

*India - Additional and Extra-Additional duties
on imports from the United States –
(DS/360)*

**Third party submission
by the European Communities**

Geneva 10 September 2007.

Tables of WTO and GATT cases referred to in this submission

WTO DISPUTE SETTLEMENT REPORTS AND ARBITRATION AWARDS

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, modified by Appellate Body Report, WT/DS207AB/R, DSR 2002:VIII, 3127
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS302/AB/R
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report, WT/DS90/AB/R, DSR 1999:V, 1799
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589

GATT DISPUTE SETTLEMENT AND WORKING PARTY REPORTS

Short Title	Full Case Title and Citation
<i>Brazil – Internal Taxes</i>	Working Party Report, <i>Brazilian Internal Taxes</i> , GATT/CP.3/42 (First Report), adopted 30 June 1949, BISD II/181; GATT/CP.5/37 (Second Report), adopted 13 December 1950, BISD II/186
<i>Japan – Alcoholic Beverages I</i>	GATT Panel Report, <i>Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages</i> , L/6216, adopted 10 November 1987, BISD 34S/83

Short Title	Full Case Title and Citation
<i>US – Malt Beverages</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R, adopted 19 June 1992, BISD 39S/206
<i>US – Section 337 Tariff Act</i>	GATT Panel Report, <i>United States Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S/345
<i>US – Superfund</i>	GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , L/6175, adopted 17 June 1987, BISD 34S/136
<i>US – Tobacco</i>	GATT Panel Report, <i>United States Measures Affecting the Importation, Internal Sale and Use of Tobacco</i> , DS44/R, adopted 4 October 1994, BISD 41S/131

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ACRONYMS

AD	Additional Duty
BCD	Basic Customs Duty
BII	Bottled in India
BIO	Bottled at origin
BL	Bulk litre
CIF	Cost, Insurance and Freight
CL	Country liquor
EAD	Extra Additional Duty
ED	Excise Duty
EDP	Ex-distillery price
ICA 62	The Indian Customs Act, 1962
ICTA 75	The Indian Customs Tariff Act, 1975
IMFL	Indian-made foreign liquor
IWSR	International Wine and Spirits Record
LC	Landed Cost
MRP	Maximum retail price
NA	Not Applicable
OCD	Ordinary Customs Duty
PL	Proof litre
Rs	Indian Rupees
USD	United States Dollars
VAT	Value Added Tax

I. INTRODUCTION

1. The intervention of the EC in this dispute is about the discriminatory taxation imposed by India on wine and spirits originating in Third countries. This discriminatory taxation was introduced on the same day on which India had committed to removing all illegal quantitative restrictions on the importation of wine and spirits, as a result of a challenge brought against these WTO-incompatible measures¹.
2. In the present submission, the EC will provide a description of the challenged discriminatory practices and obstacles to trade (Section II) and will present its views on the compatibility of those measures with the GATT (Section III).
3. The scope of the EC submission is limited to the application of the measures which will be defined as the "additional duty" and the "extra additional duty" on wine and spirits originating from third countries. In fact, following a complaint against certain Indian trade practices, the European Commission has investigated the application of such measures on alcoholic beverages gathering information from different sources (including Indian authorities, importers, association of producers). The Commission at the present moment does not have readily available information on the application of those measures to other types of products.

II. THE CHALLENGED PRACTICES AND OBSTACLES TO TRADE

1. Introduction

4. This section will briefly present some historical background to the current dispute and will subsequently illustrate the measures challenged by the United States, , in the context of the Indian system of taxation of wine and spirits.

¹*India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90 and India-Import restrictions, WT/DS149.*

2. Historical background

5. Prior to 1 April 2001, India applied, for a period of approximately forty years, non-automatic import licensing provisions to a wide range of agricultural and consumer goods, including wines and spirits. These provisions, which severely restricted the access of foreign wine and spirits to the Indian market, were contrary to the WTO obligations of India. In 1998, these provisions were accordingly challenged by the US and the European Communities under the dispute settlement procedures of the WTO².
6. As a result of the challenges, India committed to remove all **quantitative restrictions** on the importation of wines and spirits with effect from 1 April 2001. However, India maintained certain other measures³, and introduced certain new measures, which continued to impede or severely restrict the access of foreign alcoholic beverages to the Indian market.
7. In particular, India introduced with effect from 1 April 2001 (i.e., the very same date of removal of the WTO-illegal quantitative restrictions) an Additional (Customs) Duty (hereinafter the “**Additional Duty**” or “AD”). The Additional Duty was, at the date of establishment of the Panel, levied on all products under codes 2204, 2205, 2206 and 2208 of the Harmonised System imported into India in bottles or cans or any other packaging for ultimate sale in retail⁴. The Additional Duty is levied in addition to ordinary customs duties (hereinafter “Basic Customs Duty”) under the Indian Customs Act, 1962 and the Indian Customs Tariff Act, 1975⁵.
8. Moreover, India maintained a **Special Additional Duty** of four percent *ad valorem* on imported wines and spirits. This Duty had applied, since 1998, to

² *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90 and India – Import Restrictions WT/DS149.*

³ In accordance with India’s market access commitments under Article II of the GATT 1994, the applied customs duty on imported wines and spirits should have been reduced from 210% to 198% on 1 March 2001. However, this reduction was implemented only in 2002. India subsequently completed its scheduled customs duty reductions, by bringing the applied rates for ordinary customs duty down to 150% for spirits and 100% for wines.

⁴ Products imported in bulk for bottling in India are not subject to the Additional Duty, see further below Section 5.

⁵ Accessible at: <http://www.cbec.gov.in/customs/cs-acts-botm.htm>

those (limited) imports of wines and spirits which were authorised under India's system of non-automatic import licensing pursuant to Section 3A of the Indian Customs Tariff Act, 1975. The "Special Additional Duty" was abolished as regards wines and spirits in 2004.

9. However, clause 72 of the Indian Finance Bill 2005 introduced a legal basis, in Section 3(5) of the Indian Customs Tariff Act, 1975, to apply to all imported products an Additional Duty (of no more than four percent) in addition to any Additional Duty applied under Section 3(1) of the Indian Tariff Act, 1975. Hereinafter, this Additional Duty applied under Section 3(5) will be referred to as "**Extra Additional Duty**"⁶ (or "EAD"), as in the EC's view and consistently with the arguments developed in this submission, this definition reflects in a more adequate manner the nature of this duty.
10. Under the Finance Bill 2005, the Extra Additional Duty applied only to certain information technology products. Clause 63 of the Indian Finance Bill 2006, amending the First Schedule of the Customs Tariff Act 1975 provided the legal basis to expand its scope of application to cover all products, with certain listed exceptions, but including imported wines and spirits⁷. The Extra Additional Duty is levied in addition to the Basic Customs Duty and the Additional Duty under the Indian Customs Act, 1962 and the Indian Customs Tariff Act, 1975.

3. The Indian system of taxation

11. The complexity of the Indian taxation system of wine and spirits is due to a number of factors including, in particular, the division of responsibility, established by the Constitution of India, between the Central Government and State Governments for the taxation of, on the one hand, domestically produced and, on the other hand, imported alcoholic products.

⁶ The EC will thus not use the terms "SUAD", or "other additional duties as would counterbalance taxes such as sales tax, value added tax, local tax or any other charges", as used by India in its First Written submission .

⁷ The link between this provision and the relevant Customs Notifications n° 19 and 20/2006 is obscure in the absence of a copy of the "schedules" referred to in Clause 63, but it can be tracked through the memorandum to the Financial Bill, part II, which states in particular " This additional duty of customs of 4%

12. The following tables illustrate, respectively, a) the different taxes which apply to wines and spirits, and which are explained more in detail below and b) the overall duty burden in respect of imported (bottled) wines and spirits which results from the cumulative application of the Basic Customs Duty, Additional Duty and Extra Additional Duty

Table a)

	Wines and spirits produced in India	Wines and spirits imported in bottle (BIO)	Wines and spirits imported in bulk (BII)
Basic Customs Duty (BCD)	No	Yes	Yes
Additional Duty (AD)	No	Yes	No
Extra Additional Duty (EAD)	No	Yes	Yes
State taxes ("excise" duty)	Yes	No*	Yes
State taxes (other)	Yes	Yes	Yes

* Some States apply excise duties to imported BIO products (see below, in this section, sub-section (b))

Table b)

WINES				
	BCD	AD	EAD	TOTAL
CIF value 0-25 USD	100%	75%	4%	264%
Example: CIF 25 USD	25 USD**	37.5 USD	3.5 USD	66 USD
CIF value 25-40 USD	100%	50%	4%	212%
Example: CIF 40 USD	40 USD	40 USD	4.8 USD	84.8 USD
CIF value 40- USD	100%	20%	4%	177.33%
Example: CIF 60 USD	60 USD	40 USD*	6.4 USD	106.4 USD
SPIRITS				
	BCD	AD	EAD	TOTAL

has now been extended to cover all imported goods (with some exceptions). This will apply to all agricultural as well as non-agricultural imports" (see <http://indiabudget.nic.in/ub2006-07/mem/mem2.pdf>).

<i>CIF value 0-10 USD</i>	150%	150%	4%	550%
Example: CIF 10 USD	15 USD	37.5 USD	2.5 USD	55 USD
<i>CIF value 10-20 USD</i>	150%	100%	4%	420%
Example: CIF 20 USD	30 USD	50 USD	4 USD	84 USD
<i>CIF value 20-40 USD</i>	150%	50%	4%	298.33%
Example: CIF 40 USD	60 USD	53.2* USD	6.13 USD	119.33 USD
<i>CIF value 40- USD</i>	150%	25%	4%	252.22%
Example: CIF 60 USD	90 USD	53.2* USD	8.13 USD	151.33 USD

** example: $100\% \times 25 = 25\text{USD}$, $75\% \times (25 + 25) = 37,5\text{USD}$, $4\% \times (25 + 25 + 37.5) = 3.5\text{USD}$, $264\% \times 25 = 66\text{USD}$

* Fixed minimum rate of Additional Duty in this category.

13. This overall duty burden exceeds, the bound tariffs of India (bound at 150% *ad valorem*) in respect of both (bottled) wines and spirits, contrary to Article II:1 of the GATT 1994.
14. In its submission, India claims that the nature, intent and design of the AD on alcoholic beverages are solely to offset the state excise duty paid by the local manufacturer on the like products and that the AD is validly imposed in accordance with Article II:2 a) of the GATT 1994⁸. The Additional Duty is therefore claimed to be a border tax adjustment applied to compensate for excise duties applied to *Indian* wines and spirits by Indian States (Indian States do not have the power to apply excise taxes to *imported* bottled wines and spirits). However, the evidence available to the EC indicates that this is incorrect, as it will be shown in section III of this submission.
15. The Extra Additional Duty is also, according to India⁹, a border tax adjustment applied to compensate for sales taxes, value added tax and other local taxes applied to *Indian* products, including wines and spirits. Also with regard to this duty, however, the available evidence suggests that it exceeds the indirect taxes applied to domestic spirits in a high number of Indian States.

⁸ India First Written Submission, part III, B, "The additional duty is consistent with Article II:1a) and b)", page 16.

⁹ India First Written Submission, part III, C, D, para 63, page 21.

16. Therefore, neither the Additional Duty nor the Extra Additional Duty can, therefore, be justified under Article II:2(a) of the GATT 1994.

(a) Wines and spirits produced in India

17. Under Entry No 84 of List I (Union List) of Schedule VII of the Constitution of India¹⁰, the Indian Central Government is empowered to collect "excise duties"¹¹ on a range of products. Certain products are, however, specifically excluded. Products defined as 'alcoholic liquor for human consumption'¹² are amongst those excluded from the scope of Entry No. 84 of List I (Union List) of Schedule VII. It is therefore, in principle, the Indian States which have exclusive competence to levy excise duties on wines and spirits, at rates determined by the State Government pursuant to Entry 51 of List II (State List) of Schedule VII of the Constitution of India.

18. Each Indian State, accordingly, maintains a separate system for the taxation of wines and spirits. There are twenty eight separate State authorities, including the National Capital Territory of Delhi. In addition there are seven Union Territories, some of which formulate their own policies for the taxation of wines and spirits through a directly elected government, and some of which operate under policies determined by the Central government. A limited number of Indian States maintain a ban on the sale of alcoholic drinks.

19. Within States which allow the sale of alcoholic drinks, wines and spirits are generally subject to a number of different indirect taxes¹³. The structure and denomination of these taxes varies considerably across the States, as does the resulting overall level of taxation. In terms of structure, some taxes are applied

¹⁰ [http://lawmin.nic.in/legislative/7thSch-AppV%20\(219-280\).doc](http://lawmin.nic.in/legislative/7thSch-AppV%20(219-280).doc)

¹¹ A genuine Excise Duty is to be paid as a tax on consumption and not on manufacture; it is paid in the state of final consumption. Wholesalers are normally responsible for paying the duty unless the manufacturer distributes directly to the retail trade from his own warehouse, in which case he is responsible. In certain states, bottled spirits may be stored under bond and only become liable for payment of duty when they are withdrawn from bond.

¹² This term is understood in Indian law to include all wines and spirits under codes 2204, 2205, 2206 and 2208 of the Harmonised System.

¹³ In addition to indirect taxes, most States apply fees in connection with licensing of production and distribution of wines and spirits. Those fees are not indirect taxes on products, and they are therefore outside the scope of the present dispute.

ad valorem, others are specific taxes linked to the volume, alcohol content or price of the products concerned. Common denominations of taxes include "excise duty", "special duty", "vend fee", "import fee", "transport fee", "assessment fee", "gallonage fee", "litage fee", "development fee", "octroi", "sales tax" and VAT.

20. Not all Indian States apply taxes under the denomination "excise duty" (e.g., Delhi as regards wines and spirits, and Maharashtra as regards wines). Amongst those States that apply taxes denominated "excise duty" the level of taxation varies considerably.

(b) Imported wines and spirits

21. The exclusive competence of the Indian States to levy "excise" duties, under Entry 51 of List II (State List) of Schedule VII, applies only to products produced in India. Indian States may therefore, as a matter of Indian Constitutional law, not apply excise duties to wines and spirits imported from outside the territory of India. More precisely, Indian States may not apply (excise) duties to wines and spirits which are imported bottled for final consumption by the end consumer (BIO products).
22. However, excise duty may, as a matter of Indian constitutional law, be applied by the Indian States to wines and spirits which have been vinified locally or distilled and/or bottled in India. Wines and spirits imported in bulk and bottled in India (BII products) may therefore be, and are in practice, subject to State excise duties.
23. It is important to note that although the Constitution of India does not grant the Indian States the authority to apply formally denominated excise duties on BIO products, many States apply a number of indirect taxes to BIO products, such as sales taxes, VAT, special duty, as well as a variety of different fees.

4. Import Duties I - Basic Customs Duty

24. Wines and spirits imported into India are subject to payment, on importation, of a "Basic Customs Duty" (or "BCD") under Section 12(1) of the Indian Customs Act, 1962 (hereafter, "ICA 62"), read together with Section 2 of the Indian Customs Tariff Act, 1975 (hereafter, "ICTA 75"). The applied rates of the Basic Customs Duty are established by Customs Notifications issued by the Government of India under Section 25(1) of the Indian Customs Act, 1962. Pursuant to Customs Notification No 5/2004 of 8 January 2004, the applied rate of Basic Customs Duty for spirits (code 2208 of the Harmonised System) is 150% *ad valorem*. Pursuant to Customs Notification No 20/1997 of 1 March 1997, the applied rate of Basic Customs Duty for wines (codes 2204, 2205 and 2206 of the Harmonised System) is 100% *ad valorem*¹⁴. These rates apply to BII and to BIO products. The most recent relevant Customs notification, No 21/2007, confirms the rate of 150% applicable to spirits.

5. Import Duties II - Additional Duty

25. In its submission¹⁵, India claims that the Additional Duty is a border tax adjustment. It is a duty applied by the Central Government to all BIO wines and spirits (but not BII wines and spirits) at the point of importation into India allegedly to compensate for excise duties applied to wines and spirits (including BII wines and spirits) produced in India within each of the Indian States.
26. The legal basis for the Additional Duty is Section 3(1), read in conjunction with Section 3(2), of the ICTA 75. Section 3(1) was inserted by clause 110(a) of the Indian Finance Bill, 2001 and entered into force on 1 April 2001.. Sections 3(1) and (2) were amended and replaced by clause 72 of the Indian Finance Bill, 2005, with effect from 1 April 2005. The amendments introduced by Clause 72 further aimed at defining the Additional Duty as a duty *equal* to the excise duty for the time being leviable on a like article if produced or manufactured in India. Amendments also introduced an "Explanation" aimed at clarifying the level at

¹⁴ Since 3 July 2007, India increased the Basic Custom Duty applied on wines to 150% (bound duty rate), see Notification 81/2007-Customs 1.

¹⁵ India First Written Submission, part II.2, paragraph 15, page 8 and part III,B "The additional duty is consistent with Article II:1 a) and b)".

which the excise duty, for the purpose of the calculation of the Additional Duty, should be considered. No further amendments to Sections 3(1) and 3(2) were made by the Indian Finance Bill, 2006. Pursuant to the Indian Provisional Collection of Taxes Act, 1931¹⁶ clause 72 of the Indian Finance Bill, 2005, and thereby Sections 3(1) and 3(2) of the Indian Customs Tariff Act, 1975, as amended, has force of law.

27. The text of this provision (“equal to the excise duty for the time being leviable on a like article if produced or manufactured in India”) would suggest that the alleged purpose of the Additional Duty is to impose a border tax in lieu of excise taxes applied by Indian States.
28. The taxable basis for the Additional Duty is determined by Section 3(2) of the ICTA 75. According to this provision, the Additional Duty is to be applied on the aggregate of the customs value (CIF value) and applicable Basic Customs Duty of imported wines and spirits.
29. Although India refers several times to the structure of the Additional Duty, the wording of Section 3(1) of the ICTA 75 confirms that the structure of the Additional Duty is not designed to offset State excise duties. In addition, there is in the law no methodology which is to be applied by the Indian Government to ascertain what rate of Additional Duty would have, allegedly, to be regarded as “equal to” an “excise duty” applied to “like” domestic products “in different States”.
30. First, Section 3(1) does not define: (a) whether “excise duty” is to be understood as including only taxes denominated “excise duty” under the laws of the Indian States or also other (similar) indirect taxes applied by the Indian States, (b) what products are to be regarded as “like”, and (c) what States are to be regarded as relevant for determining the so-called “equivalent” level of Additional Duty. As far as is known to the EC, no other provision of Indian law, nor provisions contained in internal administrative circulars, provide clear rules to these issues.

¹⁶ Act No. 16 of 1931; accessible on the net at: <http://www.cbec.gov.in/customs/cs-acts-botm.htm>.

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31. Second, the level of excise duties (and other indirect taxes) applied by the Indian States to wines and spirits produced in India vary considerably. Section 3(1) of the ICTA 75 does not define how equivalence is to be established in relation to the plethora of State taxes. The “Explanation” included in Section 3(1) of ICTA 75 (“where such [State excise] duty is leviable at different rates, the highest duty”) might be interpreted to mean that the Additional Duty would be set at a rate equal to the *highest* tax for “like” domestic products which is applied in *any* Indian State.
32. In practice, it appears that the rates of Additional Duty applied under Section 3(1) of ICTA 75 are not determined in accordance with detailed legal criteria or mathematical calculations based on actual and relevant tax levels in different States. The rates of Additional Duty appear, rather, to be the result of a process of political negotiation between concerned ministries of the Indian Government conducted as part of the preparation of the annual Budget Bill of India, and actually disconnected from any particular domestic tax, whether designed as “excise duty” or not, which is collected at state level on domestic products.
33. As for Ordinary Customs Duties, the rates of the Additional Duty are laid down in Customs Notifications issued by the Indian Government. Since its introduction on 1 April 2001, the Additional Duty has taken the form of an *ad valorem* duty. The *ad valorem* rate of the Additional Duty varies depending on the customs value (CIF) of the products concerned. When the Additional Duty was initially introduced, in April 2001, the rates of the Additional Duty were established by Customs Notification No 37/2001 of 31 March 2001 for wines and spirits (codes 2204, 2205, 2006 and 2008) in the Harmonised System as follows¹⁷:
- 150% *ad valorem* for products the CIF value of which does not exceed USD 20 per case;
 - 100% *ad valorem* for products the CIF value of which exceeds USD 20 but does not exceed USD 40 per case); and
 - 75% *ad valorem* for products the CIF value of which exceeds USD 40 per case.

¹⁷ According to Customs Notification No 37/2001, a “case” means a packaging containing a total volume of nine litres (e.g., 12 bottles of 750 ml capacity).

34. Since 2001, Customs Notification No 37/2001 of 31 March 2001 has been amended and replaced by, first, Customs Notification 54/2001 of 11 May 2001 and, secondly, Customs Notification 24/2002 of 1 March 2002. The Additional Duty rates currently in force were established by Customs Notification No 32/2003 of 1 March 2003 which replaced all previous Customs Notifications establishing Additional Duty rates for wines and spirits. Under this notification, the *ad valorem* structure is combined with a fixed minimum rate of duty for certain product categories. The rates of the Additional Duty under Customs Notification No 32/2003¹⁸, and which are applicable at the date of the establishment of the panel, are as follows:

Spirits (code 2208 in the Harmonised System):

- 150% *ad valorem* for products the CIF value of which do not exceed USD 10 per case;
- 100% *ad valorem* or USD 40 per case, whichever is higher, for products the CIF value of which exceeds USD 10 but does not exceed USD 20 per case;
- 50% *ad valorem* or USD 53.2 per case, whichever is higher, for products the CIF value of which exceeds USD 20 but does not exceed USD 40 per nine-litre case; and
- 25% *ad valorem* or USD 53.2 per case, whichever is higher, for products the CIF value of which exceeds USD 40 per case.

Wines: (codes 2204, 2205 and 2206 in the Harmonised System):

- 75% *ad valorem* for products the CIF value of which do not exceed USD 25 per case;
- 50% *ad valorem* or USD 37 per case, whichever is higher, for products the CIF value of which exceeds USD 25 but does not exceed USD 40 per case;
- 20% *ad valorem* or USD 40 per case, whichever is higher, for products the CIF value of which exceeds USD 40 per case;

35. It should be stressed that *no* Indian State applies excise duties (or other indirect taxes) to wines and spirits produced in India with a similar structure to the Additional Duty as set out in Notification No 32/2003 of 1 March 2003. Although certain Indian States apply excise duties (or other indirect taxes) in accordance with a slab structure, slabs are typically used in connection with

¹⁸ According to Explanation (i) to Custom notification No a 32/2003 "case" means a packaging containing a total volume of nine litres (e.g. 12 bottles of 750 ml capacity).

specific (not *ad valorem*) taxes and no Indian state applies, as far as is known, tax rate slabs that are *inversely* related to the price of the product¹⁹.

6. Import duties III - Extra Additional Duty

36. The Extra Additional Duty is, like the Additional Duty, allegedly a border tax adjustment. It is a duty applied by the Central Government to *all* imported products, including all wines and spirits (BII as well as BIO), at the point of importation into India, notionally to compensate for the sales taxes, VAT and other local taxes applied pursuant to Indian law to products sold in Indian States.
37. The legal basis for the Extra Additional Duty is Section 3(5), read in conjunction with Sections 3(6) and 3(7), of the ICTA 75. Sections 3(5), 3(6) and 3(7) were inserted by clause 72 of the Indian Finance Bill, 2005 and entered into force on 1 April 2005. Pursuant to the Indian Provisional Collection of Taxes Act, 1931, clause 72 of the Indian Finance Bill, 2005, and thereby Sections 3(5), 3(6) and 3(7) of the ITCA 75, have force of law.
38. According to Section 3(7) of the ICTA 75, the Extra Additional Duty “shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.”
39. The taxable basis for the Extra Additional Duty is determined by Section 3(6) of the ITCA 75. According to this provision, the Extra Additional Duty is to be applied on a value which is the aggregate of (a) the customs value (CIF value), (b) the Basic Customs Duty and (c) the Additional Duty on imported wines and spirits.
40. The rate of the Extra Additional Duty, and the range of products to which it applies, is determined by Customs Notifications issued by the Indian Government. According to Customs Notification No 19/2006 of 1 March 2006, all products listed in the First Schedule of the Customs Tariff Act, 1975 are liable to an Extra Additional Duty of customs “at the rate of four percent *ad valorem*”.

¹⁹ On the contrary, specific excise duty and other tax rates are generally *higher* for more expensive products in Indian States.

Wines and spirits (under codes 2204, 2205, 2206 and 2208 of the Harmonised System) are listed in the First Schedule. Certain products are exempt from the Extra Additional Duty under Customs Notification No 20/2006 of 1 March 2006. However, the list of exempted products does not include wines or spirits. It follows that all wines and spirits (BII and BIO) are liable to the Extra Additional Duty on importation into India at a rate of 4% applied to a taxable basis made of the custom value plus the customs duties already applicable.

7. Final remarks on the Indian System of Taxation

41. As a result of the above-mentioned legal framework, wines and spirits are subject to a highly complex system of taxation in India. This complexity manifests itself at three levels.
42. First, wines and spirits produced *in India* are subject to indirect taxes at the State level; *imported BII* wines and spirits are subject to indirect taxes at the State level, and to the Basic Customs Duty and Extra Additional Duty applied at the Central level; *imported BIO* wines and spirits are subject to indirect taxes at the State level, and to the Basic Customs Duty, Additional Duty and Extra Additional Duty at the Central level.
43. Second, indirect State taxes vary considerably as *amongst the States*, in terms of structure, denominations and applicable rates, and their exact nature remains uncertain.
44. Third, *within* each Indian State some indirect taxes apply only to wines and spirits produced in India, some apply only to BIO wines and spirits, and some apply to both wines and spirits produced in India and BIO wines and spirits. Further, State-level taxes applicable to both local and imported products may apply with different rates.
45. The measures challenged in the dispute form part of, and must be analysed in the context of, this complex system of taxation.

III. LEGAL ASSESSMENT

A. *Additional Duty*

1. **Mandatory/discretionary distinction**

46. In its submission, India invokes the so-called mandatory/discretionary distinction and argues²⁰ that the Panel should limit its examination to the Custom Notifications, which are identified by India as mandatory measures, as opposed to the provisions of the Custom Tariff Act, 1975 and the Custom Act 1962, which would be discretionary, and allegedly wrongly characterized as "mandatory" by the United States.
47. The EC considers that the legal basis for, origins, evolution and content of the so-called mandatory/discretionary doctrine are obscure. A careful review of past GATT and WTO panel reports reveals that there is no homogeneous, systematic and consistent articulation of the same point or principle under the heading "mandatory/discretionary". Nor does the EC believe that the mandatory/discretionary rule is borne of any abstract basic principle expressed in the WTO agreements or elsewhere. The principle of mandatory as distinguished from discretionary legislation has never led the Appellate Body to adopt the "mandatory versus discretionary" theory. The Appellate Body actually also accepts the challenge *per se* of discretionary legislation.
48. In any event, the European Communities does not understand the United States to claim that any provision of the Customs Act 1962 or the Customs Tariff Act 1975 is "as such" inconsistent with the GATT 1994. Rather, the European Communities understands the United States claims to relate to the additional customs duties on alcoholic beverages set out in Customs Notification 32/2003 (apparently withdrawn by India on 20 June 2007); and the extra additional customs duties on a range of products set out in Customs Notification 19/2006.

²⁰ India First written Submission, Part II, B "Discretionary enactments and mandatory notifications" and part III, A, para 40.

In these circumstances, India's submissions regarding the so-called "mandatory-discretionary" distinction are simply inapposite.

2. Review of a measure withdrawn after panel establishment

49. The EC considers that the Panel should consider the claims made by the United States on the Additional Duty (as it existed at the time of the establishment of the Panel), provided that the United States can provide a reasonable explanation of why it considers that findings and a recommendation would be fruitful.

3. Border Duty or internal tax?

50. In order to assess the legality, as a matter of WTO law, of the Additional Duty, it is necessary, first of all, to determine whether it is an import tariff (customs duty) falling within the scope of Article II of the GATT 1994 or an internal tax within the meaning of Article III of the GATT 1994.
51. The Additional Duty is due on importation, as a condition for importation. It is calculated and collected by the Central Indian Customs authorities pursuant to the basic Indian legislation on customs duties, *i.e.* the Customs Act, 1962 and the Customs Tariff Act, 1975 and it applies - according to the clear terms of Section 3(1) of the Customs Tariff Act, 1975 - exclusively to imported products, not to products produced in India.
52. For these reasons, the Additional Duty must be regarded as a customs duty within the meaning of Article II:1(b) of the GATT 1994²¹, and not, as India argues, as an offset for internal taxes which could be deemed compatible (*quod non*) with Articles II:2 (a) and III: 1 and 2 of the GATT 1994.

4. Article II:1 of the GATT 1994: Other duties or charges

53. Under Article II:1(a) of the GATT 1994, India is obliged to accord to commerce from the US treatment no less favourable than that provided for in the tariff

schedule of India.²² India's tariff schedule specifies as regards wines and spirits (codes 2204, 2205, 2206 and 2208 of the Harmonised System) a bound rate of 'ordinary customs duty' of 150% *ad valorem*. India's tariff schedule lists no 'other duties or charges' as regards wines and spirits. *Prima facie*, the Additional Duty is not an "other duty or charge" and must be construed as an ordinary customs duty.

54. WTO panel practice suggests that in order to distinguish between 'other duties or charges' and 'ordinary customs duties', it is necessary to examine, in particular, the structure of the duty in question (in the present case, the Additional Duty) in the light of the structure of ordinary customs duties generally applied by WTO Members. WTO Members, including India, invariably express commitments in the 'ordinary customs duties' column of their tariff Schedules as *ad valorem* or specific duties, or combinations thereof. 'Ordinary customs duties' differ, in this respect, from 'other duties and charges' which are applied on the basis of factors of an exogenous nature such as, for example fluctuating world prices²³. The Additional Duty is not applied on the basis of exogenous factors, and it is structured as a combination of *ad valorem* rates and minimum specific duties.
55. The applicable rates of the Additional Duty are decreasing in "slabs" depending on the price (CIF value) of the imported goods. This slab structure is more complex than the 'ordinary customs duty' commitments set out in the schedules of WTO Members. This may suggest that the Additional Duty could be regarded in this respect as an 'other duty or charge'. It may also be relevant in this context that (a) the Additional Duty is applied under a different legal provision from that under which Indian Basic Customs Duty is collected, (b) it is levied and calculated under different legal provisions from those that govern the Basic Customs Duty (on the aggregate of customs value (CIF value) and Basic Customs Duty) and (c) according to Section 3(1) of the ICTA 75, it serves allegedly a specific purpose - different from that of Basic Customs Duty - which

²¹ See in this respect *Ad Note* to Art. III of the GATT 1994.

²² See Understanding on the Interpretation of Article II:1(b) of the General Agreement on Trade and Tariffs 1994. See also Panel Report – *Dominican Republic – Cigarettes*, para 7.88.

²³ See in this respect Panel Report – *Chile – Price Band System*, para 7.51 and 7.52.

is to ensure equivalence in the tax treatment of imported and domestically produced wines and spirits²⁴.

56. However, (a) the legal act establishing the legal basis for the Additional Duty is still the Indian *Customs Tariff Act*, and the tax is referred to in official Indian texts as the "additional duty of customs"²⁵, (b) the aggregate value of the taxed goods on which it is based is merely a compilation of the customs value used for the calculation of the Ordinary Customs Duty ("OCD") and the OCD itself, and thus the taxable base is not substantially different from that of an Ordinary Customs Duty, and (c) no demonstrable equivalence between the Additional Duty and the various taxes on domestic products which it is allegedly meant to compensate could be established.
57. On the basis of the above, the remainder of this submission will be based on the view that the Additional Duty is an 'Ordinary Customs Duty' within the meaning of the first sentence of Article II:1(b) of the GATT 1994. In any event, as will be seen below, the Additional Duty would still be inconsistent with Article II of the GATT 1994 if it were assessed as an 'other duty or charge'.
58. As it is clear from the table b) in paragraph 14 of the present submission, the cumulative application of the Basic Customs Duty and the Additional Duty to BIO wines and spirits implies the application of ordinary customs duties in excess of the level set forth in the tariff schedule of India. As regards BIO spirits, in respect of which the Basic Customs Duty is applied at the bound level of 150% *ad valorem*, any Additional Duty applied is in excess of the duties set forth in the schedule. As regards BIO wines, in respect of which the Basic Customs Duty was applied at the level of 100% *ad valorem*²⁶ (while the bound rate in the tariff schedule is also 150%), the Additional Duty applied at a rate of above 25% *ad valorem*, is automatically in excess of the duties set forth in the schedule

²⁴ See in this respect Panel Report – *Dominican Republic – Cigarettes*, para 7.115 where an *ad valorem* duty ("foreign exchange fee") was regarded as an 'other duty or charge'.

²⁵ See footnote 31 above on page 2.

²⁶ Since 3 July 2007, India increased the Basic Custom Duty applied on wines to 150% (bound duty rate), see Notification 81/2007-Customs 1.

because the Additional Duty is calculated on the basis of a formula that includes the 100% *ad valorem* Basic Customs Duty²⁷.

59. The Additional Duty as applied is therefore *prima facie* incompatible with Article II:1(b) first sentence and Article II:1(a) of the GATT 1994²⁸.
60. It may be added that a similar conclusion would apply if the Additional Duty were to be regarded as an ‘other duty or charge’ under Article II:1 (b) second sentence: since India’s tariff schedule lists no ‘other duties or charges’ as regards wines and spirits, the application of any Additional Duty would be contrary to the obligations of India under the second sentence of Article II:1(b) of the GATT 1994 and Article II:1(a) of the GATT 1994.
61. In the light of these preliminary conclusions, it must be examined whether the Additional Duty could be justified under Article II:2(a) of the GATT 1994 on border tax adjustments.

5. Article II:2(a) of the GATT 1994: charge equivalent to an internal tax

62. 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”.
63. The purpose of this provision is to allow WTO Members to collect at the border a tax on imported products which the Member would otherwise be entitled to collect through internal taxation under Article III:2 of the GATT 1994. It preserves the freedom of WTO Members to decide *where* to collect internal taxes on imported products. Such a charge can be collected in the form of a customs

²⁷ In other words, 25% Additional Duty applied to the *aggregate* of CIF value and Basic Customs Duty of 100% is equal to Basic Customs duty of 150% (CIF + BCD (150%) = CIF + BCD (100%) + (CIF + BCD (100%)) x 25%).

²⁸ Compare Appellate Body Report *Argentina – Textiles and Apparel*, para 45.

duty in excess of bound rates, insofar that it remains a genuine offsetting measure for a WTO compatible internal tax.

64. However, Article II:2(a) does not give WTO Members freedom to depart from the obligations laid down in the WTO Agreement relating to *how much* tax may be applied to imported products. Indeed, as is clear from the wording of Article II:2(a), a charge in excess of bound rates cannot be regarded as “equivalent” to an internal tax unless its is also “in accordance with” Article III:2 of the GATT 1994 on national treatment in internal taxation. In other words, Article II:2(a) allows WTO Members to apply, in the form of charges in excess of bound rates, a tax adjustment offsetting indirect taxes on domestic products that are not applied to like imported products, provided that the adjustment does not entail taxation of like imported products in excess of the internal taxation of domestic products and inputs.

(a) Internal taxes on products

65. First, it is clear from the wording (“in respect of the like domestic *product*”²⁹) of Article II:2(a) that a charge in excess of bound rates may be justified by reference to internal taxes that are applied exclusively to domestic *products*. In other words, Article II:2(a) allows WTO Members to impose border tax adjustments in respect of *indirect* taxes on products.. Indirect taxes on products include, for example, specific excise duties, sales taxes, and VAT³⁰. However, taxes levied in the form of fixed (annual or one-off) licensing fees on producers, distributors and retailers are not covered. Such licensing fees applied by Indian States cannot be considered in the implementation of Article II:(2)(a) of the GATT 1994.

(b) Internal taxes on domestic products

²⁹ Emphasis added.

³⁰ *Report by the Working Party on Border Tax Adjustments*, L/3464, of 20 November 1970. See also *GATT Analytical Index*, p. 146.

66. Second, it is equally clear from the wording (“in respect of the like *domestic* product”³¹) of Article II:2(a) that a charge in excess of bound rates may be justified only by reference to internal taxes that are applied either exclusively to *domestic* products, or to domestic products at rates in excess of those applied to imported products³². Internal taxes which apply exclusively to *imported* products obviously do not fall within the range of taxes which may be subject to border tax adjustment under Article II:2(a). On the contrary, border tax adjustments are allowed only to the extent that internal taxes which apply exclusively to *domestic* products would exceed internal taxes applied exclusively to *imported* products. Taxes that apply *equally* to domestic and imported products are irrelevant for the purpose of Article II:2(a). Thus, in so far as certain taxes – such as sales taxes, VAT and various fees - are applied by Indian States equally to imported and domestic wines and spirits, they cannot not be considered in the implementation of Article II:2(a) of the GATT 1994.

(c) Equivalence

67. The possibility for WTO Members to justify a border tax adjustment under Article II:2(a) of the GATT 1994 is available only in so far as that tax is “equivalent” to, and thus merely offsets, relevant internal taxes on like domestic products. Contrary to India's allegations in its First Written Submission³³, the fact that the statutory provisions responsible for the imposition of the BCD, AD and EAD are different is not relevant for the assessment of the substance and of WTO compatibility. Nor is the qualification of the nature, intent and design of the AD by an Indian court relevant for the assessment of WTO compatibility.

68. As explained above, excise duties on wines and spirits vary greatly both in terms of structure and overall level amongst Indian States. Some States apply specific excise duties (e.g., Andhra Pradesh, Assam, Goa, Karnataka, Punjab, Rajasthan, Uttar Pradesh), some States apply *ad valorem* excise duties (e.g. Maharashtra),

³¹ Emphasis added.

³² In this case, the equivalence of the charge must be assessed by reference to the difference between the internal taxation of domestic and imported products.

³³ India First Written Submission, Part II, A, para 11, page 6

and some States apply no tax denominated “excise duty” at all (e.g, Delhi). Moreover, no Indian State applies an excise duty (or any other tax) which is structured in a similar manner to the Additional Duty, i.e. as a combination of *ad valorem* and specific rates of duty in different slabs with rates inversely proportional to the import price. There is, therefore, no *structural* equivalence at all between the Additional Duty and the plethora of "excise" duties applied by the Indian States, contrary to India's allegation in its submission³⁴.

69. Whereas the absence of such structural equivalence may not, in theory, totally preclude the possibility that the Additional Duty could be legally justified under Article II:2(a) of the GATT 1994, the mere fact that Indian States have competence under Indian law to determine the taxation of Indian wines and spirits, and that the tax structures accordingly vary from State to State, will lead to numerous situations in which the application of the Additional Duty will entail taxation of imported products in excess of (and, therefore, not quantitatively equivalent to) taxation of domestic products within the meaning of Article III:2 of the GATT 1994. Indeed, the complete absence of any structural equivalence between the Additional Duty and such State indirect taxes on wines and spirits as set out above³⁵ provides a very strong indication that the Additional Duty is in violation of Article III:2 of the GATT 1994 and therefore not justifiable under Article II:2(a) of the GATT 1994. The evidence collected confirms, as explained below, this conclusion.

6. Article III:2 in conjunction with Article II:2(a) of the GATT 1994

(a) Preliminary comments

70. A charge (in excess of bound rates) may, as noted above, be justified under Article II:2(a) of the GATT 1994 only if it is imposed consistently with Article III:2 of the GATT 1994. The application of the Additional Duty would be

³⁴ India First written submission , Part II,A,2 paragraph 15, page 8

³⁵ That is, taxes which could meet the requirements of Article II:2(a), such as genuine excise duties imposed exclusively on domestic products.

consistent with Article III:2 only if, compared to the relevant indirect taxes applied by Indian States,

71. (a) it does not result in taxation of imported wines and spirits in excess of taxation of *like* domestic wines and spirits (within the meaning of the first sentence of Article III:2) *and*
72. (b) it does not result in a taxation of imported wines and spirits which affords protection to *directly competitive or substitutable* domestic wines and spirits (within the meaning of the second sentence of Article III:2).
73. The Additional Duty must therefore be considered, in the first place, under Article III:2, first sentence. In order to assess whether the Additional Duty is consistent with this provision it must be examined, first, whether imported BIO wines and spirits (subject to the Additional Duty) are “like” Indian wines and spirits (subject to indirect State taxes) and, second, whether the application of the Additional Duty results, directly or indirectly, in taxation “in excess of” the taxation of domestic wines and spirits³⁶.

(b) Article III:2, first sentence: like products

74. In its submission, India³⁷ recognizes that imported products, including certain alcoholic beverages, are “like” domestic products within the meaning of Article III:2, first sentence. The EC fully agrees with this argument.

(c) Article III:2, first sentence: taxation in excess

75. The Additional Duty applies according to Section 3(1) of the ICTA 75 exclusively to imported products. In other words, the Additional Duty is applied on the basis the origin of the goods affected.

³⁶ Appellate Body Report, *Canada – Periodicals*, pp. 22-23 and Appellate Body Report *Japan – Taxes on Alcoholic Beverages*, p. 19.

³⁷ India First Written submission, Part III, C.2, a), para 83, page 27

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76. Such a tax must be regarded as resulting in taxation of imported wines and spirits “in excess” of taxation of Indian wines and spirits within the meaning of Article III:2, first sentence, if it leads to higher taxation of imported products falling within *one* (or more) of the categories (price “slabs”) of imported wines and spirits laid down in Customs Notification No 32/2003 as compared to the taxation resulting from the application of indirect taxes to like domestic wines and spirits in the same “price slabs” and in *one* (or more) Indian States.
77. In this respect, it is irrelevant whether the Additional Duty (also) leads to *lower* taxation of imported products falling within one or more of the other categories (price “slabs”) of imported wines and spirits, or whether it leads to *lower* taxation of the imported products in the same category (price “slab”) in one or more other Indian States: with regards to measures - such as the Additional Duty- which explicitly distinguish on the basis of the origin of the goods to which they apply, more favourable treatment as to some products cannot be balanced against less favourable treatment as to others³⁸.
78. Moreover, *any* taxation in excess, no matter how small in amount, is sufficient to constitute “taxation in excess” within the meaning of Article III:2, first sentence, since this provision is not subject to a trade effects test or a *de minimis* standard³⁹.
79. The EC compared the taxation resulting from the Additional Duty and indirect taxes applied by a number of Indian States. Before proceeding to that comparison it is, however, worth noting that according to Section 3(1) of the ICTA 75 the Additional Duty is to be equivalent to “excise duty” applied by Indian states to domestic wines and spirits. More precisely, the “explanation” to Section 3(1)

³⁸ Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, paras 262 and 264 and GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, para 5.12 and, by analogy, Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, para 53. See also Panel Report – *United States – Measures affecting the importation, internal sale and use of tobacco*, para 98 and GATT Panel Report, *United States – Taxes on petroleum and certain imported substances*, para 5.2.9.

³⁹ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, page 24 confirming GATT Panel Reports *United States - Measures Affecting Alcoholic and Malt Beverages*, BISD 39S/206, para 5.6. See also GATT Panel Reports *Brazilian Internal Taxes*, BISD II/181, para 16; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para 5.1.9; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para 5.8.

(cited above, paragraph 78, Chapter III, section 5) provides that where excise duty “is leviable at different rates”, the Additional Duty must be equivalent to “the highest [excise] duty”. This explanation means that the Additional Duty must be applied at a level corresponding to that of the excise duty applied to Indian wines and spirits in the Indian State which, at any point in time, applies the *highest* excise duty of all India States. If this interpretation is correct, Section 3(1) would appear to be *per se* contrary to Article III:2, first sentence, and therefore already cannot be justified under Article II:2(a) of the GATT 1994.

80. The evidence confirmed that the Additional Duty, as applied by Customs Notification No 32/2003, 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 spirits⁴⁰. Indeed, the Additional Duty is, as far as can be known, applied at levels which exceed the level of taxes denominated “excise duty” in the majority of Indian states (which goes *even further* in discrimination than what the text of the “explanation” to Section 3(1) appears to suggest).
81. The EC has conducted a comparison of the taxation resulting from, on the one hand, the application of the Additional Duty by the Central Government of India on imports of BIO wines and spirits plus the application by Indian States of indirect taxes either *exclusively* to imported wines and spirits, or at rates which exceed the rates applied in respect of like domestic wines and spirits, and, on the other hand, the application of excise duties and indirect taxes by Indian States to domestic wines and spirits either *exclusively* or at rates which exceed the rates applied in respect of like imported wines and spirits, - for each of the categories (price “slabs”) of wine and spirits laid down in Customs Notification 32/2003.
82. That comparison shows that the Additional Duty leads to a taxation of imported wines and spirits which is (substantially) higher in amount than the taxation of

⁴⁰ As of 20 June 2007, when comparing Additional Duty **on its own** with formally denominated excise duty **only**, taxation of imported wines and spirits is in excess of taxation of Indian like products in all ten States for which evidence is available to the EC, with the exception of Maharashtra for spirits; Rajasthan and Uttar Pradesh for both wines and spirits. Total tax burden is, on the other hand, “in excess” for both wines and spirits in all ten States of Andhra Pradesh, Assam, Delhi, Goa, Karnataka, Maharashtra, Punjab, Rajasthan, Uttar Pradesh, West Bengal.

Indian wines and spirits as regards all of the categories (price “slabs”) in at least ten Indian States representing a major proportion of the Indian market⁴¹. There is, therefore, ample evidence that the Additional Duty leads to “taxation in excess” within the meaning of Article III:2, first sentence.

(d) Conclusion on Article III:2 in conjunction with Article II:2(a) of the GATT 1994

83. It follows from the above that the Additional Duty, as applied by Customs Notification 32/2003 pursuant to Section 3(1) of the ICTA 75, does not meet the requirements of Article III:2 of the GATT 1994 and, therefore, cannot be justified under Article II:2(a) of the GATT 1994. In view of that conclusion, it is not necessary to examine whether the Additional Duty results (also) in a protection of Indian wines and spirits which are substitutable or competing with imported wines and spirits within the meaning of Article III:2, second sentence.

7. Conclusion on the Additional Duty

84. It may be concluded from the above that, even taking the most conservative approach, the Additional Duty, as applied by Customs Notification 32/2003 pursuant to Section 3(1) of the ICTA 75, is incompatible with Article II:1(b) and Article II:1(a) of the GATT 1994⁴².

B. Extra Additional Duty

1. Article II:1 of the GATT 1994

85. The Extra Additional Duty as applied by Customs Notification No 19/2006 of 1 March 2006 pursuant to Section 3(5) of the ICTA 75 must, for reasons analogous to those set out above in relation to the Additional Duty, be regarded as an ordinary customs duty within the meaning of Article II:1 of the GATT 1994.

⁴¹ Andhra Pradesh, Assam, Delhi, Goa, Karnataka, Maharashtra, Punjab, Rajasthan, Uttar Pradesh and West Bengal.

Like the Additional Duty, the Extra Additional Duty is due on importation, as a condition for importation, and is applied, calculated and collected by the Central Indian Customs authorities pursuant to the basic Indian legislation on customs duties. It applies - according to the clear terms of Section 3(5) of the Customs Tariff Act, 1975 - exclusively to imported products, not to products manufactured in India. It is an *ad valorem* tax imposed, in principle, on all imported products at a rate of 4%. It must, for these reasons, be regarded as an ordinary customs duty within the meaning of Article II:1 of the GATT 1994.

86. According to Section 3(6) of the ICTA 75, the Extra Additional Duty is applied to the aggregate of customs (CIF) value, Basic Customs Duty and Additional Duty. However, to determine whether the Extra Additional Duty violates Article II:2 GATT separately from the violation of Article II:2 caused by the application of the Additional Duty, it necessary to consider whether the cumulative application of the Basic Customs Duty and the Extra Additional Duty (at the rate of 4 % *ad valorem*) without the application of Additional Duty would entail the application of ordinary customs duties in excess of the bound rate of 150% *ad valorem* set forth in the tariff schedule of India.

WINES			
	BCD	EAD	TOTAL
<i>CIF value 0-25 USD</i>	100%	4%	108%
Example: CIF 25 USD	25 USD	2 USD	27 USD
<i>CIF value 25-40 USD</i>	100%	4%	108%
Example: CIF 40 USD	40 USD	3.20 USD	43.20 USD
<i>CIF value 40- USD</i>	100%	4%	108%
Example: CIF 60 USD	60 USD	4.80 USD	64.80 USD
SPIRITS			
	BCD	AD	TOTAL
<i>CIF value 0-10 USD</i>	150%	4%	160%
Example: CIF 10 USD	15 USD	1 USD	16 USD

⁴² Appellate Body Report *Argentina – Textiles and Apparel*, para 45.

<i>CIF value 10-20 USD</i>	150%	4%	160%
Example: CIF 20 USD	30 USD	2 USD	32 USD
<i>CIF value 20-40 USD</i>	150%	4%	160%
Example: CIF 40 USD	60 USD	4 USD	64 USD
<i>CIF value 40- USD</i>	150%	4%	160%
Example: CIF 60 USD	90 USD	6 USD	96 USD

87. As is clear from the above, the cumulative application of the Basic Customs Duty and the Extra Additional Duty would entail for BIO spirits the application of ordinary customs duties in excess of those set forth in the tariff schedule of India.
88. As regards BIO **spirits**, in respect of which the Basic Customs Duty is applied at the bound level of 150% *ad valorem*, any Extra Additional Duty applied is in excess of the duties set forth in the schedule.
89. The application of the Extra Additional Duty to wines, as of the date of establishment of the Panel, did not - separately from application of the Additional Duty - imply the application of ordinary customs duties in excess of those set forth in the tariff schedule of India. However, this is no longer the case since the entry into force of Notification 81/2007 and Notification 82/2007 of 3 July 2007..
90. The Extra Additional Duty, as applied by Customs Notification No 19/2006 pursuant to Section 3(5) of the ICTA 75, is therefore *prima facie* incompatible with Article II:1(b) and Article II:1(a) of the GATT 1994.

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

91. The preliminary comments made above on the legal assessment of the Additional Duty in relation to Articles II:2(a) and III:2 of the GATT 1994 apply also to the legal assessment of the Extra Additional Duty.
92. Like the Additional Duty, the Extra Additional Duty is allegedly a border tax adjustment. According to the very terms of Section 3(5) of the ICTA 75, the Extra Additional Duty is intended to be equivalent to “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”.

93. However, contrary to India's assertion⁴³ that the Extra Additional Duty is a duty imposed by the Government of India to offset the incidence of VAT, CST and other local taxes and charges that are not levied on the importation of goods into India and as explained above, imported wines and spirits (BII and BIO) are *not* systematically exempt from the plethora of different sales taxes, value added taxes, and other indirect taxes applied by Indian States. Thus, imported wines and spirits are liable to availability fees (e.g., in Assam), import fees (e.g., in Assam, Goa, Punjab, Uttar Pradesh, West Bengal), library cess (e.g., in Goa), literage fee (e.g., in Assam, Karnataka), octroi (e.g., in Maharashtra), privilege fees, sales tax (e.g., in Rajasthan, Uttar Pradesh, West Bengal), special duty (e.g., in Goa, Punjab), special fees (e.g., in Karnataka, Maharashtra), tax department development fees (e.g., in Punjab), transport fees (e.g., in Maharashtra), vend fees (e.g., in Delhi), and value added tax (e.g., in Assam, Delhi, Goa, Maharashtra, Punjab). The Extra Additional Duty – which is an across-the-board 4% *ad valorem* duty – therefore cannot be claimed to offset the various taxes mentioned in Section 3(5) of the Customs Tariff Act, 1975 nor, *a fortiori*, to be the equivalent adjustment of such taxes.

94. It is, already for this reason, clear that the application of Extra Additional Duty will lead to a situation in which imported products are taxed in excess of like domestic products within the meaning of Article III:2 of the GATT 1994 and in which the Extra Additional Duty is therefore not justified under Article II:2(a) of the GATT 1994. The evidence confirms, as explained below, this conclusion.

3. Article III:2 in conjunction with Article II:2(a) of the GATT 1994

(a) Article III:2, first sentence: like products

⁴³ India First Written Submission, Part III,C,1,para 69, 2ND sentence, page 23.

95. Like the Additional Duty, the Extra Additional Duty applies, according to Section 3(5) the ICTA 75, to all imported products, including all wines and spirits (BIO and BII). The Extra Additional Duty and internal indirect taxes applied by Indian States to wines and spirits must accordingly, for the reasons set out above in the analysis of the Additional Duty, be regarded as applying to “like” products within the meaning of Article III:2, first sentence.

(b) Article III:2, first sentence: taxation in excess

96. Like the Additional Duty, the Extra Additional Duty applies - according to Section 3(5) of the ICTA 75- exclusively to imported products. In other words, the Extra Additional Duty is applied on the basis of the origin of the goods affected. Such a tax must, as explained above in relation to the Additional Duty, be regarded as resulting in taxation of imported wines and spirits “in excess” of taxation of Indian wines and spirits within the meaning of Article III:2, first sentence, if it leads to higher taxation of imported products as compared to the taxation resulting from the application of indirect taxes to like domestic wines and spirits in one (or more) Indian States. In this respect, it is irrelevant whether the Extra Additional Duty (also) leads to *lower* taxation of imported products falling in one or more other Indian States.

97. The EC has conducted a comparison of the taxation resulting from, on the one hand, the application of Extra Additional Duty by the Central Government of India and the application by Indian States of indirect taxes either exclusively to imported wines and spirits or at rates which exceed the rates applied in respect of like domestic wines and spirits and, on the other hand, the application to domestic wines and spirits of indirect taxes by Indian States either exclusively or at rates which exceed the rates applied in respect of like imported wines and spirits.

98. It should be noted that according to the “Explanation” to Section 3(5) of the ICTA 75 where “sales tax, value added tax, local tax or any other charges” applied by Indian states to imported products “are leviable at different rates”, the Extra Additional Duty must be applied at a level corresponding to that of “the

highest such tax or, as the case may be, such charge”. This explanation appears to mean that the Extra Additional Duty must be applied at a level corresponding to that of the (sum of) taxes applied to Indian wines and spirits in the Indian State which, at any point in time, applies the *highest* taxes of all India States. If this interpretation is correct, Section 3(5) would be *per se* contrary to Article III:2, first sentence, and therefore not justified under Article II:2(a), of the GATT 1994.

99. The comparison of the taxation resulting from, on the one hand, the application of the Extra Additional Duty by the Central Government of India and the application by Indian States of indirect taxes confirms that the Extra Additional Duty leads in practice to taxation of imported wines and spirits which is higher in amount than the taxation of Indian wines and spirits in several Indian States. There is, therefore, evidence that the Extra Additional Duty as applied leads to “taxation in excess” within the meaning of Article III:2, first sentence.

4. Conclusion on Article III:2 in conjunction with Article II:2(a) of the GATT 1994

100. It follows from the above that the Extra Additional Duty does not meet the requirements of Article III:2 of the GATT 1994. It is therefore not justified under Article II:2(a) of the GATT 1994. In view of that conclusion, it is not necessary to examine whether the Extra Additional Duty results (also) in protection of Indian wines and spirits which are substitutable or competing with imported wines and spirits within the meaning of Article III:2, second sentence.

5. Conclusion on the Extra Additional Duty

101. It may be concluded from the above that the Extra Additional Duty, as applied by Customs Notification Customs Notification No 19/2006 to imported spirits, is incompatible with Article II:1(b) and Article II:1(a) of the GATT 1994.

IV. CONCLUSIONS

102. In the present submission, the European Communities has explained its view that the Indian "Additional Duty" and "Extra Additional Duty" applied to imported wines and spirits are measures which are inconsistent with Article II of the GATT 1994. Notwithstanding the allegation made in the relevant Indian laws that the Additional Duty would be meant to offset internal "excise" taxes, and that the Extra Additional Duty would be meant to offset other internal taxes, both duties can only be viewed as Ordinary Customs Duties, and they raise the level of customs duties paid on imported wines and spirits beyond the rates (150% *ad valorem*) which have been bound in India's tariff schedule.
103. The reasons why the AD and EAD must be construed as Ordinary Customs Duties are manifest, and in particular:
104. Firstly, because as demonstrated above and summarised below, they cannot be construed as "other duties or charges";
105. Secondly, because they are not applied on the basis of factors of an exogenous nature, but on the basis of the customs value of the imported products;
106. Thirdly, because the AD and EAD are collected on the basis of the same legal acts, the Indian Customs laws, and by the same administration, the Indian Customs, as Ordinary Customs Duties;
107. Finally, because the alleged different purpose (offsetting of internal taxes) cannot be established in law nor in fact.
108. The reasons why the AD and EAD cannot be construed as "other duties and charges", and cannot be construed as "charge(s) equivalent to (an) internal tax(es) imposed consistently with the provisions of paragraph 2 of Article III" are manifest, and in particular:
109. Firstly, they have not been scheduled by India as "other duties or charges" as required by Article II:1 (b) second sentence;

110. Secondly, as evidenced in the present submission, there is no demonstrable correspondence between the AD and EAD and any "excise" or other internal tax imposed on domestic products;
111. Thirdly, to the extent that there would be (*quod non*) some sort of correspondence between the AD and/or EAD and certain internal taxes, such internal taxes do not appear prima facie to be themselves imposed consistently with the provisions of Article III, since they often appear to be imposed on imported products, at rates in excess of those applied, directly or indirectly, to like domestic products;
112. Finally, even though some of the internal taxes in question could eventually be imposed consistently with Article III, the AD and EAD would still not be themselves "imposed consistently with the provisions of paragraph 2 of Article III", since their application to imported products results in a taxation at rates in excess of those applied, directly or indirectly, to like domestic products.
113. Therefore, even though India could attempt to demonstrate that the AD and EAD should be considered as offsetting internal taxes in accordance with Article II:2 (a), India has so-far failed in attempting to demonstrate that, as "equivalent charges" these taxes could be applied consistently with the provisions of paragraph 2 of Article III.