India – Additional and Extra-Additional Duties on Imports from the United States (DS360)

Executive Summary of the Opening Statement of the United States at the Second Meeting of the Panel with the Parties

November 23, 2007

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

2. **Point 1:** 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.

3. The similarities reviewed in our 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. 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.

5. 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 not 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.

6. 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.

7. **Point 2:** And in the end, even if the AD and the EAD were not ordinary customs duties, they would nonetheless breach GATT Article II:1(b), 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 defense under GATT Article II:2(a) otherwise since that article concerns charges "imposed on importation."

8. **Point 3:** 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 defense. Under Article III:2 any amount of excess charges on imports is "too much" and imports are entitled to treatment no less favorable than the most-favored 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.

9. **Point 4:** 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 percent; whereas like imports are subject to an EAD rate of 4 percent. Moreover, imports are subject to the 4 percent 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.

10. 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.

11. **Point 5:** 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 percent 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 percent; (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.

12. 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.

13. **Point 6:** 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.

14. 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 U.S. 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 U.S. 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.

15. 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 we have had to analyze Customs Notification 82/2007, it appears to us 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.

16. 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 U.S. 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 favorably 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.

17. 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.

18. 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's 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.

19. India contends that Customs Notification 102/2007 does not change the essence of Customs Notification 19/2006 and again refers to the U.S. 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, we point out that the facts in *Chile – Price Bands* differ significantly from the facts in this dispute.

20. **Point 7:** The AD and the EAD are each "as such" inconsistent with GATT Article II:1(a) and (b). 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 we clearly set out in our second written submission.

21. 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.

22. 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 our 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.

23. 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 percent.

24. **Conclusion:** 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 GATT Article III:2. Consistent with this Panel's terms of reference under DSU Article 7.1, we respectfully request the Panel to find that the AD and EAD are inconsistent with GATT Article II:1(a) and (b), and consistent with DSU Article 19.1, to recommend that India bring these measures into conformity with the GATT 1994.