

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

(AB-2008-7 / DS360)

Appellee Submission of the United States of America

August 26, 2008

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on Imports from the United States***

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SERVICE LIST

OTHER APPELLANT

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THIRD PARTIES

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<i>US – Section 211 (AB)</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In its other appellant submission, India requests the Appellate Body to find that the Panel's concluding remarks contained in the final paragraph of the Panel Report are inconsistent with Articles 3, 11, and 19 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and to "remove the Panel's 'concluding remarks' commencing with the second sentence of paragraph 8.2 until the end of that p[aragraph]."¹

2. The Appellate Body should reject India's requests. The Panel's concluding remarks are not inconsistent with Article 3, 11, or 19 of the DSU. The Panel's concluding remarks are simply clarifications of the Panel's conclusions and are not in the nature of "suggestions" or "recommendations" under Article 19.1 of the DSU. Contrary to India's contention, the Panel's concluding remarks do not add to or diminish India's rights or obligations under the covered agreements.

II. ARGUMENT

3. As an initial matter, since the United States has shown in its appellant submission that the Panel erred in concluding that the United States failed to establish that the additional customs duty (AD) on alcoholic beverages and the extra-additional customs duty (EAD)² are inconsistent with Article II:1(a) and (b) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994), the Panel's remarks following its erroneous conclusions are moot, and the Appellate Body, therefore, need not address India's requests.

4. With respect to the particulars of India's requests, first, India's requests appear to be premised on the mistaken belief that the Panel's concluding remarks are in the nature of a "suggestion" within the meaning of Article 19.1 of the DSU.³ The Panel's remarks, however, are simply clarifications of its conclusions that the United States failed to establish that the AD on alcoholic beverages and the EAD are inconsistent with Article II:1(a) and (b) of the GATT 1994.⁴ In particular, those remarks clarify that although the Panel found that the United States had failed to establish that the AD or the EAD are inconsistent with Article II:1(a) or (b), the Panel was not finding that the AD or the EAD – either as they existed on the date of the Panel's establishment or after entry into force of Customs Notifications 82/2007 and 102/2007 – were WTO-consistent. The Panel's clarification accurately reflects the Panel's findings and conclusions.

¹ India Other Appellant Submission, para. 30 (emphasis in original).

² The Panel refers to the EAD as the SUAD. See, e.g., Panel Report, para. 7.18.

³ Under Article 17.6 of the DSU, the scope of the Appellate Body's review is limited to issues of law covered in the panel report and legal interpretations developed by the panel. In that regard, the Appellate Body, under Article 17.13, "may uphold, modify, or reverse the legal findings and conclusions of the panel," but not its suggestions, which are made pursuant to Article 19.1 of the DSU.

⁴ Panel Report, para. 8.1.

5. Second, contrary to India’s contention,⁵ nothing in Article 19 or elsewhere in the DSU prohibits a panel from doing what it did here – a straightforward clarification of its findings or conclusions. This is true, regardless of whether a panel finds or does not find the measure at issue WTO-inconsistent, and regardless of whether the panel does so in the final paragraph of its report or at some earlier point. While Article 19 does govern a panel’s authority to make recommendations or suggestions, Article 19 is simply inapplicable here: as India acknowledges, the Panel has not made any recommendations or suggestions in this dispute, and the Panel accurately did not characterize its concluding remarks as either a recommendation or a suggestion.⁶

6. Third, although India contends that the Panel’s concluding remarks add to or diminish its rights and obligations,⁷ India does not explain in what way the Panel’s remarks do so. As explained above, the Panel’s remarks simply clarify its conclusions, and India itself recognizes that the Panel’s remarks are not a recommendation under Article 19.1.⁸ As such, the Panel’s remarks do not add to or diminish India’s rights or obligations under the covered agreements and are not inconsistent with Article 3.2 or 19.2 of the DSU.

7. Fourth, India is incorrect that the Panel’s concluding remarks contravene Article 11 of the DSU. India appears to argue that because the Panel found that the United States failed to establish that the AD on alcoholic beverages and the EAD are inconsistent with Article II:1(a) and (b), its remarks aimed at clarifying those conclusions are inconsistent with the Panel’s obligation to “make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” The Panel, however, did not make any findings in its concluding remarks; rather, as noted, the Panel offered clarifications regarding the findings and conclusions it had already made. As such, it is difficult to see how, in being clear about its findings and conclusions, the Panel is acting in a manner contrary to Article 11.

8. In support of its contentions, India attempts to distinguish the Panel’s concluding remarks from those offered in the panel report in *United States – Gambling*.⁹ As in this dispute, the *Gambling* panel offered concluding remarks aimed at clarifying the nature or extent of its findings and conclusions.¹⁰ The fact that the *Gambling* panel report found the measures at issue WTO-inconsistent, whereas the Panel in this dispute found that the United States failed to

⁵ India Other Appellant Submission, paras. 18-19; *see also* paras. 9-17.

⁶ India Other Appellant Submission, para. 18.

⁷ India Other Appellant Submission, paras. 12, 19-23.

⁸ India Other Appellant Submission, para. 18.

⁹ India Other Appellant Submission, paras. 27-28.

¹⁰ *United States – Gambling (Panel)*, paras. 7.3-7.4.

establish that the measures are WTO-inconsistent, does not support the conclusion that the Panel in this dispute erred in clarifying the nature or extent of its conclusions. In fact, the panel report in *Gambling* would appear to support a panel's authority to clarify its findings. There is no basis in the DSU for India's proposition – and India has cited none – that a panel may clarify or explain its findings or conclusions only when the panel has made a finding for the complaining party.

9. We also note that it is not unusual for a panel to offer concluding remarks¹¹ – separate and apart from any recommendations or suggestions the panel may have offered under Article 19.1 of the DSU – and that in its reports *United States – Section 211 (AB)*¹² and *United States – Gasoline (AB)*¹³ the Appellate Body also offered such concluding remarks. In the *India – Quantitative Restrictions (Panel)* report, for example, after finding that India's quantitative restrictions on range of imports (e.g., on alcoholic beverages) were inconsistent with India's WTO obligations, the panel offered a closing observation that the parties could negotiate a reasonable period of time for India to implement the panels' finding and recommendations of more than 15 months.¹⁴ India did not object to the panel's observation, and the parties negotiated a reasonable period of time for India to eliminate its remaining quantitative restrictions ending on April 1, 2001, the same day India imposed the AD on alcoholic beverages.¹⁵

¹¹ See, e.g., *European Communities – Bananas III (Panel)*, paras. 8.1-8.3; *United States – Shrimp (Panel)*, para. 9.1; *United States – Gasoline (Panel)*, para. 7.1; *India – Patent Protection (EC) (Panel)*, para. 8.1; *EC – Hormones (U.S.) (Panel)*, para. 8.274; *EC – Hormones (Canada) (Panel)*, para. 8.278; *Canada – Periodicals (Panel)*, para. 5.45.

¹² *United States – Section 211 (AB)*, paras. 362-363. In its closing remarks, the Appellate Body stated *inter alia*: “We wish to emphasize that this ruling is not a judgment on confiscation as that term is defined in Section 211. The validity of the expropriation of intellectual or any other property rights without compensation by a WTO Member within its own territory is not before us. Nor do we express any view, nor are we required to express any view in this appeal, on whether a Member of the WTO should, or should not, recognize in its own territory trademarks, trade names, or any other rights relating to any intellectual or other property rights that may have been expropriated or otherwise confiscated in other territories.” *Id.* para. 362.

¹³ *United States – Gasoline (AB)*, p. 32. In its closing remarks, the Appellate Body stated *inter alia*: “It is of some importance that the Appellate Body point out what this does not mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the General Agreement contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression.”

¹⁴ Although the panel characterized its suggestion on the period for implementation as one made pursuant to Article 19.1 of the DSU, Article 19.1 provides that a panel suggest ways in which a Member could implement a panel recommendation that the Member bring its measure into conformity with the covered agreements. The panel's suggestion in *India – QRs (Panel)* concerns when, not how, India might implement the panel's recommendation.

¹⁵ U.S. First Written Submission, para. 11; U.S. Comments on India's Comments on the Interim Report, para. 8.

III. CONCLUSION

10. For the reasons stated above, the United States respectfully requests the Appellate Body to reject India's requests for the Appellate Body to find that the Panel's concluding remarks contained in the final paragraph of the Panel Report are inconsistent with Articles 3, 11, and 19 of the DSU and to remove the Panel's concluding remarks commencing with the second sentence of paragraph 8.2 until the end of that paragraph.