

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

(WT/DS360)

**Comments of the United States
on the Answers of India to Questions of the Panel
in Relation to the Second Substantive Meeting with the Parties**

December 3, 2007

For India:

Q48(e). At para. a.4 of its reply, is India saying that Article 286 does not prohibit the levy of "other local taxes and charges" (1) on imports (i.e., at the time foreign-made products first enter the Indian domestic tariff area) or (2) on imported goods (i.e., after foreign-made products have entered the domestic tariff area)? If so, why? In this regard, India's reply to Panel Question No. 27(e) notes that "other local taxes and charges" are imposed on the sale, purchase or transport of goods. In answering the last question please distinguish taxes on sale, purchase and transport.

Q48(f). If the reply to sub-question (e) above is that "other local taxes and charges" can be imposed on imports/imported products (see also para. 41.2 of India's replies), please address how this can be reconciled with India's reply to Panel Question 30(b), para. 79 of India's first written submission, para. 26 of India's first oral statement and para. 2.17 of India's rebuttal, where India states that "other local taxes and charges" are imposed exclusively on Indian products and not on imported products.

Q49(a). What is the basis - legal and factual - for India's contention that "other local taxes and charges" are imposed exclusively on Indian products and not on imported products?

Q50. With reference to para. 2.17 of India's rebuttal, are the Mandi Tax, Turnover Tax and Marketing Committee Fee applicable to imports (in the course of the import) or imported goods?

1. In its response to Question 48(f), India explains that there "exist certain 'local taxes and charges' that are imposed on domestic products at the time they are sold, purchased or transported, but there are no corresponding taxes imposed on products in the course of their importation into India."¹ India acknowledges, however, in its response to Questions 48(e) and 48(f) that Article 286 of the Indian Constitution only prohibits states from imposing such local taxes and charges on the importation of products and does not restrict the imposition of such

¹ India Responses to the Panel's Questions in the Context of the Second Panel Meeting, para. 48.12.

taxes or charges on imported products subsequent to their importation.² India has also not submitted any evidence as to the existence of such “local taxes and charges” much less evidence as to the rate or manner in which such other local taxes or charges are imposed and, importantly, whether they are imposed on domestic products, imported products or both.

2. India avoids Question 49(a) where the Panel inquires as to the legal and factual basis for India’s contention that these “local taxes and charges” are imposed exclusively on Indian products and not on imported products, offering only that Article 286 only prohibits the imposition of such local taxes and charges “in the course of importation.”³

3. Given this lack of evidence, coupled with India’s failure to respond to the Panel’s questions and its acknowledgment (supported by Article 286 of the Indian Constitution) that there is no prohibition on the imposition of such local taxes and charges on imported products, the Panel can logically conclude that such local taxes and charges, if they even exist, are in fact imposed on imported products, just as the state-level VATs and CST are imposed on imported products. In fact, in its response to Question 50, India acknowledges that the “turnover tax” – one of the “forms” such local taxes or charges may allegedly take⁴ – may apply to imported products.⁵

4. As noted in prior submissions, India bears the burden of putting forth evidence and argument to support what it asserts is true.⁶ India asserts that the EAD is equivalent to these “local taxes and charges” and imposed consistently with GATT Article III:2. However, as noted, India has not put forth any evidence in support of these assertions. Specifically, India has presented no basis on which to judge whether these local taxes or charges are – with respect to their structure, design and effect – equivalent to the EAD nor has India provided any accounting of how imports are not subject to charges in excess of these local taxes or charges on like

² India Responses to the Panel’s Questions in the Context of the Second Panel Meeting, paras. 48.9, 48.12.

³ India Responses to the Panel’s Questions in the Context of the Second Panel Meeting, paras. 49.1; *see also infra* para. 12 (commenting on India’s response to Question 56 regarding the meaning of “in the course of importation”).

⁴ India Second Written Submission, para. 2.17.

⁵ With respect to the “mandi tax” and “market committee fee” while India states that they do not apply to imported products, it has not submitted any evidence in support of its assertion and we see nothing under India law that would prohibit such taxes or charges from being imposed on imported products. During the second Panel meeting, India explained that a mandi tax is a tax imposed at the time agricultural products are brought to market. It is not clear why such a tax would not also be imposed on imported agricultural products at the time they are brought to market.

⁶ U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 48; U.S. Responses to the Panel’s Questions in the Context of the Second Panel Meeting, paras. 9-11; U.S. Second Written Submission, paras. 37, 43, 47.

domestic products.⁷ In fact, with respect to the latter, we note that the rates of the “mandi tax” India identifies include rates of 1 to 2 percent, 1.6 percent, and 1 percent,⁸ each of which are below the 4 percent rate of the EAD imposed on imports. Further, we note that the only attempt India has made to identify these alleged local taxes and charges (and, as noted above, this attempt is inadequate) came well into these panel proceedings,⁹ despite numerous prior requests by the United States during, and prior to, these proceedings for India to identify the taxes or charges to which the EAD was allegedly equivalent.¹⁰

Q52(b). At para. 12.11 of its replies, India states that the SUAD has been "closely calibrated" with the internal taxes it is intended to counter-balance. How is this true for the products which are outside the VAT system and are subject to State sales tax? Are there State sales taxes which are levied at rates lower than 4%?

5. In response to Question 52(b), India states that state sales taxes on products outside the VAT system are equal to or higher than 4 percent and are “consequently at all times equal to or in excess of the” 4 percent EAD on imports. First, India has not identified any state sales taxes to which the EAD is allegedly equivalent, and accordingly there is no basis to judge whether such state sales taxes are – with respect to their structure, design and effect – equivalent to the EAD and whether imports are not subject to charges in excess of such state sales taxes on like domestic products. Second, even if the rate of these sales taxes were equal to or in excess of 4 percent, such sales taxes apply to imported products.¹¹ Consequently, imported products outside the VAT system would be subject to the EAD in addition to these state sales taxes, whereas like domestic products would only be subject to these state sales taxes.

Q53. With reference to para. 2.12 of India's rebuttal, what is the basis for India's assertion that in cases where a product is not charged at nil VAT rate, or is not a product subject to the 1% rate in every State, no individual State is imposing a rate on the same product below 4%? Is the United States incorrect in asserting that "states may at their

⁷ See U.S. Closing Statement at the First Panel Meeting, para. 8 (emphasizing the importance of such an accounting).

⁸ India Second Written Submission, para. 2.17.

⁹ India does not “identify” these local taxes or charges until its second written submission, and even there only states that these local taxes or charges “could take the form of a ‘Mandi Tax’, a ‘Turnover Tax’, and a ‘Marketing Committee Fee’ etc.” India Second Written Submission, para. 2.17.

¹⁰ See, e.g., U.S. Closing Statement at the First Panel Meeting, para. 7; U.S. Second Written Submission, para. 37.

¹¹ India's Responses to the Panel's Questions in the Context of the First Panel Meeting, para. 30.a.3, 30.c.3; 41.2; see also India's Responses to the Panel's Questions in the Context of the Second Panel Meeting, paras. 48.9, 48.12 (acknowledging that the states are not prohibited from imposing sales taxes on imported products).

discretion exempt [zero-rate] products from the VAT rate suggested by the Empowered Committee" (US second oral statement, para. 16)? Can the states apply any of the four standard rates at their discretion? What are the legal instruments that constrain the States in their choice of the applicable rates? Please provide relevant documents.

6. In its response to Question 53, India notes the rates of VAT (nil, 1 percent, 4 percent and 12.5 percent), that the Empowered Committee “fixed” these rates and that the states have “enacted their respective VAT legislation reflecting these rates.” What India does not answer, however, is whether the states may apply any of the four VAT rates at their discretion and whether there are any legal instruments that constrain the states’ choice of VAT rates. We take it from India’s response that states may in fact apply any of the four VAT rates at their discretion and that there are not any legal instruments that constrain the states’ choice of VAT rates. Indeed, India in response to Question 54 acknowledges the Empowered Committee White Paper is not binding on the states.¹² And, as mentioned in our second written submission, the Delhi VAT for example states that the Delhi government may as it sees necessary reduce the VAT rate specified in the Delhi VAT schedule.¹³ The VATs Acts of Goa, Punjab and Maharashtra similarly provide that those respective state governments may reduce or raise any VAT rate set out in their respective Schedules to their VAT Acts.¹⁴

Q55. At para. 49 of its rebuttal, the United States asserts that States can nil-rate up to 10 products of their choosing from the State VAT. Is this correct?

7. In its response to Question 49, India explains that the Empowered Committee has established a nil rate for 46 products and for another 50 products of “local importance” provided that states may at their choice nil-rate up to ten of these products. India describes the 50 products of “local importance” as goods that “have no significant bearing on trade” and as “indigenous items”.¹⁵ First, as an initial matter, the states are not limited to imposing the VAT rates established by the Empowered Committee,¹⁶ and, even if they were, India’s response acknowledges that there are state-to-state variations in VAT rates for these 50 products.¹⁷

¹² India Responses to the Panel’s Questions in the Context of the Second Panel Meeting, paras. 54.1-54.2.

¹³ U.S. Second Written Submission, para. 49.

¹⁴ Section 5(4) of the Goa Value-Added Tax Act, 2005, Exhibit US-27; Section 9 of the Maharashtra Act IX of 2005 (Maharashtra Value-Added Tax Act, 2005), Exhibit US-28; Section 8(3) of the Punjab Value-Added Tax Act, 2005, Exhibit US-29.

¹⁵ India Response to the Panel’s Questions in the Context of the Second Panel Meeting, para. 55.2.

¹⁶ See *supra* para. 6.

¹⁷ India Responses to the Panel’s Questions in the Context of the Second Panel Meeting, para. 55.2.

8. Second, whether the 50 products have a significant bearing on trade is not relevant to whether the EAD may be justified under GATT Article II:2(a) as a charge that is “equivalent” to an internal tax and imposed consistently with GATT Article III:2.¹⁸ We also note that the United States does export at least some of the listed products. In 2006, U.S. tapioca exports totaled \$517,000 (\$6,000 to India) and U.S. exports of coconuts totaled \$2.1 million.

9. Third, this is the first opportunity we have had to review the list of 50 products India considers of “local importance.” Despite repeated prior requests for information on the internal taxes to which the EAD is allegedly equivalent, India’s submission of this list at this late stage in the panel proceedings has afforded us little time to examine it. However, our initial review raises a number of concerns about India’s contentions that such products have no significant bearing on trade or are limited to “indigenous items.” It is not clear why products such as tapioca, coconut and kites would necessarily be indigenous products, and to the extent India is suggesting that a certain product might only be eligible for exemption for a state-level VAT if it is domestically or locally produced, that would raise its own national treatment concerns under GATT Article III. In addition, India has not explained how the products are classified under the Schedule to the Customs Tariff Act or by the individual Indian states under their respective VAT Schedules. Nor has India identified any reason to assume that there is any uniformity in terms of how the various Indian states classify these products. Variations in how particular products are classified among the various Indian states could easily result in variations among the states in terms of which products are even eligible for a nil rate under “goods of local importance” list. We also question why India has not used what appears to be the common name for some products on the list, for example, water chestnuts (“Singhada”) or buckwheat flour (“Kuttoo atta”) which, particularly given the short time we have had to review it, would have facilitated our efforts to understand the list.

10. Fourth, we recall that the rate of the EAD in comparison to the rate of state-level VATs on like domestic products (4 percent compared to nil in some states) is only the secondary reason why the EAD is not imposed consistently with GATT Article III:2. The primary reason is that imports are subject to the EAD in addition to the state-level VATs, whereas like domestic products are only subject to the state-level VATs. Moreover, the U.S. second written submission mentioned that the Empowered Committee expressly contemplated states deviating from the Committee-suggested rate for up to ten products, as an example of the fact that there is no requirement that the individual states apply the same rate to the same products, a fact India itself appears to concede.¹⁹ The United States made this point in its second written submission as

¹⁸Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, p. 16 (“[I]t is irrelevant that ‘the trade effects’ of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.”).

¹⁹*See supra* para. 7.

evidence that the state-level VATs, which vary between four rates and from product to product, are not “equivalent” to the EAD at a flat 4 percent rate for all products, except those exempted from the EAD.²⁰

11. Finally, we note that the Empowered Committee's White Paper does not mention the EAD. Accordingly, there appears to be no basis for India's contention that the White Paper “clearly indicates that India has taken several steps to calibrate its tax structure to prevent double taxation and align the rate of [EAD] with the VAT that it is intended to counterbalance.”²¹

Q56. Are there court interpretations of the meaning of the phrase "in the course of import" as it appears in Article 286?

12. India's response to Question 56 is not entirely clear,²² and India has not submitted the court decisions it cites in support of its response, which may have enabled us to more fully appreciate its response. In any event, we recall that India has acknowledged that the state-level VATs, the CST and other local taxes and charges India contends exist apply to imported products sold within in India.²³

Q 57. With reference to India's reply to Panel Question No. 27(h), please answer the last question ("if the Central Government has discretion, why was Notification CN 82/2007 based on section 3(8)?"). Why did India exempt alcoholic liquor from the AD under section 3(8) rather than simply exercise its alleged discretion by withdrawing Notification CN 32/2003?

13. In its response to Question 57, India states that it is “common practice” for the Central Government to exempt an item in whole or part from a duty of customs and that the Central Government may “equally choose to withdraw the previous customs notification” through which the duty of custom was previously imposed. India's response implies that with respect to Customs Notification 32/2003 it has such a choice but we note that India does not respond to the Panel's question as to why, if it has such a choice, did India not simply withdraw Customs Notification 32/2003. However, contrary to what India's answer implies, the United States

²⁰ U.S. Second Written Submission, para. 49; *see also id.* para. 55 n.82 (also citing the states deviation from the Committee-suggested rate in explaining why the EAD is not imposed consistently with GATT Article III:2).

²¹ India Responses to the Panel's Questions in the Context of the Second Panel Meeting, para. 55.3.

²² India Responses to the Panel's Questions in the Context of the Second Panel Meeting, paras. 56.2-56.3; *but see* India Responses to the Panel's Questions in the Context of the First Panel Meeting, para. 30.a.3 (explaining that a tax imposed “in the course of import” means “at the time that an imported product first enters the Indian domestic tariff area into a particular State.”).

²³ India Responses to Questions in the Context of the First Panel Meeting, paras. 30.a.3, 30.c.3, 37.b.2, 41.2.

understands that Section 12 of the Customs Act and Section 3(1) of the Customs Tariff Act mandate imposition of the AD such that the Central Government did not have the choice to simply withdraw Customs Notification 32/2003, but instead could only use Section 25(1) of the Customs Act and Section 3(8) of the Customs Tariff Act to exempt imports from payment of the AD.

Q58. With reference to India's contention that State excise duties on alcoholic beverages vary from State to State (see, e.g., India's reply to Panel Question No. 8(b)), please identify relevant State excise duties and document any differences in terms of the form of taxation (ad valorem, specific, combination, other), the applicable tax rates and brackets, etc as well as the higher taxation of lower-priced alcoholic liquor.

14. India does not respond to the Panel's Question and instead renumbers Question 59, Question 58, and sequentially renumbers the remainder of the Panel's Questions. As the United States has noted throughout these proceedings, India has provided no evidence in support of its assertion that the AD is equivalent to any internal excise taxes on like domestic alcoholic beverages (or even that such excise taxes even exist). Nor has India provided any evidence in support of its assertion that the AD on imports of alcoholic beverages is imposed consistently with GATT Article III:2, that is that it does not result in charges on imports in excess of internal taxes on liked domestic alcoholic beverages.

For both parties:

Q69. What would be the legal implications of a determination that a particular border charge is equivalent to an internal tax imposed in respect of the like domestic product but imposed inconsistently with the provisions of Article III:2? Please elaborate

15. In its response, India misreads the GATT Panel in *United States – Superfund* and incorrectly suggests that if a charge is “equivalent” to an internal tax then it must also be imposed consistently with GATT Article III:2. As noted in the U.S. second written submission, such a suggestion incorrectly blurs the two elements of an analysis under GATT 1994 Article II:2(a). As India itself acknowledges,²⁴ that analysis requires an assessment both of whether the charge is (i) equivalent to an internal tax and (ii) is imposed consistently with GATT 1994 Article III:2.²⁵

²⁴India First Written Submission, paras. 65, 82.

²⁵ U.S. Second Written Submission, para. 27 & n.45; U.S. Responses to the Panel's Questions in the Context of the First Panel Meeting, paras. 31-33; U.S. Oral Statement at the First Panel Meeting, para. 16. Alternatively, even if one were to read Article II:2(a) as “a charge equivalent to an internal tax [where that internal tax is] imposed consistently with the provisions of paragraph 2 of Article III,” neither the AD nor the EAD would qualify as such a charge since neither duty would be equivalent to an internal tax imposed consistent with Article III:2.

16. The first element concerns an inquiry into whether the charge imposed on the importation of a product is “virtually identical especially in effect or function”²⁶ to an internal tax imposed on like domestic products. This inquiry does not appear to prejudge the aspects of two measures that might be examined to determine whether they correspond or are virtually identical (e.g., while the amount of the respective liability may be relevant, it would not be the only aspect relevant to determining whether two measures were “equivalent”). Whether a charge imposed on importation is equivalent to an internal tax on like domestic products requires an examination of the structure, design and effect of the two measures.²⁷

17. The second element concerns an inquiry into whether the charge on imports is imposed consistently with GATT Article III:2. For the charge to be imposed consistently with GATT Article III:2, the charge must not be in excess of internal taxes on like domestic products. Importantly, under this inquiry, the question is not whether the charge is virtually identical to the internal tax on like domestic products but whether the charge subjects imported products to *any* taxation in excess of that imposed on like domestic products. Any amount by which the charge on imports exceeds the internal tax on like domestic products is “too much.”²⁸

18. Contrary to India’s reading, the GATT panel in the *Superfund* dispute did not conclude that if a charge was “equivalent” to an internal tax within the meaning of GATT Article II:2(a) then it would “also be consistent with GATT Article III:2.”²⁹ Instead, the *Superfund* panel found that in certain cases the charge on imports of a chemical was 5 percent of the value of the substance containing the chemical, whereas the internal tax on like domestic products was 2 percent of the value of the chemical. As a result, the panel concluded that the charge did not “conform to the national treatment requirement of GATT Article III:2 first sentence, because the tax rate would in that case no longer be imposed in relation to the amount of taxable chemicals used in their production but the value of the imported substance” and “[t]hus would not meet the requirement of equivalence.”³⁰

²⁶ U.S. Responses to the Panel’s Questions in the Context of the First Panel Meeting, para. 30; U.S. Second Written Submission, para. 28.

²⁷ U.S. Second Written Submission, para. 28.

²⁸ U.S. Second Written Submission, para. 30.

²⁹ India Responses to the Panel’s Questions in the Context of the Second Panel Meeting, para. 68.6. We also note that India incorrectly reads the *Superfund* panel to suggest that internal taxes to which the AD and the EAD are allegedly equivalent are necessarily “eligible for border tax adjustments.” The portion of the *Superfund* panel report India cites in this regard merely supports the conclusion that Article II:2(a) concerns charges equivalent to indirect (as opposed to direct) taxes on like domestic products. GATT Panel Report, *United States - Superfund*, para. 5.2.4.

³⁰ GATT Panel Report, *United States - Superfund*, para. 5.2.9.

19. The United States reads the *Superfund* panel’s conclusion to mean that, because the charge on imports would be imposed in relation to the value of the substances containing the chemical (rather than in relation to the value of the chemical used in their production) whereas the internal tax was imposed on the chemical itself, the charge was not equivalent to the internal tax.

20. The United States wishes to emphasize that the *Superfund* panel reviewed two aspects of the charge on imports, both of which appear to have led to the panel’s conclusion that the charge was not imposed consistently with GATT Article III:2 nor equivalent to the internal tax on like domestic products: the rate of the charge compared to the rate of internal tax on like domestic products (5 percent v. 2 percent) and the fact that the charge was on the value of the substance containing the chemical, whereas the internal tax on like domestic products was on the value of the chemical.³¹ Thus, the *Superfund* panel had already found an aspect of the charge – apart from its amount – that was not equivalent to the internal tax (the fact that the charge and the internal tax were not imposed in relation to the same product) when it concluded that the charge was not “equivalent” to the internal tax on like domestic products.

21. There is, however, nothing in the *Superfund* panel report to support India’s interpretation that a charge found “equivalent” to an internal tax must necessarily be found to be imposed consistently with GATT Article III:2. And, in any event, as explained in our previous submissions, the AD and the EAD are neither “equivalent” to internal taxes nor imposed consistently with GATT Article III:2.

³¹ *Id.*

TABLE OF EXHIBITS

Exhibit US-	
27	Section 5(4) of the Goa Value-Added Tax Act, 2005
28	Section 9 of the Maharashtra Act IX of 2005 (Maharashtra Value-Added Tax Act, 2005)
29	Section 8(3) of the Punjab Value-Added Tax Act, 2005