices attributable to private foreign exporters or producers, or to exporting Members.[183] Seen in this light, rather than disadvantaging imports vis-à-vis domestic products, anti-dumping and countervailing duties applied consistently with the provisions of Article VI prevent domestic products from suffering a disadvantage vis-à-vis imports.

7.136 Finally, regarding charges for services rendered, dealt with in Article II:2(c), here again these are charges imposed exclusively on imports. However, the services in return for which this type of charge is imposed are services by governmental authorities which are connected with importation, that is to say, services which, by definition, are provided exclusively in relation to imports.[184] A charge imposed for services provided in connection with importation in our view does not discriminate against, or disadvantage, imports, at least not if it is commensurate with the cost of services rendered. Needless to say, the text of Article II:2(c) in fact contemplates charges which are commensurate with the cost of services rendered. Also, Article VIII:1(a) of the GATT 1994 requires that such charges "be limited in amount to the approximate cost of services rendered".[185] We therefore consider that the kind of charges contemplated in Article II:2(c) does not inherently discriminate against, or disadvantage, imports.

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[183] The Appellate Body in *US – Line Pipe* stated that "safeguard measures differ from, for example, anti-dumping duties and countervailing duties to counter subsidies, which are both measures taken in response to unfair trade practices." Appellate Body Report, *US – Line Pipe*, para. 80.

[184] We note that Article VIII of the GATT 1994, which deals with the type of charges at issue in Article II:2(c), is entitled "Fees […] connected with Importation […]". We further note that the GATT panel in *US – Customs User Fee* likewise considered that the services in question were services provided to importers. Panel Report, *US – Customs User Fee*, para. 77.

[185] The GATT panel in *US – Customs User Fee* was of the view that despite the slightly different wording of the "cost of services" limitations in Articles II:2(c) and VIII:1(a), no difference in meaning was intended. Panel Report, *US – Customs User Fee*, para. 75.

7.137 Having determined that Article II:2 charges are of a kind different from ordinary customs duties, we now turn to consider whether there would be a rationale for subjecting such charges to the disciplines contained in Article II:1(b), second sentence, which parallel, and protect, those contained in Article II:1(b), first sentence. In this regard, we recall that the first sentence of Article II:1(b) serves the purpose of preserving the value of tariff concessions. We consider that the first sentence of Article II:1(b) can serve this purpose even as Members impose additional charges of the kind contemplated in Article II:2 on the importation of products subject to a tariff binding. As we have explained, Article II:2 charges differ from ordinary customs duties (and "other duties or charges" that are of the same kind as ordinary customs duties) in that they do not inherently discriminate against, or disadvantage, imports. The imposition of such charges on the importation of products subject to a tariff binding does not inherently lessen the value of the relevant tariff concessions, which, to repeat, are concessions relating to discriminatory charges on imports. Accordingly, in view of the different nature of the Article II:2 charges, we see no obvious rationale for subjecting such charges to the disciplines contained in Article II:1(b), second sentence. It is important to remember in this respect that the Article II:2 charges are each subject to specific disciplines, set out in Articles III:2, VI and VIII:1(a) of the GATT 1994 and designed, *inter alia*, to prevent these charges from being used to discriminate against, or disadvantage, imports.

7.138 Furthermore, we think it implausible to assume that the GATT contracting parties would have accepted to bind charges that do not inherently discriminate against, or disadvantage, imports. To see this, consider a GATT contracting party who on the date of the GATT 1947 imposed on imports of a product subject to a tariff binding a charge equivalent to an internal tax imposed consistently with the provisions of Article III:2 in respect of the like domestic product. Subsequently, that contracting party determined that it was appropriate, e.g., for fiscal policy reasons, to raise the level of internal taxation. Under the second sentence of Article II:1(b), that contracting party could not impose "other duties or charges" on imports that exceeded those imposed on the date of the GATT 1947. If the charge equivalent to the internal tax imposed on the like domestic product were considered to constitute such an "other duty or charge" subject to the disciplines contained in Article II:1(b), second sentence, the contracting party in question would have been presented with a dilemma. It could either have refrained from implementing what it had determined to be sound fiscal policy, thus foregoing the additional tax revenue to be generated by the planned increase in the level of internal taxation. Or the relevant contracting party could have elected to put the like domestic product at a competitive disadvantage by subjecting it to an internal tax higher than the corresponding charge applied to imports of such product.[186] We do not believe that GATT contracting parties in 1947, or in 1994, would have agreed to abide by disciplines that could easily have produced such consequences.

7.139 This view draws further contextual support from the chapeau of Article II:2 which makes clear that nothing in Article II prevents any contracting party from imposing "at any time" on the importation of any product one or more of the Article II:2 charges. The phrase "at any time", which qualifies the verb "impose", is yet another element pointing to a difference between the Article II:2 charges and the "other duties or charges" identified in Article II:1(b), second sentence. To recall, Article II:1(b), second sentence, stipulates that imports of a product are to be exempt from all other duties or charges of any kind imposed on 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". Accordingly, whereas, under the GATT 1947, the "other duties or charges" identified in Article II:1(b), second sentence, could be imposed only if they existed "on the date" of the GATT 1947 (and then only at the levels existing on that date), or pursuant to

[186] It is no answer to say that the relevant contracting party could instead have applied the relevant internal tax also to imported products. Article II:2 indicates that border charges may be used to adjust for internal taxes imposed on domestic products. Moreover, there may exist a domestic legal bar to subjecting imported products to an internal tax as opposed to a border charge.

legislation "in force" on that date, the Article II:2 charges could be imposed "at any time". That is to say, they could be introduced, and by implication increased, also after the date of the GATT 1947.

7.140 The aforementioned difference in the texts of the chapeau of Article II:2 and the second sentence of Article II:1(b) is consistent with our view that while there is a readily apparent rationale for binding duties or charges that are of the same kind as ordinary customs duties (i.e., those covered by Article II:1(b), second sentence), there is no obvious rationale for binding Article II:2 charges (i.e., charges which are not of the same kind as ordinary customs duties) and that, in principle, Members are therefore free to introduce new, or increase existing, charges of this kind "at any time", provided, of course, they do so in accordance with the applicable requirements.

7.141 To sum up, consideration of relevant context, particularly of Article II:1(b), first sentence, and Article II:2, leads us to the view that, notwithstanding the broad scope of the phrase "other duties or charges of any kind" in Article II:1(b), second sentence, the residual category of "other duties or charges" imposed on the importation of a product should not be considered as comprising any and all duties or charges imposed on the importation of a product other than ordinary customs duties. Instead, the relevant context in this case indicates that, consistently with the well-established *ejusdem generis* canon of construction, the category of "other duties or charges" imposed on the importation of a product should be considered as encompassing only such duties or charges as are of the same kind as ordinary customs duties, i.e., charges which inherently discriminate against, or disadvantage, imports. As a result, the category of "other duties or charges" imposed on the importation of a product in our view does not comprise the three categories of charges identified in Article II:2, notwithstanding the fact that the latter charges are also imposed on the importation of a product and may be applied in respect of a product subject to a tariff binding.[187]

7.142 The above interpretation of Article II:1(b), second sentence, is also consistent with the object and purpose of the GATT 1994. Notably, that interpretation does not run counter to the goal, expressed in the preamble to the GATT 1994, of substantially reducing "tariffs" with a view to, e.g., raising standards of living, expanding the production and exchange of goods, etc. Under our interpretation, duties and charges other than ordinary customs duties which are imposed on the importation of products described in Part I of a Member's Schedule of Concessions and which inherently discriminate against, or disadvantage, imports (and hence are like "tariffs") are subject to the strict disciplines contained in Article II:1(b), second sentence, whereas duties and charges which do not inherently discriminate against, or disadvantage, imports (and hence are unlike "tariffs") are not subject to those strict disciplines, but to others.

7.143 Finally, we note that our interpretation of Article II:1(b), second sentence, is also in line with official GATT or WTO reports or decisions that specifically address the scope of the phrase "other

[187] Regarding the broad phrase "other duties or charges of any kind", we note in passing that if the drafters of Article II:2 had intended for the charges identified in Article II:2 to be considered as "other duties or charges of any kind" within the meaning of Article II:1(b), second sentence, it would not only have been possible, but also more natural, to express such an intention in different and clearer terms. For instance, Article II:2 could have been cast in the following terms:

> "Nothing in this Article shall prevent any contracting party from imposing on any product at any time, on or in connection with importation, such other duty or charge (other than an ordinary customs duty) as is:
>
> (a) equivalent to an internal tax imposed in respect of a like domestic product …;
>
> (b) imposed to offset or prevent dumping ... or to offset any bounty or subsidy ... bestowed upon the manufacture, production of export of any product ...;
>
> (c) commensurate with the cost of services rendered."

Wording along such lines would have clearly indicated the intention that the Article II:2 charges are to be considered "other duties or charges of any kind" within the meaning of Article II:1(b), second sentence. Yet, the above wording is very different from the actual wording adopted.

duties or charges". Thus, the 1955 *Report of the Review Session Working Party on "Schedules and Customs Administration"* states in relation to Article II:1(b) and (c) that:[188]

> "It is considered that the language of this sentence [the second sentence of Article II:1(b) and (c)] is all-inclusive for it speaks of '… all other duties or charges of any kind imposed on or in connection with importation', and paragraph 2 [Article II:2], which sets out the special charges which do not fall under paragraph 1, does not refer to charges on transfers."

7.144 Subsequently, in 1980, the GATT Council adopted a proposal by the GATT Director-General concerning introduction of a loose-leaf system for the Schedules of Concessions. The Council decision on *"Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions"* contains the following paragraph discussing the phrase "other duties or charges" as it appears in Article II:1(b), second sentence:[189]

> "A similar question arises with respect to the date of application to each concession for the purpose of Article II:1(b) of the General Agreement. It has been agreed that the date, as of which "other duties or charges" are bound, applicable to any concession in a consolidated schedule should be, for the purpose of Article II, the date of the instrument by which the concession on any particular item was first incorporated into the General Agreement (cf. BISD 7S/115-116). In order to draw full advantage of the loose-leaf system by making it as transparent as possible as to the status of all concessions, *I propose that the instrument by which the concession was first incorporated into a GATT Schedule be indicated in a special column* (column 6 of the proposed format in the annex to document L/4821/Add.1) *of the loose-leaf schedules*. 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".

7.145 According to the United States, the phrase "such 'other duties or charges'" in the above-quoted paragraph appears to be referring to a particular subset of "other duties or charges", namely, those that needed to be bound for the purposes of Article II:1(b), second sentence.[190] We are not persuaded by this interpretation. It is the case that the phrase singled out by the United States refers to "other duties or charges" on importation within the meaning of Article II:1(b), second sentence, but neither the highlighted passage nor the paragraph of which it is part states or implies that there exists a subset of "other duties or charges" on importation, or that Article II:2 identifies duties or charges falling within such a category. In our view, the adjective "such" serves as a simple reminder to the reader that the concept of "other duties or charges" has been introduced previously in the same paragraph.

7.146 More recently, the Appellate Body very briefly touched upon the issue in *Chile – Price Band System*, opining that:[191]

> "Article II:2 of the GATT 1994 sets out examples of measures that do not qualify as either 'ordinary customs duties' or 'other duties or charges'. These measures include

[188] GATT document L/329, adopted on 26 February 1955, BISD 3S/205, 209, para. 7.
[189] GATT document C/107/Rev.1, adopted on 26 March 1980, BISD 27S/22, 24, para. 9 (italics original; underlining added).
[190] US reply to Panel Question No. 68.
[191] Appellate Body Report, *Chile – Price Band System*, para. 276.

> charges equivalent to internal taxes, anti-dumping and countervailing duties, and fees or other charges commensurate with the cost of services rendered."

7.147 This statement by the Appellate Body, offered without elaboration, is interesting in that it touches upon an issue we have not yet addressed separately, namely, whether any of the Article II:2 charges could be considered as "ordinary customs duties" within the meaning of Article II:1(b), first sentence. Neither Party to this dispute has argued that they could. Like, apparently, the Appellate Body, we consider that Article II:2 charges are not "ordinary customs duties" within the meaning of Article II:1(b), first sentence. As is clear from the above considerations, we are of this view because Article II:2 charges are not of the same kind as ordinary customs duties.[192]

7.148 Our view that Article II:2 charges are not subject to the obligations set out in Article II:1(b) has significant implications. In particular, it means that Article II:2 does not set out exceptions to the positive obligations contained in Article II:1(b). Accordingly, the sub-paragraphs of Article II:2 cannot be invoked to justify a breach of the obligations contained in Article II:1(b).[193] In saying this, we are mindful of the fact that the chapeau of Article II:2 opens with the phrase "[n]othing in this Article [Article II] shall prevent ...". That phrase is similar to the phrase "nothing in this Agreement shall be construed to prevent ..." in the chapeau of Article XX of the GATT 1994 which is entitled "General Exceptions" and which jurisprudence confirms sets out exceptions to positive obligations. However, we do not consider that a phrase like "nothing in this Article shall prevent ..." always and necessarily introduces an exception of the kind described above. We think that instead, as in the case of Article II:2, such a phrase may also serve to provide confirmation, clarification or reassurance and carries no necessary implication that a measure caught by a clause introduced by such a phrase would otherwise (i.e., but for that phrase and the clause it introduces) be prevented by a positive obligation set out elsewhere in the relevant article or agreement.

7.149 Another implication flowing from the view that Article II:2 charges are not subject to the obligations set out in Article II:1(b) is that it is incorrect to suggest, as the United States does, that if a given charge is not an ordinary customs duty within the meaning of Article II:1(b), first sentence, it must necessarily be an "other duty or charge" within the meaning of Article II:1(b), second sentence. To be sure, the charge in question could be such an "other duty or charge". Equally, however, it could be one of the Article II:2 charges.

(b) Case-specific

7.150 The Parties to this dispute disagree on whether the measures challenged by the United States, the AD and the SUAD, are caught by the provisions of Article II:1(b) and, consequently, Article II:1(a). The United States argues that the measures at issue are ordinary customs duties or, in the alternative, "other duties or charges" on the importation of certain products. As such, they would be subject to the obligations laid down in Article II:1(b). India disagrees, submitting that the measures in question are charges on the importation of products which are equivalent to internal taxes imposed in respect of like domestic products. As such, the measures at issue would not be subject to the obligations set out in Article II:1(b).

7.151 As noted earlier, the United States considers that an "ordinary customs duty" means a duty that applies to a good at the time of importation – not on a case-by-case basis or in response to a

[192] Being of the same kind as an ordinary customs duty is a necessary, but not a sufficient condition, for a charge to be characterized as an "ordinary customs duty". As we have indicated, charges that are of the same kind as ordinary customs duties may fall within the category of "other duties or charges".

[193] In other words, the sub-paragraphs of Article II:2 do not provide affirmative defences to a claim of violation of Article II:1(b). We note in this respect that the United States, in response to Panel Question No. 44, has indicated that, in its view, Article II:2 does not provide for exceptions that are affirmative defences. India appears to agree. India's comments on the US reply to Panel Question No. 44.

singular or exceptional event or set of circumstances – but as a matter of course on, or in connection with, the good's importation. According to the United States, an ordinary customs duty is typically an *ad valorem* duty, a specific duty, or a combination thereof. It is useful and instructive to consider the concept of "other duties or charges" as it appears in Article II:1(b), second sentence, and the concept of "charges on imports equivalent to internal taxes on like domestic products", as described in Article II:2(a), in the light of the elements relied upon by the United States to define the concept of "ordinary customs duties".

7.152 We begin with the concept of "other duties or charges". In our view, this concept encompasses duties or charges that apply to goods at the time of their importation and are imposed on the goods' importation.[194] It is also clear that "other duties or charges" may be expressed in the form of *ad valorem* duties or charges, specific duties or charges, or a combination thereof.[195] While we agree that the phrase "other duties or charges" could possibly cover duties or charges imposed "on a case-by-case basis or in response to a singular or exceptional event or set of circumstances", we are not persuaded that that phrase cannot cover duties or charges imposed "as a matter of course" on the importation of goods. Indeed, the panel in *Dominican Republic – Import and Sale of Cigarettes* found that a 2 percent *ad valorem* temporary surcharge imposed by the Dominican Republic on the importation of all goods entered for consumption constituted an "other duty or charge" within the meaning of Article II:1(b), second sentence.[196] As we understand it, this surcharge was imposed "as a matter of course" on the importation of subject goods, and not "on a case-by-case basis or in response to a singular or exceptional event or set of circumstances". Thus, the elements of the US definition of "ordinary customs duties" do not allow us to distinguish such duties from "other duties or charges" which are imposed as a matter of course on the importation of a good.

7.153 Next, we compare the elements used in the US definition of "ordinary customs duties" with charges on imports equivalent to internal taxes on like domestic products, as described in Article II:2(a). We note that Article II:2(a) refers to charges, not duties. However, since the term "charge" is defined as "pecuniary burden" or "liability to pay money"[197], the term "charges" in our view includes duties. Further, it is not apparent to us why charges equivalent to internal taxes could not likewise be applied at the time of importation. Moreover, as also pointed out by the United States, the chapeau to Article II:2 contemplates that charges equivalent to internal taxes are imposed "on the importation" of a product. The phrase "on the importation" in Article II:2 parallels the phrase "on their importation" in Article II:1(b), first sentence, and also the phrase "on ... the importation" in Article II:1(b), second sentence. Given that Article II:1(b) and Article II:2 use identical language, and that the liability to pay ordinary customs duties is typically triggered by importation, we see no reason why the liability to pay charges equivalent to internal taxes could not likewise be triggered by importation.[198]

7.154 In relation to the US argument that ordinary customs duties are applied "as a matter of course" on the importation of a product and not on a case-by-case basis or in response to a singular or exceptional event or set of circumstances, it seems to us that charges equivalent to internal taxes could

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[194] We recall that Article II:1(b), second sentence, refers to "other duties or charges" imposed "*on* or in connection with […] *importation*" (emphasis added).

[195] The Appellate Body indicated that most "other duties or charges" within the meaning of Article II:1(b), second sentence, are expressed in *ad valorem* and/or specific terms. Appellate Body Report, *Chile – Price Band System*, para. 275.

[196] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.11, 7.18 and 7.25.

[197] *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 382.

[198] The fact that the internal taxes to which the relevant charges are equivalent link liability to events other than importation does not imply that the liability for the charges on imports cannot, or should not, arise from importation. In fact, in the case of imports, issues of jurisdiction would in most cases preclude linking liability to the same events.

equally be applied "as a matter of course" on the importation of a product. Internal taxes are applied "as a matter of course" on like domestic products and not on a case-by-case basis or in response to a singular or exceptional event or set of circumstances, certainly where those taxes are imposed to generate revenue. Logically, the same would then be true for any charges imposed on imports which are equivalent to such internal taxes. As regards the basis of calculation, in *Chile – Price Band System* the Appellate Body indicated that Article II:2 charges, too, "may be based on the value and/or volume of imports, and yet Article II:2 distinguishes them from 'ordinary customs duties ...'".[199] If, then, Article II:2 charges may take the form of *ad valorem* or specific charges, we think they may also be calculated on the basis of some combination of value and volume of imports.

7.155 Accordingly, based solely on the elements of the US definition of "ordinary customs duties" such duties cannot be distinguished from charges which are imposed as a matter of course on imports and which are equivalent to internal taxes on like domestic products. We note, as an additional matter, the term "ordinary" in the phrase "ordinary customs duties". It is defined as meaning "occurring in regular custom or practice; normal, customary, usual" or "of the usual kind, not singular or exceptional".[200] We do not think that the term "ordinary" is intended to define the duties caught by the first sentence of Article II:1(b) based on the form they take. At any rate, it is not apparent to us why an Article II:2(a) charge could not take the same form as a "normal" or "customary" customs duty, or a customs duty "of the usual kind".[201]

7.156 As the above comparison shows, there can be charges equivalent to internal taxes within the meaning of Article II:2(a), and also "other duties or charges", which meet the elements of the definition of "ordinary customs duties" put forward by the United States.[202] It follows that a demonstration that a charge satisfies these elements is not sufficient, by itself, to establish that the relevant charge is an ordinary customs duty (or an "other duty or charge" imposed on the importation of a good) under Article II:1(b) as opposed to a charge equivalent to an internal tax under Article II:2(a). For such a charge, it is therefore necessary to establish, in addition, that it is of the same kind as, or in the nature of, an ordinary customs duty (or an "other duty or charge" imposed on the importation of a good). Consistently with our analysis above, we consider that a charge which meets the elements of the US definition is in the nature of an ordinary customs duty (or an "other duty or charge" imposed on the importation of a good) if it inherently discriminates against, or disadvantages, imports.

7.157 Where the aforementioned additional demonstration has been made, the relevant charge could be either an ordinary customs duty or an "other duty or charge" imposed on the importation of a good. A further inquiry would then be called for to determine whether the charge in question qualifies as an ordinary customs duty under the first sentence of Article II:1(b) or as an "other duty or charge" under the second sentence of Article II:1(b). It is in this context that the US argument that a particular product can be subject to more than one ordinary customs duty would be relevant. As our assessment below will show, to dispose of the claims before us, we need not, and hence do not, examine the merits of this argument.

7.158 The United States has not sought to develop and apply a general test for determining whether a charge which satisfies the elements of its definition of "ordinary customs duties" inherently

[199] Appellate Body Report, *Chile – Price Band System*, para. 276.

[200] *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2017. The French and Spanish versions of Article II:1(b), first sentence, refer to "droits de douane proprement dits" and "derechos de aduana propiamente dichos", respectively.

[201] Likewise, we do not see why an Article II:2(a) charge could not take the same form as a customs duty "properly so called".

[202] Indeed, this may be one reason why Article II:2 was included in Article II (which deals with Schedules of Concessions), to make clear that some charges, even though they may look like ordinary customs duties, or "other duties or charges", are charges of a different kind and, as such, subject to different disciplines.

discriminates against, or disadvantages, imports. In itself, this does not pose a problem. The United States can, in our view, seek to establish by reference to the provisions of Article II:2 that a charge on the importation of a good is in the nature of an ordinary customs duty (or an "other duty or charge" imposed on the importation of a good). As we have explained, Article II:2 lists three specific categories of charges on the importation of a good that do not inherently discriminate against, or disadvantage, imports.

7.159 In the case before us, the debate between the Parties has revolved almost exclusively around the issue of whether the measures at issue fall within the scope of Article II:2(a) (dealing with charges equivalent to internal taxes). In this situation, if the United States as the complaining party cannot establish that a charge which meets the elements of its definition of "ordinary customs duties" falls outside the scope of Article II:2(a), it cannot successfully establish that the charge is in the nature of an ordinary customs duty (or an "other duty or charge" imposed on the importation of a good).[203] Conversely, if the United States can establish that such a charge falls outside the scope of Article II:2(a), II:2(b) and II:2(c), bearing in mind the Appellate Body report on *Chile – Price Band System*, the issue could arise whether Article II:2 exhaustively defines the universe of charges that do not inherently discriminate against, or disadvantage, imports or whether it identifies only examples of such charges.[204] In the latter case, a showing that a charge falls outside the scope of Article II:2 might not be sufficient, *per se*, to bring that charge within the scope of Article II:1. The United States might also need to raise a presumption that the charge in question is not some other charge (not identified in Article II:2) that does not inherently discriminate against, or disadvantage, imports. In view of our findings below, we need not attempt to resolve these issues. Accordingly, we refrain from addressing these issues further.

7.160 Below we will examine the measures at issue in the light of the provisions of Article II:2(a). The United States argues that India as the Party asserting that the AD on alcoholic liquor and the SUAD are justified under Article II:2(a) bears the burden of substantiating that assertion. We consider 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).[205] In a case where the United States has not sought to use a general test to demonstrate that a charge satisfying the elements of its definition of "ordinary customs duties" inherently discriminates against, or disadvantages, imports, it would be improper, in our view, to relieve the United States of the burden of making a prima facie case that such a charge falls outside the scope of Article II:2(a).[206] To reiterate, a charge can only be of the kind that inherently discriminates against, or disadvantages, imports if it falls outside the scope of Article II:2(a).[207]

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[203] To recall, the situation we are referring to is one where the United States has not otherwise successfully demonstrated, using an appropriate general test, that a charge which meets the elements of the US definition of "ordinary customs duties" discriminates against, or disadvantages, imports. Also, we are assuming that the issue of whether the charge being challenged falls within the scope of Article II:2(a) is objectively presented, which is the situation of our case.

[204] We recall, in this regard, that the Appellate Body in *Chile – Price Band System* observed that Article II:2 sets out "examples" of measures which do not qualify as either ordinary customs duties or other duties or charges within the meaning of Article II:1(b). Appellate Body Report, *Chile – Price Band System*, para. 276.

[205] Having said this, it is clear that both the United States and India need to prove their own assertions of fact.

[206] We recall our view that a demonstration that a charge satisfies the elements of the US definition of "ordinary customs duties" would not be sufficient to establish that the charge falls outside the scope of Article II:2(a).

[207] We are not taking a position here on whether a showing that a charge falls outside the scope of Article II:2(a) would be sufficient to establish that it falls within the scope of Article II:1(b). As we have said,

7.161 The mere fact that the responding party, due to greater familiarity with, and readier access to, its domestic laws and policies, might find it easier than the complaining party to supply information to a panel that would aid a determination of whether a particular border charge is equivalent to an internal tax and falls within the scope of Article II:2(a) is not a sufficient reason for shifting the burden of proof onto the responding party.[208] At any rate, any difficulties the complaining party might have encountered in collecting relevant information could be taken into account, as appropriate, in determining how much and what kind of evidence is required for the complaining party to sustain its burden of establishing a prima facie case that the border charge it is challenging falls outside the scope of Article II:2(a).[209] Thus, we consider that a complaining party could seek to make a prima facie case, e.g., by presenting a duly substantiated explanation of where it looked for information on relevant internal taxes, what means of research it used[210], what it found and why what it found, or did not find, warrants the inference that the challenged border charge falls outside the scope of Article II:2(a). We should note in this connection that in the present case there is no indication that relevant information was not accessible to the United States. As a matter of fact, rebuttal evidence submitted by the United States suggests that it was able to collect relevant information.[211]

7.162 We note that the United States in response to a question from the Panel referred to the GATT panel report on *US – Customs User Fee*, saying that it appeared to require the responding party to demonstrate the applicability of Article II:2(c) of the GATT 1994.[212] That panel observed that its capacity to judge whether particular government operations of the responding party were "services" within the meaning of Article II:2(c) was limited by the quality of the information presented to it. Apparently, this was the reason why the panel reached the view that "the government imposing the fee should have the initial burden of justifying any government activity being charged for".[213]

7.163 We observe that the GATT panel in *US – Customs User Fee* addressed the provisions of Article II:2(c) and did not purport to make a general statement about all sub-paragraphs of Article II:2. In view of our findings below, we have no need in this case to examine the measures at issue in the light of the provisions of Article II:2(c). As a result, we do not comment upon the approach followed by the GATT panel in *US – Customs User Fee*. Moreover, as we have explained, we consider that, in the particular circumstances of the present case, we would not be justified in requiring India initially to make a prima facie case that the border charges at issue fall within the scope of Article II:2(a).

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in this case it can be left open what, if anything, more a complaining party would need to establish once it has demonstrated that the relevant charge falls outside the scope of Article II:2(a).

[208] It is worth noting in this connection that according to the Appellate Body there is "nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case". Appellate Body Report, *EC – Sardines*, para. 281.

[209] The Appellate Body stated that "how much and precisely what kind of evidence will be required to establish such a presumption [that a claim of violation has merit] will necessarily vary from measure to measure, provision to provision, and case to case". Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[210] In this regard, in the case before us, the United States could, for instance, have availed itself of the assistance of Indian tax lawyers, or of international or Indian accounting firms with a tax practice.

[211] Exhibits US-23, -27, -28 and -29 contain the value-added tax legislation of four Indian States.

[212] US reply to Panel Question No. 44.

[213] Panel Report, *US – Customs User Fee*, para. 98. The Appellate Body in *US – Wool Shirts and Blouses* referred to this paragraph in a footnote, citing it as an example of a case where the responding party invoked certain provisions as a defence and the panel explicitly required the responding party to demonstrate the applicability of the provision it was asserting. Appellate Body Report, *US – Wool Shirts and Blouses*, footnote 23.

7.164 We note, in addition, that the United States appears to accept that in at least some situations the complaining party would have the burden of establishing that the border charge being challenged does not meet the criteria of a particular paragraph of Article II:2. Specifically, the United States argues that in cases where the complaining party asserts that the measure at issue is an "other duty or charge" imposed on or in connection with importation in breach of Article II:1(b), second sentence, and the responding party contends that the measure meets the criteria of Article II:2(a), (b) or (c), then the complaining party must also establish that the measure in dispute does not meet the criteria of the particular paragraph of Article II:2 identified by the responding party.[214] We recall that in our case the United States asserts, in the alternative, that the Indian border charges it is challenging are "other duties or charges" imposed on importation and breach Article II:1(b), second sentence. Moreover, although we do not consider that in the circumstances of this case India is required initially to identify a particular paragraph of Article II:2 and contend that the challenged border charges meet the criteria of that paragraph before the United States is to establish that the charges in question do not meet these criteria, we note that India in this case has in any event done so as early as its first written submission.

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

7.165 To resolve the issues presented in this case, the **Panel** needs to go beyond the analysis already made of the provisions of Article II:2 of the GATT 1994. In particular, the Panel needs to undertake a detailed examination of the provisions of Article II:2(a). To recall, Article II:2(a) states:[215]

> Nothing in this Article shall prevent any contracting party 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.

7.166 The Panel begins its examination of the provisions of Article II:2(a) with some general observations regarding its structure and elements.

(a) General

7.167 The first observation to be made is that the text of Article II:2(a), read together with the chapeau of Article II:2, refers to two distinct charges: (1) an "external", or border, charge imposed on the importation of a (foreign-made) product and (2) an internal tax, or charge[216], imposed in respect of the like domestic product.[217] While there is nothing unusual about an "external" charge being imposed on a product to be imported, it is noteworthy that, by its terms, Article II:2(a) appears to

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[214] US reply to Panel Question No. 44.

[215] *Ad* Note omitted.

[216] It is clear from the text of Article III:2 of the GATT 1994 that internal taxes are internal charges. Article III:2 provides (note omitted):

> The products of the territory of any contracting party imported into the territory of any other contracting party 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. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

[217] For the purposes of this dispute, the special case of internal taxes imposed on "articles" from which the imported product has been manufactured or produced in whole or in part can be left aside as none of the Parties has presented arguments based on the clause referring to "articles".

contemplate an internal charge imposed in respect of the like domestic product only.[218] Thus, analysis of the basic structure and elements of Article II:2(a) suggests that it refers to a situation in which a product to be imported is subject to an "external", or border, charge whereas the like domestic product is subject to an internal charge.

7.168 Equally significant is the fact that Article II:2(a) envisages the existence of a relationship between the border charge and the internal charge that goes beyond them being imposed in respect of a like product. More particularly, Article II:2(a) deals with situations where a border charge on a product to be imported is "equivalent" to an internal charge on the like domestic product. Accordingly, for a border charge to fall within the scope of Article II:2(a), the relationship between it and the internal charge must be one of "equivalence".

7.169 Regarding the internal tax, or charge, imposed in respect of the like domestic product, it is pertinent to add, taking account of the particular facts of this case, that the text of Article II:2(a) does not indicate that the internal tax needs to be imposed, in the case of a Member with a federal structure, by the central government of that Member. Certainly, Article II:2(a) implies a requirement that the internal tax be an internal tax attributable to the Member imposing an equivalent border charge. But, in our view, this does not, and should not, preclude the possibility of the internal tax referred to in Article II:2(a) being imposed by, and at the level of, sub-federal governments.[219]

7.170 A further issue, linked to the previous one, arises from the fact that commonly, in Members with a federal structure, the power of imposing border charges on the importation of products is reserved to the central government. This leads to the possibility of the central government of a Member imposing a border charge and claiming that it is equivalent to internal taxes imposed by, and at the level of, sub-federal governments of that Member. We see nothing in the text of Article II:2(a) to suggest an intention to rule out, *a priori*, the possibility of "equivalence" existing as between measures emanating from different levels of government. In other words, we consider that the terms of Article II:2(a) are sufficiently broad to cover federal border charges of a Member that are equivalent to sub-federal internal taxes of that Member.[220]

7.171 Another element to which we wish to call attention already at this stage is the reference in Article II:2(a) to the provisions of Article III:2. The phrase "consistently with the provisions of paragraph 2 of Article III" is interposed between the term "imposed" and the phrase "in respect of like domestic products". The term "imposed" in Article II:2(a) relates to the internal tax and not the border charge. Hence, the text contemplates a situation in which the internal tax is imposed consistently with Article III:2. In other words, the text of Article II:2(a) appears to adopt an "outside-in" perspective, in the sense that it seems to take the border charge as a given and the internal tax as something to be adjusted to it. This perspective is understandable in a provision that is part of Article II, entitled "Schedules of Concessions". Presumably, the question Article II:2(a) sought to answer was under what circumstances contracting parties who at the time were maintaining border charges of a kind different from ordinary customs duties could continue to maintain them separately from, and in addition to, bound ordinary customs duties or "other duties or charges" within the meaning of Article II:1(b). In any event, the key point to be retained in relation to the reference to Article III:2 is that the text of Article II:2(a), on its face, draws a distinction between the concepts of

[218] The European Communities suggests that Article II:2(a) could also cover a border charge equivalent to an internal tax imposed in respect of the like domestic and imported product in cases where the domestic product is subject to a higher tax rate than the imported product in respect of which the same internal tax is imposed. EC third party written submission, para. 66. In the present case, there is no need to decide whether the situation described by the European Communities would in fact be one that would be covered by the provisions of Article II:2(a).

[219] We note that neither Party to this dispute has suggested otherwise.

[220] Here again, we note that neither Party to this dispute has suggested otherwise.

"equivalence" and "consistency with Article III:2". We understand that neither Party disputes that the concepts of "equivalence" and "consistency with Article III:2" are separate and distinct concepts.

7.172 With the foregoing remarks in mind, we now turn to examine in more detail the two concepts of "equivalence" and "consistency with Article III:2" as they appear in Article II:2.

(b) "equivalent"

7.173 The **United States** argues that in Article II:2(a) the term "equivalent" is used to describe a relationship between a "charge" and "internal tax". The ordinary meaning of the word "equivalent" is "equal in force, amount, or value"[221]; "corresponding or virtually identical especially in effect or function"[222]; "virtually the same thing; having the same effect"[223]. Taken in the context of Article II:2(a), an "equivalent" charge thus appears to mean a charge imposed on importation that corresponds to and is equal in force, amount or value, or virtually identical in effect, function or amount, to an internal tax imposed on the like domestic product. The United States considers that examination of whether two measures are "equivalent" requires an examination of the structure, design and effect of the measures.

7.174 In the United States' view, while the amount of the respective liability is certainly a factor in whether the charge on the imported product and the internal tax on the like domestic product are "equivalent", the ordinary meaning of the word "equivalent" does not appear to prejudge the aspects of two measures that might be examined to determine whether they correspond or are virtually identical. Also, were the examination focused solely on the amount of the charge in relation to the internal tax this would appear to make the requirement that the charge not be in excess of internal taxes largely redundant.

7.175 The United States further argues that the term "charge" in Article II:2(a) is described not only by the term "equivalent" but also by the phrase "imposed consistently with the provisions of Article III:2". The United States submits that whether a charge is "equivalent" to an internal tax and whether a charge is imposed consistently with Article III:2 are separate inquiries. According to the United States, the element of "equivalent to an internal tax" appears to focus on the qualitative aspects of measure, whereas the other element referred to in Article II:2(a) – "consistently with the provisions of Article III:2" – appears to focus on its quantitative aspects. With regard to the latter element, the question is not whether the charges are in effect equal or virtually identical but whether the charges subject imported products to any taxation in excess of that imposed on like domestic products.

7.176 **India** argues that "equivalence" as referred to in Article II:2(a) has to be limited to ensuring that the net fiscal burden imposed by the border charge on the imported product does not exceed that imposed by the internal tax on the like domestic product. The intent and purpose of Article II:2(a) is to provide WTO Members with a way in which they can offset internal taxes borne by domestic products and ensure an equal fiscal burden on imported and domestic like products. India accordingly understands the term "equivalent" as used in Article II:2(a) to mean that the taxes charged at the border in lieu of internal charges do not impose a greater net fiscal burden on imported products than on like domestic products.

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[221] *Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com/-dictionary/equivalent>.

[222] *Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com/-dictionary/equivalent>.

[223] *The New Shorter Oxford English Dictionary*, L. Brown (ed) (Clarendon Press), 1993, Vol. 1, p. 843.

7.177 More specifically, India argues that Webster's Dictionary defines the word "equivalent" as being "equal in value, force, meaning or the like".[224] Accordingly, in India's view, Article II:2(a) means that the charge imposed on imported products must be equal in force to the internal tax. Therefore, the requirement of "equivalence" must be said to be met if the charges imposed at the border overall impose an equal fiscal burden on imported products as the internal taxes applied to like domestic products.

7.178 India further argues that term "equivalent" must be contrasted with the phrase "in excess of" used in Article III:2 which requires that taxes applied internally to imported products must not be "in excess of" internal taxes applied to like domestic products. India points out that the term "in excess of" has been restrictively interpreted by the Appellate Body. Even the smallest amount of excess is impermissible.[225] Thus, India submits, an internal tax imposed on imported products under Article III:2 would need to satisfy a stricter standard than a charge imposed on imported products at the border under Article II:2(a). The equivalence required under Article II:2(a) is limited to requiring an equality of net fiscal burden on imported and like domestic products. Consequently, a country like India, with its federal structure and different rates of state-level internal taxes, need only ensure that the net fiscal burden of any border charge imposed on imported products is no greater than the net fiscal burden of any internal taxes imposed on like domestic products.

7.179 The **Panel** notes that dictionaries identify more than one possible ordinary meaning of the term "equivalent". Among the possible meanings are: "[e]qual in power, rank, authority, or excellence", "[e]qual in value, significance, or meaning", "[t]hat is virtually the same thing; having the same effect" and "[h]aving the same relative position or function; corresponding".[226] It emerges from these definitions that "equivalence" and "equality" are not one and the same concept. The adjective "equivalent" denotes something that is equal, or virtually equal, in one respect, but not others.[227] Thus, "equivalence" implies a lesser degree of commonality or correspondence than "equality".

7.180 This view fits well with the provisions of Article II:2(a) which contrast an "external", or border, charge with an internal charge. In the situation contemplated in Article II:2(a), the product to be imported and the like domestic product are not subject to "equal", or the same, charges, in that the product to be imported is subject to an "external", or border, charge upon importation whereas the like domestic product is subject to an internal charge, e.g. upon manufacture (ex factory level).[228] At the same time, as Article II:2(a) makes clear, this important difference does not preclude the charge levied at the border being considered "equivalent" to the charge levied internally.

7.181 The issue to which we must turn, then, is in what respect the border charge to which Article II:2(a) refers needs to be equal, or virtually equal, to an internal charge for it to fall within the scope of that provision. In this regard, we can quickly eliminate the dictionary definitions "[e]qual in power, rank, authority, or excellence" and "[e]qual in value, significance, or meaning". The concepts of power, rank, authority and excellence do not fit with the concept of charges imposed on

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[224] *Merriam-Webster Online Dictionary* available at <http://www.merriam-webster.com/-dictionary/equivalent>.

[225] India refers to the Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 24.

[226] *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 851.

[227] Two objects x and y are equivalent if they are equal in respect of one particular trait, property, attribute, feature, etc. See *Meyers kleines Lexikon Philosophie*, ed. Redaktion für Philosophie des Bibliographischen Instituts (Mannheim/Wien/Zürich: Bibliographisches Institut, 1987), p. 46 (under "general").

[228] In this respect, we agree with the United States that the situation contemplated in Article II:2(a) is different from that contemplated in the Note *Ad* Article III of the GATT 1994 where an internal tax or charge which applies to both the imported product and the like domestic product is collected or enforced in the case of the imported product at the time or point of importation. As the Note makes clear, the tax or charge collected at the time or point of importation is to be regarded as an internal tax or charge.

products.[229] Regarding the definition "equal in significance", we can see how it may be of interest to determine whether winning the football world cup is equal in significance to winning a gold medal in the athletics world championships, but we fail to see a plausible rationale for determining whether a charge imposed at the border in respect of an imported product is equal in significance to an internal charge imposed in respect of a like domestic product. Similarly, while it makes sense to say that in American English the word "faucet" is "equal in meaning" to the word "tap" in British English, it is not clear to us how charges imposed on products could be usefully compared in terms of their meaning. Finally, we note that in an exchange situation two sheep might be considered "equal in value" to a dozen hens, or x USD may be "equal in value" to y Euros. Apart from the fact that charges are not normally considered to have a value, we note that Article II:2(a) does not seem to be concerned with an exchange situation.

7.182 Another dictionary definition we have noted is "having the same effect" or, as the United States submits, "equal in amount". To assess the appropriateness of these definitions, it is necessary to look to the context of the term "equivalent" in Article II:2(a). Of particular relevance in this regard is the phrase "consistently with the provisions of paragraph 2 of Article III". We have already underlined the importance of distinguishing the concept of "equivalence" from that of "consistency with Article III:2". As also pointed out by the United States, these concepts concern, and call for, separate inquiries.

7.183 Regarding the inquiry into whether the internal tax (to which a border charge is equivalent) is imposed consistently with Article III:2, it is useful to recall that Article II:2(a) refers to "like" domestic products. Therefore, Article II:2(a) implicitly references the provisions of Article III:2, first sentence.[230] In this respect, we note the finding by the panel in *Argentina – Hides and Leather* that Article III:2, first sentence, is concerned with the "economic impact [of taxes or charges] on the competitive opportunities of imported and like domestic products" and that, therefore, in an inquiry under Article III:2, first sentence, "what must be compared are the tax burdens imposed on the taxed products".[231] The same panel further found that Article III:2, first sentence, does not permit any tax burden differentials disfavouring imported products.[232]

7.184 In the situation contemplated in Article II:2(a), tax burden differentials disadvantaging imports could result, for instance, from the border charge being applied at higher rates than the internal tax, or from it not being creditable against internal charges in case of internal re-sale of the imported product when such credits are available for equivalent transactions involving the like domestic product. In the light of this, a situation where a border charge does not "have the same effect" (in terms of its impact on competitive conditions as between the imported product and the like domestic product) as an internal tax, or is not "equal in amount" to an internal tax, would be one where the internal tax is not imposed consistently with Article III:2.

7.185 The foregoing demonstrates that if we were to construe "equivalent" as meaning "having the same effect", or "equal in amount", we would fail to give separate meaning to the concepts of "equivalence" and "consistency with Article III:2", contrary to the requirement of effective treaty interpretation.[233] Indeed, if we were to adopt these meanings, it would be difficult to see any

[229] Regarding the dictionary meaning "equal in force", referred to by the United States, it is not apparent to us how this could be considered a relevant meaning. While a tornado might, perhaps, be equal in force to some types of explosions, we fail to see what the United States means by a border charge that is equal in force to an internal charge.

[230] The present case does not present the issue whether Article II:2(a) might, in addition, imply a reference to the provisions of Article III:2, second sentence. Both Parties have argued in terms of "like" products only.

[231] Panel Report, *Argentina – Hides and Leather*, para. 11.182.

[232] *Ibid*., para. 11.243 (referring to the Appellate Body Report in *Japan – Alcoholic Beverages II*).

[233] See Appellate Body Report, *US – Gasoline*, p. 23.

difference between the two concepts. Accordingly, reading the term "equivalent" in its context, we think the mere fact that a comparison of a border charge on the importation of a product with an internal tax imposed on the like domestic product reveals a tax burden differential to the detriment of imported products would not warrant the conclusion that the border charge is not "equivalent" to the internal tax.[234]

7.186 We are thus left with the dictionary definition "[h]aving the same relative position or function; corresponding". We consider that this definition, notably "having the same function" and "corresponding", fits well with the specific context of Article II:2(a). In relation to the definition "corresponding", consistent with the difference between "equivalence" and "equality", we would nonetheless add that this should not be taken as meaning "corresponding absolutely or completely", but "corresponding in a relevant respect", such as function.

7.187 Both meanings – "having the same function" and "corresponding" – comport well with what we have said above about the importance of distinguishing the concept of "equivalence" from that of "consistency with Article III:2". Where a comparison of a border charge on the importation of a product with an internal tax imposed on the like domestic product shows a tax burden differential to the detriment of imported products, this does not necessarily imply that the border charge does not have the same function, or does not correspond, to the internal tax. Analysis may indicate that the border charge has the same function as, or corresponds to, the internal tax and hence is "equivalent" to the internal tax. Or analysis may show that the border charge is, e.g., an "other duty or charge" and so does not have the same function as, or does not correspond to, the internal tax. As a result, construing "equivalent" as meaning "having the same function", or "corresponding", preserves the separate meaning we think should be given to the concepts of "equivalence" and "consistency with Article III:2". Moreover, we consider that the meanings "having the same function" and "corresponding" are in accord with the explanation of the term "equivalent" given by the Legal Drafting Committee during the Geneva session of the Preparatory Committee and referred to by the Parties. The Legal Drafting Committee stated that the term "equivalent" meant that:[235]

> "[F]or 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".

7.188 Plainly, a value-based border charge on *perfume* cannot be said to "have the same function" as, or to "correspond" to, a value-based internal tax on domestic *alcohol*. On the other hand, a border charge imposed in respect of the alcohol contained in perfume could possibly be said to "have the same function" as, or to "correspond" to, an internal tax on domestic alcohol.

7.189 Having ascertained the appropriate ordinary meaning of the term "equivalent", we think it is useful, in a second step, to attempt to elucidate when a border charge imposed on the importation of a product can be said to "have the same function" as an internal tax imposed in respect of the like

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[234] Logically, then, the same conclusion would apply in cases where there is a tax burden differential to the detriment of like domestic products. A similar conclusion was reached by the panel in *Argentina – Hides and Leather*, although that case was an Article III:2 case. Nonetheless, similarly to our case, the panel in that case had to determine whether two Argentinean tax measures – RG 3543, which was applicable to import transactions, and RG 2784, which was applicable to like domestic (and internally re-sold imported) products – were "equivalent in nature" (Panel Report, *Argentina – Hides and Leather*, para. 11.154). The panel observed in this regard that "[t]he mere fact that some equivalent transactions are not subject to RG 2784 or are subject to different rates does not, in our view, detract from the comparability of RG 3543 and RG 2784. In fact, such differences may constitute infringements of Article III:2, first sentence". Panel Report, *Argentina – Hides and Leather*, note 450.

[235] Doc. EPCT/TAC/PV/26, p. 21.

domestic product.[236] We begin this task by noting that Article II:2(a) relates a border charge imposed on the importation of a product to an internal tax imposed on the like domestic product. To us, this indicates that Article II:2(a) is concerned with the relative function of the border charge and internal tax, respectively. In other words, we think that the concept of "equivalence" in Article II:2(a) implies that the relevant internal tax fulfils a certain function in respect of the domestic product whereas the border charge fulfils the same (relative) function in respect of imports of the like product. Additionally, since Article II:2(a) relates a border charge to an internal tax, it can be inferred that it needs to be assessed whether the two charges fulfil the same relative function within the customs duty and tax system of the Member concerned. It follows that, in effect, an "equivalence" determination under Article II:2(a) aims at establishing whether despite constituting separate charges, the border charge on the importation of a product and the internal tax on the like domestic product, when viewed together, can be considered to form a distinct whole within the relevant Member's customs duty and tax system.

7.190 We consider that, for the purposes of an examination under Article II:2(a), 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. It is not their function to impose a charge on a particular product *qua* domestic product (in the case of the internal tax) or *qua* foreign product being imported (in the case of the border charge). To take the example of a border charge on wine, if it is "equivalent" to an internal tax, its function is, and must be, to impose a charge on the importation of wine, not because it is foreign-made wine, but because it is a product on which a charge is to be imposed regardless of whether it is of foreign or domestic origin, with the consequence that it needs to be imposed on wine also if and when it is being imported.

7.191 For further illustration, it is useful to consider the case of ordinary customs duties or "other duties or charges". We have already explained that these are charges which by nature and design discriminate against, or disadvantage, imports. Consistently with this, we consider that the basic function fulfilled by this kind of charges is to impose a charge on a particular product *qua* foreign product being imported. Thus, to stick to the example of wine, an ordinary customs duty, or an "other duty or charge", is imposed on the importation of wine because it is foreign-made wine that is being imported. Where an ordinary customs duty or "other duty or charge" is imposed, the foreign origin of the subject product is not merely an incidental characteristic of that product but the very reason for the imposition of such a duty.

7.192 Yet another situation that it is instructive to consider is one where a border charge on the importation of a product is levied at a higher rate than an internal tax imposed in respect of the like domestic product.[237] The question presented by this type of situation is whether the mere existence of a rate differential disfavouring the product being imported would preclude the border charge from being regarded as "having the same function" as the internal tax. As mentioned previously, our view is that the existence of such a rate differential would not preclude an affirmative "equivalence" determination that would otherwise be warranted.

7.193 We think it is not incongruous to say that a border charge can have the same function as, and hence be equivalent to, an internal tax, but at the same time provide for less favourable treatment of the subject product than the internal tax. On the contrary, allowing for this possibility is consistent with the distinction drawn in Article II:2(a) between the concepts of "equivalence" and "consistency with Article III:2". That distinction suggests that it must be possible for a border charge to be

[236] Hereafter we omit separate reference to the meaning of "corresponding". This is because we think that in the particular context of Article II:2(a) the "correspondence" required as between a border charge and an internal tax is, essentially, "correspondence in function".

[237] We are using the case of a rate differential as one example of a case involving a tax burden differential.

equivalent to an internal tax and for that internal tax to be imposed inconsistently with Article III:2.[238] Accordingly, the fact that a border charge on the importation of a product is levied at a higher rate than an internal tax imposed on the like domestic product in our view does not demonstrate that the two charges do not have the same function, *viz*., to impose a charge on the relevant product *qua* product. Instead, the existence of such a rate differential may merely demonstrate that each charge fulfils that function (i.e., that of imposing a charge on the relevant product *qua* product) in a different manner, with the consequence that the product being imported is treated less favourably than the like domestic product.[239]

7.194 We see nothing in our interpretation of the term "equivalent" that would conflict with the object and purpose of the GATT 1994 of substantially reducing "tariffs" with a view to, e.g., raising standards of living, expanding the production and exchange of goods, etc.[240] In particular, we do not share the United States' concern that if we were not to give the term "equivalent" the interpretation it appears to argue for – equal in amount or value, or virtually identical in effect or amount – we would undermine the value of tariff concessions negotiated by exporting Members. This argument might have some force if an affirmative "equivalence" determination meant that the importing Member would be essentially free to impose, in addition to any WTO-consistent ordinary customs duty and/or ODC, a border charge on the importation of a product at a level, or otherwise in a manner, that would disadvantage it *vis-à-vis* the like domestic product. This is not the case, however. As we will explain further below, if a border charge is determined to be equivalent to an internal tax, it is caught by the provisions of Article III:2, first sentence.[241] Article III:2, first sentence, sets out a strict national treatment obligation. Indeed, as the United States itself has reminded us, under Article III:2, first sentence, even a *de minimis* tax burden differential disfavouring the product being imported would put the importing Member in breach of Article III:2.[242] Thus, we do not believe the interpretation which we consider should be given to the term "equivalent" in Article II:2(a) diminishes the value of tariff concessions.

7.195 As to how it is to be determined whether a particular border charge on the importation of a product is being imposed to levy a charge on that product *qua* product or *qua* foreign product being imported, we consider this type of determination must be made having regard to the specific facts and circumstances of each case, notably including the customs duty and tax system of the relevant Member as in existence at the time of review. Indeed, by nature, the outcome of an Article II:2(a) inquiry is highly context-dependent. One and the same border charge may be determined to have the same function as an internal tax in one context but to have a different function in another context. To provide an example, a border charge which at present has the same function as an internal tax imposed on the like domestic product may subsequently cease to fulfil the same function if the internal tax is repealed or imposed also in respect of the imported product.

7.196 Finally, we need to consider the consequences of a negative "equivalence" determination. In this regard, it is useful to think first about what are the consequences of an affirmative "equivalence" determination. As we have explained above, a border charge which is imposed on the importation of a product and which is equivalent to an internal tax imposed in respect of the like domestic product is

[238] This is also consistent with the point we have made earlier that Article II:2(a) charges are charges that do not inherently discriminate against, or disadvantage, imports, but that particular Article II:2(a) charges may discriminate against, or disadvantage, imports (and, hence, fall foul of the provisions of Article III:2).

[239] Of course, it is possible that a border charge, such as an ordinary customs duty, is applied to the product being imported at a higher rate than an internal tax imposed in respect of the like domestic product without the two charges having the same function. In such a case the existence of a rate differential would obviously not demonstrate that each charge fulfils the same function in a different manner.

[240] See the preamble to the GATT 1994.

[241] We reiterate that the case at hand does not present the issue whether Article II:2(a) might, in addition, imply a reference to the provisions of Article III:2, second sentence.

[242] See Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 25.

one which has the same function as the internal tax, but in other respects differs from the internal tax. As further addressed in the next sub-section, the reference in Article II:2(a) to "consistency with Article III:2" makes clear that, in the view of the drafters of Article II:2(a), a border charge on the importation of a product which fulfils the same function as an internal tax on the like domestic product should be, and is, subject to the provisions of Article III:2. Since such a border charge is caught by the provisions of Article III:2, there is, to that extent, a clear indication that it is a border charge of the kind which does not inherently discriminate against, or disadvantage, imports. In view of this indication, it seems sensible not to subject this kind of border charge to the obligations contained in Article II:1.

7.197 In contrast, a border charge on the importation of a product which has been determined not to be equivalent to an internal tax imposed in respect of the like domestic product does not have the same function as the internal tax. It stands to reason that a border charge which, quite apart from being different from an internal tax in terms of form, etc., does not even have the same function as an internal tax cannot be considered to be subject to the provisions of Article III:2. If such a border charge is not caught by the provisions of Article III:2, however, there is, to that extent, no indication that it is a border charge of the kind which does not inherently discriminate against, or disadvantage, imports. In the absence of such an indication[243], there does not appear to be an obvious reason for not subjecting this kind of border charge to the obligations contained in Article II:1.

7.198 The foregoing considerations lead us to the view that, in an Article II:2(a) inquiry, it is only if a border charge is equivalent to an internal tax that it can (ever) be concluded that – to use terms similar to those appearing in the chapeau of Article II:2 – "nothing in Article II would prevent" the imposition of such a charge. Or to put it another way, for the purposes of an Article II:2(a) inquiry, "equivalence" is a necessary condition for a charge to fall outside the scope of Article II:1. It is important to recall, however, that "equivalence" is a necessary condition for the purposes of an Article II:2(a) inquiry only. To explain, even if a border charge is not equivalent to an internal tax and thus does not fall within the scope of Article II:2(a), it may still fall within the scope of, e.g., Article II:2(b). If it meets the conditions of Article II:2(b), it falls outside the scope of Article II:1. Hence, in cases where a border charge is not equivalent to an internal tax, it may or may not fall outside the scope of Article II:1.

(c) "consistently with the provisions of paragraph 2 of Article III"

7.199 As already pointed out, Article II:2(a) distinguishes the concept of "equivalence" from that of "consistency with Article III:2". Below, some additional observations are offered regarding the relevance of the latter concept to an Article II:2(a) inquiry.

7.200 The **United States**, as previously noted, stresses that whether a charge is "equivalent" to an internal tax and whether a charge is imposed consistently with Article III:2 are separate inquiries. According to the United States, the element of "equivalent to an internal tax" appears to focus on the qualitative aspects of measure, whereas the element of "consistently with the provisions of Article III:2" appears to focus on its quantitative aspects. Specifically, the latter element requires that the charge applied to imported products must not exceed the internal taxes on like domestic products to which they are asserted to be equivalent.

7.201 The United States considers that each of the two separate elements of Article II:2(a) – "equivalent to an internal tax" and "imposed consistently with the provisions of Article III:2" – must be met for a charge on the importation of a product to fall within the scope of that provision. As a result, a charge equivalent to an internal tax imposed in respect of the like domestic product but

[243] We note that such an indication could also result, e.g., from the fact that the border charge in question is caught by the provisions of Article VI of the GATT 1994.

imposed inconsistently with Article III:2 could not, in the United States' view, be justified under Article II:2(a).

7.202 **India** states that Members are permitted by Article II:2(a) to levy charges at the border, notwithstanding the restrictions contained in Article II:1, provided that such charges are: (a) "equivalent" to an internal tax, (b) imposed in a manner that is consistent with Article III:2, and (c) in respect of a "like domestic product". Thus, from this statement it would appear that it, too, views the element of "consistently with the provisions of Article III:2" as an independent element to be separately established.[244] As noted earlier, however, India also appears to suggest that a border charge need only be equivalent to an internal tax and that "equivalence" is a more flexible concept than the concept used in Article III:2 of "not in excess of".[245] In this regard, India refers to the GATT panel in *US – Superfund* which stated that Article III:2 requires "complete equivalence between domestic and imported products".[246] To India, this apparently suggests that if a border charge is "equivalent" to an internal tax, it would also be consistent with Article III:2.[247]

7.203 The **Panel** begins its additional analysis of the concept of "consistency with Article III:2" by noting again that it does not consider that "equivalence" and "consistency with Article III:2", as distinguished in Article II:2(a), are one and the same concept, such that a finding of "equivalence" is one and the same things as a finding of "consistency with Article III:2", or that a finding of "equivalence" compels a finding of "consistency with Article III:2". Regarding the first proposition, as is clear from previous discussion, it is possible, and makes sense, to give the two concepts different meaning. Also, if the concepts were the same, or were intended to mean the same, there would be no point in referring to both concepts in one and the same subparagraph and in relation to the same measures being related to each other.

7.204 With regard to the second proposition (to the effect that a finding of "equivalence" compels a finding of "consistency with Article III:2"), we recall that Article II:2(a) refers to the "like domestic product" and that it therefore implicitly refers to Article III:2, first sentence.[248] In our view, in a case involving charges on imported and like domestic products, it is not possible to infer "consistency with Article III:2" from the existence of "equivalence". This is because, as we have said, the concept of "equivalence" is compatible with the existence of a tax burden differential, which is not the case of the concept of "consistency with Article III:2", at least not in a case involving charges imposed on like products as opposed to charges imposed on directly competitive or substitutable products.

7.205 We note India's reference to the GATT panel report on *US – Superfund*. We agree with India that that panel appears to have used the term "equivalent" both to indicate "equivalence" within the meaning of Article II:2(a)[249] and to mean "not in excess of" within the meaning of Article III:2, first sentence[250]. In its report, the panel does not suggest, however, that the concepts of "equivalence"

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[244] In fact, this is how India has analyzed the measures at issue in this case under Article II:2(a).

[245] India's reply to Panel Question No. 14.

[246] India refers to GATT Panel Report, *US – Superfund*, para. 5.2.9.

[247] India's reply to Panel Question No. 68.

[248] We recall that the present case does not present the issue whether Article II:2(a) might, in addition, imply a reference to the provisions of Article III:2, second sentence. Accordingly, we leave this issue unaddressed.

[249] See, e.g., GATT Panel Report, *US – Superfund*, para. 5.2.9 ("[a tax imposed on imported substances, appraised on the basis of the value of the imported substance] would […] no longer be imposed in relation to the amount of taxable chemicals used in their production but the value of the imported substance [derived from the chemicals]" and hence not meet "the requirement of equivalence which the drafters explained in the perfume – alcohol example").

[250] See *ibid*., paras. 5.2.8 ("to the extent that the tax on certain imported substances was equivalent to [i.e., did not exceed] the tax borne by like domestic substances as a result of the tax on certain [domestic] chemicals, the tax met the national treatment requirement of Article III:2, first sentence") and 5.2.9 ("whether

within the meaning of Article II:2(a) and "consistency with Article III:2" are the same. Nor does the panel say that "equivalence" implies "consistency with Article III:2". The panel did seem to consider, however, that, on the facts of the case before it, a lack of equivalence meant that the challenged tax, which was imposed on imported products, would have fallen foul of Article III:2, first sentence.[251] But this was because, on the facts of that case, the absence of an equivalent tax imposed on domestic products meant that the tax imposed on imported products was imposed exclusively on imported products. It is important to note in this connection that the case before the GATT panel in *US – Superfund* involved a completely different situation from ours. In that case, the panel was examining a claim under Article III:2. As is clear from our previous remarks, in the context of an Article II:2(a) inquiry, a lack of equivalence does not imply an inconsistency with Article III:2.

7.206 Next, we wish to elaborate upon a point we have made earlier, namely, that a border charge on the importation of a product equivalent to an internal tax on the like domestic product is within the ambit of Article III:2. Absent the provisions of Article II:2(a), it might have been open to debate whether a border charge which is equivalent to an internal tax (that is to say, a border charge which is not itself an internal tax) falls within the scope of application of Article III:2. This is because, by its terms, Article III:2 applies to "internal taxes or other internal charges". The provisions of Article II:2(a) have rendered any such debate moot. The reference in Article II:2(a) to an internal tax imposed consistently with the provisions of Article III:2 would not make much sense if the border charge contemplated in Article II:2(a) were not caught by the provisions of Article III:2. Indeed, Article III:2 requires a comparison of the tax burden borne by imported products, on the one hand, and domestic products, on the other. The text of Article II:2(a) refers to an internal tax imposed in respect of the like domestic product. Thus, in the situation contemplated in Article II:2(a), the charge to which it is logical to compare the internal tax on the domestic product is the border charge on the importation of that same product.

7.207 The view that border charges equivalent to internal taxes are subject to the provisions of Article III:2 is further supported by the GATT panel report on *EEC – Animal Feed Proteins*. The panel in that case observed that:[252]

> "The wording of Article II:2(a) which refers to 'charges equivalent to internal taxes' is different from that of Article III:2 which refers to 'internal taxes and other charges of any kind', but it appeared to be the common understanding of the drafters of these articles that their scope should be the same as to the kind of measures being covered."

7.208 The other issue to be examined as part of this additional analysis is that of the consequences that would flow from an affirmative or negative determination regarding "consistency with Article III:2". It is well to recall in this regard that, in an Article II:2(a) inquiry, the issue of consistency with Article III:2 would only arise in a case where it had been previously determined that a border charge is equivalent to an internal tax, as otherwise the border charge would not be subject to the provisions of Article III:2. Accordingly, for the purposes of the present analysis, we shall assume a border charge that is equivalent to an internal tax.

7.209 We need not dwell upon the cases where a border charge is equivalent to an internal tax and the internal tax is imposed consistently with Article III:2. Undoubtedly, such a border charge would fall outside the scope of application of Article II:1. The cases we need to discuss are those where a border charge is equivalent to an internal tax and the internal tax is imposed inconsistently with Article III:2. In relation to those cases, we recall our view that it is the fact of being equivalent to an

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they will establish complete equivalence [i.e., equal tax burdens] between domestic and imported products, as required by Article III:2, first sentence, remain open questions").

[251] *Ibid*., para. 5.2.9.

[252] GATT Panel Report, *EEC – Animal Feed Proteins*, para. 4.16c.

internal tax which brings a border charge within the scope of application of Article III:2 and removes that border charge from the scope of application of Article II:1. The validity of this conclusion is not affected by whether the internal tax to which the relevant border charge is equivalent is imposed consistently with the provisions of Article III:2.[253] If the internal tax is imposed inconsistently with the provisions of Article III:2, then, quite simply, the importing Member is in breach of its obligations under Article III:2. This finding of a breach of Article III:2 would be the end result of the analysis (barring availability of exceptions justifying such breach) and not merely an intermediate result that would take the analysis of the border charge back to Article II.[254] In other words, we consider that a border charge which is equivalent to an internal tax imposed inconsistently with Article III:2 would, also, fall outside the scope of application of Article II:1.

7.210 Thus, we think it would be incorrect to say that it is only if a border charge is equivalent to an internal tax and the internal tax is imposed consistently with Article III:2 that it can be concluded, in the words of the chapeau of Article II:2, that nothing in Article II would prevent the imposition of such a charge. As we just have explained, a border charge equivalent to an internal tax which is imposed inconsistently with the provisions of Article III:2 would, in our view, fall outside the scope of application of Article II:1. As a result, we consider that, for the purposes of an inquiry under Article II:2(a), 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.

7.211 The foregoing presents the issue of what purpose is served by the reference in Article II:2(a) to the consistency with Article III:2 of the internal tax to which a border charge is equivalent. As we see it, rather than to stipulate an additional requirement that must be met for a border charge to fall outside the scope of Article II:1, the purpose of the reference in question is to acknowledge, and call attention to, the existence of relevant requirements stipulated elsewhere in the GATT 1994, *viz.*, in the provisions of the next article. In other words, we consider that the main purpose of the reference in question is to link up the provisions of Article II:2(a) with those of Article III:2. In so doing, the reference acts as an important reminder to Members that their obligations in respect of border charges of the kind at issue in Article II:2(a) go beyond ensuring that such border charges are equivalent to internal taxes.[255] In our view, Article II:2(a) could thus be understood as referring, in effect, to "an internal tax imposed (as it must be pursuant to this Agreement) consistently with the provisions of paragraph 2 of Article III".

7.212 We do not think it is possible to draw particular inferences from the reference to consistency with Article III:2 regarding the GATT 1947 negotiators' intentions in respect of those cases, discussed above, where a border charge is equivalent to an internal tax, but the tax is imposed inconsistently with Article III:2.[256] Indeed, as we have suggested, Article II:2(a) in our view refers to an internal tax imposed "consistently with" Article III:2 because this is what the GATT 1947 prescribed (and the

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[253] We recall our view that the fact that the border charge is imposed at a higher rate than the internal tax to which it is equivalent does not preclude an affirmative "equivalence" determination.

[254] Indeed, in view of the fact that Article II:2(a) confirms that a border charge equivalent to an internal tax is subject to Article III:2, the situation is comparable to one where an internal tax is applied to the imported product at a higher rate than is applied to the like domestic product pursuant to a separate, but corresponding, internal tax. The fact of being inconsistent with Article III:2 would not remove such an internal tax from the scope of application of Article III:2 and bring it within the scope of application of Article II:1, e.g., on the grounds that it disadvantages imports in the same way an "ordinary customs duty" (or "other duty or charge") would do.

[255] As we have indicated previously, the reference in addition provides important confirmation of the fact that border charges equivalent to internal taxes are caught by the provisions of Article III:2. This, in turn, is an indicator that such border charges are border charges of the kind which do not inherently discriminate against, or disadvantage, imports.

[256] Nonetheless, as we have said, the reference supports the inference that border charges equivalent to internal taxes are subject to the provisions of Article III:2.

GATT 1994 still prescribes today). Where a border charge is equivalent to an internal tax, it is subject to Article III:2, and so the internal tax to which the border charge is equivalent must be imposed consistently with Article III:2. If a reference to other requirements to be complied with – specifically, those contained in Article III:2 – was to be included in Article II:2(a), it stands to reason that the text of Article II:2(a) would do so in a manner that reflects, and is consistent with, what the GATT 1947 prescribed and, hence, would contemplate an internal tax imposed consistently with Article III:2. In the light of this, the fact that the text of Article II:2(a) contemplates an internal tax imposed "consistently with" Article III:2 in our view does not support the conclusion that the GATT 1947 negotiators considered that if a contracting party subsequently imposed an internal tax inconsistently with Article III:2, the border charge equivalent to that internal tax would be subject to the provisions of Article II:1.

7.213 Additionally, we note that the relevant context of Article II:2(a) includes Article II:2(b) which makes clear that Article II does not prevent the imposition, on the importation of a product, of an "anti-dumping or countervailing duty applied consistently with the provisions of Article VI". In our view, similarly to what we have said in respect of the concept of "consistency with Article III:2" in Article II:2(a), the concept of "consistency with Article VI" in Article II:2(b) is not to be regarded as a necessary condition, for the purposes of an Article II:2(b) inquiry, for an "anti-dumping or countervailing duty" imposed on the importation of a product to fall outside the scope of Article II:1. Accordingly, we consider that our interpretation of the phrase "an internal tax imposed consistently with the provisions of paragraph 2 of Article III" in Article II:2(a) is consistent with the provisions of Article II:2(b).

7.214 As to whether our interpretation of the phrase "an internal tax imposed consistently with the provisions of paragraph 2 of Article III" is consistent with the object and purpose of the GATT 1994, we recall our view that a border charge equivalent to an internal tax which is imposed inconsistently with the provisions of Article III:2 would fall outside the scope of Article II:1. However, we have also indicated that such a border charge would be caught by the strict obligations contained in Article III:2. In the light of this, we do not consider that our interpretation of the aforementioned phrase could be said to undermine the value of tariff concessions negotiated by exporting Members.[257] As our interpretation does not threaten to undermine the value of tariff concessions, we do not consider that it runs counter to the object and purpose, expressed in the preamble to the GATT 1994, of substantially reducing "tariffs".

7.215 A final point should be made. In keeping with our view that the reference in Article II:2(a) to "consistency with Article III:2" is not intended to stipulate an additional requirement to be met for a border charge to fall outside the scope of Article II:1, we would not proceed, in an inquiry under Article II:2(a), to examine the consistency of an internal tax with Article III:2 after having determined that a particular border charge is equivalent to that internal tax.[258] It is important to keep in mind, in this connection, that 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, and to develop such a claim in its submissions to a panel.

3. Consistency of the AD on alcoholic liquor with Article II:1(b) of the GATT 1994

7.216 The **Panel** now turns to assess the United States' claim that the AD on alcoholic liquor is, as such, inconsistent with Article II:1(b) of the GATT 1994.

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[257] For further elaboration, see *supra*, para. 7.194.

[258] In a case where it has been determined that a particular border charge is not equivalent to an internal tax, a necessary condition of Article II:2(a) is not met, and so a negative "equivalence" determination *ipso facto* ends an Article II:2(a) inquiry.

7.217 The **United States** recalls that Article II:1(b) prohibits Members from levying "ordinary customs duties" or "other duties or charges imposed on or in connection with importation" in excess of the rates established in Members' Schedule ("WTO-bound rates"). In the United States' view, the AD on alcoholic liquor is inconsistent with this provision as an "ordinary customs duty" that exceeds India's WTO-bound rates. The United States submits that the AD on alcoholic liquor is an "ordinary customs duty" because it applies: (1) at the time of importation (and, in this connection, it must be paid by the importer before the good may clear customs); (2) as a matter of course upon a good's importation (and, in this connection, it applies generally on the importation of alcoholic beverages into India and the event for which liability ensues is importation); and (3) as a combination of *ad valorem* and specific duties. The United States points out that in this regard the AD on alcoholic liquor is no different from India's BCD. In relation to the BCD, the United States observes that India has already conceded that the BCD is an ordinary customs duty within the meaning of Article II:1(b). The United States notes that like the AD on alcoholic liquor, the BCD applies: (1) at the time of importation (and, in this connection, it must be paid by the importer before the good may clear customs); (2) as a matter of course upon a good's importation (and, in this connection, it applies generally on the importation of products into India and the event for which liability ensues is importation); and (3) as a combination of *ad valorem* and specific duties.

7.218 The United States contends that there are a number of additional similarities between the BCD and the AD on alcoholic liquor which indicate that the AD on alcoholic liquor like the BCD is an "ordinary customs duty", including the fact that both are referred to under Indian law as "duties of customs", authorized under the same constitutional provision, required to be levied under the same provision of the Customs Act, subjected to exemptions under the same provision of the Customs Act, and administered under the same Customs rules and procedures.

7.219 The United States points out that the principal distinction India draws between the BCD and the AD on alcoholic liquor is that the latter is intended to offset internal taxes imposed on like domestic products. The United States argues that whether the AD on alcoholic liquor constitutes an ordinary customs duty must be based on an examination of its structure, design and effect. The stated purpose or intent of a duty does not determine whether it is or is not an ordinary customs duty. The United States notes that the GATT 1947 panel in *EEC – Parts and Components* rejected the notion that the stated purpose or characterization of an EEC anti-circumvention duty under EEC law provided a sufficient basis to characterize the measure as an internal tax rather than a customs duty. Similarly, the United States submits, this Panel should reject India's contention that the stated purpose or characterization of the AD under Section 3(1) of the Customs Tariff Act provides a sufficient basis to find the AD on alcoholic liquor a charge equivalent to an internal tax rather than an ordinary customs duty.

7.220 The United States argues, in addition, that an interpretation of Article II:1(b) that would allow the stated purpose or intent of a measure to determine whether it fell within the scope of that article would allow Members to avoid or manipulate WTO commitments simply by attributing a particular purpose to a measure (regardless of what the measure in fact does) or by calling a measure by one name versus another, similar to the situation faced in *EEC – Parts and Components.* In this dispute, the United States contends, India may attribute a different purpose to the BCD on the one hand and the AD on alcoholic liquor on the other, but both of them, based on an examination of their structure, design and effect as reviewed above, constitute "ordinary customs duties" within the meaning of Article II:1(b).

7.221 Furthermore, in the United Sates' view, the fact that the AD on alcoholic liquor may be distinct from India's basic customs duty, in that it is imposed under a separate section of the Customs Tariff Act, does not mean that the AD on alcoholic liquor is not an ordinary customs duty. According to the United States, it is not the case that a Member may only impose one duty that may properly be characterized as an "ordinary customs duty" under Article II:1(b). Nothing in the text of

Article II:1(b) suggests that Members are limited to a single "ordinary customs duty" and, in fact, the text refers to "ordinary customs duties" in the plural.

7.222 In the alternative, the United States believes that even if the AD on alcoholic liquor were not an "ordinary customs duty", it would constitute an "other duty or charge" (ODC) within the meaning of Article II:1(b), second sentence. The United States submits that the AD on alcoholic liquor would necessarily constitute an ODC if it were not an ordinary customs duty. This is because the word "other" as used in Article II:1(b) means duties or charges that are not ordinary customs duties that are applied on or in connection with importation. If the AD on alcoholic liquor is not an ordinary customs duty, then it must, in the United States' view, necessarily be something other than an ordinary custom duty. The United States points out in this regard that the AD on alcoholic liquor applies on or in connection with importation. Specifically, it applies at the time of importation and as a consequence of importation (that is, importation is the event for which liability for duty ensues). Moreover, the United States considers that in asserting that the AD on alcoholic liquor is a charge equivalent to an internal tax within the meaning of Article II:2(a), India has implicitly characterized it as a charge "imposed on importation" since the chapeau to Article II:2 makes clear that it concerns measures "imposed on importation". Therefore, the United States maintains, if the AD on alcoholic liquor is not an ordinary customs duty, it must be an other duty or charge within the meaning of Article II:1(b).

7.223 Regarding the other element of an Article II:1(b) inquiry, the United States contends that the AD on alcoholic liquor when imposed with India's BCD results in ordinary customs duties on imports of alcoholic liquor in excess of India's WTO-bound rates. Specifically, the United States asserts that the AD on alcoholic liquor imposed with the BCD results in ordinary customs duties on imports of alcoholic beverages that exceed India's WTO-bound rates of 150 percent *ad valorem* by amounts ranging from 48 to 400 percentage points. According to the United States, the AD on alcoholic liquor is therefore as such inconsistent with Article II:1(b). Moreover, if the AD on alcoholic liquor were considered an ODC, it would, in the United States' view, exceed the ODCs specified in India's Schedule as India's Schedule does not specify any ODCs for alcoholic liquor or any other product.

7.224 The United States notes India's assertion that the AD on alcoholic liquor is equivalent to State excise duties imposed on like domestic products and thus imposed in accordance with Article II:2(a). The United States considers that it has presented evidence and argument sufficient to establish a prima facie case that the AD on alcoholic liquor is (i) an ordinary customs duty that (ii) exceeds India's WTO-bound rates and, therefore, is inconsistent with Article II:1(b). According to the United States, having made a prima facie case that the AD on alcoholic liquor is an ordinary customs duty, the necessary corollary of that showing is that the AD on alcoholic liquor is not a "charge equivalent to an internal tax".

7.225 The United States further points out that even if the AD on alcoholic liquor were not considered an ordinary customs duty but an "other duty or charge" on importation, India has presented no evidence that it is "equivalent" to an internal tax on like domestic alcoholic liquor and imposed consistently with Article III:2. The United States argues that India as the party asserting that the AD on alcoholic liquor is justified under Article II:2(a) bears the burden of sustaining that assertion. According to the United States, in view of the Appellate Body report in *United States – Wool Shirts and Blouses*, it is up to India to present evidence and argument sufficient to establish that what it asserts is true.

7.226 The United States submits in this regard that although India asserts that the AD on alcoholic liquor is equivalent to State excise duties on domestic alcoholic liquor, it has not actually identified

any such State excise duties,[259] much less explained how the AD on alcoholic liquor is "equivalent" to them or imposed consistently with Article III:2. In the United States' view, simply citing the stated purpose of Section 3(1) of the Customs Tariff Act is insufficient. According to the United States, to be considered equivalent to internal taxes within the meaning of Article II:2(a), the AD on alcoholic liquor must in fact be equivalent to, and offset or counterbalance, internal taxes on like domestic products.

7.227 The United States submits, in addition, that India has admitted that the AD on alcoholic liquor "could in some cases, have been less than the excise duty being charged on like domestic products in some States, and in other cases equal to or perhaps slightly in excess of the excise duty being charged in some other States".[260] Therefore, the United States contends, since the AD on alcoholic liquor – by India's own admission – exceeds the excise duties charged on like domestic products in at least some instances, it is not imposed consistently with Article III:2 with respect to like domestic products. Furthermore, the United States notes that even if India had not admitted that the AD on alcoholic liquor is imposed on imports in excess of State excise duties on like domestic products in some States, the Explanation to Section 3(1) supports the same conclusion. The United States considers that, notwithstanding India's contentions to the contrary, Section 3(1) read with the Explanation means that, since the rate of excise duty on like domestic alcoholic liquor varies from State to State, imports shall be liable to an AD that is equal to the highest rate of State excise duty imposed. Accordingly, the United States believes, Section 3(1) read with the Explanation subjects imports of alcoholic liquor to rates of AD that exceed the rate of excise duties on like domestic alcoholic beverages in at least some Indian States and, as a consequence, the AD on alcoholic liquor is not imposed consistently with Article III:2.

7.228 The United States further notes an assertion made by the European Communities in its third party submission. The United States points out that in that submission the European Communities explained that it had compared the taxation resulting from the AD on alcoholic liquor on imports with the taxation resulting from excise taxes applied by a number of Indian States on like domestic products and concluded that the AD on alcoholic liquor "exceeds by a large margin the taxation resulting from taxes denominated 'excise duty' in the legislation of most Indian States representing a major proportion of the market for wines and spirits".[261]

7.229 In the light of this, the United States considers that the AD on alcoholic liquor is not a charge "equivalent" to internal taxes (State excise duties) and, as India even concedes, that it is imposed on imports in excess of State excise duties on like domestic alcoholic liquor. Therefore, the United States believes, the AD on alcoholic liquor is not a charge "equivalent" to internal taxes imposed consistently with Article III:2.

7.230 **India** submits that the United States fails to appreciate that there is a clear demarcation under Indian law between the BCD and the AD on alcoholic liquor. India argues that the BCD is the only duty imposed by it on imports which is in the nature of an "ordinary customs duty" as understood under Article II:1(b) and is accordingly bound at the levels prescribed in India's Schedule. India does not levy any "other duties or charges". India states that the BCD is distinct from the AD on alcoholic liquor, which is levied on imported products in lieu of different internal taxes.

7.231 India submits that the United States has failed properly to distinguish between different types of duties and the statutory provisions based upon which they are imposed. India notes in this regard

[259] The United States contends that it has made requests for relevant information to India. However, in the context of the Panel proceedings, the United States has not made use of the opportunity to put an appropriate written question to India.

[260] The United States refers to India's reply to Panel Question No. 28.

[261] The United States refers to paras. 79-82 of the EC third party written submission.

that although the AD and the BCD are authorized under the same constitutional entry, they are levied under different statutory provisions. India recalls that the Customs Act and the Customs Tariff Act are different statutory enactments created by separate acts of Parliament. India contends that the BCD is levied under Section 12 of the Customs Act whereas the AD on alcoholic liquor was levied under Section 3(1) of the Customs Tariff Act. India also maintains that the United States has misinterpreted the cross-reference provisions contained in Section 3(8) of the Customs Tariff Act and Section 25 of the Customs Act to mean that both statutes essentially administer the same duties and that they are in the nature of "ordinary customs duties" or ODCs. India argues that the mere existence of a cross-reference between two statutes, inserted primarily for administrative convenience, does not alter the nature of the distinct charges levied under each. Specifically in relation to Section 25 of the Customs Act, India does not agree with the United States that the power to exempt imports from the AD is contained in the Customs Act. According to India, without the existence of the reference in Section 3(8) of the Customs Tariff Act, the power to exempt imports from the AD does not exist under Section 25. Furthermore, India considers that the mere fact that the AD on alcoholic liquor is calculated "inclusive of" the BCD does not make it an "ordinary customs duty" or an ODC. India points out that the AD is calculated under the Customs Tariff Act and not the Customs Act. In sum, India submits that the levy, calculation and collection of the AD on alcoholic liquor as well as exemptions from the AD on alcoholic liquor are provided for in the Customs Tariff Act, which makes the AD on alcoholic liquor fundamentally different from the BCD levied under Customs Act.

7.232 According to India, the intent and design of the AD on alcoholic liquor is solely to offset the excise duty payable by Indian manufacturers on the like domestic product. India contends that this view has been confirmed by a binding interpretation of Section 3(1) of the Customs Tariff Act – the statutory basis of the AD – by the Supreme Court of India in *Hyderabad Industries Ltd. v. Union of India*. India is of the view that the policy purpose behind the introduction of a duty is an important factor, although not the only factor, which a Panel may look into while characterizing a duty. The Panel, India suggests, is not precluded from reviewing all relevant factors.

7.233 In sum, in India's view, it is clear from such factors as the purpose of the AD on alcoholic liquor, its statutory basis and its relationship with the internal taxes it is intended to counterbalance that the AD on alcoholic liquor is a distinct duty from the BCD. The BCD, India notes, has no such purpose (as it is intended as a tariff imposed in accordance with India's Schedule), no relationship whatsoever with any internal tax and a different statutory basis.

7.234 India notes that the only commonality between the BCD, which is an "ordinary customs duty", and the AD on alcoholic liquor is that they are imposed on imports at the border and that both are expressed in *ad valorem* terms. India submits in this regard that the Appellate Body in *Chile – Price Band System* held that this does not necessarily mean that such duties are "ordinary customs duties". As a result, the United States as the complaining party must look beyond the mere point at which the duty is levied and the manner in which the duty is expressed, since neither of them will necessarily mean or indicate that the duty is an "ordinary customs duty". Yet, India contends, instead of positively substantiating the existence of a prima facie case, the United States has based its claim under Article II:1(b) on two elements: (i) what it considers to be the general definition of an "ordinary customs duty" and (ii) India's alleged failure to prove that the AD on alcoholic liquor falls outside this broad definition. India considers, therefore, that the United States as the complaining party in this case has failed to make out a prima facie case that the AD on alcoholic liquor is an "ordinary customs duty". Consequently, in India's view, the United States' further assertion that the AD on alcoholic liquor results in ordinary customs duties "in excess of" the WTO-bound rates in India's Schedule is without merit.

7.235 Regarding the United States' alternative assertion that the AD on alcoholic liquor may qualify as an "other duty or charge", India submits that the United States has offered no reason in support of its contention other than that it is imposed "on importation". India submits that the United States has,

therefore, failed to discharge its burden of proof. India considers that the AD on alcoholic liquor is not in the nature of an ODC. It is imposed at the time of import but is not imposed on, or in connection with importation. India argues that, contrary to the United States' contention, the AD on alcoholic liquor is not imposed as a consequence of importation. India maintains that the liability to pay the AD on alcoholic liquor arises as a consequence of domestic like products being charged an excise duty and not merely because the products are imported into India. Looked at in another way, if domestically manufactured goods are not charged an excise duty, then, India contends, imported like products will also not be charged the AD on alcoholic liquor even if they are imported into the customs territory of India.[262]

7.236 Based upon the above arguments, India submits that rather than being an "ordinary customs duty" or an ODC within the meaning of Article II:1(b), the AD on alcoholic liquor was being imposed in accordance with the provisions of Article II:2(a). India considers that as a charge equivalent to an internal tax, it did not erode the "value of tariff concessions" offered by India.

7.237 Concerning the issue of "equivalence", India notes that each of its 28 State Governments and 7 Union Territories are empowered to levy their own excise duties. Consequently, India argues, the AD on alcoholic liquor could not be fixed with reference to any one single rate of State excise duty and the Central Government decided in its discretion to adopt the most practical method of imposing the AD on alcoholic liquor through a process of averaging, whereby the Central Government arrived at an approximation of the excise duty rates paid by different States on alcoholic liquor. India notes that this rate could in some cases be less than the excise duty being charged on like domestic products in some States, and in other cases equal to or perhaps in excess of the excise duty being charged in some other States. However, India contends, the Central Government tried to ensure that to the extent possible, the rate was a reasonable approximation of the net fiscal burden imposed on like domestic products on account of the excise duty payable on alcoholic liquor.

7.238 India submits, finally, that the Explanation to Section 3(1) cannot be interpreted as binding the Central Government to impose the AD on alcoholic liquor at the highest rate, as the United States seems to believe. India contends in this respect that the on AD on alcoholic liquor as imposed through CN 32/2003 was in some States lower than the State excise duty being charged on like domestic products. Thus, if the United States' contention that the Central Government is required to levy the AD on alcoholic liquor at the highest rate were accepted, the Central Government would not have been empowered to levy the AD on alcoholic liquor at a rate lower than the highest excise duties. India submits that this clearly establishes the existence of discretion on the part of the Central Government.

7.239 In view of the above, India considers that the United States has failed to demonstrate that the AD on alcoholic liquor was not imposed in accordance with Article II:2(a) and that, notwithstanding the United States' failure to discharge its burden, India has amply demonstrated how the AD on alcoholic liquor was imposed in accordance with Article II:2(a).

7.240 The **Panel** notes India's argument that the United States' claim of inconsistency with Article II:1(b) lacks merit because, in its view, the challenged measure – the AD on alcoholic liquor, as imposed through CN 32/2003[263] – was not subject to the provisions of Article II:1(b). India considers that, contrary to the United States' assertion, the measure at issue was neither an "ordinary customs duty" nor an "other duty or charge" within the meaning of Article II:1(b), but rather a charge equivalent to State-level internal taxes within the meaning of Article II:2(a).

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[262] India argues that this position is confirmed by the decision of the Supreme Court of India in *Hyderabad Industries Ltd. v. Union of India*.

[263] Hereafter, unless the context requires otherwise, we will for the sake of brevity refer to the "AD on alcoholic liquor" rather than "the AD on alcoholic liquor, as imposed through CN 32/2003".

7.241 In view of the disagreement between the Parties over the correct legal characterization of the AD on alcoholic liquor, before undertaking any further analysis of the United States' claim under Article II:1(b), the Panel needs to satisfy itself that the measure at issue fell within the scope of application of Article II:1(b). As correctly argued by the United States, if the challenged measure qualifies as either an "ordinary customs duty" or an "other duty or charge", it was subject to the provisions of Article II:1(b). The United States' principal contention in this regard is that the AD on alcoholic liquor constituted an "ordinary customs duty" within the meaning of Article II:1(b), first sentence. The United States' alternative contention is that it constituted an "other duty or charge" within the meaning of Article II:1(b), second sentence.

7.242 The United States' alternative contention is not based on separate or additional evidence, but rather on the word "other" in the phrase "other duty or charge".[264] According to the United States, if the challenged measure were considered by the Panel not to constitute an "ordinary customs duty", it would, in view of the word "other", necessarily be an "other duty or charge" imposed on the importation of alcoholic liquor. This means that if the United States cannot demonstrate, based on the evidence adduced by it, that the AD on alcoholic liquor was an ordinary customs duty, it will also have failed to establish its alternative contention.

7.243 In the light of the above, the Panel will examine first whether the AD on alcoholic liquor was an "ordinary customs duty" (or, alternatively, an "other duty or charge" imposed on the importation of alcoholic liquor) and, thus, subject to the obligations contained in Article II:1(b), first sentence (or, alternatively, those contained in Article II:1(b), second sentence).

(a) Ordinary customs duty (or "other duty or charge")

7.244 We begin our examination by recalling at the outset that the United States has sought to establish that the AD on alcoholic liquor was an "ordinary customs duty" by reference to its definition of that concept. Accordingly, we now proceed to consider the definitional and other elements relied upon by the United States with a view to determining whether they establish that the AD on alcoholic liquor was an "ordinary customs duty" (or alternatively, an "other duty or charge" imposed on the importation of alcoholic liquor).

7.245 To recall, the United States considers that the term "ordinary customs duty" as it appears in Article II:1(b) means a duty that applies to a good at the time of importation – not on a case-by-case basis or in response to a singular or exceptional event or set of circumstances – but as a matter of course on, or in connection with, the good's importation. According to the United States, an ordinary customs duty is typically an *ad valorem* duty, a specific duty, or a combination thereof.

7.246 The AD, as its statutory name makes clear, is a "duty".[265] It applies to goods (articles) which are imported into India (in our case, alcoholic liquor).[266] It does not apply to domestic goods. The AD is assessed at the time and point of importation by India's Customs authorities.[267] The good which is imported and subject to the AD is cleared through customs for entry into India's customs territory once the AD has been paid.[268] The AD is payable by the importers of the subject goods or their

[264] US second written submission, para. 19.
[265] Section 3(1) of the Customs Tariff Act, including its proviso.
[266] *Ibid*; CN 32/2003.
[267] India's replies to Panel Question Nos. 5 and 12; US reply to Panel Question No. 12.
[268] India's reply to Panel Question No. 12. In some circumstances, goods may clear customs on execution of bonds or under duty deferment procedures. US reply to Panel Question No. 12.

agents.[269] Furthermore, as imposed through CN 32/2003, the AD on alcoholic liquor took the form of either an *ad valorem* duty or a specific duty.[270]

7.247 Regarding whether the AD on alcoholic liquor was also applied "as a matter of course" on the importation of alcoholic liquor, we note India's argument that the AD is not levied on imports unconditionally. Specifically, India stated that if domestically manufactured goods are not charged an excise duty, imported like products will also not be charged the AD.[271] This statement appears to be consistent with the text of CN 32/2003 and the proviso to Section 3(1) of the Customs Tariff Act, in that both refer to "the excise duty for the time being leviable". Moreover, the Supreme Court of India stated in *Hyderabad Industries Ltd. v. Union of India* that "[t]he levy of additional duty being with a view to provide for counter balancing the excise duty leviable, we are clearly of the opinion that additional duty can be levied only if on a like article excise duty could be levied".[272] The Supreme Court's statement concerned the AD as it existed prior to the inclusion in Section 3(1) of the proviso regarding alcoholic liquor. Section 3(1) at the time consisted of what is now the opening paragraph of Section 3(1) and the Explanation. However, we understand that as of the date of establishment of the Panel, the opening paragraph of Section 3(1) and the Explanation also applied to alcoholic liquor.[273] Moreover, the text of the opening paragraph and the proviso both contain the phrase "the excise duty for the time being leviable". In view of these elements, we see no reason to disagree with India's statement that the AD on alcoholic liquor can be levied only if on like domestically manufactured alcoholic liquor (or domestically manufactured alcoholic liquor of the same class or description) excise duty is leviable. Accordingly, since the AD on alcoholic liquor was being collected on the date of establishment of this Panel, it can be inferred that, in the view of India's Central Government, the aforementioned condition for the levy of the AD was satisfied at the time. In the light of this, as well as the characteristics of the AD on alcoholic liquor set out at paras. 7.246 and 7.248, it seems to us to be correct for the United States to say that in respect of alcoholic liquor subject to the AD, the AD on alcoholic liquor was applied as a matter of course, and not on a case-by-case basis or in response to a singular or exceptional event or set of circumstances.

7.248 Finally, as to whether the AD on alcoholic liquor was imposed "on the importation" of alcoholic liquor, we note India's assertion that liability for the payment of the AD arises as a consequence of domestic like products being charged an excise duty and not merely because the products are imported into India. In our view, India's assertion does not adequately distinguish between what we see as two separate issues: (1) whether a particular good is liable to a duty (i.e., whether a duty is to be imposed in respect of a particular good) and (2) what is the event which triggers the liability to pay a duty that is to be imposed respect of a particular good (i.e., what is the taxable event). We consider that the element of "on the importation" as it appears in Article II:1(b) and II:2, and also in the US definition of "ordinary customs duties", goes to the second issue. In relation to the AD, as discussed above, the evidence suggests that it may be levied on alcoholic liquor only if State excise duty is leviable on like domestically manufactured alcoholic liquor, or domestically manufactured alcoholic liquor of the same class or description.[274] Where this condition is met, and the AD is imposed in respect of relevant alcoholic liquor, the event which in our

[269] *Ibid.*
[270] Exhibit US-6.
[271] India's second oral statement, para. 3.5; India's comments on the US reply to Panel Question No. 43.
[272] Exhibit IND-11, para. 17. We note, also with a view to further references by us to statutory interpretations by the Supreme Court of India, that India has stated that pursuant to Article 141 of the Constitution of India the law declared by the Supreme Court is binding on all courts within the territory of India.
[273] India's replies to Panel Question Nos. 27(b), (c) and (i). The United States similarly considers that the opening paragraph of Section 3(1) requires the imposition of the AD on alcoholic liquor (and all other imports). US reply to Panel Question No. 11; US second written submission, paras. 84-85.
[274] It is not clear from the evidence before us whether it would be sufficient if one or more States, as opposed to all States, permitting the sale of alcoholic liquor levied an excise duty on like alcoholic liquor or on alcoholic liquor of the same class or description.

understanding triggers the liability to pay the AD is the importation of the relevant alcoholic liquor.[275] Therefore, it seems to us that the United States is correct in saying that the AD was a duty imposed "on the importation" of alcoholic liquor.

7.249 Judging exclusively by the above characteristics of the AD on alcoholic liquor as in force on the date of establishment of this Panel, we would agree with the United States that the AD on alcoholic liquor could, in principle, have qualified as an "ordinary customs duty", or an "other duty or charge", within the meaning of Article II:1(b). However, these same characteristics are also consistent with India's view that the AD on alcoholic liquor qualified as a charge imposed on the importation of a product and equivalent to an internal tax imposed in respect of the like domestic product within the meaning of Article II:2(a). In this regard, to mention only a few elements[276], the AD being a "duty" imposed on a product, it can be considered a "charge" imposed on a product as that term is used in Article II:2(a). Also, as we have explained, the AD is a duty imposed "on the importation of a product". And finally, as is already clear from its name, the AD is imposed in addition to India's basic customs duty (BCD) which the United States does not dispute is an "ordinary customs duty" within the meaning of Article II:1(b).[277] Article II:2 implies that Article II:2(a) charges may be imposed on a product subject to a tariff binding in addition to the ordinary customs duty levied on that product.[278]

7.250 In response to a question from the Panel, India has stated that the BCD, the AD and the SUAD are referred to in India as "duties of customs".[279] India has explained that this reflects the fact that all three duties are authorized by the same constitutional entry, Entry 83 of List I (Union List), which confers upon the Central Government the exclusive power to legislate with regard to "duties of customs".[280] In our view, the fact that, for the purposes of Indian constitutional law, the AD constitutes a "duty of customs" does not imply that, for WTO purposes, it is an "ordinary customs duty", or an "other duty or charge", within the meaning of Article II:1(b).[281] Moreover, we do not consider that the fact of describing the AD as a "duty of customs" undermines India's view that it is an Article II:2(a) charge. Article II:2(a), read together with the chapeau of Article II:2, refers to a charge imposed on the importation of a product and equivalent to an internal tax. Hence, the border charge in question is not itself an internal tax, but merely equivalent to such a tax. We therefore think that even as a "duty of customs" the AD on alcoholic liquor could qualify as a border charge equivalent to an internal tax within the meaning of Article II:2(a). Moreover, we are not troubled by the fact that India's basic customs duty (BCD), which we have said may be considered, for WTO purposes, as an

[275] As we have said, India has indicated that the AD is payable by the importer at the point and time of importation, and customs clearance is not granted until the AD has been paid.

[276] See also *supra*, paras. 7.153-7.155.

[277] The United States considers, however, that the BCD is not the only "ordinary customs duty" imposed by India.

[278] We note that since the AD on alcoholic liquor applies exclusively to imports, it is clear that it produces the same type of effect as the BCD. However, Article II:2(a) charges by definition apply to imports only. We also note in this context the European Communities' allegation that the AD on alcoholic liquor was introduced on the same date India committed to eliminate the last quantitative restrictions judged WTO-inconsistent in the dispute *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS90). According to the European Communities, "it seems fair to assume" that the new measure was adopted to produce the same or similar effects as the measures just withdrawn, i.e., to limit imports of alcoholic liquor into India. EC third party oral statement, para. 18. We note in this regard the statement by the Appellate Body in *Chile – Alcoholic Beverages* according to which "Members of the WTO should not be assumed, in any way, to have *continued* previous protection or discrimination through the adoption of a new measure". Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74 (footnote omitted).

[279] India's reply to Panel Question No. 7.

[280] *Ibid*.

[281] We note, in this respect, the statement by the United States that, according to the GATT panel report on *EEC – Parts and Components*, the particular characterization of a measure under the domestic law of the responding party is not determinative of the proper characterization of that measure under WTO rules.

"ordinary customs duty", is also regarded, for the purposes of Indian constitutional law, as a "duty of customs". Indeed, as we have said, it is not apparent to us why an Article II:2(a) charge could not take the same form as an "ordinary customs duty", or an "other duty or charge".

7.251 Consistently with the fact that the AD is considered in India a "duty of customs", it is collected and administered by India's Customs authorities pursuant to the provisions of India's Customs Act.[282] In our view, this does not disqualify the AD from being an Article II:2(a) charge. Since an Article II:2(a) charge is, by nature, a border charge, it seems quite natural that a Member might find it convenient to entrust its Customs authorities with the collection of such a charge and, to that end, would apply its Customs legislation as appropriate.

7.252 Relying upon the fact that the AD is regarded as a "duty of customs", the United States asserts that Section 25 of the Customs Act is the legal authority used by India's Central Government to exempt imports from the BCD and/or the AD. Section 25 empowers the Central Government to exempt goods "from the whole or any part of duty of customs leviable thereon". India contests this US assertion, arguing that the specific provision conferring the power to exempt imports from the AD is Section 3(8) of the Customs Tariff Act. Section 3(8) states that the provisions of the Customs Act, including those relating to exemption from duties – i.e., Section 25 – "shall, so far as may be, apply" to the AD as they apply to duties leviable under the Customs Act. Thus, from the text of Section 3(8) it would appear that Section 3(8) renders applicable to the AD, "so far as may be", the provisions of Section 25. If this were a correct interpretation of Section 3(8), it would be plausible to argue, as India does, that, but for Section 3(8), the provisions of Section 25 would not be available to exempt imports from the AD. We note that unlike CN 82/2007, other customs notifications, including CN 20/2006 or CN 102/2007, reference Section 25, but not Section 3(8). In reply to a question from the Panel India stated that some customs notifications refer to Section 25 only and that in those cases a reference to Section 3(8) is implicit, since, without it, the exemption mechanism provided for in Section 25 could not be invoked. According to India, the absence of a reference to Section 3(8) does not invalidate an exemption notification.[283]

7.253 Even if Section 3(8) did not have the legal significance ascribed to it by India and Section 25 provided independent authority to exempt imports from the AD, contrary to what the United States suggests, this would not demonstrate that India's customs duty system regards both the BCD and the AD as "ordinary customs duties". Rather, it would merely demonstrate that there exists a common exemption authority for different types of "duty of customs", such as the BCD, the AD or the SUAD. Logically, this does not imply that, for the purposes of Indian law, the BCD, the AD and the SUAD are all considered charges of the same nature and serving the same purpose. Indeed, Section 25 makes clear that an exemption may be granted with regard to only a part of the "duty of customs" leviable on a good. This appears to make it possible to grant an exemption from one type of "duty of customs" (e.g., the BCD), but not another (e.g., the AD).[284]

7.254 Having regard to the description of the AD as a "duty of customs", the United States further asserts that the AD is required to be collected under the same provision of India's Customs legislation – Section 12(1) of the Customs Act – as the BCD. Section 12(1) provides that "[e]xcept 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], or any other law for the time being in

[282] India's replies to Panel Question Nos. 5 and 12; Section 3(8) of the Customs Tariff Act.

[283] India's replies to Panel Question Nos. 39(a) and 27(h). In its reply to Panel Question No. 27(h), India stated that the Supreme Court of India, in *Assistant Commissioner, Commercial Taxes v. Dharmender Trading Co*., AIR 1988 SC 1247, held that when the exercise of legislative power can be traced to a legitimate source, mere failure to mention it does not vitiate the exercise of the power. India has not submitted the text of the decision.

[284] Exhibits IND-13, paras. 14 and 18; IND-12.

force, on goods imported into […] India". Section 2 of 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". India argues that the United States' assertion regarding the statutory basis for the levy of the AD is incorrect as a matter of Indian law.

7.255 It is important not to be misled, in construing Section 12(1), by the fact that Section 12(1) uses the term "duties of customs" and talks about rates being specified under the Customs Tariff Act. As was observed by the Supreme Court of India in *Hyderabad Industries Ltd. v. Union of India*, "[t]here are different types of customs duty levied under different acts or rules".[285] The Supreme Court further stated that "there can be no manner of doubt that additional duty which is levied under Section 3(1) of the Tariff Act is independent of the customs duty which is levied under Section 12 of the Customs Act".[286] Thus, even though both the BCD and the AD are "duties of customs" and the issue of the specification of rates is in both cases dealt with in the Customs Tariff Act, the statutory basis for the levy of the BCD is Section 12(1) of the Customs Act, whereas that for the levy of the AD is Section 3(1) of the Customs Tariff Act, and not, as the United States suggests based upon its own interpretation of Indian law, Section 12(1) of the Customs Act. As a result, consideration of the statutory bases of the BCD and the AD does not bear out the United States' assertion that under India's customs duty regime both the BCD and the AD are regarded as "ordinary customs duties".

7.256 The United States also points out that in accordance with Section 3(2) of the Customs Tariff Act the AD on alcoholic liquor is to be calculated based upon the value of the imported good inclusive of the BCD. India has said that the method of calculating the AD on alcoholic liquor is based upon that applied for excise duties.[287] In our understanding, it is not uncommon even in the case of *ad valorem* internal taxes enforced and collected at the point and time of importation to assess them on the basis of the duty-paid value of the imported good.[288] In the light of this, we do not think that the fact that the AD on alcoholic liquor is levied based upon a value of the imported good which is defined to include the BCD indicates that the AD is itself an "ordinary customs duty" or an "other duty or charge".

7.257 Another point clarified by India in response to a question from the Panel is that the revenue collected by India's Customs authorities as a result of the levy of the AD on alcoholic liquor does not go to the States alone, but is distributed as between India's Central Government and the States in accordance with a revenue sharing formula. The same applies to the BCD and the SUAD.[289] As we see it, the fact that the Central Government does not distribute to the States all of the revenues collected as a result of imposition of the AD on alcoholic liquor does not demonstrate that the AD is not a border charge equivalent to State-level internal taxes. Article II:2(a) does not speak to the issue of revenue distribution, and our interpretation of the term "equivalent" does not turn on how revenues collected are distributed. Moreover, one reason for imposing an Article II:2(a) charge is to level the competitive playing field as between products being imported and like domestic products. This can be achieved independently of the particular revenue sharing formula that is adopted. Therefore, we attach no particular importance to the fact that in terms of the distribution of revenues collected there is no difference between the AD and the BCD.

[285] Exhibit IND-11, para. 14.

[286] *Ibid.*, para. 17. At para. 14, the Court provided elaboration as follows: "Merely because the incidence of tax under Section 3 of the Customs Tariff Act, 1975 arises on the import the articles into India it does not necessarily mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act".

[287] India's reply to Panel Question No. 29.

[288] See also GATT Panel Report, *Canada – Provincial Liquor Boards (US)*, para. 5.25.

[289] India's replies to Panel Question Nos. 25 and 47(b)-(d).

7.258 The foregoing analysis shows that even though the AD on alcoholic liquor met the elements of the US definition of "ordinary customs duties", this is not sufficient, on its own, to establish that the AD on alcoholic liquor was an ordinary customs duty (or an "other duty or charge" imposed on the importation of alcoholic liquor) under Article II:1(b) as opposed to a border charge equivalent to an internal tax under Article II:2(a). This remains true even if account is taken of the overall structure of India's customs duty and tax system, including such aspects as the domestic legal description of the AD as a "duty of customs", the role of India's Customs authorities in the collection of the AD, the exemption mechanism established by Section 25 of the Customs Act, the method of calculation of the AD and the distribution of the revenues collected as a result of imposition of the AD.

7.259 As we have explained previously, under such circumstances, it is necessary for the United States to establish, in addition, that the AD on alcoholic liquor was of the same kind as, or in the nature of, an ordinary customs duty (or an "other duty or charge" imposed on the importation of alcoholic liquor).

(b) Equivalence to internal taxes

7.260 We have also indicated previously that the United States can seek to establish by reference to the provisions of Article II:2 that the AD on alcoholic liquor was in the nature of an ordinary customs duty (or an "other duty or charge" imposed on the importation of alcoholic liquor). In this regard, the only category of Article II:2 charges discussed by the Parties is that concerning charges imposed on the importation of a product and equivalent to internal taxes imposed in respect of the like domestic product.

7.261 As our analysis below amply demonstrates, this case does indeed objectively present the issue whether the AD on alcoholic liquor was a charge equivalent to an internal tax within the meaning of Article II:2(a), or to be more accurate, whether it was a charge equivalent to State-level internal taxes (excise duties). In these conditions, if the United States as the complaining party cannot establish that the AD on alcoholic liquor was not equivalent to State-level internal taxes imposed in respect of like domestic alcoholic liquor, it cannot successfully establish that the AD on alcoholic liquor was in the nature of an ordinary customs duty (or an "other duty or charge" imposed on the importation of a good).[290] Accordingly, the issue we turn to examine now is whether the United States has met its burden of establishing that the AD on alcoholic liquor was not "equivalent" to State-level internal taxes on like domestic alcoholic liquor.[291]

7.262 We first examine the particular features, structure and design of CN 32/2003. CN 32/2003 says the Central Government specified the rates of AD applicable to alcoholic liquor "having regard to the excise duties for the time being leviable on like alcoholic liquors produced or manufactured in different States, or the excise duties which would be leviable for the time being in different States on the class or description of alcoholic liquor, as the case may be". Thus, CN 32/2003 suggests that "excise duties" were in force at the time in different States of the Union and that such excise duties were imposed in respect of like alcoholic liquor produced or manufactured in these States or in respect of domestic alcoholic liquor of the class or description of alcoholic liquor to which the imported alcoholic liquor belongs.[292] The passage quoted from CN 32/2003 further indicates that the

[290] We have explained previously that if the United States could establish that the AD on alcoholic liquor was not an Article II:2(a) charge, we would need to examine what, if any, further demonstration would be required of it.

[291] We recall that, for the purposes of an Article II:2(a) inquiry, "equivalence" is a necessary condition for the AD on alcoholic liquor to fall outside the scope of Article II:1.

[292] We note that there is a distinction to be made between India's 28 States and the 7 Union Territories. In its reply to Panel Question No. 24, India indicates, however, that this distinction is not relevant to the resolution of any issue put before the Panel. The United States has not claimed otherwise. Accordingly, we will hereafter pay no further attention to this distinction.

Central Government set the rates of AD for alcoholic liquor having regard to the State excise duties on domestic alcoholic liquor leviable at the time.

7.263 We observe that CN 32/2003, on its face, points to the existence of a relationship between the AD on alcoholic liquor and State excise duties on alcoholic liquor. In relation to these State excise duties on alcoholic liquor, we note that the Constitution of India describes and characterizes State excise duties on alcoholic liquor as duties on goods manufactured or produced in the relevant State.[293] According to India, the taxable event from which liability to pay such a duty arises is the manufacture of the product.[294] Evidence submitted by the United States regarding the so-called central excise duty (i.e., the excise duty levied by the Central Government of India on goods manufactured or produced in India other than, *inter alia*, alcoholic liquor) suggests that it applies to goods manufactured or produced in India upon their removal from the place of manufacture or production.[295] Nevertheless, in response to a question from the Panel, the United States said that the reference in the proviso to Section 3(1) to "excise duties" appeared to be a reference to internal taxes. The United States further said that without knowing the details of these excise duties, it could not make a determination that they constituted internal taxes within the meaning of Article III:2.[296] In our assessment, the elements before us tend to support the view that the State excise duties on domestic alcoholic liquor referred to in CN 32/2003 and the proviso to Section 3(1) are imposed in respect of domestic goods – alcoholic liquor manufactured or produced in the relevant State. However, in view of the particular circumstances[297], we deem it appropriate to suspend our analysis of this issue for the time being and to conduct our "equivalence" inquiry on the assumption that the State excise duties on alcoholic liquor may be regarded as internal taxes imposed in respect of a domestic product, as contemplated in Article II:2(a).

7.264 As to whether the alcoholic liquor subject to the AD was "like"[298] domestic alcoholic liquor subject to State excise duties, we note that the Parties have been arguing or assuming that this is the case.[299] Since the Parties did not treat this as an issue of particular interest or concern and there is little relevant information on the record, in relation to this issue as well we consider it appropriate to suspend our analysis for the time being and to conduct the present "equivalence" inquiry on the assumption that the alcoholic liquor subject to the AD was "like" domestic alcoholic liquor subject to State excise duties.

7.265 The United States notes that CN 32/2003 does not identify any State excise duties to which the AD relates. However, Article II:2(a) requires that a border charge imposed on a product being imported be equivalent to an internal tax imposed in respect of the like domestic product. It contains no requirement specifically to identify the relevant internal tax by name, date of publication, etc.[300]

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[293] Entry 51 of List II of the Constitution of India, quoted in India's reply to Panel Question No. 26.

[294] India's reply to Panel Question No. 36.

[295] Exhibit US-21; US reply to Panel Question No. 12. This seems relevant in view of the similar language of the provisions of the Constitution of India authorizing the making of laws concerning State excise duties and the central excise duty. Entry 84 of List I of the Constitution refers to "[d]uties of excise on tobacco and other goods manufactured or produced in India except", *inter alia*, alcoholic liquor for human consumption. Entry 51 of List II of the Constitution refers to "[d]uties of excise on the following goods manufactured or produced in the State", including on alcoholic liquor for human consumption.

[296] US reply to Panel Question No. 19.

[297] The record contains little evidence on the issue, which reflects the fact that neither Party paid much attention to it.

[298] Article II:2(a) uses the phrase "like domestic product".

[299] US second written submission, para. 30 (assuming "likeness" and noting, in addition, that the Panel need not reach the issue); India's first written submission, para. 84 (arguing "likeness" for SUAD, but addressing also alcoholic liquor).

[300] The fact that it is not a requirement does not mean that it would not be desirable for a Member, as a matter of good practice, specifically to identify the relevant internal tax.

At any rate, it is clear to us from the text of CN 32/2003, particularly when read together with the proviso to Section 3(1) of the Customs Tariff Act, that the State excise duties on alcoholic liquor to which CN 32/2003 refers are those in force at the time in the different States of the Union. In other words, they comprise the excise duties of all those States which levied such duties on alcoholic liquor at the time.[301] Also, as we have just mentioned, the Constitution of India explicitly refers to, and explains, the concept of State excise duties on alcoholic liquor. Based upon these elements, we think that the relevant State excise duties referred to in CN 32/2003 are, in principle, identifiable.[302]

7.266 The United States further points out that CN 32/2003 does not indicate how the rates of AD specified by the Central Government "have regard" to the excise duties levied by the States. It is useful to deal with this point after we have considered relevant provisions of Section 3(1) of the Customs Tariff Act pertaining to the AD on alcoholic liquor. We note in this respect the statement in CN 32/2003 to the effect that the rates of AD 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, 1975". In view of the fact that there is a clear and direct link between CN 32/2003 and the proviso to section 3(1) of the Customs Tariff Act, the proviso is relevant to an assessment of whether the AD on alcoholic liquor was equivalent to State excise duties imposed in respect of domestic alcoholic liquor.

7.267 We recall that the proviso to Section 3(1) reads:

> "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."

7.268 Concerning the proviso's phrase "having regard to", India has explained that it "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 AD which is 'equal to the excise duty' [as is contemplated in the introductory paragraph of Section 3(1) for products imported into India other than alcoholic liquor and in respect of which the like domestic product is subject to an excise duty levied by the Central Government (the Central Excise Tax)]".[303] 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 AD, but does not make it mandatory to adopt any one single rate – this continues to be left to the discretion of the Central Government".[304] Finally, India observed that the proviso "does not require a correlation between the methodology for the calculation of the AD 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".[305]

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[301] India's reply to Panel Question No. 8(a) suggests that some States do not permit the sale of domestic alcoholic liquor. It is unclear from India's reply whether these States permit the sale of imported alcoholic liquor.

[302] We note in this respect that the United States is not alleging that India is in breach of its obligations of Article X:1 of the GATT 1994 on publication of trade regulations.

[303] India's reply to Panel Question No. 27(d).

[304] *Ibid.*

[305] *Ibid.* (corrected for typographical error).

7.269 With these explanations in mind, we now return to the point raised by the United States that CN 32/2003 does not indicate how the Central Government had regard to State excise duties when it specified the rates of AD for alcoholic liquor. India has addressed the specific point raised by the United States in response to a question from the Panel. India stated that the rates of AD specified in CN 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".[306] India went on to observe that the Central Government "also noticed that the fiscal burden imposed on lower-priced alcoholic liquor, which accounts for a majority of sales in the domestic market, was higher than that imposed on higher priced alcoholic liquor" and that, consequently, it was decided "to divide the rate into four *ad valorem* rates and impose these rates as the additional duty on alcoholic liquor through … CN 32/2003".[307] Finally, India stated that "[w]hile it is possible that in some States and in some price bands, the AD 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 AD is less than the State excise duty in some other States".[308]

7.270 The first point we wish to make in response to the above is that, by itself, the fact that CN 32/2003 does not say how the Central Government "had regard" to State excise duties does not mean that the AD on alcoholic liquor is not equivalent to State-level excise duties on domestic alcoholic liquor. We see no requirement in Article II:2(a) that a Member imposing a border charge equivalent to an internal tax needs explicitly to state, either in the measure establishing the border charge or that establishing the corresponding internal tax, why and how either is equivalent to the other.[309]

7.271 As to whether the rates specified in CN 32/2003 indicate that the AD on alcoholic liquor is not equivalent to State-level excise duties on domestic alcoholic liquor, we should make clear at the outset that neither the United States nor India has supplied specific information about excise duties actually levied by different States on alcoholic liquor.[310] This said, it is clear from India's Constitution that the States are empowered to levy excise duties on alcoholic liquor manufactured or produced in the relevant State.[311] Since there do not appear to exist any harmonization measures, it is also clear that the structure and level of these excise duties may vary from State to State.[312] India has asserted in response to a question that, at the time of the Panel's establishment, all States that permitted the sale of

[306] India's reply to Panel Question No. 28. India has not provided further particulars in support of its statement.

[307] *Ibid*. India has provided no information regarding the fiscal burden imposed in different States on, respectively, low- and high-priced domestic alcoholic liquor.

[308] *Ibid*.; India's reply to Panel Question No. 8(c). We note 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 AD at the highest excise duty rate.

[309] We do not understand the United States to say otherwise. However, we do not wish to suggest that it would not be desirable for a Member, as a matter of good practice, to provide an *ex ante* explanation.

[310] After the second substantive meeting with the Parties, the Panel, in a written question, requested India to identify relevant State excise duties and any differences in terms of the form of taxation, applicable duty rates, etc. India did not respond to the Panel's question. Regrettable as this is, we note that we put the question to India in an effort at obtaining more background information that could have helped us in our internal deliberations. Also, some of the information might have enabled us to verify certain assertions by India in case this would have proved necessary. As is clear from our findings, however, we have been able to dispose of the US claim under Article II:1(b) without the information in question. We have, therefore, refrained from pursuing our question.

[311] Entry 51 of List II of the Constitution of India.

[312] We note that this can also be inferred from the text of the proviso to Section 3(1) of the Customs Tariff Act.

alcoholic liquor levied an excise duty on alcoholic liquor subject to the AD.[313] India further stated that the excise duties levied by the States did, indeed, vary.[314]

7.272 Although we have no information on specific State excise duties, it is possible, and useful, to offer some observations regarding the rates of AD specified in CN 32/2003, based upon the explanations India has provided. To begin with, India has stated that the proviso to Section 3(1) does not require any correlation between the methodology for the calculation of the AD and that for the calculation of the respective State excise duties. It appears that, in essence, the point India intends to convey in referring to methodologies for calculation is that, irrespectively of what individual States may do in relation to their excise duties on alcoholic liquor, the proviso leaves the Central Government free to decide, e.g., whether to impose the AD on alcoholic liquor in the form of an *ad valorem* duty, a specific duty or a combination of both. As we have already pointed out, the rates of AD specified in CN 32/2003 take the form of either *ad valorem* duties or specific duties. Similarly, we note that CN 32/2003 creates different price bands and different rates of AD corresponding to these bands.

7.273 In our view, even if, as appears possible, the form (*ad valorem* vs. specific duties, etc.) and structure of the rates of AD for alcoholic liquor were different from the form and structure of the rates of State excise duties on alcoholic liquor, this would not demonstrate that the AD on alcoholic liquor was not equivalent to State excise duties on domestic alcoholic liquor. The concept of "equivalence" as it appears in Article II:2(a) does not imply that a border charge and an internal tax need to have the same form (*ad valorem* vs. specific duties, etc.) and/or rate structure.[315] Rather, it implies that they need to have the same function of imposing a charge on a product *qua* product. We do not see why a border charge and an internal tax having a different form (*ad valorem* vs. specific duties, etc.) and/or rate structure could not nonetheless fulfil the same relative function within the customs duty and tax system of the Member concerned.

7.274 We also wish to comment upon India's statement that the rates of AD specified in CN 32/2003 reflect a process of averaging. As explained by India, its attempt at averaging in a context of State excise duties leviable at different rates could have meant that the rate of AD for alcoholic liquor exceeded the rate of excise duty applicable to like domestic alcoholic liquor in some States and in some price bands (or, more generally, that the tax burden as a result of imposition of the AD on alcoholic liquor exceeded the tax burden as a result of imposition of a particular State excise duty on like alcoholic liquor manufactured or produced in the State). If that was the case, and India explicitly acknowledged that this was a possible consequence of CN 32/2003, it would nevertheless

[313] India's reply to Panel Question 8(a). India has not provided any supporting evidence. At the same time, we note that the United States has not asserted otherwise or provided evidence to the contrary. In contrast, the European Communities as a third party asserts that not all Indian States apply taxes on alcoholic liquor under the denomination "excise duty". It refers to Delhi for wines and spirits, and Maharashtra as regards wines. EC third party written submission, para. 20. Neither Party has commented or relied upon this EC assertion. As the European Communities has not substantiated its assertion through documents, information or detailed explanation, we are not in a position to determine whether the European Communities is correct in asserting that the States in question do not levy any excise duty on specified alcoholic liquor. Also, as noted by the European Communities itself at para. 19 of its submission, the denominations of State taxes may vary from State to State. In these circumstances, just like we can only note India's assertion that all States did levy excise duties on alcoholic liquor, so also we can only note the EC assertion to the contrary.

[314] India's reply to Panel Question 8(b). The United States relied upon this reply by India. US second written submission, note 58.

[315] Indeed, if it were otherwise, a Member could not, e.g., use a price band to apply an additional and preferential rate (e.g., 2 per cent *ad valorem*) to products being imported while applying a general rate (e.g., 6 per cent *ad valorem*) to all like domestic products and to products being imported that do not qualify for the preferential rate. We do not consider that the terms of Article II:2(a) are intended to prevent a trade-creating rate structure of this type.

not demonstrate, for the reasons we have articulated earlier[316], that the AD on alcoholic liquor and the State excise duties did not fulfil the same relative function within India's customs duty and tax system. Instead, the existence of a rate differential (or, more generally, of a tax burden differential) disfavouring alcoholic liquor being imported may merely indicate that the AD on alcoholic liquor and the State excise duties fulfilled the function of imposing a charge on alcoholic liquor *qua* alcoholic liquor in a different manner, with the consequence that, in some States and circumstances, alcoholic liquor being imported was treated less favourably than the like domestic product.[317]

7.275 Before proceeding to consider the purpose of the AD on alcoholic liquor it is appropriate to call attention to a feature of CN 32/2003 that neither Party specifically commented upon. As we understand it, pursuant to CN 32/2003, the AD on alcoholic liquor was imposed on the importation of specified alcoholic liquor apparently without regard for where in India, and, specifically, in which State, it would be finally consumed.[318] To our minds, if it was the case that the AD was being imposed, pursuant to CN 32/2003, on alcoholic liquor destined for consumption in a State where no excise duty was leviable on like alcoholic liquor, this would present the issue whether in respect of alcoholic liquor destined for consumption in that State, the AD was "equivalent" to a State-level excise duty. However, as previously noted and as further addressed below, it is not clear from the record whether on the date of establishment of the Panel there were States that permitted the sale of alcoholic liquor but did not levy an excise duty on alcoholic liquor subject to the AD.

7.276 Having regard to our considerations so far, it can thus be said that the particular features and structure of CN 32/2003, including the fact that, on its face, it points to a relationship with State excise duties, the form and structure of the rates it specifies, and the fact that it applies to imports of alcoholic liquor without apparent regard for its final destination in India, support or at least are not inconsistent with India's position that the AD on alcoholic liquor was "equivalent" to State excise duties.

7.277 Turning now to examine the design, or purpose, of the measure at issue, we note the United States' argument that the proviso's phrase "having regard to the excise duty for the time being leviable on like alcoholic liquor produced or manufactured in different States" does not change the appropriateness of characterizing the AD on alcoholic liquor as an ordinary customs duty, because, in its view, the purpose or intent a Member attributes to a duty is not determinative. Otherwise, the United States maintains, a Member could avoid the commitments made in its Schedule simply by attributing an appropriate purpose to the duty.[319] In considering this argument, we note, as an initial matter, that the phrase referred to by the United States does not actually state the purpose of the AD on alcoholic liquor. Rather, as stated by India, it directs the Central Government to take account of State excise duties when exercising its right to set the rate of AD for alcoholic liquor.[320]

7.278 Nonetheless, we consider that the phrase in question is consistent with India's view[321] that the AD on alcoholic liquor is designed to offset State excise duties levied on alcoholic liquor produced or

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[316] See *supra*, para. 7.192-7.193.

[317] *Ibid*.

[318] CN 32/2003 applies to alcoholic liquor for human consumption. See the proviso to Section 3(1) of the Customs Tariff Act. We also note that as of the date of establishment of the Panel no exemptions had been granted from the AD as imposed through CN 32/2003.

[319] In support of its argument, the United States refers to the GATT Panel Report on *EEC – Parts and Components*, para. 5.7.

[320] To that extent, the proviso does not appear to constitute an example of a case where a Member's statute attributes to a duty a particular purpose or intent. At any rate, we would agree that the purpose stated in a Member's legislation is not determinative, by itself, for WTO purposes. Nevertheless, it is a relevant factual element which we may consider together with others in coming to an overall conclusion on the issue of "equivalence".

[321] India's reply to Panel Question No. 27(d).

manufactured in the States.[322] To us, this seems to be a natural and plausible explanation of why the Central Government is to have regard to State excise duties when specifying the rate of AD for alcoholic liquor. However, from the text of the proviso it is not clear to us whether the AD may be imposed on alcoholic liquor imported into India only in cases where an excise duty is for the time being leviable on like domestic alcoholic liquor in all States permitting the sale of the alcoholic liquor in question, or whether it would be sufficient that an excise duty is leviable in only some States permitting its sale.[323] Regarding the second hypothesis, it is pertinent to note that pursuant to Section 3(8) of the Customs Tariff Act in conjunction with Section 25 of the Customs Act the Central Government appears to have the power to grant exemptions from the levy of the AD subject to such conditions (to be fulfilled before or after customs clearance) as it may specify in the exemption notification.[324] Thus, it seems to us that even if the proviso authorized, or required, the Central Government to impose the AD in cases where an excise duty is leviable in only some States permitting the sale of alcoholic liquor, it is not clear that the Central Government would be required to impose it on all alcoholic liquor imported into India, irrespective of its final destination. In the light of this, and in the absence of evidence to the contrary, we see no reason to consider that the AD on alcoholic liquor, as designed, necessarily "overshoots" in certain circumstances.

7.279 In support of its view regarding the design of the AD on alcoholic liquor, India has referred to the following statement offered by the Supreme Court of India in its decision in *Hyderabad Industries Ltd. v. Union of India*:[325]

> "Even though the impost under Section 3 [of the Customs Tariff Act] is not called a countervailing duty there can be little doubt that this levy under Section 3 is with a view to levy additional duty on an imported article so as to counterbalance the excise duty leviable on the like article indigenously made."

7.280 Although this statement concerns an earlier version of Section 3(1) which did not include the current proviso relating to alcoholic liquor, we consider that it is relevant also to the AD on alcoholic liquor as contemplated in the proviso.[326] To begin with, the proviso was incorporated into, and thus forms an integral part of, Section 3(1). Furthermore, the principal change effected by the proviso relates to the rate of AD to be applied. The opening paragraph stipulates that for products other than alcoholic liquor the AD is to be equal to the excise duty (central excise tax), whereas the proviso stipulates that for alcoholic liquor the rate must have regard to the excise duty in different States. We fail to see in this difference regarding the rate of AD to be applied any indication that India's

[322] In our view, the fact that, as pointed out by India in reply to Panel Question No. 28, the proviso allows the Central Government to set the rate of AD in a manner that results in the rate exceeding the excise duty leviable in some States and being lower than the excise duty leviable in other States does not imply that it is designed to accomplish something other than offsetting State excise duties. Setting the AD rate based upon a determination of some kind of average State excise duty is one way of offsetting such duties.

[323] We note that neither Party has addressed this issue.

[324] The power to grant exemptions appears to include the power to grant a refund of a duty already paid. See the decision by the Supreme Court of India in *Assistant Commissioner of Commercial Taxes (Asst.) Dharwar and Ors. vs. Dharmendra Trading Company and Ors.*, at para. 8 (Exhibit IND-20), and CN 102/2007 which references Section 25 and provides for the possibility of obtaining a refund of the SUAD paid in specified circumstances.

[325] Exhibit IND-11, para. 15.

[326] As a separate matter, we note that the Supreme Court of India is an independent branch of the Central Government of India (Exhibit IND-9).

legislature intended for the AD on alcoholic liquor to have a purpose different from that of the AD on other products.[327]

7.281 In sum, having regard to the issue of the design of the AD on alcoholic liquor, we think the text of the proviso, the above-quoted statement by the Supreme Court of India as well as the previously discussed condition that the AD is to be levied on alcoholic liquor only if on like alcoholic liquor (or alcoholic liquor of the same class or description) excise duty is leviable are all consistent with India's view that the AD on alcoholic liquor as contemplated in the proviso to Section 3(1) is designed to counterbalance State excise duties. Moreover, it does not appear to us to be the case that the AD on alcoholic liquor, as designed, necessarily "overshoots" in certain circumstances.[328] If, as argued by India, the AD on alcoholic liquor was designed to counterbalance State excise duties on like domestic alcoholic liquor, this would in our view support the inference that it was designed to impose a charge on alcoholic liquor imported into India *qua* alcoholic liquor, and not *qua* alcoholic liquor being imported.

7.282 As to what this means for the AD on alcoholic liquor, as actually imposed through CN 32/2003, we recall that the proviso to Section 3(1) is the statutory basis upon which CN 32/2003 was issued, that CN 32/2003 explicitly states that the Central Government had regard to the excise duties leviable in different States, as required by the proviso[329], and that there is no indication that the consistency of CN 32/2003 with the proviso was ever questioned in India[330]. To that extent, there is no reason to think, based upon CN 32/2003 and its statutory basis, that the AD on alcoholic liquor could not be designed to counterbalance State excise duties, as argued by India. Or to put it another way, the aforementioned elements do not contradict the view that the function which the AD on alcoholic liquor was designed to fulfil was to impose a charge on alcoholic liquor imported into India *qua* alcoholic liquor.

7.283 Nevertheless, the design of the AD on alcoholic liquor could not, in any event, be determinative, on its own, of whether it was equivalent to State excise duties. As we have pointed out, the outcome of an "equivalence" inquiry under Article II:2(a) is context-dependent. Depending on the context, one and the same border charge may be equivalent, or not equivalent, to an internal tax. As a result, we also need to examine the AD on alcoholic liquor in its relevant context.

7.284 We turn first to the legal context within which the AD on alcoholic liquor operated, i.e., the legal structure of India's customs duty and tax system. Indeed, the AD on alcoholic liquor did not operate within a vacuum, but formed part of, and was embedded in, the legal framework of India's customs duty and tax system. We commence our review of the relevant legal context with the State excise duties on alcoholic liquor. As we have indicated previously, the Constitution of India empowers the States to impose "duties of excise" on alcoholic liquor manufactured or produced in the State.[331] In addition, the same entry of the Constitution empowers the States to impose "countervailing duties" on alcoholic liquor manufactured or produced elsewhere in India. The relevant entry is silent on the issue of the powers of State Governments in respect of imposition of excise duties or countervailing duties on imported alcoholic liquor. However, India has told the Panel

[327] To recall India's explanation: "The proviso to Section 3(1) addresses the specific situation of alcoholic liquor where different States levy varying rates of excise duty and the Central Government is unable to fix a single rate of AD which is 'equal to the excise duty'". India's reply to Panel Question No. 27(d).

[328] In the light of these elements as well as in view of our consideration below of the legal context within which the AD on alcoholic liquor operates, there is no apparent reason to be concerned that the relevant phrase in the proviso is designed to conceal the true nature of the AD on alcoholic liquor.

[329] We also recall in this regard the further explanations provided by India in response to Panel Question No. 28.

[330] In the context of the present proceedings, the United States has not, itself, alleged that CN 32/2003 is not properly based on the proviso to Section 3(1).

[331] Entry 51 of List II of the Constitution of India.

that its Constitution adopts a positive list approach according to which the Central Government and the State Governments are to exercise their powers strictly in accordance with their respective lists.[332] Thus, since the aforementioned relevant entry of the State List does not confer upon State Governments the power to impose excise duties, or countervailing duties, on alcoholic liquor imported into India, and such power does not appear to be conferred elsewhere, it seems the State Governments lack the power to impose excise duties or countervailing duties on alcoholic liquor not manufactured or produced in the State or elsewhere in India.[333]

7.285 Given the lack of powers of State Governments in respect of imposition of excise duties or countervailing duties on alcoholic liquor not manufactured or produced in the State or elsewhere in India[334], it is not unreasonable that India's customs duty and tax system, as it existed on the date of establishment of this Panel, would provide for some form and measure of compensatory taxation of imported alcoholic liquor. In this regard, we first note that the Constitution of India authorizes the Central Government to impose "duties of excise" on goods, but only on "goods manufactured or produced in India".[335] Moreover, the relevant provision explicitly states that the Central Government is not authorized to impose duties of excise on alcoholic liquor. In other words, the Constitution reserves to State Governments the right to impose excise duties on alcoholic liquor.[336] And, at any rate, the Central Government can impose excise duties only on goods manufactured or produced in India.

7.286 However, as we have seen, the Constitution of India authorizes the Central Government, and it alone, to impose "duties of customs".[337] India has explained that the term "duties of customs" encompasses the BCD, the AD and the SUAD. The Parties have not specifically discussed any other "duties of customs" that would be applicable to alcoholic liquor. In view of the fact that the Central Government does not have the authority, under India's Constitution, to impose excise duties on alcoholic liquor imported into India, it seems natural that it might possibly wish to use a "duty of customs" in order to counterbalance State excise duties. In this regard, it is common ground in this case that the BCD, which is also applied to alcoholic liquor, is an "ordinary customs duty" within the meaning of Article II:1(b).[338] As such, in relation to alcoholic liquor, as in relation to any other products on which it is imposed, it has the function of imposing a charge on the subject product *qua* product being imported into India. Put differently, it is not imposed to counterbalance State excise duties. The SUAD is imposed pursuant to Section 3(5) of the Customs Tariff Act to "counter-balance the sales tax, value added tax, local tax or any other charges" leviable on the sale, purchase or transportation of domestic products. India has explained that the categories of charges enumerated in Section 3(5) do not overlap with the category of excise duties mentioned in the proviso to Section 3(1).[339] Thus, the SUAD does not purport to counterbalance State excise duties on alcoholic liquor. Consequently, the "duty of customs" that is left to achieve this purpose is the AD. As we have previously seen, the AD has a statutory basis that is different from that of the BCD, which is consistent with the view that it fulfils a different function within India's customs duty and tax system, namely, in relation to alcoholic liquor, the function of imposing a charge on alcoholic liquor *qua* alcoholic liquor.

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[332] India's reply to Panel Question No. 48(d). As part of the same reply, India also explained that it has a system of judicial review whereby the exercise of by the Central Government and State Governments of their respective powers under the positive lists is subject to judicial scrutiny.

[333] India's reply to Panel Question No. 48(c).

[334] *Ibid.*

[335] Entry 84 of List I of the Constitution of India.

[336] India's replies to Panel Question Nos. 30(a) and (b).

[337] Entry 83 of List I of the Constitution of India.

[338] India's first written submission, para. 12; US second written submission, paras. 8, 10 and 16.

[339] India's reply to Panel Question No. 27(e).

7.287 We note that the State List of the Constitution of India confers upon State Governments exclusive power with regard to "[i]ntoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors".[340] Furthermore, the Constitution of India grants the State Governments exclusive power with regard to "[f]ees in respect of any of the matters in this List [the State List], but not including fees taken in any court".[341] Hence, it may be the case that the State Governments have the power to impose fees on, e.g., the transport of intoxicating liquor. We note, however, that neither Party has explained the concept of "fees" as it appears, inter alia, in the State List and how it relates to other relevant concepts appearing in that List, such as "duties of excise" and "taxes".[342] Nor have we been provided with any example of a State measure imposing a fee on imported alcoholic liquor in lieu of State excise duties. Based upon the information on the record it is not clear to us whether, as a matter of Indian law or as a practical matter, fees could be used by State Governments to counterbalance State excise duties imposed on alcoholic liquor manufactured or produced in the relevant State.[343]

7.288 Even if fees could, in principle, be so used (and we recall that we have seen no example documenting this), it seems to us that a "duty of customs" like the AD fits more naturally with the provisions of Entry 51 of the State List which deals with State "excise duties" and "countervailing duties". To recall, in a case involving alcoholic liquor, States may in accordance with Entry 51 impose excise duties only on alcoholic liquor manufactured or produced in the State and countervailing duties only on alcoholic liquor manufactured or produced elsewhere in India. Given this, it seems natural, having regard to alcoholic liquor manufactured or produced outside India, to counterbalance State excise duties by using a "duty of customs" like the AD, since "duties of customs" are by definition imposed only on goods imported into India. In contrast, there is no indication in the relevant Lists of the Constitution that "fees" are by definition imposed only on imported goods. Moreover, if fees were the more obvious and natural instrument to use for the purpose of counterbalancing State excise duties, it is not easy to see why Entry 51 contemplates countervailing duties imposed at the same or lower rates as excise duties, and not fees, since States imposing excise duties on alcoholic liquor would then typically impose "fees" on out-of-State Indian alcoholic liquor.[344]

7.289 In the light of the above, the legal framework of India's customs duty and tax system, as described above, is not inconsistent with India's position that the AD on alcoholic liquor was designed to counterbalance excise duties imposed by States permitting the sale of alcoholic liquor. Simply put,

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[340] Entry 8 of List II of the Constitution of India.

[341] Entry 66 of List II of the Constitution of India.

[342] The term "fee" is commonly used to denote charges payable in return for services. See, e.g., Articles II:2(c) and VIII of the GATT 1994. Thus, in relation, for instance, to the "production", "manufacture", "purchase" or "sale" of alcoholic liquor, the term "fees" as it appears in Entry 66 could be referring to licensing fees.

[343] For instance, it is not clear from the record whether the Constitution of India would permit the imposition by a State Government of a fee that discriminates against imported alcoholic liquor and whether a fee imposed by a State Government on imported alcoholic liquor could be properly compared, not to a fee, but an excise duty imposed on alcoholic liquor manufactured or produced in the relevant State. We recall in this context that it is not clear whether Entry 66 of List II uses the term "fee" to denote service charges or whether it uses the term in a broader sense.

[344] We note, as a separate and additional matter, the United States' comment that it is not clear that the State Governments lack the power to impose excise taxes on the consumption of imported alcoholic liquor. However, the United States has failed to identify any entry in the State or Concurrent List authorizing the imposition of this type of tax. Nor has the United States cited an example of a State excise tax on the consumption of imported alcoholic liquor, imposed in lieu of an "excise duty" imposed on State-manufactured alcoholic liquor. As we will explain in more detail in our analysis below of the SUAD, alcoholic liquor, whether imported or domestically produced, may, like other products, be subject to the Central Sales Tax, a State sales tax, etc. However, these taxes are not excise taxes, nor is there any information on the record to suggest that they are imposed to counterbalance State "excise duties" on alcoholic liquor.

the relevant States cannot impose excise duties on imported alcoholic liquor, and it appears that the Central Government can only counterbalance State excise duties on alcoholic liquor by means of a "duty of customs". Moreover, the record does not indicate that there is another "duty of customs" applicable to alcoholic liquor designed to counterbalance State excise duties, or that there are other taxes or charges imposed by State Governments that could be said to counterbalance State excise duties with regard to alcoholic liquor imported into India. It is true that the States are not legally required to impose excise duties. The lack of a requirement to impose excise duties does not, however, give rise to a presumption that the States permitting the sale of alcoholic liquor would not actually impose such duties.

7.290 If all States permitting the sale of alcoholic liquor levied an excise duty on alcoholic liquor subject to the AD, and if the States levied excise duties on alcoholic liquor as envisaged in India's Constitution (and so did not impose them on imported alcoholic liquor),[345] the legal framework described above also supports the view that the AD on alcoholic liquor and the State excise duties on alcoholic liquor fulfilled the same relative function within India's customs duty and tax system. To begin with, it is clear that, under the legal framework in existence at the time of establishment of the Panel, the AD constituted a charge on alcoholic liquor imported into India, whereas the State excise duties referred to in CN 32/2003 and the proviso to Section 3(1) constituted charges on alcoholic liquor produced or manufactured in the State imposing the duty. Moreover, to the extent all States permitting the sale of alcoholic liquor levied an excise duty on alcoholic liquor subject to the AD, the legal framework supports the inference that the function the AD, as imposed by CN 32/2003, fulfilled within India's customs duty and tax system was to impose a charge on alcoholic liquor *qua* alcoholic liquor, and not *qua* alcoholic liquor being imported into India. Furthermore, to the extent the States levied excise duties as envisaged in India's Constitution (and thus did not impose them on imported alcoholic liquor), the legal framework also supports the inference that the function the State excise duties fulfilled within India's customs duty and tax system was to impose a charge on alcoholic liquor *qua* alcoholic liquor, and not *qua* alcoholic liquor produced or manufactured in the State imposing the duty.

7.291 Besides the legal context within which the AD on alcoholic liquor operated, it is, of course, important to have regard also to the factual context within which it was imposed. In this respect, a relevant factual issue is whether, on the date of establishment of the Panel, all States permitting the sale of alcoholic liquor levied an excise duty on alcoholic liquor subject to the AD. As we have indicated, if this was not the case, it would present the issue of whether in respect of alcoholic liquor destined for consumption in States that did not levy an excise duty, the AD fulfilled the same function as, and so was "equivalent" to, a State excise duty. We recall in this regard that it is unclear from the record whether on the date the Panel was established all States permitting the sale of alcoholic liquor levied an excise duty on alcoholic liquor subject to the AD. As there is no apparent reason to presume that individual States would not use their power to impose an excise duty on alcoholic liquor and since in this case it is up to the United States to establish that the AD was not "equivalent" to State excise duties, we can only conclude that there is no evidence on the record to demonstrate that there were States permitting the sale of alcoholic liquor that did not levy an excise duty on alcoholic liquor subject to the AD.

7.292 Another relevant factual issue is whether India's Constitution and/or relevant laws were in fact implemented as envisaged in these legal instruments. We note in this respect that we have seen no concrete evidence of instances where an excise duty was imposed on imported alcoholic liquor in individual States. In the absence of evidence to the contrary, we must, therefore, presume that, at the

[345] We will revert to these two factual conditions further below.

time of establishment of this Panel, the States followed the requirements of India's Constitution and did not impose excise duties on imported alcoholic liquor.[346]

7.293 Accordingly, the legal and factual context within which the AD on alcoholic liquor operated on the date of establishment of the Panel does not indicate that the AD on alcoholic liquor was not "equivalent" to State excise duties imposed in respect of like alcoholic liquor produced or manufactured in the State imposing the duty.

7.294 Based upon the above analysis of the AD on alcoholic liquor, including its particular features, structure and design and the legal and factual context within which it operated, we thus come to the following overall result regarding the element of "equivalence":

(a) The evidence before us, comprising, *inter alia*, CN 32/2003, its statutory basis and the general legal framework of India's customs duty and tax system as it existed at the time of establishment of this Panel, is not inconsistent with India's position that the AD on alcoholic liquor was "equivalent" to State excise duties imposed in respect of like alcoholic liquor produced or manufactured in the State imposing the duty;

(b) there is no evidence on the record to demonstrate that, on the date of establishment of the Panel, there were States permitting the sale of alcoholic liquor that did not levy an excise duty on alcoholic liquor subject to the AD; and

(c) there is no evidence on the record to demonstrate that, notwithstanding the general legal framework in existence at the time, excise duties were, in fact, imposed in the States on imported alcoholic liquor.

7.295 In these circumstances, we can only conclude that the United States has failed to meet its burden of establishing that the AD on alcoholic liquor was not "equivalent", within the meaning of Article II:2(a), to State excise duties imposed in respect of like alcoholic liquor produced or manufactured in the State imposing the duty.

7.296 In view of this conclusion, we need not, for the purposes of disposing of the United States' claim under Article II:1(b), and hence do not, come back to the issues of whether the State excise duties on domestic alcoholic liquor are internal taxes imposed in respect of domestic products and whether the alcoholic liquor subject to the AD was in fact "like" domestic alcoholic liquor subject to State excise duties.

(c) Conclusion

7.297 As we have explained earlier, in the specific circumstances of this case, if the United States as the complaining party cannot meet its burden of establishing that the AD on alcoholic liquor was not "equivalent" to State excise duties imposed in respect of like domestic alcoholic liquor,[347] it cannot successfully establish that the AD on alcoholic liquor was of the same kind as, or in the nature of, an ordinary customs duty (or an "other duty or charge" imposed on the importation of alcoholic liquor).

7.298 As we have also explained, in the absence of a showing that the AD on alcoholic liquor was in the nature of an ordinary customs duty (or an "other duty or charge" imposed on the importation of a good), the fact that it met the elements of the US definition of "ordinary customs duties" is not

[346] We also recall in this context that the record contains no example of a fee, or other tax or charge, imposed by a State, consistently or inconsistently with the Constitution of India, on imported alcoholic liquor in lieu of State excise duties imposed on alcoholic liquor manufactured or produced in the relevant State.

[347] We recall that, for the purposes of an Article II:2(a) inquiry, "equivalence" is a necessary condition for the AD on alcoholic liquor to fall outside the scope of Article II:1.

sufficient to establish that it was an ordinary customs duty (or an "other duty or charge" imposed on the importation of alcoholic liquor) under Article II:1(b). Hence, we find that the United States has failed to establish that the AD on alcoholic liquor constituted an ordinary customs duty (or an "other duty or charge" imposed on the importation of alcoholic liquor) within the meaning of Article II:1(b). As a result, it has not been demonstrated that the obligations contained in Article II:1(b) were applicable to the AD on alcoholic liquor.

7.299 Accordingly, we come to the conclusion that the United States has failed to establish that the AD on alcoholic liquor, as imposed through CN 32/2003, was inconsistent with Article II:1(b), first or second sentence.

4. Consistency of the SUAD with Article II:1(b) of the GATT 1994

7.300 The **Panel** now proceeds to examine the United States' additional claim that the SUAD is, as such, inconsistent with Article II:1(b) of the GATT 1994.

7.301 The **United States** submits that the SUAD is inconsistent with this provision as an "ordinary customs duty" that exceeds India's WTO-bound rates. The United States submits that the SUAD is an "ordinary customs duty" because it applies: (1) at the time of importation (and, in this connection, it must be paid by the importer before the good may clear customs); (2) as a matter of course upon a good's importation (and, in this connection, it applies generally on the importation of alcoholic beverages into India and the event for which liability ensues is importation); and (3) as an *ad valorem* duty. The United States points out that in this regard the SUAD is no different from India's BCD. In relation to the BCD, the United States observes that India has already conceded that the BCD is an ordinary customs duty within the meaning of Article II:1(b). The United States notes that like the SUAD, the BCD applies: (1) at the time of importation (and, in this connection, it must be paid by the importer before the good may clear customs); (2) as a matter of course upon a good's importation (and, in this connection, it applies generally on the importation of products into India and the event for which liability ensues is importation); and (3) as a combination of *ad valorem* and specific duties.

7.302 The United States contends that there are a number of additional similarities between the BCD and the SUAD which indicate that the latter, like the former, is an "ordinary customs duty", including the fact that both are referred to under Indian law as "duties of customs", authorized under the same constitutional provision, required to be levied under the same provision of the Customs Act, subjected to exemptions under the same provision of the Customs Act, and administered under the same Customs rules and procedures.

7.303 The United States points out that the principal distinction India draws between the BCD and the SUAD is that the latter is intended to offset internal taxes imposed on like domestic products. The United States argues that whether the SUAD constitutes an ordinary customs duty must be based on an examination of its structure, design and effect. The stated purpose or intent of a duty does not determine whether it is or is not an ordinary customs duty. The United States notes that the GATT 1947 panel in *EEC – Parts and Components* rejected the notion that the stated purpose or characterization of an EEC anti-circumvention duty under EEC law provided a sufficient basis to characterize the measure as an internal tax rather than a customs duty. Similarly, the United States submits, this Panel should reject India's contention that the stated purpose or characterization of the SUAD under Section 3(5) of the Customs Tariff Act provides a sufficient basis to find the SUAD a charge equivalent to an internal tax rather than an ordinary customs duty.

7.304 The United States argues, in addition, that an interpretation of Article II:1(b) that would permit the stated purpose or intent of a measure to determine whether it fell within the scope of that article would permit Members to avoid or manipulate WTO commitments simply by attributing a particular purpose to a measure (regardless of what the measure in fact does) or by calling a measure

by one name versus another, similar to the situation faced in *EEC – Parts and Components*. In this dispute, the United States contends, India may attribute a different purpose to the BCD on the one hand and the SUAD on the other, but both of them, based on an examination of their structure, design and effect as reviewed above, constitute "ordinary customs duties" within the meaning of Article II:1(b).

7.305 Furthermore, in the United Sates' view, the fact that the SUAD may be distinct from India's basic customs duty, in that it is imposed under a separate section of the Customs Tariff Act, does not mean that the SUAD is not an ordinary customs duty. According to the United States, it is not the case that a Member may only impose one duty that may properly be characterized as an "ordinary customs duty" under Article II:1(b).

7.306 In the alternative, the United States believes that even if the SUAD were not an "ordinary customs duty", it would constitute an "other duty or charge" (ODC) within the meaning of Article II:1(b), second sentence. The United States submits that the SUAD would necessarily constitute an ODC if it were not an ordinary customs duty. If the SUAD is not an ordinary customs duty, then it must, in the United States' view, necessarily be something other than an ordinary custom duty. The United States points out in this regard that the SUAD applies on or in connection with importation. Specifically, it applies at the time of importation and as a consequence of importation (that is, importation is the event for which liability for duty ensues). Moreover, the United States considers that in asserting that the SUAD is a charge equivalent to an internal tax within the meaning of Article II:2(a), India has implicitly characterized it as a charge "imposed on importation" since the chapeau to Article II:2 makes clear that it concerns measures "imposed on importation". Therefore, the United States maintains, if the SUAD is not an ordinary customs duty, it must be an other duty or charge within the meaning of Article II:1(b).

7.307 Regarding the other element of an Article II:1(b) inquiry, the United States contends that the SUAD when imposed with India's BCD results in ordinary customs duties on imports in excess of India's WTO-bound rates. More particularly, the United States asserts that the SUAD imposed with the BCD results in ordinary customs duties on imports in excess of WTO-bound rates in any situation where the BCD is already at or very near India's WTO-bound rate. The United States notes that Exhibit US-1 contains a number of examples of products in addition to alcoholic liquor where this is the case. According to the United States, the SUAD is therefore as such inconsistent with Article II:1(b). Moreover, if the SUAD were considered an ODC, it would, in the United States' view, exceed the ODCs specified in India's Schedule as India's Schedule does not specify any ODCs for any product.

7.308 The United States notes India's assertion that the SUAD is equivalent to State excise duties imposed on like domestic products and thus imposed in accordance with Article II:2(a). The United States considers that it has presented evidence and argument sufficient to establish a prima facie case that the SUAD is (i) an ordinary customs duty that (ii) exceeds India's WTO-bound rates and, therefore, is inconsistent with Article II:1(b). According to the United States, having made a prima facie case that the SUAD is an ordinary customs duty, the necessary corollary of that showing is that the SUAD is not a "charge equivalent to an internal tax".

7.309 The United States further points out that even if the SUAD were not considered an ordinary customs duty but an "other duty or charge" on importation, India has presented no evidence that it is "equivalent" to an internal tax on like domestic products and imposed consistently with Article III:2. The United States argues that India as the party asserting that the SUAD is justified under Article II:2(a) bears the burden of sustaining that assertion.

7.310 The United States notes in this regard India's statement that the SUAD is equivalent to State-level VATs and the CST in addition to unnamed other local taxes and charges imposed on domestic

products. With regard to the latter category of taxes, the United States argues that India has not identified any such other local taxes or charges until its second written submission. In the US view, India's effort to identify such taxes is not adequate. The United States argues that India has provided no evidence that such taxes or charges exist, much less any evidence that such taxes or charges are equivalent to the SUAD, or that the SUAD results in charges that do not exceed such taxes or charges. Accordingly, the United States considers, India cannot sustain its assertion that the SUAD is equivalent to these local taxes or charges.

7.311 With regard to State-level VATs, the United States argues that they are not, in terms of their structure, design or effect, "equivalent" to the SUAD. First, 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 (zero and one, four and 12.5 per cent *ad valorem*)[348], the SUAD is set at a single rate of four per cent for all products. Secondly, the United States asserts that while the State level VATs may generally break down into four rates, there is no requirement that the individual States apply the same rate to the same domestic products. Thus, the United States maintains, 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. The United States points out in this respect 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. In addition, the United States notes, the Union Territory of Delhi applies its VAT at five rates (zero and one, four, 12.5 and 20 percent). The United States notes that this contrasts with the SUAD which does not prescribe different rates for different products and does not subject imports to different rates depending on the Indian State into which it is imported. Thirdly, the United States mentions the fact that State VAT operates by crediting against the VAT owed on a product's transfer, the VAT paid on the product's previous transfers. By contrast, the United States submits, there is no mechanism for crediting against the SUAD owed on a product, taxes or charges paid on the product's previous transfers. Nor is there a mechanism for crediting the SUAD paid on a product against the VAT owed on the product's subsequent transfers in India.

7.312 Regarding the CST, the United States considers that it is not equivalent to the SUAD for similar reasons. The United States contends that like the VAT, it is imposed at various rates and may vary from State to State and from product to product. Depending on the recipient, the United States notes, the CST 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).

7.313 The United States further states that with respect to both the VAT and the CST the amount of SUAD owed on imports as compared to the amount of VAT or CST owed on like domestic products is not equivalent, since it does not correspond, and is not virtually identical to, the VAT or CST, respectively, on like domestic products. For example, with respect to some products, the rate of State-level VATs and the CST is 12.5 per cent, whereas the rate of SUAD is four per cent. A rate of four per cent, the United States submits, does not appear to correspond, or be virtually identical to, a 12.5 per cent rate (the base on which both are calculated are the same).

7.314 Finally, the United States reiterates that the stated purpose of the SUAD is not sufficient to support India's assertion that it is a charge equivalent to an internal tax. Thus, in the United States' view, the fact that Section 3(5) of the Customs Tariff Act authorizes the Central Government to impose "an additional duty as would counter-balance" certain internal taxes does not mean that the resulting SUAD in fact "counter-balances" such internal taxes.

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[348] The United States notes, however, that some State-level VATs appear to apply five rates: zero and one, four, 12.5 and 20 per cent. The United States refers to the example of the Union Territory of Delhi.

7.315 The United States submits, as an additional matter, that India also acknowledges that the SUAD may in some instances be "marginally 'in excess' of the tax on like domestic products".[349] Therefore, the United States maintains, in conceding that the SUAD may result in any amount of charge on imports in excess of internal taxes on like domestic products, India has disproved its own assertions that the SUAD is imposed consistently with Article III:2 and in turn justified under GATT 1994 Article II:2(a).

7.316 The United States further asserts that State-level VATs and the CST apply to imported products sold within India and that imported products are, therefore, subject to the SUAD as well as the State-level VATs and CST with no offsetting credit for the SUAD paid. As a consequence, and since domestic products are not subject to the SUAD, imported products are, in the United States' view, subject to charges in excess of those on like domestic products and, therefore, the SUAD is not imposed consistently with Article III:2.

7.317 Finally, the United States submits that the rate of SUAD, on the one hand, and the rates of State-level VATs and the CST, on the other, are not the same. First, the United States points out that the rate of CST for sales to registered dealers is three per cent whereas the rate of SUAD is four per cent. Secondly, the United States contends that, as noted above, there may be instances where the rate of State-level VATs vary from State to State. In such instances, the United States argues, the SUAD which is imposed at a single rate cannot at the same time be equal to two or more rates of State-level VAT on like domestic products. Thirdly, the United States submits that in instances where the CST is based on the rate of State-level VAT of the State from which it originates, there may be instances where the rate of CST varies within in a single State. The United States notes that, for example, if the VAT rate in one State (State A) is four per cent and in another State (State B) is zero, when sold from State A to a non-registered dealer in State C, a product will be subject to a CST rate of four per cent, whereas when sold from State B to a non-registered dealer in State C, the product will be subject to a CST rate of zero. The United States argues that the SUAD imposed at a single rate cannot at the same time be equal to two or more rates of CST.

7.318 In the light of the above, the United States considers that the SUAD is not a charge equivalent to an internal tax (State-level VATs, the CST, or unnamed other local taxes or charges) and, as India even concedes, it is imposed on imports in excess of internal taxes on like domestic products. Therefore, the United States believes, the SUAD is not a charge equivalent to an internal tax imposed consistently with Article III:2.

7.319 **India** submits that the United States fails to appreciate that there is a clear demarcation under Indian law between the BCD and the SUAD. India argues that the BCD is the only duty imposed by it on imports which is in the nature of an "ordinary customs duty" as understood under Article II:1(b) and is accordingly bound at the levels prescribed in India's Schedule. India does not levy any "other duties or charges". India states that the BCD is distinct from the SUAD, which is levied on imported products in lieu of different internal taxes. According to India, the structure and design of the SUAD clearly highlight the fact that it is an "extra-ordinary" duty levied at the time of import and not in the nature of an "ordinary customs duty" or ODC.

7.320 India submits that the United States has failed properly to distinguish between different types of duties and the statutory provisions based upon which they are imposed. India notes in this regard that although the SUAD and the BCD are authorized under the same constitutional entry, they are levied under different statutory provisions. India recalls that the Customs Act and the Customs Tariff Act are different statutory enactments created by separate acts of Parliament. India contends that the BCD is levied under Section 12 of the Customs Act whereas the SUAD is levied under Section 3(5) of the Customs Tariff Act. India maintains that the United States has misinterpreted the cross-

[349] The United States refers to India's first written submission, note 51.

reference provisions contained in Section 3(8) of the Customs Tariff Act and Section 25 of the Customs Act to mean that both statutes essentially administer the same duties that are in the nature of "ordinary customs duties" or ODCs. India argues that the mere existence of a cross-reference between two statutes, inserted primarily for administrative convenience, does not alter the nature of the distinct charges levied under each. Specifically in relation to Section 25 of the Customs Act, India does not agree with the United States that the power to exempt imports from the SUAD is contained in the Customs Act. According to India, without the existence of the reference in Section 3(8) of the Customs Tariff Act, the power to exempt imports from the SUAD does not exist under Section 25. Furthermore, India considers that the mere fact that the SUAD is calculated "in addition" to the BCD does not make it an "ordinary customs duty" or an ODC. India points out that the SUAD is calculated under the Customs Tariff Act and not the Customs Act. In sum, India submits that the levy, calculation and collection of the SUAD as well as exemptions from the SUAD are provided for in the Customs Tariff Act, which makes the SUAD fundamentally different from the BCD levied under Customs Act.

7.321 According to India, Section 3(5) of the Customs Tariff Act makes clear that the intent and design of the SUAD is solely to offset, or counterbalance, certain internal taxes from which imported products at the time of importation are exempt, i.e., the State value-added tax ("VAT"); and/or the Central Sales Tax ("CST"); and/or "other local taxes and charges" on the sale, purchase or transport of domestic products. India is of the view that the policy purpose behind the introduction of a duty is an important factor, although not the only factor, which a Panel may look into while characterizing a duty.

7.322 In sum, in India's view, it is clear from such factors as the purpose of the SUAD, its statutory basis and its relationship with the internal taxes it is intended to counterbalance that the SUAD is a distinct duty from the BCD. The BCD, India notes, has no such purpose (as it is intended as a tariff imposed in accordance with India's Schedule), no relationship whatsoever with any internal tax and a different statutory basis.

7.323 India notes that the only commonality between the BCD, which is an "ordinary customs duty", and the SUAD is that they are imposed on imports at the border and that both are expressed in *ad valorem* terms. India submits in this regard that the Appellate Body in *Chile – Price Band System* held that this does not necessarily mean that such duties are "ordinary customs duties". As a result, the United States as the complaining party must look beyond the mere point at which the duty is levied and the manner in which the duty is expressed, since neither of them will necessarily mean or indicate that the duty is an "ordinary customs duty". Yet, India contends, instead of positively substantiating the existence of a prima facie case, the United States has based its claim under Article II:1(b) on two elements: (i) what it considers to be the general definition of an "ordinary customs duty" and (ii) India's alleged failure to prove that the SUAD falls outside this broad definition. India considers, therefore, that the United States as the complaining party in this case has failed to make out a prima facie case that the SUAD is an "ordinary customs duty". Consequently, in India's view, the United States' further assertion that the SUAD results in ordinary customs duties "in excess of" the WTO-bound rates in India's Schedule is without merit.

7.324 Regarding the United States' alternative assertion that the SUAD may qualify as an "other duty or charge", India submits that the United States has offered no reason in support of its contention other than that it is imposed "on importation". India submits that the United States has, therefore, failed to discharge its burden of proof. India considers that the SUAD is not in the nature of an ODC. It is imposed at the time of import but is not imposed on, or in connection with importation. India argues that, contrary to the United States' contention, the SUAD is not imposed as a consequence of importation. India maintains that the liability to pay the SUAD arises as a consequence of domestic like products being charged a VAT/sales and other local taxes and not merely because the products are imported into India. Looked at in another way, if domestically manufactured goods are not

charged a VAT/sales and other local taxes, then, India contends, imported like products will also not be charged the SUAD even if they are imported into the customs territory of India.

7.325 Based upon the above arguments, India submits that rather than being an "ordinary customs duty" or an ODC within the meaning of Article II:1(b), the SUAD is imposed in accordance with the provisions of Article II:2(a). India considers that as a charge equivalent to an internal tax, it does not erode the "value of tariff concessions" offered by India.

7.326 Concerning the issue of "equivalence", India argues that the SUAD is calibrated by the Central Government to be equivalent to the State VAT, the CST and other local taxes and charges. With regard to the State VAT, India points out that it is imposed by State Governments on the intra-State sale of domestic products under their respective State VAT statutes on domestic products and not on the importation of like products from outside India since they are precluded by the Constitution of India from levying VAT on the import of goods.[350] India submits that since domestic manufacturers have to bear the incidence of VAT which is not equally imposed on the import of products into India, the Central Government has sought to counterbalance the incidence of the VAT (and the CST and other local taxes and charges) by imposing the SUAD. According to India, appropriate tax credit and exemption mechanisms ensure that if certain domestic products are exempt from the payment of State VAT, then the like imported products are also correspondingly exempted from the payment of the SUAD. Similarly, products that are charged at a nominal rate of 1 per cent under the relevant State VAT legislation are charged SUAD for imported like products at a corresponding rate of 1 per cent.[351] Therefore, India contends, the SUAD is designed to be equivalent to the State VAT. India notes in this regard that it is because of variations in the State VAT rates that India has chosen to peg the SUAD on imported products to the lowest rate of VAT imposed on a like domestic product.[352] In India's view, merely because the VAT is in some instances charged at different rates cannot mean that the SUAD is not "equivalent" to internal taxes imposed on like domestic products.

7.327 With regard to the CST, India notes that it is levied only on the inter-state movement of domestically manufactured products by the Central Government under the Central Sales Tax Act. India argues that since domestic manufacturers have to bear the incidence of the CST (on inter-State sales) which is not imposed on the import of products into India, the Central Government has sought to counterbalance the incidence of the CST by imposing a 4 per cent SUAD. India points out that the rate at which the CST is charged on a product is determined in accordance with the laws of the State from where the movement originates, that is to say, the rate of CST will be equivalent to the prescribed rate of sales tax/VAT of the State of origin. Thus, the rate at which CST is levied on inter-state sales is interconnected with the VAT rates. According to India, appropriate tax credit and exemption mechanisms ensure that domestic goods that are exempt from the payment of VAT in the State from where they originate are also exempt from the payment of CST. Simultaneously, India contends, their like imported products are also exempted from the payment of the SUAD when they are imported into India.[353] Similarly, India notes, in the case of products such as gold, jewellery, etc. that are eligible to be charged the CST at the nominal rate of 1 per cent, their like imported products are correspondingly subject to the SUAD at the (reduced) rate of 1 per cent.[354]

7.328 With regard to the "local taxes and other charges", India notes that each State Government is empowered by the Constitution of India to collect a variety of local levies on goods and the raw materials used in their manufacture, such as transport fees, various type of surcharges, cess etc. India

[350] India refers to Article 286 of the Constitution of India.
[351] India refers to CN 20/2006.
[352] India notes that where the VAT rate exceeds 4 per cent, the SUAD charged is only 4 per cent.
[353] India refers to CN 20/2006.
[354] India refers to CN 20/2006.

submits that the cumulative effect of all State-level internal taxes imposed only on domestic products, from the raw material stage to its finished state, have to be counterbalanced on imported like products. India asserts that the SUAD was introduced with the objective of counterbalancing such internal taxes which may vary from State to State in terms of their nomenclature, quantum and character. According to India, the SUAD is levied at the lowest rate possible to counterbalance these State levies that are not imposed on like imported products.

7.329 India submits, as an additional matter, that the SUAD does not tax imported products "in excess of" like domestic products since it is equivalent to the VAT, the CST and/or other local taxes and charges paid by like domestic products. India notes that the imposition of the SUAD on the imported product merely equalizes the tax burden imposed on the like domestic product. India argues that since internal taxes and charges (VAT and CST) are levied at a minimum rate of 4 per cent, the tax burden on an imported product on account of the SUAD, which is levied at a rate of 4 per cent, cannot be said to be in excess of the tax burden imposed on like domestic products. Furthermore, India recalls that the benefit of an exemption or reduction from an internal tax such as VAT or CST results in a parallel exemption or reduction from the payment of the SUAD for like imported products, thus ensuring an overall equality of tax burdens on imported and like domestic products.

7.330 In view of the above, India considers that the United States has failed to demonstrate that the SUAD is not imposed in accordance with Article II:2(a) and that, notwithstanding the United States' failure to discharge its burden, India has amply demonstrated how the SUAD is imposed in accordance with Article II:2(a).

7.331 The **Panel** notes at the outset that the United States' legal claim in respect of the SUAD is the same as its claim in respect of the AD on alcoholic liquor. The analytical framework of the Panel's examination of the SUAD is, therefore, not different from that applied in the Panel's examination of the AD on alcoholic liquor. The SUAD itself bears many similarities with the AD on alcoholic liquor, and so the issues presented in respect of the SUAD are in good part the same as, or similar to, those presented in respect of the AD on alcoholic liquor. As a result, there are observations and explanations the Panel considers it is not necessary to repeat in its examination below of the SUAD. It is important, therefore, that the Panel's analysis of the SUAD be read together with, and in the light of, the more detailed analysis of the AD on alcoholic liquor. Also, the Panel will refer back to its analysis of the AD on alcoholic liquor, as appropriate.

7.332 With this said by way of introduction, we now turn to examine the United States' claim of inconsistency with Article II:1(b). The United States, as is logical in view of its claim under Article II:1(b), asserts that the SUAD, as imposed through CN 19/2006[355], constitutes an "ordinary customs duty", or, in the alternative, an "other duty or charge" within the meaning of Article II:1(b). As the United States' alternative contention is not based on separate or additional evidence, but rather on the word "other" in the phrase "other duty or charge"[356], if the United States cannot demonstrate, based on the evidence adduced by it, that the SUAD is an ordinary customs duty, it will also have failed to establish its alternative contention. India contests that the SUAD is either an "ordinary customs duty" or an "other duty or charge". India considers that it instead constitutes a charge equivalent to internal taxes within the meaning of Article II:2(a). India therefore requests the Panel to reject the United States' claim under Article II:1(b).

7.333 In the light of the disagreement between the Parties over the correct legal characterization of the SUAD, the Panel will examine first whether the SUAD was an "ordinary customs duty" (or, alternatively, an "other duty or charge" imposed on the importation of the products subject to the

[355] Hereafter, unless the context requires otherwise, we will for the sake of brevity refer to the "SUAD" rather than "the SUAD, as imposed through CN 19/2006".

[356] US second written submission, para. 19.

SUAD) and, thus, subject to the obligations contained in Article II:1(b), first sentence (or, alternatively, those contained in Article II:1(b), second sentence).

(a) Ordinary customs duty (or "other duty or charge")

7.334 We begin our examination by recalling that the United States has sought to establish that the SUAD is an "ordinary customs duty" by reference to its definition of that concept. Accordingly, we now proceed to consider the definitional and other elements relied upon by the United States with a view to determining whether they establish that the SUAD is an "ordinary customs duty" (or alternatively, an "other duty or charge" imposed on the importation of the products subject to the SUAD).

7.335 The SUAD, as its statutory name makes clear, is a "duty".[357] It applies to goods (articles) which are imported into India (in our case, those specified in CN 19/2006).[358] It does not apply to domestic goods. The SUAD is assessed at the time and point of importation by India's Customs authorities.[359] A good which is imported and subject to the SUAD is cleared through customs for entry into India's customs territory once the SUAD has been paid.[360] The SUAD is payable by the importers of the subject goods or their agents.[361] Furthermore, the SUAD takes the form of an *ad valorem* duty.[362]

7.336 Regarding whether the SUAD was also applied "as a matter of course" on the importation of the subject products, we note India's argument that the SUAD is not levied on imports unconditionally. Specifically, India stated that if domestic products are not charged State VAT or sales tax, or other local taxes, imported like products will also not be charged the SUAD.[363] This statement appears to be consistent with the text of CN 19/2006 and Section 3(5) of the Customs Tariff Act and its Explanation, in that both refer to different types of internal taxes "for the time being leviable"[364] on the sale, purchase or transportation in India of a like product, or a product of the same class or description as the imported product. We recall that corresponding language is found in the proviso to Section 3(1) and CN 32/2003 dealing with the AD on alcoholic liquor, and that a decision by the Supreme Court of India makes clear that the AD can be levied on a product only if on a like product excise duty is leviable. In view of these elements, we see no reason to disagree with India's statement that the SUAD can be levied on an imported product only if on a like domestic product (or a domestic product of the same class or description) relevant internal taxes are leviable. Accordingly, since the SUAD was being collected on the date of establishment of this Panel, it can be inferred that, in the view of India's Central Government, the aforementioned condition for the levy of the SUAD was satisfied at the time. In the light of this, as well as the characteristics of the SUAD set out at paras. 7.335 and 7.337, it seems to us to be correct for the United States to say that in respect of the products subject to the SUAD the SUAD is applied as a matter of course, and not on a case-by-case basis or in response to a singular or exceptional event or set of circumstances.

7.337 Finally, as to whether the SUAD was imposed "on the importation" of the products subject to the SUAD, we note India's assertion that liability for the payment of the SUAD arises as a consequence of relevant internal taxes being leviable on domestic like products and not merely

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[357] Section 3(5) of the Customs Tariff Act.

[358] *Ibid*; CN 19/2006.

[359] India's replies to Panel Question Nos. 5 and 12; US reply to Panel Question No. 12.

[360] India's reply to Panel Question No. 12. In some circumstances, goods may clear customs on execution of bonds or under duty deferment procedures. US reply to Panel Question No. 12.

[361] *Ibid*.

[362] Section 3(5) of the Customs Tariff Act; CN 19/2006.

[363] India's second oral statement, para. 3.5; India's comments on the US reply to Panel Question No. 43.

[364] CN 19/2006 omits the words "for the time being" but at the same time indicates that it is based on Section 3(5).

because the products are imported into India. As discussed above, the evidence suggests that the SUAD can be levied on an imported product only if on a like domestic product (or a domestic product of the same class or description) relevant internal taxes are leviable.[365] Where this condition is met, and the SUAD is imposed in respect of the relevant product, the event which in our understanding triggers the liability to pay the SUAD is the importation of the product.[366] Therefore, it seems to us that the United States is correct in saying that the SUAD is a duty imposed "on the importation" of the products subject to the SUAD.

7.338 Judging exclusively by the above characteristics of the SUAD, we would agree with the United States that the SUAD could, in principle, qualify as an "ordinary customs duty", or an "other duty or charge", within the meaning of Article II:1(b). However, these same characteristics are also consistent with India's view that the SUAD qualifies as a charge imposed on the importation of a subject product and equivalent to internal taxes imposed in respect of the like domestic product within the meaning of Article II:2(a). In this regard, to mention only a few elements[367], the SUAD being a "duty" imposed on a product, it can be considered a "charge" imposed on a product as that term is used in Article II:2(a). Also, as we have explained, the SUAD is a duty imposed "on the importation of a product". And finally, as is clear from its name, the SUAD is imposed in addition to India's BCD which the United States does not dispute is an "ordinary customs duty" within the meaning of Article II:1(b).[368] As we have stated earlier, Article II:2(a) charges may be imposed on a product subject to a tariff binding in addition to the ordinary customs duty levied on that product.[369]

7.339 We recall that the BCD, the AD and the SUAD are regarded under Indian law as "duties of customs".[370] In fact, CN 20/2006 which exempts specified products from some or all of the SUAD, refers to the SUAD as an "additional duty of customs". We also note that the SUAD is collected and administered by India's Customs authorities pursuant to the provisions of India's Customs Act.[371] For the reasons we have given earlier in the context of our analysis of the AD on alcoholic liquor, we consider that these elements do not conflict with India's view that the SUAD, as imposed by CN 19/2006, is an Article II:2(a) charge.[372]

7.340 The fact that the SUAD under Indian law is considered a "duty of customs" presents another issue, identified by the United States and familiar from our discussion of the AD on alcoholic liquor. Section 25 of the Customs Act empowers the Central Government to exempt goods "from the whole or any part of duty of customs leviable thereon". India argues that the authority to exempt products from the SUAD is not conferred by Section 25 of the Customs Tariff Act, but Section 3(8) which, as we have also noted earlier, stipulates that the provisions of the Customs Act, including Section 25, apply to the SUAD. We also recall that in reply to a question from the Panel India stated that some customs notifications, including CN 20/2006, refer to Section 25 only and that in those cases a reference to Section 3(8) is implicit. According to India, the absence of a reference to Section 3(8)

[365] It is not clear from the evidence before us whether it would be sufficient if one or more States, as opposed to all States, levied relevant internal taxes on a like domestic product or a domestic product of the same class or description.

[366] As we have said, India has indicated that the SUAD is payable by the importer at the point and time of importation, and customs clearance is not granted until the SUAD has been paid.

[367] See also *supra*, paras. 7.153-7.155.

[368] The United States considers, however, that the BCD is not the only "ordinary customs duty" imposed by India.

[369] We note that since the SUAD applies exclusively to imports, it is clear that it produces the same type of effect as the BCD. However, Article II:2(a) charges by definition apply to imports only.

[370] India's reply to Panel Question No. 7.

[371] India's replies to Panel Question Nos. 5 and 12; Section 3(8) of the Customs Tariff Act.

[372] See *supra*, paras. 7.250-7.251.

does not invalidate an exemption notification.[373] We consider that even if Section 25 provided independent authority to exempt imports from the SUAD, contrary to what the United States suggests, this would not demonstrate that India's customs duty system regards both the BCD and the SUAD as "ordinary customs duties". The reasons supporting this view are articulated in our analysis of the AD on alcoholic liquor.[374]

7.341 Having regard to the description of the SUAD as a "duty of customs", the United States further asserts that the SUAD and the BCD are required to be collected under Section 12(1) of the Customs Act, a proposition contested by India which says the statutory basis for the levy of the SUAD is Section 3(5) of the Customs Tariff Act. We are of the view that the statutory basis for the levy of the BCD is Section 12(1) of the Customs Act, whereas that for the levy of the SUAD is Section 3(5) of the Customs Tariff Act. In support of our view, we refer to the considerations we have offered when analyzing the same issue in the context of our discussion of the AD on alcoholic liquor.[375] In the light of our view, we are unable to agree with the United States that consideration of the statutory bases of the BCD and the SUAD supports the United States' assertion that under India's customs duty regime both the BCD and the SUAD are regarded as "ordinary customs duties".

7.342 The United States also points out that in accordance with Section 3(6) of the Customs Tariff Act the SUAD is to be calculated based upon the value of the imported good inclusive of the BCD and the AD. India has said that the method of calculating the SUAD is based on that of the State VATs.[376] As we have indicated, we understand that it is not uncommon even in the case of *ad valorem* internal taxes enforced and collected at the point and time of interpretation to assess them on the basis of the duty-paid value of the imported good.[377] Moreover, it is our understanding that in the case of general sales taxes like the VAT that are imposed on imported goods at the border it is not uncommon to include in the value of the imported good also specific commodity taxes (such as excise taxes payable on the good in question). In the light of this, we do not think that the fact that the SUAD is levied based upon a value of the imported good which is defined to include the BCD and the AD indicates that the SUAD is itself an "ordinary customs duty" or an "other duty or charge".

7.343 Another point previously covered in relation to the AD on alcoholic liquor concerns the distribution of revenues collected between India's Central Government and the States. As we have stated in that context, the revenues collected from the levy of the AD, the SUAD and the BCD are distributed as between India's Central Government and the States in accordance with a revenue sharing formula. Thus, although the SUAD is said to counterbalance, *inter alia*, State-level internal taxes, some of the revenues collected go to the Central Government. At the same time, some of the revenues collected from the levy of the BCD, which is not said to counterbalance any internal taxes, go to the States. For the reasons explained in our analysis of the AD on alcoholic liquor, we attach no particular importance to the fact that in terms of the distribution of revenues collected there is no difference between the SUAD and the BCD.[378]

7.344 The foregoing analysis shows that even though the SUAD meets the elements of the US definition of "ordinary customs duties", this is not sufficient, on its own, to establish that it is an

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[373] India's replies to Panel Question Nos. 39(a) and 27(h). In its reply to Panel Question No. 27(h), India stated that the Supreme Court of India, in *Assistant Commissioner, Commercial Taxes v. Dharmender Trading Co*., AIR 1988 SC 1247, held that when the exercise of legislative power can be traced to a legitimate source, mere failure to mention it does not vitiate the exercise of the power. India has not submitted the text of the decision.

[374] See *supra*, paras. 7.252-7.253.

[375] See *supra*, paras. 7.254-7.255.

[376] India's reply to Panel Question No. 29. India has said that State VAT is levied based upon a value of the product which is defined to include other taxes, including excise duties, as applicable.

[377] See also GATT Panel Report, *Canada – Provincial Liquor Boards (US)*, para. 5.25.

[378] See *supra*, para. 7.260.

ordinary customs duty (or an "other duty or charge" imposed on the importation of the products subject to the SUAD) under Article II:1(b) as opposed to a border charge equivalent to an internal tax under Article II:2(a). This remains true even if account is taken of the overall structure of India's customs duty and tax system, including such aspects as the domestic legal description of the SUAD as a "duty of customs", the role of India's Customs authorities in the collection of the SUAD, the exemption mechanism established by Section 25 of the Customs Act, the method of calculation of the SUAD and the distribution of the revenues collected as a result of the levy of the SUAD.

7.345 As a result, as in the case of the AD on alcoholic liquor, we need to go on to determine whether the United States has established, in addition, that the SUAD is of the same kind as, or in the nature of, an ordinary customs duty (or an "other duty or charge" imposed on the importation of the products subject to the SUAD).

(b) Equivalence to internal taxes

7.346 We have indicated previously that the United States can seek to establish by reference to the provisions of Article II:2 that the SUAD is in the nature of an ordinary customs duty (or an "other duty or charge" imposed on the importation of the products subject to the SUAD). In this regard, as in the case of the AD on alcoholic liquor, the Parties only discussed Article II:2(a)-type charges, i.e., charges equivalent to internal taxes.

7.347 As our analysis below amply demonstrates, this case objectively presents the issue whether the SUAD is a charge equivalent to internal taxes (sales tax, value added tax and other local taxes and charges) within the meaning of Article II:2(a). As a result, if the United States as the complaining party cannot establish that the SUAD is not equivalent to internal taxes imposed in respect of like domestic products, it cannot successfully establish that the SUAD is in the nature of an ordinary customs duty (or an "other duty or charge" imposed on the importation of the products subject to the SUAD). Accordingly, we now turn to examine whether the United States has met its burden of establishing that the SUAD is not "equivalent" to internal taxes on like domestic products.[379]

7.348 We first examine the particular features, structure and design of CN 19/2006 which directs the imposition of the SUAD on specified goods at a rate of 4 per cent *ad valorem*.[380] CN 19/2006 says the Central Government directed the imposition of the SUAD at the rate identified "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". Thus, CN 19/2006 states that internal taxes of the specified kind were in force at the time in India and that such internal taxes were imposed in respect of goods that are like those subject to the SUAD.

7.349 We observe that CN 19/2006, on its face, points to the existence of a relationship between, on the one hand, the SUAD and, on the other hand, the sales tax, value added tax, local tax and other taxes or charges leviable in India. In relation to these taxes or charges, CN 19/2006 indicates that they are leviable on the sale, purchase or transportation of goods. India contends that the internal taxes or charges referred to in CN 19/2006 are internal taxes or charges imposed in respect of domestic products. In response to a question from the Panel, the United States said that the reference in Section 3(5) to various taxes or charges appeared to be a reference to internal taxes. The United States further said that without knowing the details of these taxes or charges, it could not make a determination that they constituted internal taxes within the meaning of Article III:2.[381] In our assessment, to the extent CN 19/2006 refers to taxes or charges leviable on the sale or purchase of

[379] We recall that, for the purposes of an Article II:2(a) inquiry, "equivalence" is a necessary condition for the SUAD to fall outside the scope of Article II:1.

[380] Section 3(5) of the Customs Tariff Act envisages a maximum rate of 4 per cent *ad valorem*.

[381] US reply to Panel Question No. 19.

goods, the elements before us tend to support the view that they are internal taxes or charges imposed in respect of domestic goods. To the extent CN 19/2006 refers to taxes or charges leviable on the transportation of goods, there is not much information on the record about the nature of these internal taxes or charges.[382] In these circumstances, we deem it appropriate to suspend our analysis of this issue for the time being and to conduct our "equivalence" inquiry on the assumption that the relevant taxes or charges may be regarded as internal taxes or charges imposed in respect of domestic products, as contemplated in Article II:2(a).

7.350 As to whether the products subject to the SUAD are "like"[383] domestic products subject to relevant internal taxes, we note that the Parties have been arguing or assuming that this is the case.[384] Since the Parties did not treat this as an issue of particular interest or concern, and there is little relevant information on the record, in relation to this issue as well we consider it appropriate to suspend our analysis for the time being and to conduct the present "equivalence" inquiry on the assumption that the products subject to the SUAD are "like" domestic products subject to relevant internal taxes.

7.351 As correctly noted by the United States, CN 19/2006 does not specifically identify any internal taxes to which the SUAD relates. However, as we have previously stated, Article II:2(a) contains no requirement specifically to identify the relevant internal tax by name, date of publication, etc. At any rate, from the text of CN 19/2006, it is clear to us that the internal taxes to which CN 19/2006 refers are taxes in force at the time in India.[385] Also, we note that, by definition, sales taxes and value-added taxes ("VAT") are taxes on the sale of a product.[386] Therefore, it follows from the text of CN 19/2006 that the category of "local taxes and other charges" are charges imposed on the sale, purchase or the transportation of a domestic good.

7.352 More particularly, regarding the "sales tax", we note that there exist in India State-level sales taxes.[387] To begin with, State sales taxes are imposed on goods outside the State VAT system.[388] India has indicated that these goods include alcoholic liquor, tobacco products and certain petroleum products.[389] In addition, there apparently is one State – Uttar Pradesh – which still applies a sales tax instead of a VAT.[390] State sales taxes are leviable on sales taking place within the State imposing the tax.[391] In addition, there is a Central Sales Tax ("CST") which is levied exclusively on inter-state

[382] This reflects the fact that neither Party paid much attention to this category of taxes or charges. In particular, there is little information regarding whether these taxes or charges are (a) internal taxes or charges within the meaning of Article III:2 or (b) internal transportation charges within the meaning of Article III:4, second sentence.

[383] Article II:2(a) uses the phrase "like domestic product".

[384] US second written submission, para. 30 (assuming "likeness" and noting, in addition, that the Panel need not reach the issue); India's first written submission, para. 84.

[385] This is also confirmed by the statutory basis of Section 3(5), more specifically the Explanation to Section 3(5) which refers to taxes "for the time being in force".

[386] This has been confirmed, for India's case, by India in its reply to Panel Question No. 35.

[387] They are authorized under Entry 54 of List II (State List) of the Constitution of India.

[388] India's replies to Panel Question Nos. 33 and 52; Exhibit IND-25, p. 13.

[389] India's reply to Panel Question No. 33; Exhibit IND-25, p. 13.

[390] India's second written submission, note 2 and para. 2.12.

[391] Pursuant to Entry 92A of List I (Union List) of the Constitution of India, the Central Government alone is empowered to impose taxes on inter-State trade or commerce. India's replies to Panel Question Nos. 30(c), 49(b) and 58. Furthermore, Section 286 of the Constitution of India the States may not impose taxes on the sale of goods where the sale takes place "in the course of the import of the goods into […] the territory of India".

sales.[392] Although it is prescribed by a law of the Central Government, the CST is levied, collected and appropriated by the State where the good being sold originates.[393]

7.353 Regarding the "value added tax", as already mentioned, all States but one apply a State VAT.[394] As with State sales taxes, State VAT is leviable on sales taking place within the State imposing the VAT. There is a separate tax referred to as the Central VAT, or "CENVAT". However, this Central VAT system concerns the central excise duty.[395] As we have previously explained, India's Constitution distinguishes between excise duties, which are taxes on the manufacture of a good, and sales taxes.[396] Since CN 19/2006 refers to sales taxes and VAT but not excise duties, it is apparent that CN 19/2006 does not refer to the CENVAT, or central excise duty.

7.354 In sum, it seems clear that the sales tax referred to in CN 19/2006 is any applicable State sales tax or the CST, and the value added tax referred to is any applicable State VAT. It is useful to note that a sale in India involving a particular good would be subject either to State sales tax/State VAT (in case of intra-State transactions) or to the CST (in case of inter-State transactions).

7.355 So far as concerns the "local tax and other taxes or charges", the term "local tax" suggests that the relevant tax is applied in a local area, by a local government or municipality of the State. The phrase "other taxes or charges" does not explicitly indicate whether the relevant charges are imposed by the Central Government and/or the State Governments. In view of the fact that the other taxes identified in CN 19/2006 are all State taxes[397], it seems natural to infer that the "other taxes or charges" at issue are those imposed at State level.[398] At any rate, India has pointed out that any "local tax and other taxes or charges" must be authorized by a specific constitutional entry.[399] We note in this regard that there are entries in the State List concerning charges other than general sales taxes.[400]

7.356 In the light of the above, we think that the relevant internal taxes referred to in CN 19/2006 are, in principle, identifiable.[401] In fact, the taxes and charges identified by India before the Panel correspond to the above inferences. Specifically, India has stated that the SUAD is intended to counterbalance the following three categories of internal taxes: (1) the State VAT/State sales taxes, (2) the CST, and (3) other local taxes and charges imposed by State[402] or local governments.[403]

7.357 The United States further observes that CN 19/2006 does not indicate how the 4 per cent *ad valorem* rate of SUAD specified therein "has regard" to the internal taxes mentioned. By itself, the fact that CN 19/2006 does not say how the Central Government "had regard" to the relevant internal taxes does not mean that the SUAD is not equivalent to those internal taxes. We further note that, as is indicated in its text, CN 19/2006 was issued by the Central Government "[i]n exercise of the powers conferred by sub-section (5) of section 3 of the Customs Tariff Act, 1975". In view of the fact that

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[392] Section 6(1) of the Central Sales Tax Act (Exhibit IND-3).

[393] India's replies to Panel Question Nos. 6 and 25. The CST is collected from the seller. India's reply to Panel Question No. 61.

[394] India's second written submission, para. 2.12. Like State sales taxes, State VAT is authorized under Entry 54 of List II (State List) of the Constitution of India.

[395] Exhibit IND-25, p. 3; Section 3(1) of the Central Excise Act (Exhibit US-21).

[396] See, e.g., India's replies to Panel Question Nos. 36 and 48(a).

[397] As noted, the CST, in effect, is also a State tax in that it is levied and appropriated by the States.

[398] In fact, India has said that the local taxes and other charges the SUAD is intended to counterbalance are those levied at State level. India's reply to Panel Question No. 25.

[399] India's reply to Panel Question No. 30(a).

[400] E.g., Entries 56-58 and 66.

[401] We note in this respect that the United States is not alleging that India is in breach of its obligations of Article X:1 of the GATT 1994 on publication of trade regulations.

[402] India's first written submission, para. 79; India's reply to Panel Question No. 25.

[403] India's first written submission, paras. 23 and 70; India's second written submission, note 2.

there is a clear and direct link between CN 19/2006 and Section 3(5) of the Customs Tariff Act, Section 3(5) is relevant to an assessment of whether the SUAD is equivalent to internal State taxes imposed in respect of like domestic products.

7.358 We recall that Section 3(5) reads:

> "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."

7.359 Thus, Section 3(5) leaves a margin of discretion to the Central Government, but at the same time stipulates that the rate of SUAD may not exceed 4 per cent *ad valorem*. CN 19/2006 imposes the SUAD at this maximum rate of 4 per cent *ad valorem*. India has explained that the rate of 4 per cent has been calibrated to ensure equivalence between the SUAD and the State VAT/sales taxes, the CST and other local taxes and charges. More specifically, India has explained that the rate of the SUAD has been set so as to correspond to the lowest rate of State VAT applicable to a particular product.[404] The 4 per cent rate of SUAD corresponds to the lowest basic rate of State VAT.[405]

7.360 According to India, based on guidelines prepared by the Empowered Committee of State Finance Ministers for the implementation of State-level VAT, the States adopted VAT statutes which largely provide for the same four applicable *ad valorem* rates of VAT: (1) nil for exempt goods, which include (a) certain natural and unprocessed goods as well as (b) "goods of local importance", (2) a special rate of 1 per cent for gold, bullion, jewellery, etc., (3) a basic rate of 4 per cent for basic necessities and (4) a basic rate of 12.5 per cent for all other goods.[406] With regard to "goods of local importance", India has stated that they are identified in a list of 50 goods which has been approved by the Empowered Committee.[407] From this list, each State may choose 10 goods to be nil-rated or exempted.[408] The remaining goods on the list are apparently subject to any of the State's basic rates.

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[404] E.g., India's second written submission, para. 2.12, stating that the SUAD has been "pegged" to the lowest rate of State VAT.

[405] The term "basic rate" is used, e.g., in Exhibit IND-25, p. 13.

[406] The guidelines at issue are entitled "A White Paper On State-Level Value Added Tax" (Exhibit IND-25). India has confirmed that the White Paper is not binding on States, noting that under the Constitution of India the States alone are empowered to levy sales taxes. India's reply to Panel Question No. 54. Nonetheless, we note that the White Paper states that "[i]t should be clearly noted, as already mentioned before, that all the States have agreed to amend their earlier VAT Bills so as to conform broadly to the common design as elaborated in this White Paper. […] The point of reference on VAT should therefore be this design of VAT as explained in this White Paper". Exhibit IND-25, p.18. Under the heading of "Design of State-Level VAT", the White Paper includes a sub-heading "VAT Rates and Classification of Commodities" which identifies the identified four rates of VAT and also indicates the type and approximate number of goods to be subject to each rate. *Ibid*., p. 13. Finally, the White Paper states that the common design of the State-level VAT "will also stop unhealthy tax rate 'war' and trade diversion among the States". *Ibid*., p. 14. Taken together, these elements suggest to us that individual States are not supposed, e.g., to nil-rate goods falling within the 4 per cent category (with the possible exception of any "goods of local importance" which might fall within that category), as otherwise it is difficult to see how the common design could achieve the goal of averting a tax rate "war". In relation to "goods of local importance", we note that the White Paper describes them as goods which are of local social importance for individual States "without having any inter-state implication". *Ibid*., p. 13.

[407] Exhibit IND-24.

[408] India's reply to Panel Question No. 55.

7.361 The United States has submitted evidence concerning one State that applies an additional rate of 20 per cent.[409] India does not dispute that in different States different VAT rates may apply to the same good, but asserts that the lowest basic rate in every State is 4 per cent.[410] In fact, India has stated that the SUAD is imposed at the single rate of 4 per cent, among other things, because the States where imported goods will eventually be sold may have different applicable rates of 4 per cent or higher. Evidence supplied by the United States further shows that there are at least four States which, under their relevant laws, have the authority to reduce any applicable rates of State VAT.[411] However, the fact that these States have the authority to reduce rates does not demonstrate that the lowest basic rate in any of these States is less than 4 per cent. The authority to lower rates may have been provided for other reasons.[412] Moreover, we understand that the Central Government, under Sections 3(5) and 3(8) of the Customs Tariff Act, also has the authority to reduce the rate of SUAD in general or for specific goods.

7.362 As noted, the SUAD as imposed through CN 19/2006 is levied at 4 per cent. However, a separate customs notification issued by the Central Government – CN 20/2006[413] – exempts certain goods from some or all of the SUAD. Specifically, as a result of CN 20/2006, India maintains, goods (other than "goods of local importance") that are exempt from State VAT are also exempt from the SUAD (nil rated).[414] Similarly, goods subject to the special VAT rate of 1 per cent are subject to a corresponding rate of SUAD of 1 per cent. India has stated that since the SUAD has been set so as to correspond to the lowest VAT rate applicable to a particular product, the SUAD is levied at nil or 1 per cent even where other relevant taxes, such as "other local taxes or charges", are leviable on the like domestic good.[415] India acknowledges, however, that for "goods of local importance" which are nil rated in individual States there is no corresponding SUAD exemption. India submits that its international trading partners cannot be said to have a significant commercial interest in the relevant goods which, India notes, include products such as religious threads, indigenous food ingredients and handicraft items. India asserts that there are no significant imports of such goods into India. The United States points out that it does export at least some of the listed products, such as tapioca.

7.363 The CST is interconnected with the State VAT. The CST is levied at the rate applicable to the sale of the relevant good under the sales tax law of the State where the good originates (i.e., from which it is sold).[416] Thus, since the State VAT rates in the State of origin generally are either nil, 1 per cent, 4 per cent or 12.5 per cent, the CST would be levied at these same rates, respectively. Where the CST rate is nil or 1 per cent, by virtue of CN 20/2006, the corresponding rate of SUAD would also be nil (except for "goods of local importance") or 1 per cent. For other goods, the rate of SUAD is 4 per cent, whereas, according to India, the rate of CST is 4 per cent or higher, since, like VAT rates, the CST rates in different States may be different for the same good. There appear to be two possible exceptions, however. First, based on India's explanations of State VAT and the CST, it would seem that where a "good of local importance" has been nil-rated in the State of origin, the CST rate would also be nil. However, the information before us does not allow us to verify this. Secondly, as pointed out by India, where a dealer sells to a registered dealer in another State, the

[409] Exhibit US-23.
[410] India's second written submission, para. 2.12; India's reply to Panel Question No. 53.
[411] Exhibits US-23, -27, -28 and –29.
[412] One such purpose could be to allow for co-ordinated downward adjustment of all State VAT rates in the light of actual experience with implementation of a State VAT system or a changing economic situation. The guidelines prepared by the "Empowered Committee" of State Finance Ministers for the implementation of State-level VAT state that it is expected that after an initial loss of revenue in some States, introduction of VAT may, after a few years, lead to revenue growth. Exhibit IND-25, p. 15. If so, then there might be room for a lowering of the basic rates of 4 and 12.5 per cent.
[413] Exhibit US-11.
[414] The United States has not contested this.
[415] India's reply to Panel Question No. 34.
[416] Section 8(2) of the Central Sales Tax Act.

dealer is to pay CST amounting to 3 per cent of his turnover or at the rate applicable to the sale of such good under the sales tax law of the State of origin, whichever is lower.[417] It seems that this concessional rate reflects the fact that the CST paid on a first inter-State sale transaction is not creditable against the State VAT (or the CST) payable in case of subsequent re-sale within the relevant State (or to another State).[418] India has, however, confirmed that the SUAD is applicable to imports by registered dealers.[419] Accordingly, if application of the turnover rule leads to a lower effective tax rate than the relevant State VAT rate, the rate of the SUAD may, depending on the State of origin of the good subject to the CST, exceed the rate of the CST.

7.364 In relation to State sales taxes other than VAT, i.e., those applicable to goods outside the VAT system, India has stated that State sales taxes for such goods vary from State to State, but are equal to or higher than 4 per cent.[420] They may, India maintains, be higher than 12.5 per cent.[421] India has, however, provided no supporting evidence. The United States, for its part, has not submitted evidence disproving this assertion. Furthermore, no information was provided to us regarding the rates applicable under the sales tax maintained by the State of Uttar Pradesh.

7.365 Finally, so far as concerns "other local taxes and charges", we understand that some or all of these charges (such as Mandi taxes, market committee fees, turnover taxes or transport fees) are not eligible for credit against the State VAT.[422] India states that the SUAD is intended to counterbalance those "other local taxes and charges" which are not creditable against the State VAT.[423] These charges increase the tax burden borne by goods subject to State VAT or CST as well as of goods subject to State sales tax. India submits that these charges therefore effectively raise the cumulative rate resulting from imposition of internal taxes to one that is higher than the basic 4 per cent rate of SUAD. As previously pointed out, India has said that where a good is subject to a State VAT rate of nil (or 1 per cent) and, in addition, to "other local taxes and charges" which are not creditable against State VAT, the SUAD would, nevertheless, be applied at a rate of nil (or 1 per cent), and not at a rate of 4 per cent.[424]

7.366 It is important to note, as an additional matter, India's explanation that the SUAD was introduced to counterbalance only those of the relevant internal taxes or charges that would be leviable on a good in respect of a domestic sale transaction equivalent to the import transaction involving the like good.[425] India refers to this as the "first sale" transaction. Subsequent to the first (international) sale transaction, imported goods – like domestic goods subsequent to a domestic first sale transaction – may of course be re-sold internally or used in the manufacture of another product. India notes that where imported goods on which the SUAD has been paid have entered India's customs territory, and where they are subsequently re-sold internally or used in the manufacture of another product, they are subject to State VAT, State sales tax, CST and/or "other local taxes or charges", or not, in the same way as like domestic products.

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[417] Section 8(1) of the Central Sales Tax Act. India has stated that this rule has been in force since 1 April 2007. However, Exhibit IND-3 shows that a similar rule was in force previously. Also, this Panel was established on 20 June 2007.

[418] India's reply to Panel Question No. 59.

[419] India's reply to Panel Question No. 37(b).

[420] By implication, the same would then be true for the CST in case of inter-state transactions involving such goods.

[421] India's reply to Panel Question No. 33.

[422] India's reply to Panel Question No. 46; India's second written submission, para. 2.17.

[423] India's first written submission, para. 79; India's second written submission, para. 2.17.

[424] India's reply to Panel Question No. 33.

[425] India's first written submission, para. 71; India's second written submission, para. 2.5; India's reply to Panel Question No. 48(e) and (f).

7.367 In this regard, India has stated that on the date of establishment of the Panel no refund of the SUAD paid in respect of the import transaction was available against the State VAT, or the CST, payable in respect of a domestic re-sale transaction.[426] Nor was the SUAD paid creditable against the State VAT, or the CST, payable in respect of a domestic re-sale transaction.[427] This mirrors the situation of the CST, in that the CST paid in respect of a first inter-State sale transaction is not creditable against the State VAT, or the CST, payable in respect of a domestic re-sale transaction.[428] In relation to State VAT, we recall that one of the particularities of State VAT is that an off-set is given for State VAT paid in respect of previous sale transactions (e.g., for inputs or the same good where the goods was not further processed).[429] Accordingly, the State VAT paid in respect of a first intra-State sale transaction is creditable against the State VAT payable in respect of an intra-State re-sale transaction.[430]

7.368 India has pointed out that a credit of the SUAD 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.[431] In response to a question, India has confirmed, however, that the credit in question cannot be used to offset any other taxes like the State VAT, the CST, etc.[432] Furthermore, the credit against the central excise duty is equally available where the raw materials from which the finished product has been manufactured are domestic.[433]

7.369 As to whether the rate of SUAD specified in CN 19/2006 indicates that the SUAD is not equivalent to the relevant internal taxes (i.e., the State VAT/sales tax, the CST and "other local taxes or charges"), the first point to be made is that while, as indicated above, we have a good deal of general information, we have little specific information about State VAT/sales taxes or "other local taxes or charges" actually levied by different States. Nevertheless, it is clear from the information we have and the explanations India has provided that there could conceivably be circumstances where the SUAD 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[434] or (iii) is subject to State VAT and followed by an intra-State re-sale transaction involving the same good[435]. Even assuming, however, that circumstances might arise where, e.g., the rate of SUAD exceeded the rate resulting from imposition of relevant internal taxes on like domestic goods, in our view this would nevertheless not demonstrate,

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[426] As previously noted, in the course of the Panel proceedings India issued CN 102/2007 which provides, subject to certain conditions being satisfied, for the possibility of obtaining a refund from the SUAD paid in case of a subsequent domestic re-sale transaction subject to State VAT.

[427] India's reply to Panel Question No. 51(a).

[428] India's reply to Panel Question No. 59. In our understanding, there also is no possibility of obtaining a refund.

[429] India's reply to Panel Question No. 32(b); Exhibit IND-25, p. 1.

[430] It is unclear from the information on the record whether the State VAT paid is also creditable against the CST which is payable in respect of a domestic inter-State re-sale transaction.

[431] The availability of the credit is provided for in Rule 3 of the Cenvat Credit Rules (Exhibit IND-4).

[432] India's reply to Panel Question No. 51(b) and (c).

[433] India's reply to Panel Question No. 51(b).

[434] We make no comment upon whether this second set of circumstances remains relevant in view of CN 102/2007 which came into force after the date of establishment of the Panel. We note in this regard India's contention that registered dealers will either resell the same product or use the imported product to manufacture other products. The United States contends that a registered dealer could also consume or use a product it purchased inter-State.

[435] We make no comment upon whether this third set of circumstances remains relevant in view of CN 102/2007 which came into force after the date of establishment of the Panel.

for the reasons we have stated earlier[436], that the SUAD and relevant internal taxes do not fulfil the same relative function within India's customs duty and tax system. Instead, the existence of a rate differential (or, more generally, of a tax burden differential) disfavouring products being imported may merely indicate that the SUAD and the relevant internal taxes fulfil the function of imposing a charge on the products subject to the SUAD *qua* products in a different manner, with the consequence that, in certain circumstances, products being imported are treated less favourably than like domestic products.[437]

7.370 An additional feature of CN 19/2006 to which we wish to draw attention is that according to our understanding, pursuant to CN 19/2006, the SUAD is imposed on the importation of a subject good without regard for the particular State into which it is imported. To our minds, if the SUAD were imposed, through CN 19/2006, on a good imported into a State where relevant internal taxes are not leviable on the like domestic good, this would present the issue whether in respect of imports of the relevant good into that State the SUAD is "equivalent" to relevant internal taxes.[438] However, as further addressed below, there is no evidence on the record to show that, on the date of establishment of the Panel, this situation pertained.

7.371 Having regard to the foregoing considerations, it can thus be said that the particular features and structure of CN 19/2006, including the fact that, on its face, it points to a relationship with relevant internal taxes, the rate it specifies, and the fact that it applies to imports of subject goods without apparent regard for the State into which they are imported, support or at least are not inconsistent with India's position that the SUAD is "equivalent" to relevant internal taxes leviable in India.

7.372 Turning now to examine the design, or purpose, of the SUAD, we note the United States' argument that the statement in Section 3(5) that the SUAD may be imposed "[i]f the Central Government is satisfied that it is necessary in the public interest to 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 […] in India" does not affect whether the SUAD may be regarded as an ordinary customs duty. In the United States' view, the purpose or intent a Member attributes to a duty is not determinative.[439] We would agree that the purpose stated by a Member in its legislation is not determinative, by itself, for WTO purposes. Nevertheless, it is a relevant factual element which we may consider together with others in coming to an overall conclusion on the issue of "equivalence".[440]

7.373 In considering this element, we observe, as an initial matter, that the quoted statement in Section 3(5) makes clear that if the SUAD is imposed, it must be imposed for the purpose of counterbalancing the internal taxes identified in Section 3(5). We therefore consider that the passage in question is consistent with India's view[441] that the SUAD is a duty imposed by the Central Government of India to offset the incidence of State VAT/sales taxes, the CST and other local taxes or charges that are not levied on the importation of goods into India.[442]

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[436] See *supra*, para. 7.192-7.193.

[437] *Ibid*.

[438] We recall that pursuant to CN 20/2006 a list of specified goods are nil-rated. In relation to these goods, the issue referred to would not arise.

[439] In support of its argument, the United States refers to the GATT Panel Report on *EEC – Parts and Components*, para. 5.7.

[440] See also Panel Report, *Argentina – Hides and Leather*, note 440.

[441] India's first written submission, paras. 69 and 70.

[442] In our view, the mere fact that the Explanation to Section 3(5) contemplates that in cases "where such [internal] taxes, or, as the case may be, such charges are leviable at different rates", the Central Government may set the rate of SUAD by reference to "the highest such tax or, as the case may be, such

7.374 It is not clear to us from the quoted statement whether the SUAD may be imposed on a good being imported into India only in cases where relevant internal taxes are for the time being leviable on a like domestic good in all States, or whether it would be sufficient that relevant internal taxes are leviable in only some States.[443] Regarding the second hypothesis, it is pertinent to note that pursuant to Section 3(8) of the Customs Tariff Act in conjunction with Section 25 of the Customs Act the Central Government appears to have the power to grant exemptions from the levy of the SUAD subject to such conditions (to be fulfilled before or after customs clearance) as it may specify in the exemption notification.[444] Thus, it seems to us that even if Section 3(5) authorized the Central Government to impose the SUAD in cases where relevant taxes are leviable on a good in only some States, it is not clear that the Central Government would be required to impose it on all like goods imported into India, irrespective of the State into which they are imported. In the light of this, and in the absence of evidence to the contrary, we see no reason to consider that the SUAD, as designed, necessarily "overshoots" in certain circumstances.

7.375 In sum, having regard to the issue of the design of the SUAD, we think the text of Section 3(5) as well as the previously discussed condition that the SUAD is to be levied on a good only if on a like good (or a good of the same class or description) relevant internal taxes are leviable are consistent with India's view that the SUAD as contemplated in Section 3(5) is designed to counterbalance the internal taxes Section 3(5) identifies. Moreover, it does not appear to us to be the case that the SUAD, as designed, necessarily "overshoots" in certain circumstances.[445]

7.376 If, as argued by India, the SUAD is designed to counterbalance the internal taxes identified in Section 3(5) and leviable on like domestic goods, this would in our view support the inference that it is designed to impose a charge on the subject goods as such, and not *qua* goods being imported. It should be recalled in this respect that the SUAD is capped, by virtue of Section 3(5), at a rate of 4 per cent *ad valorem* for all subject goods whereas, as we have seen, in respect of some of these goods the States may apply rates of, e.g., State VAT that are higher. It is clear, therefore, that the SUAD, as designed, may not fully counterbalance the relevant internal taxes. The fact that it may not does not imply, in our view, that it is designed to have a different function. Rather, as we have said earlier, it may indicate that the SUAD and the relevant internal taxes fulfil the function of imposing a charge on the goods subject to the SUAD *qua* goods in a different manner, with the consequence in this case being that, in certain circumstances, goods being imported are treated more favourably than like domestic products.

7.377 As to what this means for the SUAD, as actually imposed through CN 19/2006, we recall that Section 3(5) is the statutory basis upon which CN 19/2006 was issued, that CN 19/2006 explicitly states that the Central Government had regard to the "sales tax, value added tax, local tax and other taxes or charges" leviable in India, as required by Section 3(5), and that there is no indication that the consistency of CN 19/2006 with Section 3(5) was ever questioned in India[446]. To that extent, there is no reason to think, based upon CN 19/2006 and its statutory basis, that the SUAD could not be designed to counterbalance the internal taxes identified in CN 19/2006, as argued by India. Or to put

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charge", provided the rate does not exceed 4 per cent *ad valorem*, does not demonstrate that the SUAD is designed to accomplish something other than offsetting the incidence of relevant internal taxes. As CN 19/2006 and CN 20/2006 indicate, the provisions of Section 3(5) and its Explanation leave the Central Government considerable freedom of action.

[443] We note that neither Party has addressed this issue.

[444] As we have indicated previously, the power to grant exemptions appears to include the power to grant a refund of a duty already paid.

[445] In the light of these elements as well as in view of our consideration below of the legal context within which the SUAD operates, there is no apparent reason to be concerned that the relevant statement in Section 3(5) is designed to conceal the true nature of the SUAD.

[446] In the context of the present proceedings, the United States has not, itself, alleged that CN 19/2006 is not properly based on Section 3(5).

it another way, the aforementioned elements do not contradict the view that the function which the SUAD is designed to fulfil is to impose a charge on goods imported into India as such, and not on goods *qua* goods being imported.

7.378 Nevertheless, the design of the SUAD could not, in any event, be determinative, on its own, of whether it is equivalent to relevant internal taxes. As we have previously explained, as part of our "equivalence" inquiry under Article II:2(a), we also need to examine the SUAD in its relevant context.

7.379 We turn first to review the legal context within which the SUAD operates and, more specifically, the legal framework of India's customs duty and tax system, of which the SUAD forms part. We commence our review with the State VAT and the sales taxes. The Constitution of India empowers the States to impose taxes on the sale (or purchase) of goods, except where such sale (or purchase) takes place in the course of inter-State trade or commerce.[447] However, pursuant to Article 286(1) of the Constitution of India, "[n]o law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place […] (b) in the course of import of the goods into […] the territory of India". As explained by India, Article 286(1) prohibits States from imposing State VAT or sales taxes in respect of the import transaction, i.e., when an imported product first enters the Indian customs territory.[448] Accordingly, the first (international) sale transaction may not be subjected to State VAT or a State sales tax, but subsequent domestic re-sale transactions may be subjected to State VAT or a State sales tax. In addition, the States lack the power of imposing State VAT or a State sales tax in respect of inter-State sale transactions. The power to impose taxes on the sale or purchase of goods where such sale or purchase takes place in the course of inter-State trade or commerce is reserved to the Central Government.[449]

7.380 Given that State Governments lack the power to impose VAT or sales taxes in respect of international or inter-State sale transactions, it is not unreasonable that India's customs duty and tax system, as it existed on the date of establishment of this Panel, would provide for some form and measure of compensatory taxation of these sale transactions. In this regard, it is our understanding that the Central Government has exercised its power to impose sales taxes on inter-State trade *inter alia* by enacting the Central Sales Tax Act which provides for the imposition of the CST.[450] We further understand that the Central Government does not have the power to impose taxes on the sale or purchase of goods where such sale or purchase takes place in the course of import of the goods into the territory of India.[451] However, as we have seen, the Constitution of India authorizes the Central Government, and it alone, to impose "duties of customs". To recall, India has explained that the term "duties of customs" encompasses the BCD, the AD and the SUAD. The Parties have not specifically discussed any other "duties of customs" that would be applicable to the goods subject to the SUAD. In view of the fact that the Central Government does not have the authority, under India's Constitution, to impose sales taxes on products being imported into India, it seems natural that it might possibly wish to use a "duty of customs" in order to counterbalance the State VAT or sales taxes leviable on like products in India.

7.381 In this regard, it is common ground in this case that the BCD, which is no doubt also applied to some or all of the products subject to the SUAD, is an "ordinary customs duty" within the meaning of Article II:1(b). As such, it has the function of imposing a charge on the subject product *qua*

[447] Entry 54 of List II (State List) of the Constitution of India.
[448] India's reply to Panel Question No. 30(a).
[449] Entry 92A of List I (Union List). India asserts that this also follows from Article 286(1)(a) which prohibits the imposition of State sales taxes where the sale takes place "outside of the State". India's reply to Panel Question No. 58.
[450] India's reply to Panel Question No. 30(c).
[451] India's first written submission, para. 71.

product being imported into India. Put differently, it is not imposed to counterbalance any of the internal taxes at issue. The AD is imposed pursuant to Section 3(1) of the Customs Tariff Act to counterbalance State or Central excise duties. India has explained that the categories of taxes or charges enumerated in Section 3(5) do not overlap with the category of excise duties referred to in Section 3(1).[452] Thus, the AD does not purport to counterbalance any of the internal taxes or charges referred to in Section 3(5). Consequently, the "duty of customs" that is left to achieve this purpose is the SUAD. As we have seen, the SUAD has a statutory basis that is different from that of the BCD, which is consistent with the view that it fulfils a different function within India's customs duty and tax system, namely, the function of imposing a charge on the products subject to the SUAD *qua* products rather than *qua* products being imported.

7.382 Regarding the "other local taxes or charges" leviable on the sale, purchase or transportation of like domestic products, India has stated that Article 286(1) of the Constitution of India prohibits the imposition of "other local taxes or charges" on the sale or purchase of goods where the sale or purchase takes place in the course of the import of the goods into India.[453] We note that Article 286(1) only concerns State or local taxes on the sale or purchase of goods; it does not concern State or local taxes on the transportation of goods.[454] However, as pointed out by India, "other local taxes or charges" must be authorized by a specific constitutional entry in List II or III.[455] We have not been able to identify, nor did the Parties identify, among the "other local taxes or charges" authorized by specific constitutional entries in List II or III, any which could be imposed, in lieu of transportation charges, in the course of the import of relevant goods into India's customs territory.[456] India has also confirmed that "other local taxes or charges" on the sale or purchase of goods may not be applied when the sale or purchase takes place in the course of inter-State trade, and that such taxes or charges may be imposed on the transportation of goods only to the extent that such goods enter the territory of the State or local area imposing such a tax or charge.[457] In view of the foregoing, it is understandable that the Central Government might possibly wish to use a "duty of customs" like the SUAD to counterbalance any "other local taxes or charges" on the sale, purchase or transportation of goods which cannot be imposed, at the State or local level, in respect of import transactions.[458]

7.383 In the light of the above, we consider that the legal framework of India's customs duty and tax system, as described above, is not inconsistent with India's position that the SUAD is designed to counterbalance State VAT/sales taxes, the CST and "other local taxes or charges" leviable in India. The States are either expressly prohibited from imposing, or lack the power to impose, the relevant internal taxes (State VAT/sales taxes and "other local taxes or charges") on goods in the course of the

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[452] India's reply to Panel Question No. 27(e).

[453] India's reply to Panel Question No. 48(e). India has confirmed that once imported products enter India's customs territory, they may be subjected to "other local taxes or charges" in the same way as domestic products. India's replies to Panel Question Nos. 30(a), 41 and 48(f).

[454] *Ibid.*

[455] India's reply to Panel Question No. 30(a). We also recall that India has explained that it has a system of judicial review whereby the exercise by the Central Government and State Governments of their respective powers under the positive lists is subject to judicial scrutiny. India's reply to Panel Question No. 48(d).

[456] We note Entry 52 of List II (Exhibit US-20) which deals with taxes on the "entry of goods into a local area for consumption, use or sale therein". However, it would appear that the word "entry" does not refer to entry into the customs territory of India, but rather, as the text of Entry 52 suggests, entry into a local area. This understanding appears to be consistent also with India's response to Panel Question No. 48(e) as well as India's response to Panel Question No. 49(b) which indicates that no "other local taxes or charges" may be imposed on the inter-State sale of goods.

[457] India's reply to Panel Question No. 49(b).

[458] India's reply to Panel Question No. 48(f). In the case of inter-State transactions, to the extent it wished to provide for any compensatory taxation, the Central Government would need to use the CST or another tax on the sale or purchase of goods.

import into India's customs territory. In turn, it appears that the Central Government can only counterbalance relevant internal taxes (the CST, State VAT/sales taxes and "other local taxes or charges") by means of a "duty of customs". Moreover, the record does not indicate that there is a "duty of customs" other than the SUAD applicable to the relevant products and designed to counterbalance relevant internal taxes, or that there are other types of taxes or charges imposed by State Governments that could be said to counterbalance relevant internal taxes with regard to products imported into India and subject to the SUAD. It is true that the States are not legally required to impose State VAT/sales taxes and/or "other local taxes or charges". The lack of a requirement to impose such taxes or charges does not, however, give rise to a presumption that the States would not actually impose such taxes or charges.

7.384 If relevant internal taxes are leviable in all States on products subject to the SUAD, and if the States levy such taxes as envisaged in India's Constitution (and so do not impose them on products in the course of their import into India's customs territory),[459] the legal framework described above also supports the view that the SUAD and the relevant internal taxes fulfil the same relative function, in respect of equivalent transactions, within India's customs duty and tax system. To begin with, it is clear that, under the legal framework as described above, the SUAD imposes a charge in respect of import transactions involving specified products imported into India, whereas the relevant internal taxes impose a charge in respect of equivalent domestic transactions involving like products. Moreover, to the extent all States levy relevant internal taxes on products subject to the SUAD, the legal framework supports the inference that the function the SUAD, as imposed by CN 19/2006, fulfils within India's customs duty and tax system is to impose a charge on the specified products *qua* products, and not *qua* products being imported into India. Furthermore, to the extent the States levy the relevant internal taxes as envisaged in India's Constitution (and thus do not impose them on products in the course of their import into India's customs territory), the legal framework also supports the inference that the function these internal taxes fulfil within India's customs duty and tax system, in respect of domestic transactions equivalent to import transactions, is to impose a charge on the products *qua* products, and not *qua* domestic products.

7.385 Having reviewed the legal context within which the SUAD operates, we now turn to consider the factual context within which the SUAD is imposed. In this respect, a relevant issue is whether, on the date of establishment of the Panel, all States levied relevant internal taxes on products subject to the SUAD. We note in this respect that pursuant to the Central Sales Tax Act the CST is required to be levied. Furthermore, India has stated that all States but one impose State VAT and that the State which does not impose a VAT imposes a sales tax.[460] The United States did not contest this statement. Regarding the list of "goods of local importance" from which States may select up to 10 items to be nil-rated or exempted from VAT, we observe that the fact that the States have the right to do so does not necessarily imply that any State had actually availed itself of that right as of the date of establishment of the Panel.[461] At any rate, we have been provided no evidence indicating that a particular State has nil-rated or exempted one or more products which are included in the list of "goods of local importance" and subject to the SUAD. In relation to goods outside the VAT system, India asserts that such taxes are levied at a rate of 4 per cent or higher. However, there is no information on the record which confirms that all States impose a sales tax on goods which are outside the VAT system but subject to the SUAD.[462] Finally, concerning other "local taxes or charges", we have been given examples of such taxes or charges imposed by particular States, but the evidence before us does not indicate whether such taxes or charges are levied in all States.

[459] We will revert to these two factual conditions further below.

[460] India's second written submission, note 2 and para. 2.12.

[461] India has suggested that conditions apply, including that nil-rating or exempting a listed good not have any inter-State implications. India's reply to Panel Question No. 55.

[462] Exhibit IND-25, p. 13, suggests that the relevant goods used to be taxed and would "continue to be taxed", but no specific information is provided.

7.386 We see no basis upon which we would be entitled to presume that, as of the date of establishment of the Panel, there were States which did not impose relevant taxes on goods subject to the SUAD (e.g., on goods outside the VAT system or "goods of local importance").[463] We also recall that in this case it is up to the United States to establish that the SUAD is not "equivalent" to relevant internal taxes. As a result, we can only conclude that there is no evidence on the record to demonstrate that, on the date of establishment of the Panel, there were States which did not levy relevant internal taxes on products subject to the SUAD.

7.387 Another relevant factual issue is whether India's Constitution and/or relevant laws are in fact implemented as envisaged in these legal instruments. We note in this respect that there is no evidence on the record indicating that relevant internal taxes have been imposed on products subject to the SUAD in the course of their import into India's customs territory. In the absence of such evidence, we must presume that, at the time of establishment of this Panel, the States followed the requirements of India's Constitution and/or relevant laws and did not impose relevant internal taxes on products subject to the SUAD in the course of their import into India's customs territory.[464]

7.388 Accordingly, the legal and factual context within which the SUAD operated on the date of establishment of the Panel does not indicate that the SUAD was not "equivalent" to relevant internal taxes leviable on products subject to the SUAD.

7.389 Based upon the above analysis of the SUAD, including its particular features, structure and design and the legal and factual context within which it operates, we thus come to the following overall result regarding the element of "equivalence":

(a) The evidence before us, comprising, *inter alia*, CN 19/2006, its statutory basis and the general legal framework of India's customs duty and tax system, is not inconsistent with India's position that the SUAD is "equivalent" to taxes or charges referred to in CN 19/2006 and leviable in India on like domestic products;

(b) there is no evidence on the record to demonstrate that, on the date of establishment of the Panel, there were States which did not levy internal taxes or charges referred to in CN 19/2006 on products subject to the SUAD; and

(c) there is no evidence on the record to demonstrate that, notwithstanding the general legal framework in existence at the time, relevant internal taxes or charges were, in fact, imposed on products subject to the SUAD in the course of their import into India's customs territory.

7.390 In these circumstances, we can only conclude that the United States has failed to meet its burden of establishing that the SUAD is not "equivalent", within the meaning of Article II:2(a), to taxes or charges referred to in CN 19/2006 and leviable in India on like domestic products.

7.391 In view of this conclusion, we need not, for the purposes of disposing of the United States' claim under Article II:1(b), and hence do not, come back to the issues of whether the taxes or charges referred to in CN 19/2006 and leviable in India are internal taxes or charges imposed in respect of domestic products and whether the products subject to the SUAD are in fact "like" domestic products subject to the previously mentioned internal taxes or charges.

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[463] We recall that CN 20/2006 nil-rates certain goods that would otherwise be subject to the SUAD, as imposed through CN 19/2006.

[464] We also recall in this context that the record contains no specific example of another type of tax or charge, imposed by a State, consistently or inconsistently with the Constitution of India, on imported products subject to the SUAD in lieu of relevant internal taxes.

(c) Conclusion

7.392 As we have explained earlier, in the specific circumstances of this case, if the United States as the complaining party cannot meet its burden of establishing that the SUAD is not "equivalent" to taxes or charges referred to in CN 19/2006 and leviable in India on like domestic products,[465] it cannot successfully establish that the SUAD is of the same kind as, or in the nature of, an ordinary customs duty (or an "other duty or charge" imposed on the importation of the products subject to the SUAD).

7.393 As we have also explained, in the absence of a showing that the SUAD is in the nature of an ordinary customs duty (or an "other duty or charge" imposed on the importation of a good), the fact that it meets the elements of the US definition of "ordinary customs duties" is not sufficient to establish that it is an ordinary customs duty (or an "other duty or charge" imposed on the importation of the products subject to the SUAD) under Article II:1(b). Hence, we find that the United States has failed to establish that the SUAD constitutes an ordinary customs duty (or an "other duty or charge" imposed on the importation of the products subject to the SUAD) within the meaning of Article II:1(b). As a result, it has not been demonstrated that the obligations contained in Article II:1(b) are applicable to the SUAD.

7.394 Accordingly, we come to the conclusion that the United States has failed to establish that the SUAD, as imposed through CN 19/2006, is inconsistent with Article II:1(b), first or second sentence.

E. US CLAIMS OF VIOLATION OF ARTICLE II:1(A) OF THE GATT 1994

7.395 Having disposed of the US claims of violation of Article II:1(b) of the GATT 1994, we turn now to assess the separate and additional US claims of violation of Article II:1(a) of the GATT 1994. To recall, the United States claims that both the AD and the SUAD are inconsistent, as such, with Article II:1(a). Article II:1(a) reads as follows:

> "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."

7.396 The claims made by the **United States** under Article II:1(a) are linked to its claims under Article II:1(b). As already noted, the United States is of the view that the AD is inconsistent with Article II:1(b) because it results in ordinary customs duties on imports of alcoholic beverages that exceed those set out in India's WTO Schedule. Based on this view, and relying on the Appellate Body report on *Argentina – Textiles and Apparel*, the United States submits that by imposing ordinary customs duties on imports of alcoholic beverages from the United States in excess of those set forth in India's Schedule, the AD also accords imports from the United States less favourable treatment than provided for in India's Schedule and is therefore, as such, inconsistent with Article II:1(a).

7.397 Similarly, the United States submits that the SUAD is, as such, inconsistent with Article II:1(a). Because in the United States' view the SUAD results in customs duties on imports of alcoholic beverages and other products (including those in Exhibit US-1) from the United States that exceed those set out in India's Schedule, it accords imports from the United States less favourable treatment than provided for in India's Schedule. Consequently, the United States argues, the SUAD is, as such, inconsistent with Article II:1(a).

7.398 **India** considers that the SUAD is not inconsistent with Article II:1(a). India submits that Article II:1(a) and (b) when read together require that an offending measure be either an ordinary

[465] We recall that, for the purposes of an Article II:2(a) inquiry, "equivalence" is a necessary condition for the SUAD to fall outside the scope of Article II:1.

customs duty or an ODC which is in excess of bound commitments and which results in "less favourable" treatment being given to imported products. In this respect, India recalls its view that the SUAD is neither an ordinary customs duty nor an ODC as defined under Article II:1(b), and hence is not required to be listed as part of India's Schedule. Instead, India argues, the SUAD is a charge levied at the border in lieu of internal taxes and in accordance with Section II:2(a). India therefore considers that it has "preserved the value of tariff concessions" listed in its Schedule and its ordinary customs duty applied on the importation of certain alcoholic beverages and other identified industrial and agricultural products is well within the limits prescribed in its Schedule.

7.399 Regarding the AD, India's position is that it has been validly removed by virtue of Customs Notification 82/2007 which reduced the AD rate applicable to alcoholic beverages to nil.

7.400 The **Panel** notes that the United States' claims under Article II:1(a) are in the nature of consequential claims.[466] The United States argues, in essence, that an inconsistency with Article II:1(a) follows by implication from an established inconsistency with Article II:1(b). We are able to accept this argument, which is supported by the Appellate Body report on *Argentina – Textiles and Apparel* wherein the Appellate Body found that "[p]aragraph (b) [of Article II:1] prohibits a specific type of practice that will always be inconsistent with paragraph (a) [of Article II:1]".[467] And further on in the same report, the Appellate Body observed that "[i]t is evident to us that the application of customs duties in excess of those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a)".[468]

7.401 Accordingly, the starting point of our analysis are our conclusions concerning the US claims under Article II:1(b). These conclusions are to the effect that the United States has failed to establish that India has acted inconsistently with its obligations under Article II:1(b) either in respect of the AD or in respect of the SUAD. As no inconsistency with Article II:1(b) has been established, and as the United States' claims under Article II:1(a) are premised on the existence of a breach by India of Article II:1(b), we come to the conclusion that the United States has also failed to establish that the AD and/or the SUAD are inconsistent with Article II:1(a).

F. REFERENCES BY THE UNITED STATES TO ARTICLE III:2 OF THE GATT 1994

7.402 There is one additional matter it is appropriate to address before concluding. This concerns various references made by the United States to the provisions of Article III:2 of the GATT 1994 and to the alleged inconsistency of the measures at issue with these provisions.

7.403 In this regard, we recall at the outset the US request for the establishment of a panel of 25 May 2007 which states in relevant part:[469]

> "Even if the additional duty and the extra additional duty were considered to be internal taxes applied at the time of importation, these duties subject imports from the United States to internal taxes in excess of those applied to like domestic products or directly competitive or substitutable domestic products in breach of Article III:2 of the GATT 1994, and afford less favourable treatment to imported products than to like domestic products in breach of Article III:4 of the GATT 1994.

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[466] See, e.g., para. 14 of the US first oral statement where the United States submits that "because India imposes each of the AD and the [SUAD] in excess of the ordinary customs duties, or other duties or charges, set forth in its WTO Schedule, each is inconsistent with Article II:1(b) and, as a consequence, also Article II:1(a) of the GATT 1994".

[467] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.

[468] *Ibid*., para. 47.

[469] WT/DS360/5.

> ...
>
> These measures appear to be inconsistent with India's obligations under provisions of the GATT 1994, in particular with:
>
> [Article II:1(b) of the GATT 1994 and Article II:1(a) of the GATT 1994];
>
> and to the extent that the measures impose an internal tax or other charge on imported products,
>
> (5) Article III:2 of the GATT 1994; and
>
> (6) Article III:4 of the GATT 1994."

7.404 It is clear from the above-quoted passage that the US request for the establishment of a panel covers alternative US claims under Article III:2 and Article III:4 of the GATT 1994.

7.405 Subsequent to the establishment of the Panel, in its submissions to the Panel, the United States, as already noted, referred to the provisions of Article III:2 of the GATT 1994, but nowhere do these submissions refer, either explicitly or by implication, to the provisions of Article III:4 of the GATT 1994 in connection with a measure before the Panel.[470] There can therefore be no doubt that the United States has effectively abandoned its alternative claim under Article III:4. Conversely, in view of the fact that the United States has made references to the provisions of Article III:2 and to the alleged inconsistency of the AD on alcoholic liquor and the SUAD with these provisions, as well as the Panel's findings that the AD and the SUAD are "charges equivalent to internal taxes imposed ... in respect of the like domestic product", it is appropriate to examine below whether the United States put forward a claim under Article III:2 on which the Panel needs to rule.

7.406 Section IV of the US first written submission is entitled "Summary of Legal Argument". In that section, there is a paragraph – paragraph 33 – which reads as follows:

> "Alternatively, the additional customs duty and extra-additional customs duty are inconsistent with GATT Article III:2 as taxes applied on imported products, including alcoholic beverages, that exceed those applied to like domestic products or directly competitive or substitutable domestic products."

7.407 This paragraph states an alternative claim of violation, albeit in very summary form. The brevity of the statement is not surprising for a paragraph included in a summary. However, contrary to what one would expect after reading the summary, Section V of the US first written submission, which is entitled "Legal Argument", does not provide any arguments in support of a separate and independent claim under Article III:2.

7.408 Moreover, both in the introductory section and in the concluding section of the US first written submission, the United States put forward requests for findings by the Panel. In both sections, the United States requests findings in relation to its claims under Article II:1(a) and Article II:1(b) of the GATT 1994. Yet in neither section does the United States request findings in relation to a claim under Article III:2.

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[470] The United States appears to suggest that CN 102/2007 may not be consistent with Article III:4. US second oral statement, para. 22. However, as we have previously explained, the United States itself has requested that we not rule upon CN 102/2007 in this case.

7.409 Consideration of the US first written submission thus leads to the conclusion that although the United States at paragraph 33 stated a claim under Article III:2 in summary form, it refrained both from developing relevant arguments and from requesting findings in relation to that claim. In the light of this conclusion, it is necessary to go on to review the US second written submission and other submissions to the Panel.

7.410 The introductory and concluding sections of the US second written submission set out requests to the Panel for findings in relation to the US claims under Article II:1(a) and Article II:1(b) of the GATT 1994, but, as in the case of the US first written submission, do not request the Panel to make findings in relation to a claim under Article III:2. Likewise, while the US second written submission contains specific sections discussing the US claims under Article II:1(b), there is no section devoted to a possible alternative US claim under Article III:2.[471]

7.411 Nevertheless, there exists one section in the US second written submission, Section III, which contains statements relating to Article III:2. Section III is intended to demonstrate that the AD on alcoholic liquor and the SUAD are not charges within the meaning of Article II:2(a) of the GATT 1994. As part of that demonstration, the United States argues that in at least some instances the AD and the SUAD result in charges on imported products in excess of those on like domestic products and hence are not imposed consistently with Article III:2.[472]

7.412 The statements in Section III alleging a lack of consistency of the AD and the SUAD with Article III:2 do not warrant the conclusion that the United States has pursued a separate and independent claim under Article III:2. As explained, the statements in question are embedded in a discussion of whether the AD and the SUAD fall within the scope of Article II:2(a). In turn, that discussion is linked to the US claims under Article II:1(a) and (b). It would be improper for the Panel *proprio motu* to take these statements out of their specific context and rely on them to rule on an alternative claim under Article III:2. Certainly, it would be improper to do so in the present case where the United States has not requested any findings in relation to a claim under Article III:2 and has not incorporated relevant statements, through cross-references, into a section or paragraph(s) devoted to a separate alternative claim under Article III:2.[473]

7.413 Turning to the two US oral statements, we note that neither of them sets out a request for findings in relation to a claim under Article III:2. Both oral statements nevertheless argue that the SUAD is not a charge imposed in a manner consistent with Article III:2.[474] In addition, the second oral statement argues that India effectively conceded that the AD is not a charge imposed in a manner consistent with Article III:2.[475] However, as is the case with the US second written submission, the discussion offered in the oral statements regarding the consistency with Article III:2 of the AD and the SUAD forms part of an analysis of whether the AD and the SUAD are, to use the United States' terms, "justified" under Article II:2(a) notwithstanding the prohibitions contained in Article II:1(a) and (b). The relevant discussion is not part of a separate and independent analysis of whether the AD and the SUAD are in breach of Article III:2, nor is it made part of any such analysis through cross-references.

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[471] This is despite the fact that India had previously argued at para. 98 of its first written submission and para. 29 of its first oral statement that the United States had failed to explain the basis for its contention that the AD and the SUAD are inconsistent with Article III:2.

[472] US second written submission, paras. 34, 39, 42, 52, 54, 57 and 60.

[473] This seems consistent with the view of the Appellate Body expressed in *US – Certain EC Products*. The facts of that case were somewhat different but the Appellate Body appeared to indicate that where a complaining party in support of a claim wishes to rely on relevant references made in its submissions to a panel, such references need to be "specifically linked" to the claim of violation in question. See Appellate Body Report, *US – Certain EC Products*, para. 113.

[474] US first oral statement, paras. 22-23; US second oral statement, paras. 13-15.

[475] US second oral statement, para. 12.

7.414 Finally, neither of the concluding statements of the United States delivered at the end of each substantive meeting requests findings in respect of a separate and independent claim under Article III:2. The first concluding statement alleges that India has failed to prove its contention that the AD and the SUAD are applied in a manner consistent with Article III:2.[476] The second concluding statement asserts that the United States has demonstrated that neither the AD nor the SUAD is equivalent to an internal tax or imposed consistently with Article III:2 and that they are therefore not to be considered as charges under Article II:2(a).[477] However, once again, the issue of the consistency of the AD and the SUAD with Article III:2 is addressed exclusively in connection with the US claims under Article II:1(a) and (b) and India's counter-argument that the AD and the SUAD fall within the scope of Article II:2(a).

7.415 Accordingly, having regard to the US submissions as a whole, the Panel is not convinced that the United States meant to pursue the alternative claim under Article III:2 it stated in its first written submission. Indeed, if the United States meant to pursue such a claim, it would be highly unusual to state it in a summary section of the first written submission without ever following up, and supporting, such an initial statement of claim with independent or incorporated argument and evidence.

7.416 But even assuming that the United States intended to pursue an alternative claim of violation based on paragraph 33 of its first written submission, the fact remains that the United States failed to make a request for findings in relation to a claim under Article III:2. In a situation such as the one we are facing, where the complaining party has explicitly requested findings in relation to some claims put forward by it but not others, it would be incongruous for a panel to offer findings on those claims in respect of which the complaining party has not requested any findings.[478] Consequently, as the United States at no point requested us to make findings on a claim under Article III:2, and as there is no other indication in the record suggesting that such findings were nevertheless expected, we see neither a need nor a justification to rule on such a claim.[479]

7.417 In any event, paragraph 33 of the US first written submission, which is the only paragraph devoted to a possible independent claim under Article III:2, would be insufficient to sustain the United States' burden of establishing that the challenged measures are inconsistent with Article III:2. That paragraph states a claim, but offers no arguments or evidence in support. As indicated above, the fact that the United States advanced relevant arguments in connection with other claims is inapposite in the absence of appropriate incorporation of those arguments.

7.418 In the light of the above considerations, we offer no findings on the merits of the US alternative claim, stated at paragraph 33 of the US first written submission, that the AD and the SUAD are inconsistent with Article III:2.

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[476] US first concluding statement, para. 5.

[477] US second concluding statement, paras. 2-3.

[478] We note in this regard the Appellate Body's view that for reasons of due process and orderly procedure the responding party and the third parties must not be left to wonder what specific claims have been made. See Appellate Body Report, *Chile – Price Band System*, para. 164. By extension, where a complaining party requests findings in relation to some of the claims it has made, for the reasons enunciated by the Appellate Body, it appears justifiable to conclude, absent other evidence to the contrary, that a failure to request findings in relation to other claims means that no findings are requested.

[479] We note in passing that in *US – Certain EC Products* the United States appealed against the panel's finding of inconsistency with Article 23.2(a) of the DSU arguing, *inter alia*, that the complaining party in that case "never requested or argued for findings under Article 23.2(a)". See Appellate Body Report, *US – Certain EC Products*, para. 108.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 For the reasons set forth in this Report, the Panel concludes as follows:

(a) the United States has failed to establish that the Additional Duty on alcoholic liquor is inconsistent with Article II:1(a) or (b) of the GATT 1994; and

(b) the United States has failed to establish that the SUAD is inconsistent with Article II:1(a) or (b) of the GATT 1994.

8.2 In the light of these conclusions, the Panel makes no recommendations under Article 19.1 of the DSU. However, we 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 AD on alcoholic liquor and the SUAD[480], "to address concerns raised by [India's] trading partners"[481]. It is therefore appropriate to note that the Panel's disposition of the US 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 AD on alcoholic liquor, to the extent it still exists, and the SUAD are WTO-consistent.[482]

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[480] See *supra*, Section C.1.

[481] India's second oral statement, para. 9.1.

[482] The new customs notifications are outside our terms of reference, and so we did not assess their impact upon the WTO-consistency of the AD on alcoholic liquor and the SUAD.