WORLD TRADE ORGANIZATION

WT/DS584/R

17 April 2023

(23-2704)

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Original: English

INDIA – TARIFF TREATMENT ON CERTAIN GOODS

REPORT OF THE PANEL

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Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
Colombia – Textiles	Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Chicken Cuts	Panel Reports, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R *(Brazil)* / WT/DS286/R *(Thailand)*, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, p. 9295 / DSR 2005:XX, p. 9721
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EC – Hormones (Canada)	Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, p. 235
EC – Hormones (Canada) (Article 22.6 – EC)	Decision by the Arbitrator, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS48/ARB, 12 July 1999, DSR 1999:III, p. 1135

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EC – Hormones (US) (Article 22.6 – EC)	Decision by the Arbitrator, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, DSR 1999:III, p. 1105
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EU – Poultry Meat (China)	Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, WT/DS492/R and Add.1, adopted 19 April 2017, DSR 2017:III, p. 1067
Greece – Phonograph Records	Group of Experts Report, *Greek Increase in Bound Duty*, L/580, 9 November 1956, unadopted
India – Additional Import Duties	Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 November 2008, DSR 2008:XX, p. 8223
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
India – Solar Cells	Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Procurement	Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, p. 3541
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, p. 2363

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US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – COOL (Article 21.5 – Canada and Mexico)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW, DSR 2015:IV, p. 2019
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – Countervailing and Anti-Dumping Measures (China)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R, DSR 2014:VIII, p. 3175
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Renewable Energy	Panel Report, *United States – Certain Measures Relating to the Renewable Energy Sector*, WT/DS510/R and Add.1, circulated to WTO Members 27 June 2019, appealed 15 August 2019
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Wool Shirts and Blouses	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, p. 343

LIST OF FREQUENTLY CITED EXHIBITS

Panel Exhibit	Short Title (where applicable)	Title
Exhibit JPN-4	Letter from Japan to India (9 November 2018)	Letter dated 9 November 2018 from the Permanent Mission of Japan to the Permanent Mission of India, Rectification and Modification of Schedule (India's WTO Schedule XII)
Exhibit JPN-5	Customs Act 1962	The Customs Act, 1962, Act No. 52 of 1962 (13 December 1962)
Exhibit JPN-6	Customs Tariff Act 1975	The Customs Tariff Act, 1975, No. 51 of 1975 (18 August 1975)
Exhibit JPN-10	First Schedule as of 12 February 2020	R. K. Jain, *Customs Tariff of India: Customs Duty Rates & Exemptions*, 71st edn (Centax Publications, 2020), Vol. 1
Exhibit JPN-22	Provisional Collection of Taxes Act 1931	The Provisional Collection of Taxes Act, 1931, Act No. 16 of 1931 (28 September 1931)
Exhibit JPN-23	Finance Act 2018	The Finance Act, 2018, No. 13 of 2018 (28 March 2018)
Exhibit JPN-27	Notification No. 57/2017	Notification No. 57/2017 (30 June 2017)
Exhibit JPN-28	General Exemption No. 239	Central Board of Indirect Taxes and Customs, General Exemption No. 239 - Exemption to Goods Seeks to Prescribe BCD Rates on Certain Electronic: Notification No. 57/2017 (30 June 2017) as amended by Notification Nos. 22/2018, 37/2018, 69/2018, 75/2018, 2/2019, 24/2019 and 02/2020 (accessed 28 January 2021)
Exhibit JPN-32	Notification No. 50/2017	Notification No. 50/2017 (30 June 2017)
Exhibit JPN-33	General Exemption No. 183	Central Board of Indirect Taxes and Customs, General Exemption No. 183 - Exemption and Effective Rate of Basic and Additional Duty for Specified Goods of Chapters 1 to 99: Notification No. 50/2017 (30 June 2017) as amended by Notification Nos. 65/2017, 66/2017, 70/2017, 71/2017, 74/2017, 76/2017, 77/2017, 84/2017,85/2017, 87/2017, 89/2017, 92/2017, 93/2017, 2/2018, 5/2018, 6/2018, 24/2018, 26/2018, 27/2018, 29/2018, 31/2018, 32/2018, 40/2018, 44/2018,46/2018, 47/2018, 49/2018, 52/2018, 54/2018, 56/2018, 57/2018, 62/2018, 68/2018, 72/2018, 77/2018, 80/2018, 3/2019, 6/2019, 11/2019, 13/2019, 14/2019,15/2019, 17/2019, 25/2019, 30/2019, 31/2019, 34/2019, 37/2019, 01/2020, 23/2020, 26/2020 and 27/2020 (accessed 28 January 2021)
Exhibit JPN-40	Notification No. 24/2005	Notification No. 24/2005 (1 March 2005)
Exhibit JPN-41	Notification No. 132/2006	Notification No. 132/2006 (30 December 2006)
Exhibit JPN-42	Notification No. 58/2017	Notification No. 58/2017 (30 June 2017)
Exhibit JPN-43	Notification No. 36/2019	Notification No. 36/2019 (30 December 2019)
Exhibit JPN-44	General Exemption No. 181	Central Board of Indirect Taxes and Customs, General Exemption No. 181 - Exemption to Specified Goods to Chapter 38, 84, 85 and 90 and All Goods for the Manufacture Thereof: Notification No. 24/2005 (1 March 2005) as amended by Notification Nos. 132/2006, 11/2014, 19/2016, 32/2016, 67/2016, 58/2017, 38/2018, 76/2018, 36/2019 and 06/2020 (accessed 28 January 2021)
Exhibit JPN-45	Notification No. 22/2018	Notification No. 22/2018 (2 February 2018)
Exhibit JPN-46	Notification No. 75/2018	Notification No. 75/2018 (11 October 2018)
Exhibit JPN-47	Notification No. 02/2019	Notification No. 02/2019 (29 January 2019)
Exhibit JPN-48	Lok Sabha Statutory Resolution Approving Notification No. 36/2018	Statutory Resolution Re: Notification to Increase Basic Customs Duty on Populated, Loaded or Stuffed Printed Circuit Boards, Lok Sabha Official Report, Series 16, Vol. XXXI, 14th Session, No. 27 (4 April 2018)
Exhibit JPN-49	Rajya Sabha Statutory Resolution Approving Notification No. 36/2018	Statutory Resolution Increasing Basic Customs Duty (BCD) on Populated, Loaded or Stuffed Printed Circuit Boards, Falling Under Tariff Item 8517 70 10 of the Customs Tariff Act, 1975 from Nil to 10%, Rajya Sabha Official Report, Vol. 245, No. 29 (5 April 2018)

Panel Exhibit	Short Title (where applicable)	Title
Exhibit JPN-50	Notification No. 36/2018	Notification No. 36/2018 (2 April 2018)
Exhibit JPN-51	Finance Bill 2020	Lok Sabha, The Finance Bill, No. 26 of 2020 (1 February 2020)
Exhibit JPN-52	Finance Act 2020	The Finance Act, 2020, No. 12 of 2020 (27 March 2020)
Exhibit JPN-53	Notification No. 38/2018	Notification No. 38/2018 (2 April 2018)
Exhibit JPN-54	Notification No. 76/2018	Notification No. 76/2018 (11 October 2018)
Exhibit JPN-55	Notification No. 02/2020	Notification No. 02/2020 (2 February 2020)
Exhibit JPN-56	Notification No. 01/2020	Notification No. 01/2020 (2 February 2020)
Exhibit JPN-57	Notification No. 37/2019	Notification No. 37/2019 (30 December 2019)
Exhibit JPN-58	Notification No. 37/2018	Notification No. 37/2018 (2 April 2018)
Exhibit JPN-60	General Rules for the Interpretation of the Harmonized System	World Customs Organization, General Rules for the Interpretation of the Harmonized System
Exhibit JPN-68		McGraw-Hill Dictionary of Scientific and Technical Terms (6th Edition), definitions of "carrier", "carrier current" and "radiotelephony" (McGraw-Hill, 2002)
Exhibit JPN-69	HS1996 Explanatory Notes to Headings 8517 and 8525	World Customs Organization, Harmonized System Nomenclature 1996 Explanatory Notes, 2nd edn (1996), Headings 8517 and 8525
Exhibit JPN-72	HS2007 Explanatory Notes to Heading 8517	World Customs Organization, Harmonized System Nomenclature 2007 Explanatory Notes, 4th edn (2007), Heading 8517
Exhibit JPN-74	CBIC, Correlation of Customs Tariff between 2021 and 2022 (December 2021)	Central Board of Indirect Taxes and Customs, Correlation of Customs Tariff between 2021 and 2022 (December 2021)
Exhibit JPN-75	First Schedule as of 1 February 2022	R. K. Jain, *Customs Tariff of India: Customs Duty Rates & Exemptions*, 74th edn (Centax Publications, 2022), Vol. 1
Exhibit JPN-76	Notification No. 55/2021	Notification No. 55/2021 (29 December 2021)
Exhibit JPN-77	Notification No. 02/2022	Notification No. 02/2022 (1 February 2022)
Exhibit JPN-79	WCO, Classification Opinion on "smartphones" (2018)	World Customs Organization, Classification Opinion on "smartphones" (2018)
Exhibit IND-2		International Court of Justice, *Case concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, Judgment of 20 June 1959: ICJ Reports 1959, p. 209
Exhibit IND-3		International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6
Exhibit IND-6	HS1996 Explanatory Notes to Heading 8525	World Customs Organization, Harmonized System Nomenclature 1996 Explanatory Notes, 2nd edn (1996), Heading 8525
Exhibit IND-9	HS2007 Section Notes to Section XVI	World Customs Organization, Harmonized System Nomenclature 2007, Section Notes to Section XVI
Exhibit IND-13		M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009)
Exhibit IND-14		T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018)
Exhibit IND-18		É. Wyler and R. Samson, "Article 48" in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* (Oxford University Press, 2011)
Exhibit IND-41	Notification No. 69/2011	Notification No. 69/2011 (29 July 2011)
Exhibit IND-42	Notification No. 55/2011	Notification No. 55/2011 (1 August 2011)

Panel Exhibit	Short Title (where applicable)	Title
Exhibit IND-49	Email from IDB, WTO, to India (8 November 2013)	Email correspondence dated 8 November 2013 from IDB, WTO, to the Permanent Mission of India to the WTO to the Permanent Mission of India to the WTO, Subject: "HS2007 transposition file: India"
Exhibit IND-50	Email from Market Access Intelligence Section, WTO, to India (12 February 2014)	Email correspondence dated 12 February 2014 from Market Access Intelligence Section, WTO, Senior Statistical Officer, to the Permanent Mission of India to the WTO, Subject: "RE: HS2007 transposition file. India"
Exhibit IND-60	Finance Act 2021	The Finance Act 2021, No. 13 of 2021
Exhibit IND-75	India's rectification request, G/MA/TAR/RS/572	Rectification and Modification of Schedules, Schedule XII - India, Communication to the Secretariat (25 September 2018), G/MA/TAR/RS/572
Exhibit IND-76	Prof. M. Waibel, Legal Opinion on Error	Prof. M. Waibel's Legal Opinion on Error and Curriculum Vitae
Exhibit IND-78		Circular No. 04/2022 (27 February 2022)
Exhibit IND-79	Indian Wireless Telegraphy Act 1933	The Indian Wireless Telegraphy Act 1933, No. 17 of 1933
Exhibit IND-80		Notification No. 71 (25 September 1953)
Exhibit IND-82	Notification No. 57/2021	Notification No. 57/2021 (29 December 2021) as amended by Notification Nos. 22/2018, 37/2018, 69/2018, 75/2018, 02/2019, 24/2019, 02/2020, 03/2020, and 57/2021
Exhibit IND-83		Cambridge Advanced Learner's Dictionary online, definition of "impair" https://dictionary.cambridge.org/dictionary/english/impair (accessed 22 May 2022)
Exhibit IND-85	Chapter 85 of the HS2022	World Customs Organization, Harmonized System Nomenclature, 7th edn (2022), Chapter 85
Exhibit IND-86		World Customs Organization, Harmonized System Committee, 49th Session, "Classification of the Machines Commercially Referred to as 'Tablet Computers'" (13 February 2012) document NC1730E1a; and World Customs Organization, Harmonized System Committee, 50th Session, "Possible Amendments to the Compendium of Classification Opinions and Explanatory Notes arising from the Decisions taken by the Committee at its 49th Session" (19 July 2012) document NC1775E1a
Third-party Exhibit EU-4		Hon'ble Supreme Court in the case of *Kasinka Trading and ANR v. Union of India and ANR*, 1994 (74) ELT 782 (S.C.)
Third-party Exhibit EU-5		Hon'ble Supreme Court in the case of *Share Medical Care v. Union of India and ORS*, 2007 (209) ELT 321 (S.C.)
Third-party Exhibit EU-6		Hon'ble CESTAT, *Cipla Ltd. v. Commissioner of Customs*, 2007 (218) ELT 547 (Tri. – Chennai)
Third-party Exhibit EU-7		Hon'ble CESTAT, *Burroughs Wellcome (I) Ltd. v. Commissioner of Central Excise*, 2007 (216) ELT 522 (Tri. – Chennai)
Third-party Exhibit TPKM-3	Letter from Chinese Taipei to India (19 October 2018)	Letter dated 19 October 2018 from the Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the Permanent Mission of India

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1980 Decision	GATT Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions, L/4962
CBIC	Central Board of Indirect Taxes and Customs
Customs Act 1962	The Customs Act, 1962, Act No. 52 of 1962 (13 December 1962)
Customs Rules 2017	Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017
Customs Tariff Act 1975	The Customs Tariff Act, 1975, No. 51 of 1975 (18 August 1975)
General Council Decision on HS2002 Transposition Procedures	General Council Decision of 18 July 2001 on Concessions under the Harmonized Commodity Description and Coding System, A Procedure for Introduction of Harmonized System 2002, Changes To Schedules of Concessions, WT/L/407
General Council Decision on HS2007 Transposition Procedures	General Council Decision of 15 December 2006 on A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database, WT/L/673
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT	General Agreement on Tariffs and Trade
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized System
HS1996	Harmonized System Nomenclature 1996 Edition
HS2002	Harmonized System Nomenclature 2002 Edition
HS2007	Harmonized System Nomenclature 2007 Edition
HS2017	Harmonized System Nomenclature 2017 Edition
HS2022	Harmonized System Nomenclature 2022 Edition
ICJ	International Court of Justice
ICT	Information communication technology
India's WTO Schedule	Schedule XII – India
ITA	Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16
ITA Expansion	Ministerial Declaration on the Expansion of Trade in Information Technology Products, WT/MIN(15)/25
PCBA	Printed circuit board assembly
PCIJ	Permanent Court of International Justice
Transposition Note	Email correspondence dated 8 November 2013 from IDB, WTO, to the Permanent Mission of India to the WTO, Subject: "HS2007 transposition file: India", Attachment 3, CTS HS2007 Transposition Note XII - India
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna (23 May 1969), UN Treaty Series Vol. 1155, p. 331
WCO	World Customs Organization
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Japan

1.1. On 10 May 2019, Japan requested consultations with India pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 23 May 2019 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 19 March 2020, Japan requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 29 July 2020, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Japan in document WT/DS584/9, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Japan in document WT/DS584/9 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. Brazil, Canada, China, the European Union, Indonesia, the Republic of Korea, Norway, Pakistan, the Russian Federation, Singapore, Chinese Taipei, Thailand, Türkiye[5], the United Kingdom, and the United States notified their interest in participating in the Panel proceedings as third parties.[6]

1.6. Further to the agreement of the parties on the three panelists to serve in this dispute, the Panel was composed on 7 October 2020 as follows:

Chairperson:	Mr Paul O'CONNOR
Members:	Ms Samantha ATAYDE ARELLANO Mr Fabián VILLARROEL RÍOS

1.3 Panel proceedings

1.3.1 General

1.7. The Panel held an organizational meeting with the parties on 19 November 2020.[7]

1.8. The Panel adopted its Working Procedures[8] and timetable[9] on 4 December 2020, after consulting with the parties.

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[1] WT/DS584/1.
[2] WT/DS584/9.
[3] Dispute Settlement Body, Minutes of the meeting held on 29 July 2020, WT/DSB/M/443, p. 13.
[4] WT/DS584/10.
[5] Formerly "Turkey". (See WT/INF/43/Rev.23).
[6] On 28 October 2020, Ukraine requested to join this dispute as a third party. Invited by the Panel to comment on Ukraine's request, the parties indicated that they had no objections to Ukraine's participation as a third party. (Panel's communications of 29 October 2020 and parties' responses of 10 November 2020). On 18 November 2020, the Panel informed Ukraine, as well as the parties and third parties, that it had accepted Ukraine's request to participate as a third party in this dispute. The revised constitution note, which includes Ukraine in the list of third parties, was circulated as document WT/DS584/10/Rev.1.
[7] For more details regarding the organizational phase of the dispute, see section 1.3.2 below.
[8] The Panel revised its Working Procedures on 27 January 2021 and on 12 April 2021.
[9] The Panel's timetable was revised on 4 May 2021, 26 October 2021, 28 April 2022, 30 September 2022 and 6 February 2023.

1.9. Japan submitted its first written submission on 28 January 2021. India submitted its first written submission on 8 April 2021.

1.10. On 22 April 2021, the Panel received third-party submissions from Brazil, Canada, the European Union, Korea, Norway, Chinese Taipei, Türkiye, Ukraine, and the United States.

1.11. On 20 July 2021, the Panel sent questions for written responses before the first substantive meeting and the third-party session to the parties and third parties. The parties and third parties[10] submitted their written responses on 20 September 2021.

1.12. The Panel held its first substantive meeting with the parties in virtual format on 7-8 October 2021.[11] Prior to the meeting, the Panel sent the parties a list of questions to be answered orally at the meeting.[12] A joint session with the third parties in this dispute and in the other two disputes in which the same panelists had been appointed[13] took place in virtual format on 13 October 2021. Following these meetings, the Panel sent written questions to the parties and third parties on 18 October 2021. The parties and third parties sent their written responses on 24 November 2021.

1.13. The parties submitted their second written submissions on 15 February 2022.

1.14. The Panel held its second substantive meeting with the parties on 31 March – 1 April 2022 in hybrid format.[14] Prior to the substantive meeting, the Panel sent the parties a list of questions to be answered orally at the meeting. Following the meeting, the Panel sent written questions to the parties. Written responses to these questions were received on 23 May 2022, and comments on the other party's responses were received on 21 June 2022.

1.15. On 5 July 2022, the Panel issued the descriptive part of its Report to the parties. The parties provided written comments on 26 July 2022.

1.16. The Panel issued its Interim Report to the parties on 28 October 2022 and its Final Report on 27 February 2023.

1.3.2 Organizational phase - Working Procedures and timetable

1.17. On 16 October 2020, noting that the same panelists served on *India – Tariffs on ICT Goods (EU)* (DS582), *India – Tariffs on ICT Goods (Japan)* (DS584), and *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588), and mindful of Article 9.3 of the DSU, the Panel sent a pre-organizational meeting questionnaire to the parties seeking their views on how to set up the timetable and working procedures in the three disputes.[15] The Panel also invited the parties to indicate whether they agreed to have a single organizational meeting for this dispute and the other two disputes in which the same panelists were serving, or whether they preferred separate organizational meetings.

1.18. While Japan agreed to have a single joint organizational meeting for the three disputes in which the same panelists had been appointed[16], India requested that consecutive separate organizational meetings be held for each dispute.[17]

[10] Brazil, Canada, the European Union, Korea, Chinese Taipei, Türkiye, Ukraine, and the United States provided responses to the Panel.

[11] For details regarding the organization of the first substantive meeting by remote means, see section 1.3.3.1 below.

[12] Panel's communication to the parties (29 September 2021).

[13] The same panelists were appointed in *India – Tariffs on ICT Goods (EU)* (DS582), *India – Tariffs on ICT Goods (Japan)* (DS584), and *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588).

[14] For details regarding the organization of the second substantive meeting in hybrid format, see section 1.3.3.2 below.

[15] In the pre-organizational meeting questionnaire, the Panel enquired in particular about the extent to which the timetables in the three proceedings in which the same panelists had been appointed could and should be harmonized, how the parties envisaged the scheduling and organization of the substantive meetings and the third-party session in those three disputes, and whether the parties intended to request the Panel to adopt additional working procedures for the protection of confidential information.

[16] Japan's communication (22 October 2020).

[17] India's communication (22 October 2020).

1.19. Additionally, Japan considered that the scheduling of the three cases should be harmonized, and the substantive meetings and third-party sessions should be held jointly. Japan further stated that, to the extent that the Panels decided not to hold joint substantive meetings, "those third parties which are a complainant in one of the other two proceedings be accorded enhanced third party rights in the two other proceedings, including the right to attend the entire substantive meeting." Japan submitted that the Panel should, "to the greatest extent possible, conduct a single panel process, with a single record, resulting in separate reports contained in a single document in such a manner that the rights that parties or third parties would otherwise have enjoyed are in no way impaired". For Japan, documents submitted by the parties to the Panel as well as questions from the Panel to the parties should also be shared with the parties in the other two disputes.[18]

1.20. India stated that "the three disputes involve distinctly different claims and arguments" and "the measures identified by the complainants in their respective requests for the establishment of a panel are also different." India had no objection to the timetables in the three proceedings being harmonized "to the extent that they allow India, a developing country respondent, sufficient time to effectively respond to three different complaints." To that end, India agreed to have common dates set for the written submissions of the complainants. Furthermore, "[g]iven the likely differences in the complainants' presentation of their claims and arguments", India requested sufficient time to prepare and present its arguments. Insofar as meetings were concerned, India stated that "the timetables cannot collapse the proceedings into a single, identical process by holding common substantive meetings for all the three disputes." India considered that "its ability to respond to distinct claims and arguments requires separate substantive meetings to be devoted to each dispute." Therefore, India requested that "the substantive meetings between the respective parties be held separately and sequentially on consecutive days". India suggested that, "[i]n order to achieve efficiency, a single, consolidated third party session may be held" and "encouraged" each third party to submit a single submission, "identifying the dispute(s) to which its views related". India indicated that it would not object if the Panel adopted identical working procedures for the three disputes.[19]

1.21. On 23 October 2020, the Panel invited the parties to comment on each other's responses to the pre-organizational meeting questionnaire. On 26 October 2020, India informed the Panel that the Permanent Mission of India to the World Trade Organization (WTO) had shut down because several staff members had been diagnosed as COVID-19 positive. India requested that, "[i]n view of these extraordinary circumstances", the Panel postpone the organizational meeting by 10 days and extend by two weeks the deadline to submit comments on the other party's responses to the pre-organizational meeting questionnaire.[20] On the same date the Panel postponed the organizational meeting and extended the deadline to submit comments on the parties' responses to the pre-organizational meeting questionnaire.[21] The parties submitted their comments on each other's responses to the pre-organizational meeting questionnaire on 10 November 2020. On 19 November 2020, the Panel held an organizational meeting with the parties.[22]

1.22. The Panel adopted its Working Procedures and timetable on 4 December 2020.[23] In its communication transmitting the Working Procedures and timetable to the parties, the Panel indicated that it had noted the parties' agreement as well as differences of views regarding the conduct of the proceedings in this dispute and in the other two disputes in which the same panelists had been appointed. In taking its decisions in relation to the Working Procedures and timetable, the Panel endeavoured to balance the efficient conduct of the proceedings with the parties' due process rights under the DSU, bearing in mind Article 9.3 of the DSU. The Panel decided, *inter alia*, that the first substantive meeting with the parties would be held separately for each dispute and the meetings would be scheduled on consecutive dates and in the sequential order of the DS numbers of the disputes. A joint third-party session would be held in DS582, DS584 and DS588. The Panel added

[18] Japan's communication (22 October 2020).
[19] India's communication (22 October 2020), p. 1.
[20] India's communication (26 October 2020).
[21] Panel's communication to the parties (26 October 2020).
[22] The Panel held separate consecutive organizational meetings in DS582, DS584, and DS588.
[23] When adopting the timetable for these proceedings the Panel took into account Article 12.10 of the DSU and ensured that India, a developing country Member and the respondent in this dispute, had sufficient time to prepare and present its argumentation.

that it would advise on the conduct of the second substantive meeting in due course, after consulting with the parties. Finally, the deadlines for submissions were harmonized in the three disputes.[24]

1.3.3 Format of the substantive meetings

1.23. The COVID-19 pandemic disrupted the work of the Panel, contributing to delays in the proceedings. Moreover, restrictions related to COVID-19, in particular on international travel, obliged the Panel to modify the format of the substantive meetings. This section provides an overview of the process leading to the Panel's decision to conduct its first and second substantive meetings in virtual and hybrid format, respectively.

1.3.3.1 Format of the first substantive meeting

1.24. The first substantive meeting of the Panel was initially scheduled for 3-4 June 2021. On 31 March 2021, the Panel sent a communication to the parties noting that the COVID-19 pandemic continued to present serious challenges for international travel and in-person meetings. The Panel concluded that, in light of those challenges, it would not be possible to hold its first substantive meeting with the parties and the third-party session in the traditional face-to-face format in Geneva on the WTO premises. The Panel indicated that, under the prevailing circumstances, and taking into account the objective of prompt settlement of disputes set out in Article 3.3 of the DSU and the need to preserve the parties' due process rights, the Panel intended to hold both its first substantive meeting and the third-party session with remote participation, through the Cisco Webex platform. The Panel provided the parties with draft Additional Working Procedures concerning meetings with remote participation and invited the parties to comment on the proposed arrangements for the first substantive meeting and the third-party session, and on the draft Additional Working Procedures.[25]

1.25. The parties submitted their comments on the format of the first substantive meeting on 12 April 2021. Japan indicated that it held a consistent view that substantive meetings should in principle be held in face-to-face format but was aware of the challenges this format raised during the COVID-19 pandemic. Japan submitted that "a substantive meeting in virtual format may be an option, if the Panel decides that such a format is considered to be appropriate."[26] India informed the Panel that it would not be able to participate in the first substantive meeting remotely for several reasons. India requested the Panel "to wait, observe the Covid-19 situation in India and hold the first substantive meeting in this dispute only when the situation improves so as to permit face to face meetings".[27]

1.26. On 13 April 2021, the Panel invited the parties to comment on each other's comments on the Panel's proposed arrangements for the first substantive meeting and third-party session, and on the draft Additional Working Procedures concerning meetings with remote participation.[28] On the same date, the Panel also invited the third parties to express their views on the parties' comments regarding the Panel's communication of 31 March 2021.[29]

1.27. Japan agreed with India that the utmost consideration should be given to India's concern regarding certain technical issues in a virtual format meeting, "taking into account the need to preserve the parties' due process rights". Japan observed that a virtual meeting, "by its nature, does not itself favour one party over the other in any manner whatsoever, and that technical difficulties may be alleviated to a certain extent by sufficient advance preparation, testing and other relevant measures".[30]

1.28. India informed the Panel that, since submitting its comments on 12 April 2021, India had "witnessed a surge of 42% in positive [COVID-19] cases in a period of just 5 days". India reiterated that it was "not in a position to participate in full-fledged dispute settlement proceedings … through remote participation". India drew attention to several ongoing panel proceedings where the panels

[24] Panel's communication to the parties (4 December 2020).
[25] Panel's communication to the parties (31 March 2021). A copy of this communication can be found in Annex D-1 of the Report.
[26] Japan's communication (12 April 2021).
[27] India's communication (12 April 2021).
[28] Panel's communication to the parties (13 April 2021).
[29] Panel's communication to the third parties (13 April 2021).
[30] Japan's communication (16 April 2021).

had decided to postpone the substantive meeting due to the COVID-19 pandemic. India submitted that "a virtual meeting format without the consent of all parties would be inconsistent with Article 3.1 and 3.2" of the DSU and that "[t]he margin of discretion held by panels under Article 12.1 does not extend to modifying 'substantive provisions' of the DSU." For India, "the manner in which domestic judicial proceedings are conducted is not germane to the issue before the Panel." India reiterated its concerns regarding security and confidentiality of the proceedings, as well as the difficulty of extending technical support to members of its delegation who were working remotely. India considered that the Panel could not "amend the working procedures and conduct the first substantive meeting in virtual format as it would modify substantive provisions of the DSU and impair the respondent's due process rights."[31]

1.29. On 16 April 2021, Canada, China, Singapore, Chinese Taipei, and the United States, as third parties to the dispute, submitted comments on the parties' views regarding the Panel's proposed arrangements for the first substantive meeting and third-party session.

1.30. In a communication dated 21 April 2021, the Panel noted that the DSU did not prescribe a particular format for panel meetings and, therefore, the Panel was not precluded from amending its Working Procedures and conducting meetings in the format it deemed appropriate, after consulting the parties to the dispute, as provided for in Article 12.1 of the DSU. However, mindful of the alarming rate of growth in COVID-19 cases in India, the Panel deemed it appropriate to postpone the first substantive meeting in this dispute, and in the other two disputes in which the same three panelists had been appointed, until the weeks of 4 and 11 October 2021. The Panel further indicated that it would confirm the format of the first substantive meeting by 31 August 2021.[32]

1.31. On 31 August 2021, the Panel informed the parties and third parties that, in view of the epidemiological situation, the first substantive meeting and the third-party session would be conducted in virtual format on 7-8 and 13 October 2021, respectively.[33] On 6 September 2021, the Panel invited the parties to comment on the Panel's draft Additional Working Procedures concerning meetings with remote participation.

1.32. On 20 September 2021, the Panel confirmed its decision of 31 August 2021 to conduct the first substantive meeting in a virtual format.[34] On the same date, the Panel adopted Additional Working Procedures concerning meetings with remote participation for the first substantive meeting.[35]

1.3.3.2 Format of the second substantive meeting

1.33. On 22 February 2022, noting that measures related to COVID-19 had been relaxed in certain parts of the world, the Panel sent a communication to the parties enquiring about the feasibility of an in-person meeting in Geneva. The Panel invited the parties to indicate whether, taking into consideration remaining restrictions on international travel and their more general policy on official travel, the parties would be in a position to attend the second substantive meeting in person at the WTO premises on 29-30 March 2022. In light of the Panel's decision to hold separate meetings on consecutive days in the three disputes in which the same panelists had been appointed, the Panel decided to consolidate all four parties' views regarding the organization of the second substantive meetings. To that end, the Panel copied its communication to the representatives of the complainants in DS582 and DS588 and asked that the parties do so as well when conveying their views.[36]

[31] India's communication (16 April 2021) (quoting Appellate Body Report, *India – Patents (US)*, para. 92).

[32] Panel's communication to the parties (21 April 2021). A copy of this communication can be found in Annex D-2 of the Report.

[33] Panel's communication to the parties and third parties (31 August 2021). A copy of the Panel's communication to the parties can be found in Annex D-3 of the Report.

[34] Panel's communication to the parties (20 September 2021). A copy of this communication can be found in Annex D-4 of the Report.

[35] The Panel's Additional Procedures for the first substantive meeting can be found in Annex A-2 of the Report.

[36] Panel's communication to the parties (22 February 2022).

1.34. Noting the rapidly changing situation concerning the COVID-19 pandemic and the resulting possibility that not all members of Japan's delegation may be able to travel to Geneva, Japan suggested that the second substantive meeting be held in a hybrid format.[37]

1.35. India requested that the Panel provide for a hybrid hearing, in which the parties' representatives could attend the meeting in-person at the WTO premises and also participate through a virtual mode.[38]

1.36. On 2 March 2022, the Panel informed the parties that, in light of the responses of the parties in DS582, DS584, and DS588[39], the Panel intended to hold the second substantive meeting in the three disputes in a hybrid format, thus allowing for both in-person participation at the WTO premises and simultaneous remote participation via the Webex platform.[40] On 18 March 2022, the Panel adopted Additional Working Procedures concerning meetings with remote participation for the second substantive meeting.[41]

1.3.4 Requests for enhanced third-party rights

1.37. On 21 and 22 December 2020, the Panel received requests for enhanced third-party rights from the European Union and Chinese Taipei, respectively. The European Union and Chinese Taipei requested that the Panel grant them the following enhanced third-party rights: (i) to receive copies of all written submissions of the parties, their oral statements, rebuttals and responses to questions from the Panel and each other, through all stages of the proceedings; (ii) to be present for the entirety of all substantive meetings of the Panel with the parties; (iii) to be allowed to make oral statements, to orally reply to questions, and to ask questions to the parties or other third parties, as appropriate, in those meetings; and (iv) to review the draft summary of their own arguments in the descriptive part of the Panel Report.[42]

1.38. The European Union and Chinese Taipei noted that enhanced third-party rights had been granted in previous disputes to address "practical considerations arising from a third party's involvement as a party in a parallel panel proceeding".[43] According to the European Union and Chinese Taipei, their interest in the parallel disputes extended beyond the "substantial" interest in Article 10.2 of the DSU because of their involvement as parties in, respectively, DS582 and DS588.[44] The European Union and Chinese Taipei argued that the decision to compose the panels in the three disputes with the same three panelists, as well as the decision by the Panel to hold a joint third-party session in DS582, DS584 and DS588 – at the request of India – confirmed the fact that the matters in those disputes overlapped substantially.[45] The European Union and Chinese Taipei stated that they had "an exceptionally strong interest in the Panel's assessment of the matter in the two parallel disputes" and it was "a matter of due process for [them] to have the possibility of hearing and following the discussions in the substantive meetings in the parallel proceedings in order to be

[37] Japan's communication (25 February 2022).
[38] India's communication (25 February 2022).
[39] The European Union confirmed that its representatives would attend the second substantive meeting in person at the WTO premises on 29-30 March 2022. (European Union's communication in DS582 (23 February 2022)). Chinese Taipei indicated that, with the rapidly changing situation concerning the COVID-19 pandemic, it did not intend to send a delegation to attend the second substantive meeting in person at the WTO premises. (Chinese Taipei's communication in DS588 (25 February 2022)).
[40] Panel's communication to the parties (2 March 2022).
[41] The Panel's Additional Procedures for the second substantive meeting can be found in Annex A-3 of the Report.
[42] European Union's communication (21 December 2020), p. 1; Chinese Taipei's communication (22 December 2020), pp. 1-2.
[43] European Union's communication (21 December 2020), p. 2; Chinese Taipei's communication (22 December 2020), p. 2. Both communications refer to Panel Reports, *EC – Hormones (Canada)*, para. 8.17; *US – COOL*, para. 2.7; *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 1.15-1.16; and Decisions of the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC) / EC – Hormones (US) (Article 22.6 – EC)*, para. 7.
[44] European Union's communication (21 December 2020), p. 2; Chinese Taipei's communication (22 December 2020), p. 2.
[45] European Union's communication (21 December 2020), p. 2; Chinese Taipei's communication (22 December 2020), p. 2.

in a position to properly defend [their] interests during the substantive meeting[s] in [their] own case[s]".[46]

1.39. The Panel invited the parties and the other third parties to comment on the requests. While Japan agreed with the requests by the European Union and Chinese Taipei[47], India asked the Panel to reject those requests.[48]

1.40. India stated that granting the enhanced third-party rights requested by the European Union and Chinese Taipei would require the parties' agreement, so as not to affect the balance guaranteed by the DSU (such as the right to confidentiality) and in order to avoid due process concerns. India submitted that the only reason cited in the requests (i.e. their status as a complainant in a parallel proceeding) "cannot be the only factor on the basis of which such extraordinary rights may be granted" over the objection of a party.[49]

1.41. According to India, a panel's discretion to grant enhanced third-party rights was circumscribed by the relevant DSU provisions[50] and by due process considerations.[51] In itself, the status as a complainant in a parallel dispute did not "automatically result[] in an interest over and above those held by other third parties in this dispute" and the requesting third parties had not established compelling circumstances for seeking such additional rights.[52] India submitted that, without prejudice to the applicability of Article 9 of the DSU to this dispute and the other two disputes where the same panelists were appointed, this provision "has been found to not address the question of rights of third parties" in parallel disputes.[53] For India, "any due process consideration in having a right to be heard and having an adequate opportunity thereto, are already sufficiently addressed by [the requesting third parties'] exercise of their right to initiate panel procedures under the DSU and their standard third party rights under Article 10 [of the] DSU in this dispute."[54] The requests for enhanced third-party rights "would inappropriately blur the distinction with the complainant".[55] India was of the view that the first two rights requested by the European Union and Chinese Taipei affected India's "right to confidentiality of its submissions and positions under Article 18.2 [of the] DSU" and the last two rights implied those third parties' "active involvement at par with that of the complaining party [which] would also entail an additional burden" for India.[56]

1.42. China, the Russian Federation, Türkiye, and the United States, as third parties, provided comments on the requests submitted by the European Union and Chinese Taipei.[57]

1.43. On 27 January 2021, the Panel informed the parties and third parties, that "[a]fter carefully reviewing the requests and the views of the parties and other third parties, the Panel has concluded that the particular circumstances of this dispute warrant[ed] the granting of certain enhanced third-party rights to the European Union and Chinese Taipei." The enhanced rights granted by the Panel comprised "access to (i) the parties' second written submissions, (ii) the final written versions of the parties' oral statements made during the first and second substantive meetings, (iii) each party's responses to questions from the Panel and to any questions posed by the other party following the first and second substantive meetings, and (iv) each party's comments on the other party's responses to those questions following the second substantive meeting." The Panel rejected the

[46] European Union's communication (21 December 2020), p. 2; Chinese Taipei's communication (22 December 2020), pp. 2-3.

[47] Japan's communication (11 January 2021).

[48] India's communications (11 January 2021).

[49] India's communications (11 January 2021), para. 3.

[50] India's communications (11 January 2021), para. 5 (referring to Appellate Body Reports, *India – Patents (US)*, para. 92; and *US – FSC (Article 21.5 – EC)*, para. 241).

[51] India's communications (11 January 2021), para. 5 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147).

[52] India's communications (11 January 2021), para. 6.

[53] India's communications (11 January 2021), para. 7.

[54] India's communications (11 January 2021), para. 9 (referring to Panel Report, *US – Washing Machines*, para. 1.12).

[55] India's communications (11 January 2021), para. 11 (referring to Panel Report, *India – Quantitative Restrictions*, para. 5.95).

[56] India's communications (11 January 2021), paras. 14-15.

[57] China and Türkiye generally supported the requests while the United States opposed them. The Russian Federation noted that, if granted, enhanced third-party rights should extend to all third parties.

remainder of the requests.[58] On the same date, the Panel revised the Working Procedures to reflect its decision.[59]

1.3.5 Disclosure of a panelist's professional engagements

1.44. On 4 February 2021, the Chairperson of the Panel informed the parties that a panelist had signed a new disclosure form under the Rules of Conduct for the DSU, reflecting an update of professional engagements. The update conveyed the information that the consortium employing the panelist was eligible, alongside with other law firms, to provide legal services to a WTO Member in the field of international law, trade negotiations and dispute settlement, on request by the Government of that Member. The panelist further indicated that this information was publicly available and that, as of the date of the communication, the consortium had not provided any legal service to that WTO Member. The Panel invited the parties to comment in this regard.[60]

1.45. Japan considered that there was no particular problem with regard to the disclosed information but reserved its rights to comment in case a conflict issue arose in the future.[61]

1.46. India noted that the situation disclosed involved a WTO Member which was a third party in this dispute and India was therefore concerned that the situation disclosed might present a direct conflict of interest that ought to be avoided. India requested the panelist concerned to provide an undertaking that the panelist's employer would avoid incurring any obligation or accepting any benefit from the Member in question that could result in a direct or indirect conflict or give rise to justifiable doubts as to the proper performance of the panelist's dispute settlement duties, in particular with respect to instructions which directly or indirectly related to the subject matter of, and measures at issue in, this dispute.[62]

1.47. In a communication sent to the parties on 12 February 2021, the Panel indicated that, in its view, the information disclosed by the panelist concerned did not give rise to any direct or indirect conflict of interest in respect of the subject matter of the proceedings, or to justifiable doubts regarding that panelist's independence or impartiality. The Panel noted that, consistent with the requirements in Section III of the Rules of Conduct for the DSU, the panelist concerned had reiterated the undertaking to disclose any new information that was likely to affect or give rise to justifiable doubts as to that panelist's independence or impartiality and would take due care to avoid any direct or indirect conflicts of interest in respect of the subject matter of the proceedings.

1.3.6 Preliminary ruling

1.48. On 8 April 2021, India requested a preliminary ruling, incorporated in its first written submission. In its preliminary ruling request, India claimed that Japan's panel request did not satisfy the conditions laid down in Article 6.2 of the DSU.[63]

1.49. On 14 April 2021, the Panel invited Japan to comment on India's preliminary ruling request. Third parties that wished to comment on the matter were also invited to do so.

1.50. On 23 June 2021, the Panel informed the parties that it intended to issue a communication regarding India's preliminary ruling request on 28 June 2021. On 28 June 2021, India requested the Panel to defer the issuance of its communication so as to ensure that these issues "are properly discussed and considered at the first substantive meeting."[64] On the same day, the Panel informed

[58] The Panel's decision can be found in Annex E-1 of the Report. On 24 February 2021, the Panel received a communication from India commenting on the Panel's decision. In that communication, India stated that "reasons for granting the additional privileges are not available in [the Panel's] decision" and that "India reserves the right to request the Panel to revisit this decision as these proceedings progress." (India's communication (24 February 2021)). The Panel acknowledged receipt of India's communication and took note of India's views. (Panel's communication to the parties and third parties (25 February 2021)).
[59] The revision concerned paragraphs 21bis and 30(d) of the Working Procedures.
[60] Panel's communication to the parties (4 February 2021).
[61] Japan's communication (9 February 2021).
[62] India's communication (9 February 2021).
[63] India's first written submission, para. 20.
[64] India's communication (28 June 2021).

the parties that, in light of India's communication, it would suspend the issuance of the Panel's communication and invited Japan to comment on India's request.[65]

1.51. Japan submitted that the parties and third parties had sufficiently expressed their views regarding India's preliminary ruling request, "and therefore the time is ripe for the Panel to make findings and rulings in this respect."[66]

1.52. On 7 July 2021, the Panel issued a communication to the parties and third parties regarding India's preliminary ruling request.[67]

1.3.7 Evidentiary objection

1.53. On 31 March 2022, during the second substantive meeting with the parties, the Panel addressed a question to India regarding whether Professor Michael Waibel's Legal Opinion, which had been submitted as Annex II to India's second written submission, constituted evidence or was part of India's arguments.[68] In its oral response, India explained that, in its view, Professor Waibel's Legal Opinion was in the nature of an expert opinion that was independent of India's submissions, and, if the Panel so wished, India would assign it an exhibit number in accordance with the Panel's Working Procedures. Japan orally objected to India's characterization of Professor Waibel's Legal Opinion as evidence. According to Japan, Professor Waibel's Legal Opinion should not be given any weight or probative value because it was neither neutral nor objective, and suffered from a number of serious legal flaws. Japan further argued that, to the extent the Legal Opinion could be considered evidence, it should be disregarded by the Panel because, *inter alia*, the submission of that Legal Opinion as evidence was inconsistent with the Panel's Working Procedures.

1.54. On 6 April 2022, following the second substantive meeting, the Panel sent a communication to the parties, noting that, in its comments on India's oral response to Panel question No. 3 at the second substantive meeting, Japan had objected to the submission by India of Professor Waibel's Legal Opinion as evidence. The Panel requested Japan to submit its objection in writing by 12 April 2022 and invited India to submit comments on Japan's objection by 19 April 2022. Additionally, and without prejudice to Japan's objection, the Panel requested India to provide Professor Waibel's Legal Opinion as an exhibit, reserving its right to make a ruling on that objection at a later stage of the proceedings.[69]

1.55. Having received Japan's written objection, as well as India's comments on that objection, the Panel issued its decision to the parties on 16 May 2022.[70] As explained in that decision, the Panel rejected Japan's objection and invited Japan to comment on that exhibit in the course of its comments on India's response to questions from the Panel.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. Japan challenges the duties applied by India to imports of certain information communication technology (ICT) products, on the ground that such duties are in excess of the relevant tariff bindings set forth in India's WTO Schedule.[71] According to Japan, at the time of the Panel's establishment,

[65] Panel's communication to the parties (28 June 2021).
[66] Japan's communication (1 July 2021).
[67] The Panel's decision can be found in Annex E-2 of the Report.
[68] On 11 March 2022, the Panel sent questions for oral responses at the second substantive meeting. Panel question No. 3 addressed the following question to India (footnote omitted):

> In its second written submission, India indicates that its "submissions are supplemented by the expert opinion of Prof. Michael Waibel annexed as Annex II". The Panel notes that India has not submitted Annex II as an exhibit. Should the Panel consider Professor Waibel's opinion to be part of India's second written submission, and therefore by extension part of India's arguments, or should the Panel consider Professor Waibel's opinion to be evidence in support of India's arguments?

[69] Panel question No. 62, sent on 11 April 2022.
[70] The decision of the Panel can be found in Annex E-3 of the Report.
[71] Request for the establishment of a panel by Japan (Japan's panel request), WT/DS584/9, pp. 1-5.

the ICT products concerned fell within the scope of the following tariff items[72]: 8517.12.11; 8517.12.19; 8517.12.90; 8517.61.00; 8517.62.90; 8517.70.10; and 8517.70.90 of the First Schedule to the Customs Tariff Act, 1975 (First Schedule).[73] Japan identifies a number of legal instruments through which India applies the alleged tariff treatment to products falling under these tariff items.[74]

2.2 India's customs regime

2.2.1 Main legal instruments

2.2. The main legislative instruments governing the imposition of customs duties on imports of goods into India are the Customs Act, 1962, Act No. 52 of 13 December 1962 (Customs Act 1962)[75] and the Customs Tariff Act, 1975, Act No. 51 of 18 August 1975 (Customs Tariff Act 1975).[76]

2.3. Section 12 of the Customs Act 1962, titled "Dutiable goods", provides as follows:

> Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the … [Customs Tariff Act], or any other law for the time being in force, on goods imported into, or exported from, India.[77]

2.4. Section 2 of the Customs Tariff Act 1975, in turn, is titled "Duties specified in the Schedules to be levied" and provides as follows:

> The rates at which duties of customs shall be levied under the Customs Act, 1962 (52 of 1962), are specified in the First and Second Schedules.[78]

2.5. The First Schedule of the Customs Tariff Act 1975 sets out maximum duty rates leviable on imports of goods into India.[79] The First Schedule is based on the World Customs Organization's (WCO's) Harmonized System (HS) Nomenclature.[80] At the time of the Panel's establishment, India's First Schedule was based on the HS Nomenclature 2017 Edition (HS2017).[81] Subsequently, during the Panel proceedings, India amended its First Schedule to align it with the HS Nomenclature 2022 Edition (HS2022).[82]

2.6. The duty rates set out in the First Schedule may be modified by the Indian Parliament or by the Central Government of India (the Government), as illustrated below.

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[72] We understand that under the Harmonized System (HS) nomenclature, entries at the four-digit level are referred to as "headings", entries at the six-digit level are referred to as "subheadings", and entries at the eight, or more, digit level are referred to as "tariff lines". We also note that the parties do not adhere consistently to this nomenclature. (See e.g. Japan's first written submission, para. 101 and fn 163 thereto; and India's first written submission, para. 26). In this Report, we use the term "tariff item" to refer to subheadings and tariff lines set forth in India's WTO Schedule and First Schedule. Where useful for the purposes of clarity, we use the terms "subheading" and "tariff line" as per the HS nomenclature.

[73] Japan's panel request. India amended its First Schedule during the panel proceedings. We analyse the effect of those amendments on Japan's claims in section 7 below.

[74] Japan's panel request. We address the parties' assertions regarding these legal instruments in the context of assessing the merits of Japan's claims in section 7 below.

[75] Customs Act 1962, (Exhibit JPN-5).

[76] Customs Tariff Act 1975, (Exhibit JPN-6).

[77] Customs Act 1962, (Exhibit JPN-5), section 12.

[78] Customs Tariff Act 1975, (Exhibit JPN-6), section 2.

[79] Japan notes that India has not officially published the First Schedule in a single document. However, according to Japan, the latest First Schedule can be found in hard-copy format published by third-party publications, and online on the website of the Central Board of Indirect Taxes and Customs (CBIC), Department of Revenue, Ministry of Finance, India. (Japan's first written submission, para. 25. See also Chinese Taipei's third-party submission, para. 3.26). India does not contest this assertion.

[80] Japan's response to Panel question No. 66, para. 24; India's response to Panel question No. 66, para. 36.

[81] India's response to Panel question No. 21, para. 78.

[82] India's second written submission, para. 105 (referring to Finance Act 2021, (Exhibit IND-60)).

2.2.2 Parliament's power to amend the First Schedule

2.7. The Indian Parliament may amend the First Schedule through a Finance Bill or Finance Act.[83] A Finance Bill becomes a Finance Act once passed by both Houses of Parliament and assented to by the President.[84]

2.2.3 The Government's power to modify the applied duty rates

2.8. The Government has the power to (i) increase tariff rates in the First Schedule through customs notifications or amendments, and (ii) provide exemptions from duties leviable, through customs notifications.

2.2.3.1 Power to increase tariff rates

2.9. Section 8A(1) of the Customs Tariff Act 1975 authorizes the Government to increase the duty rates set out in the First Schedule through customs notifications. Section 8A(1), titled "Emergency power of Central Government to increase import duties" provides as follows:

> Where in respect of any article included in the First Schedule, the Central Government is satisfied that the import duty leviable thereon under section 12 of the Customs Act, 1962 (52 of 1962) should be increased and that circumstances exist which render it necessary to take immediate action, it may, by notification in the Official Gazette, direct an amendment of that Schedule to be made so as to provide for an increase in the import duty leviable on such article to such extent as it thinks necessary:
>
> Provided that the Central Government shall not issue any notification under this subsection for substituting the rate of import duty in respect of any article as specified by an earlier notification issued under this sub-section by that Government before such earlier notification has been approved with or without modifications under sub-section (2).[85]

2.10. Notifications issued by the Government pursuant to section 8A(1) of the Customs Tariff Act 1975 are approved by each House of Parliament by way of resolution.[86] Such notifications may also be rescinded by the Government at any time by subsequent notification.[87]

2.2.3.2 Power to exempt goods from import duties

2.11. Section 25(1) of the Customs Act 1962, titled "Power to grant exemption from duty" provides as follows:

> If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or

[83] See e.g. Chinese Taipei's third-party submission, para. 3.27. The parties do not contest this assertion. Moreover, pursuant to Section 3 of the Provisional Collection of Taxes Act, a Bill that provides for the imposition or increase of a customs duty may enter into force the day after it is introduced to Parliament. Such Bill ceases to have force of law when it comes into operation as an enactment. (Provisional Collection of Taxes Act 1931, (Exhibit JPN-22), sections 3, 4(1), and 4(2)(a)).

[84] European Union's third-party submission, para. 40. The parties do not contest this assertion.

[85] Customs Tariff Act 1975, (Exhibit JPN-6), section 8.

[86] Customs Tariff Act 1975, (Exhibit JPN-6), section 7(3). Section 7(3) provides that "[e]very notification under sub-section (2), in so far as it relates to increase of such duty, shall be laid before each House of Parliament if it is sitting as soon as may be after the issue of the notification, and if it is not sitting within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder."

[87] Customs Tariff Act 1975, (Exhibit JPN-6), section 7(4). Further, section 11A(1) of the Customs Tariff Act 1975 empowers the Government to amend the First Schedule where it is satisfied that it is necessary to do so in the public interest, by notification in the Official Gazette. (Ibid. section 11A(1)). Notifications issued under section 11A(1) must also be approved by both Houses of Parliament. (Ibid. section 11A(2)).

> subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.[88]

2.12. Section 25(1) thus empowers the Government to exempt goods from imposition of all applicable import duties or part of the import duties leviable. The exemptions may also be subject to conditions.

2.13. Notifications exempting goods from import duties (exemption notifications) may be amended, superseded or rescinded by other exemptions notifications issued by the Government in the exercise of its powers under Section 25(1) of the Customs Act 1962.[89] The Government can also withdraw exemptions issued under Section 25 at any time if the "'public interest' so demand[s]" and the Government determines that the exemption does not require to be extended any further.[90] In certain instances, two exemption notifications or two different entries in the same exemption notification may apply to the same tariff item. In such cases, an importer can claim the treatment afforded under the most beneficial exemption notification or entry.[91]

2.2.4 Conclusion

2.14. From the foregoing, and in light of the clarifications of the parties, we understand that, under India's customs regime, the duty rates set out in the First Schedule are not necessarily the duty rates applied to imported products. Rather, the applied duty rate is based not only on the First Schedule, but also on any relevant customs notifications which relate to the tariff item at issue.[92] In sum, the duty rates applicable to imports of goods into India are to be understood from reading the First Schedule in light of relevant customs notifications.

2.3 India's WTO Schedule

2.15. Schedule XII – India (India's WTO Schedule) sets forth concessions and commitments undertaken by India in relation to trade in goods. While the parties contest a number of issues related to India's WTO Schedule, we nevertheless consider it useful to describe at the outset certain uncontested background facts regarding that Schedule.

2.16. India's WTO Schedule is based on the HS nomenclature, which is a multilaterally agreed system of classifying goods for customs purposes.[93] The HS nomenclature, which is established under the HS Convention, is administered by the WCO.[94] The WCO regularly amends the HS to update the nomenclature. When an updated nomenclature is published, the WCO publishes correlation tables, also referred to as concordance tables, which identify the correlations between the product scope of HS headings and subheadings in the previous version of the nomenclature as compared to the new version.[95]

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[88] Customs Act 1962, (Exhibit JPN-5), section 25(1).

[89] European Union's third-party submission, para. 55. The parties do not contest this assertion.

[90] Hon'ble Supreme Court in the case of *Kasinka Trading and ANR v. Union of India and ANR*, 1994 (74) ELT 782 (S.C.), (European Union's third-party Exhibit EU-4), pp. 462-463.

[91] Hon'ble Supreme Court in the case of *Share Medical Care v. Union of India and ORS*, 2007 (209) ELT 321 (S.C.), (European Union's third-party Exhibit EU-5); Hon'ble CESTAT, *Cipla Ltd. v. Commissioner of Customs*, 2007 (218) ELT 547 (Tri. – Chennai), (European Union's third-party Exhibit EU-6); Hon'ble CESTAT, *Burroughs Wellcome (I) Ltd. v. Commissioner of Central Excise*, 2007 (216) ELT 522 (Tri. – Chennai), (European Union's third-party Exhibit EU-7).

[92] India's response to Panel question No. 22, paras. 81-82, and No. 53, para. 52. In its first written submission, India uses the term as "basic customs duty (BCD) rate" to refer to the duty rates set forth in the First Schedule. (See e.g. India's first written submission, paras. 131, 147, and 159). Subsequently, India clarified that its reference to "basic customs duty" in its first written submission should be read as "standard rate". (India's response to Panel question No. 53, para. 52). In this Report, when referring to the duty rates set out in the First Schedule we do so explicitly. We use the term "applied duty rate" to refer to the rate applied to imports, taking into account all relevant legal instruments (including relevant customs notifications).

[93] India's response to Panel question No. 1, paras. 9-10.

[94] India is a contracting party to the HS Convention. (Japan's first written submission, para. 17; Chinese Taipei's third-party submission, para. 3.24). This assertion is uncontested by the parties.

[95] See e.g. General Council Decision of 18 July 2001 on Concessions under the Harmonized Commodity Description and Coding System, A Procedure for Introduction of Harmonized System 2002, Changes to Schedules of Concessions (General Council Decision on HS2002 Transposition Procedures), WT/L/407,

2.17. In the WTO, Members' Schedules are regularly updated in order to reflect newer versions of the HS nomenclature. This process of updating a Member's Schedule is referred to as a transposition. Prior to the establishment of the WTO, procedures were adopted that required the Contracting Parties to the General Agreement on Tariffs and Trade 1947 (GATT 1947) to incorporate updated nomenclature into their Schedules and, if necessary, conduct negotiations under Article XXVIII of the GATT 1947 if the transposition resulted in a change in the scope of the concession.[96]

2.18. On 13 December 1996, a number of WTO Members concluded the Ministerial Declaration on Trade in Information Technology Products (ITA). India joined the ITA on 26 March 1997. The ITA participants agreed among themselves to bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the GATT 1994, with respect to certain products.[97] The Annex to the ITA requires that participants "shall incorporate" such measures into their Schedules annexed to the GATT 1994, and indicates that their Schedules should be modified in accordance with the GATT Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (1980 Decision).[98] India, as a participant in the ITA, proposed a modification to its WTO Schedule, which was circulated on 2 April 1997 for review by all WTO Members, pursuant to the 1980 Decision. These changes to India's Schedule, which were based on the HS Nomenclature 1996 Edition (HS1996), were certified on 2 October 1997.[99]

2.19. Subsequently, WTO Members agreed to update their WTO Schedules to align them with the HS Nomenclature 2002 Edition (HS2002). For the transposition to HS2002, additional procedures regarding the transposition process were adopted by the General Council, but the obligation remained on Members to perform the transposition process.[100]

2.20. In 2006, in preparation for the transposition of Members' Schedules from the HS2002 to the HS Nomenclature 2007 Edition (HS2007), the General Council adopted a Decision concerning "A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database" (Decision on HS2007 Transposition Procedures).[101] Pursuant to that Decision, developed country Members were to prepare their own transpositions from the HS2002 to the HS2007, and the WTO Secretariat was requested to "transpose the schedules of developing country Members, except for those who undertake to prepare their own transposition and submit a notification to this effect".[102]

2.21. Since India did not indicate that it intended to undertake the transposition of its Schedule from the HS2002 to the HS2007, the WTO Secretariat undertook to prepare India's transposition. On 8 November 2013, the Secretariat communicated to India via email the draft files for the HS2007 transposition of India's Schedule.[103]

2.22. Following receipt of the draft transposition files prepared by the WTO Secretariat, India provided comments on the draft files.[104] The Secretariat then communicated a revised file to India

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Attachment A, p. 2; General Council Decision of 15 December 2006 on A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database (General Council Decision on HS2007 Transposition Procedures), WT/L/673, Annex 2, para. 7.

[96] GATT, Procedures to Implement Changes in the HS, L/6905, Annex, paras. 2-4. Under these procedures, transpositions "shall not involve any alteration in the scope of concessions nor any increase in bound rates of duty unless their maintenance results in undue complexity in the national tariffs". (Ibid. para. 1. See also WTO, Decision on Establishment of Consolidated Loose-Leaf Schedules on Goods, G/L/138).

[97] The relevant products are identified in the ITA as "(a) all products classified (or classifiable) with [HS1996] headings listed in Attachment A to the Annex [to the ITA]; and (b) all products specified in Attachment B to the Annex [to the ITA], whether or not they are included in Attachment A". (Ministerial Declaration on Trade in Information Technology Products (ITA), WT/MIN(96)/16, para. 2).

[98] Paragraphs 1 and 2 of the Annex to the ITA. See also GATT Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (1980 Decision), L/4962. Pursuant to paragraph 2 of the Annex to the ITA, each ITA participant's proposed modification of their WTO Schedules is subject to review, and approval on a consensus basis, by all ITA participants.

[99] WT/Let/181.

[100] General Council Decision on HS2002 Transposition Procedures, WT/L/407.

[101] General Council Decision on HS2007 Transposition Procedures, WT/L/673.

[102] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 2.

[103] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49).

[104] India did not provide comments or seek clarifications regarding the transposition of the tariff items at issue in this dispute. (Email from Market Access Intelligence Section, WTO, to India (12 February 2014), (Exhibit IND-50)).

for approval.[105] A multilateral review session was held in the Committee on Market Access on 23 April 2015, during which the draft files were approved by Members in the Committee on Market Access.[106] The draft modifications to the Schedule were circulated on 12 May 2015 and, since no objections were received within three months of circulation, on 12 August 2015 the changes to the Schedule were certified.[107]

2.23. On 25 September 2018, India requested that its Schedule be rectified, in accordance with the 1980 Decision, in order to correct "certain errors contained in its HS2007 Schedule".[108] Specifically, India requested that its commitments with respect to 15 tariff items be rectified to "Unbound", including certain of the tariff items at issue in this dispute.[109] In its request, India stated that "[w]hile transposing the HS2002 schedule to HS2007 schedule on the products concerned, errors occurred, resulting in wrong bound tariff commitments on certain lines which were inadvertently included in the Schedule."[110] According to India, "the various tariff subheadings for which India is seeking rectification to its HS2007 Schedule" were not covered by the commitments in the ITA, and "[t]he new products became part of the schedule on account of the WCO transposition from HS2002 to HS2007".[111] India considered that the rectification did not alter its commitments "either under GATT 1994 or the ITA[]"[112], and that "[t]he errors in the HS2007 scheduling should be interpreted as an inadvertent oversight by India on binding of products not covered by the ITA[] at 0%".[113]

2.24. Several Members, including Canada[114], China[115], the European Union[116], Japan[117], Chinese Taipei[118], Switzerland[119], and the United States[120] objected to India's proposed rectification under the 1980 Decision. In light of these objections, and in accordance with the 1980 Decision[121], India's rectification request has not, to date, been certified.

[105] India's response to Panel question No. 19, paras. 60-61.

[106] Committee on Market Access, Rectification and Modification of Schedules, Schedule XII – India, Communication from the Secretariat, G/MA/TAR/RS/409, 12 May 2015.

[107] Committee on Market Access, Rectification and Modification of Schedules, Schedule XII – India, Communication from the Secretariat, G/MA/TAR/RS/409, 12 May 2015, as certified in WT/Let/1072, effective 12 August 2015; India's response to Panel question No. 19, para. 61.

[108] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-75), p. 1.

[109] India requested that, *inter alia*, the following tariff items be rectified to "unbound": 8517.12 (telephones for cellular networks or for other wireless networks); 8517.61 (base stations); ex 8517.62 (other machines for the reception, conversion and transmission or regeneration of voice, images or other data including switching and routing apparatus); ex 8517.70 (parts of 8517.12, 8517.61, ex 8517.62 and ex 8517.69); and ex 8517.70 (other parts). (India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-75), Appendix 2, p. 3).

[110] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-75), p. 1.

[111] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-75), Appendix 1, p. 2.

[112] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-75), p. 1.

[113] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-75), Appendix 1, p. 2.

[114] Council for Trade in Goods, Minutes of the meeting held on 11 and 12 April 2019, G/C/M/134, p. 40; and Committee on Market Access, Minutes of the meeting held on 11 November 2019, G/MA/M/71, para. 15.4.

[115] Council for Trade in Goods, Minutes of the meeting held on 11 and 12 April 2019, G/C/M/134, para. 12.5; and Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 14 May 2019, G/IT/M/70, para. 1.14.

[116] Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, para. 18.4; Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 30 October 2018, G/IT/M/69, paras. 1.19-1.21; and Committee on Market Access, Minutes of the meeting held on 9 October 2018, G/MA/M/68, para. 134.

[117] Letter from Japan to India (9 November 2018), (Exhibit JPN-4); Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, para. 18.13.

[118] Letter from Chinese Taipei to India (19 October 2018), (Chinese Taipei's third-party Exhibit TPKM-3); Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 30 October 2018, G/IT/M/69, para. 1.36.

[119] Council for Trade in Goods, Minutes of the meeting held on 11 and 12 April 2019, G/C/M/134, para. 12.12.

[120] Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, paras. 18.7-18.8; Committee on Market Access, Minutes of the meeting held on 9 October 2018, G/MA/M/68, para. 131.

[121] The 1980 Decision indicates that proposed changes shall become a certification provided that no objection has been raised by a Member within three months of being communicated to all Members. (GATT, 1980 Decision, L/4962, para. 3).

2.25. In light of the foregoing, India's WTO Schedule presently indicates, *inter alia*, the following tariff commitments [122]:

	Ex	Description	Bound rate
85		Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles	
8517		Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28	
8517.12		--Telephones for cellular networks or for other wireless networks	0%
8517.61		--Base stations	0%
8517.62		--Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus	0%
8517.70.00		-Parts	
8517.70.00	01	--Parts and accessories of the machines of heading 84.71: For populated PCBs	0%
8517.70.00	02	--Parts and accessories of the machines of heading 84.71: Other	0%
8517.70.00	03	--Other	0%

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Japan requests the Panel to find that the measures at issue are inconsistent with India's obligations under Articles II:1(a) and (b) of the GATT 1994.[123] Japan also requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with its obligations under the GATT 1994.[124]

3.2. India requests the Panel to find that:

a. India has not acted inconsistently with Articles II:1(a) and (b) of the GATT 1994 because the applied rate of duty for products at issue is "nil" on imports of such products from Japan[125];

b. The products at issue are not covered by the ITA and the 2007 Schedule, which was certified in error, included products not originally covered by the ITA[126];

c. Since the products at issue are not covered under the ITA, the draft rectification circulated by India is of a "purely formal character".[127] Therefore, the objection raised by Japan to the draft rectification was unfounded, contrary to paragraph 3 of the 1980 Decision, and impeded India's right to rectify its Schedule under the 1980 Decision[128]; and

d. The commitments under the contested subheadings of India's WTO Schedule are invalid due to "error" within the meaning of Article 48 of the Vienna Convention on the Law of Treaties (Vienna Convention).[129]

[122] WT/Let/181; WT/Let/1072.
[123] Japan's first written submission, para. 142; second written submission, para. 279.
[124] Japan's first written submission, para. 142; second written submission, para. 279.
[125] India's first written submission, para. 263(c); second written submission, para. 135 (d).
[126] India's first written submission, para. 263(d); second written submission, para. 135 (b).
[127] India's first written submission, para. 263(e); second written submission, para. 135 (c).
[128] India's second written submission, para. 122; response to Panel question No. 49, para. 43.
[129] India's first written submission, para. 263(f); second written submission, para. 135(a).

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, the European Union, the Republic of Korea, Norway, Singapore, Chinese Taipei, Türkiye, Ukraine, the United Kingdom, and the United States are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, C-9, C-10, and C-11). China, Indonesia, Pakistan, the Russian Federation, and Thailand did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 28 October 2022, the Panel issued its Interim Report to the parties. On 18 November 2022, Japan and India each submitted written requests for the Panel to review aspects of the Interim Report. On 9 December 2022, each party submitted comments on the other party's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage, including certain requests discussed in greater detail below. The numbering of some of the paragraphs and footnotes in the Final Report has changed from the numbering in the Interim Report.

6.3. Certain of the parties' requests for review of the Interim Report include requests to provide more detailed summaries of the parties' arguments. In certain instances, we considered it useful and appropriate to modify the summaries of the parties' arguments in response to such requests. We wish to highlight in this regard that, throughout the Report, we have summarized the parties' arguments with a view to making an objective assessment of the matter before us, in order to make such findings as will assist the DSB in making the recommendations or rulings provided for in the relevant covered agreements. The Report therefore does not comprehensively reproduce every aspect of the parties' arguments, which are more fully reflected in the executive summaries annexed to this Report.

6.4. Certain of the parties' requests for review of the Interim Report also include requests to modify or clarify aspects of the Panel's substantive reasoning. In certain instances, we have sought to clarify or simplify our reasoning. In other instances, however, we consider that the Interim Report was sufficiently clear on its face, and no modifications were required. In several instances (both with respect to the summaries of the parties' arguments and our own reasoning) we have modified the Report in response to a party's request, but without necessarily using the precise drafting requested by the parties, or by adjusting paragraphs/footnotes other than those specifically identified by the parties.

6.5. We have also made typographical and other editorial modifications in the Report, including in response to the parties' requests for review.

6.6. We address below certain specific issues raised by the parties' requests for review.

6.1 General issues concerning India's WTO tariff commitments

6.7. Japan requests that the description of its arguments in paragraphs **7.14, 7.22, 7.85**, and **7.90** of the Interim Report, with respect to the applicability of Article 48 of the Vienna Convention as well as the relevance of the ITA, be clarified to indicate that they are specific to this dispute and do not concern as a general matter the applicability of Article 48 or the ITA.[130] India considers that Japan

[130] Japan's request for interim review, paras. 3-4, 6, and 20-22. In particular, Japan requests that its arguments on this point be reflected.

does argue that Article 48 of the Vienna Convention does not apply in WTO dispute settlement.[131] Regarding the applicability of Article 48, in our view, Japan's arguments do not appear to be specific to the circumstances of this dispute but rather appear to implicate the applicability of Article 48 more generally.[132] Nevertheless, Japan is correct that in its submissions it consistently refers to the applicability issue as pertaining to *this dispute*. On that basis, and taking into account that we do not actually address the merits of this issue, we consider it appropriate to accept Japan's request.[133]

6.8. Japan requests the addition of certain language describing India's arguments concerning the interpretative relevance of the ITA.[134] India does not comment on Japan's request. In our view, the summary of India's arguments is sufficient. We note that India's arguments regarding the interpretative relevance of the ITA are comprehensively addressed in paragraphs **7.75** to **7.79** of the Interim Report.

6.9. Japan requests certain minor modifications to the Panel's reasoning in paragraph **7.123** of the Interim Report.[135] India does not comment on Japan's request. In our view, the requested changes might lead to unintended ambiguity and we therefore decline this request.

6.1.1 Whether India's assumption that the transposition of its WTO Schedule to the HS2007 would not expand the scope of its WTO tariff commitments from its ITA undertakings formed an essential basis of India's consent to be bound by its WTO Schedule

6.10. Section 7.3.3.2.3.4 of the Report addresses whether India's assumption that the transposition of its WTO Schedule to the HS2007 would not expand the scope of its WTO tariff commitments from its ITA undertakings formed an essential basis of its consent to be bound by its WTO Schedule.

6.11. In its request for interim review, India asserts that the Panel's reasoning in paragraphs **7.137** to **7.139** of the Interim Report "inverts rather than addresses India's arguments".[136] India considers that "it is irrelevant what India's conduct signalled to the WTO members (if anything at all)" and "[w]hat is relevant is whether India was provided with the required flagging of the relevant tariff lines – the absence of which led to India's flawed assumption".[137] India requests the Panel to "provide further clarity on its reasoning and conclusion, including for the Panel's basis to seek additional evidence from India regarding the 'conditional basis for accepting the changes to its Schedules' to confirm the existence of an assumption".[138]

6.12. Japan considers that the Panel provided a sufficient explanation in the Report as to how it reached the conclusion that India failed to demonstrate that its assumption (i.e. that the scope of its tariff commitments in its WTO Schedule would not be expanded beyond the scope of its ITA undertakings) constituted an essential basis for its consent.[139] Japan also considers that India's comment regarding "the lack of flagging by the WTO Secretariat during the transposition process appears to be relevant to the analysis of the requirements under Article 48(2) of the Vienna Convention and, therefore, is irrelevant to what the Panel addresses in paragraphs 7.137 to

[131] India's comments on Japan's request for interim review, para. 3.
[132] We note that Japan's arguments on the issue of applicability of Article 48 are: (i) the Vienna Convention is not a covered agreement within the meaning of Article 1.1 of the DSU and thus does not fall within the Panel's terms of reference; (ii) Article 48 is not part of the "customary rules of interpretation" within the meaning of Article 3.2 of the DSU; (iii) Article 48 does not constitute "relevant rules of international law" within the meaning of Article 31(3)(c) of the Vienna Convention; (iv) the Panel cannot add to or diminish the rights and obligations provided in the covered agreements in accordance with Article 3.2 of the DSU; and (v) the specific procedures under Article XXVIII of the GATT 1994 must be followed when modifying Members' tariff concessions. (See Japan's second written submission, paras. 32-33 and 36-67; opening statement at the second meeting of the Panel, paras. 10-12; Japan's closing statement at the second meeting of the Panel, paras. 6-8; and request for interim review, para. 20). All of Japan's arguments in relation to the DSU would appear to apply to any invocation of Article 48 in WTO dispute settlement.
[133] Since it is not necessary for us to address the merits of this issue, it is also not necessary to include a full exposition of Japan's arguments on this issue in section 7 of the Report.
[134] Japan's request for interim review, para. 12.
[135] Japan's request for interim review, para. 29.
[136] India's request for interim review, para. 15.
[137] India's request for interim review, para. 15.
[138] India's request for interim review, para. 16.
[139] Japan's comments on India's request for interim review, para. 24.

7.139."[140] Japan also notes that the Panel examined that issue at paragraphs **7.179** to **7.196** of the Interim Report.[141]

6.13. At the outset, we recall that it is uncontested that the burden of proof under Article 48(1) of the Vienna Convention falls on the party invoking Article 48. With that in mind, we note that throughout the course of these proceedings, India has argued that the "error" (within the meaning of Article 48 of the Vienna Convention) that occurred during the transposition of its Schedule was an expansion of India's WTO tariff commitments beyond those contained in the ITA.[142] On this basis, India has argued that the "assumption" which allegedly constituted an "essential basis" of India's consent to be bound by its Schedule was that its WTO tariff commitments would not be expanded beyond the ITA.[143]

6.14. Thus, in applying the distinct elements of Article 48(1), we have assessed, *inter alia*, whether India has demonstrated that its assumption (i.e. that the transposition of its WTO Schedule to the HS2007 would not expand the scope of its WTO tariff commitments beyond its ITA undertakings) formed an essential basis of its consent to be bound by its WTO Schedule.[144] Having reviewed the evidence and arguments adduced by the parties, including with respect to India's conduct at the time of the transposition, we have concluded that India has failed to meet its burden of proof with respect to this element of the analysis under Article 48(1). Briefly put, there is no persuasive evidence before us that, at the time of the transposition process, an essential basis for India's consent to be bound by its transposed WTO Schedule was that the scope of its WTO tariff commitments would be no broader than the ITA (with respect to relevant ITC products). In response to India's request, we have modified paragraph **7.139** of the Interim Report to clarify this.

6.15. Regarding other aspects of India's request, we first note India's assertion that we required "additional evidence" from India "to confirm the existence of an assumption". That is incorrect. In the first step of our analysis under Article 48(1) (in section 7.3.3.2.3.2), we address the "existence" of India's assumption and, on balance, accept in good faith India's assertion that it held that assumption at the time of the transposition exercise. As a distinct step, in assessing the third element of the test under Article 48(1) (in section 7.3.3.2.3.4), we address whether India has demonstrated that its assumption constituted an "essential basis of its consent to be bound". It is in that specific respect that we consider that India has failed to substantiate its burden of proof.

6.16. Regarding India's observation that its conduct during the transposition process is irrelevant to the question of whether India's stated assumption constituted an essential basis for its consent to be bound, we disagree. To the contrary, India's actions during the transposition process provide some indication of what constituted India's essential bases for its consent to be bound by its transposed Schedule.

6.17. We further note that India also argues that what matters in this context is whether India "was provided with the required flagging of the relevant tariff lines".[145] We disagree. We recall that this step of the analysis assesses whether India's assumption regarding the scope of the ITA and the scope of its WTO Schedule constituted an essential basis of its consent to be bound by that Schedule. Regardless of whether the relevant tariff items were adequately flagged by the WTO Secretariat, there is no indication before us that India's consent to be bound by its WTO Schedule was conditional upon the product scope of its WTO tariff commitments not exceeding the product scope of the ITA. In other words, even if the WTO Secretariat had failed to flag the relevant tariff items, that would not prove (or even seem to be relevant to) India's assertions regarding its *stated* assumption being an essential basis of its consent to be bound.[146] Thus, India's argument regarding the alleged failure

[140] Japan's comments on India's request for interim review, para. 25.
[141] Japan's comments on India's request for interim review, para. 25.
[142] See e.g. India's first written submission, para. 40; and second written submission, para. 20.
[143] India states that it "assumed at the time of the certification of [India's] 2007 Schedule that the HS2007 transposition did not expand India's tariff commitments beyond India's obligations under the ITA-1". (India's first written submission, para. 42). Similarly, India states that "its mistaken assumption was that the HS2007 did not expand India's tariff commitments beyond India's obligations under the ITA-1. That remains India's clearly articulated position." (India's opening statement at the second meeting of the Panel, para. 26).
[144] See section 7.3.3.2.3.4 below.
[145] India's request for interim review, para. 15.
[146] India's arguments during interim review might be interpreted as suggesting that its "assumption" for purposes of Article 48 was that the WTO Secretariat would flag the relevant tariff items. Notwithstanding that India has not framed its alleged error under Article 48 in this manner, we recall that in the context of applying

of the Secretariat to flag the relevant tariff items is not pertinent to our assessment of this specific aspect of India's arguments under Article 48(1).

6.1.2 Whether the circumstances were such as to put India on notice of a possible expansion of its WTO tariff commitments from its ITA undertakings

6.18. Section 7.3.3.3.3.2 of the Report addresses whether the circumstances of the transposition of India's Schedule were such as to put India on notice of a possible expansion of its WTO tariff commitments from its ITA undertakings (one of two elements arising under Article 48(2) of the Vienna Convention).

6.19. India notes the Panel's conclusion that the WTO Secretariat "fulfilled its obligation to flag the complex technical transpositions … thereby put[ting] India on notice of the error", notwithstanding the Panel's observation in paragraph **7.195** of the Interim Report that "both parties … may read document G/MA/283 differently".[147] India states that it is unclear "how a document like G/MA/283 should be read differently by different parties on a contested issue, and yet somehow justifiably meet its purpose".[148] India requests the Panel to "address the contradictions arising out of its legal reasoning and make suitable modifications".[149]

6.20. Japan considers that India is misreading the Interim Report and its request should be rejected. Japan submits that the Panel appropriately notes India's argument regarding the WTO Secretariat's alleged failure to flag the relevant tariff items. Japan considers that the Panel refers to the parties' difference in interpretation correctly and explains why the Panel's understanding of document G/MA/283 is different. Thus, Japan considers that there are no contradictions in the Interim Report.[150]

6.21. While we agree with Japan that the Interim Report sufficiently conveyed the Panel's reasoning on this issue, we have in any event modified paragraphs **7.194** to **7.195** of the Interim Report in order to further elucidate that reasoning. For the sake of additional clarity, we consider it useful to note here that although the parties appear to agree that document G/MA/283 does not flag any tariff items, the parties are in fact saying two different things when they make their respective assertions. Japan argues that "in case the contested subheadings were not flagged by the WTO Secretariat, this fact indicates that there were no changes in the scope of concessions for the contested subheadings".[151] Thus, Japan asserts that the WTO Secretariat would only have flagged any tariff items if there were actual changes in the scope of concessions of those tariff items. That assertion, however, does not square with the plain language of the flagging obligation imposed on the WTO Secretariat – "[a]ny tariff line for which a change in the scope of a concession *may have occurred* due to the complex technical nature of the transposition shall be clearly flagged."[152] Japan does not reconcile, on the one hand, its assertion that the Secretariat would only have flagged a tariff item if there was a change in scope, with, on the other hand, the obligation on the Secretariat to flag any tariff item for which a change in scope *may* have occurred. In any event, for our purposes, we understand that when Japan says that the WTO Secretariat did not flag any tariff items, Japan means that the WTO Secretariat did not flag any tariff items whose product scope had, in fact, changed.

6.22. That assertion by Japan that the WTO Secretariat did not flag any tariff items because their product scope had not actually changed is not the same as India's assertions that the WTO Secretariat failed to flag any tariff items for which the product scope of the concession *may have* changed. In contrast to Japan, India acknowledges that the flagging obligation on the WTO Secretariat applied to *possible* changes of scope, but India maintains that, contrary to that obligation, the WTO Secretariat did not flag any relevant tariff items. Thus, when India says that

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Article 48(2), we have indeed assessed India's arguments regarding the WTO Secretariat's alleged failure to flag the relevant tariff items, and concluded that the WTO Secretariat correctly and appropriately flagged *all* relevant tariff items. (See paras. 7.178-7.196 below). Thus, if India had alleged that the "error" under Article 48(1) was that the WTO Secretariat had failed to flag the relevant tariff items (*quod non*), our findings indicate that no such error occurred.

[147] India's request for interim review, para. 17.
[148] India's request for interim review, para. 18.
[149] India's request for interim review, para. 18.
[150] Japan's comments on India's interim review request, para. 28.
[151] Japan's comments on India's interim review request, para. 28.
[152] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4. (emphasis added)

document G/MA/283 does not flag any tariff items, India means that document G/MA/283 does not flag any tariff items for which the product scope of the concessions may have changed.

6.23. In short, while the parties appear to agree that the WTO Secretariat did not flag any relevant tariff items, they are in fact making different assertions. In our findings regarding this issue, we have addressed distinctly: (i) India's arguments regarding whether the Secretariat satisfied its obligation to flag tariff items for which the product scope of the concession *may* have changed[153]; and (ii) Japan's argument that the Secretariat did not flag any tariff items for which the product scope of the concession actually changed.[154]

6.24. India also notes that in paragraph **7.199** of the Interim Report, the Panel "concludes that India's argument deletes the word 'possible' as contained in Article 48(2) …, thereby requiring the state to 'be unmistakeably aware of the actual error'".[155] India considers that "the word 'possible' has little to do with the customary international law standard which applies in the present instance 'that no interested party should fail to notice the error' or indeed a 'possible error'."[156] India states that the "thrust of that international legal standard is in relation to how evident an error (or a possible error) must be for a State to be put on notice under Article 48(2)".[157] According to India, "that standard is in the context of the prominence of an error or a possible error, and not in the context of the range of errors that might be covered in its scope".[158] India requests the Panel to provide "further clarity" on the conclusions reached by the Panel on this issue.[159]

6.25. Japan submits that India's request should be rejected. Japan considers that the Panel accurately summarizes the parties' arguments and addresses India's interpretation of the legal standard under Article 48, such that there is no need for "further clarity". Japan considers that India's request seeks to re-argue and further elaborate on its arguments regarding that legal standard.[160]

6.26. We note that the issue being addressed in the relevant paragraphs is India's argument that "for a state to be put on notice of a possible error, the circumstances should be such that no interested party should fail to notice the error or be under a misapprehension about it."[161] The Report addresses this argument and ultimately concludes that the relevant standard under this element of Article 48(2) is whether the State was on notice of a *possible* error, not an *actual* error. Those are plainly different things. We see no need to modify or further clarify our reasoning on this issue.

6.27. Japan requests the addition of a new paragraph of substantive reasoning by the Panel following paragraph **7.202** of the Interim Report, addressing India's argument that India's "prior conduct could not have given rise to any good faith expectations by Japan" and any party would have known that India did not intend to commit to obligations beyond those in the ITA.[162]

6.28. India disagrees with the suggested addition and submits that "Japan seeks to write and rewrite the substantive conclusions arrived at by the Panel".[163]

6.29. In our view, the arguments raised by India (and referred to by Japan in its request for review) are not relevant in this section of the Report, where we address whether India was on notice as to a potential error. We recall that Article 48(2) of the Vienna Convention contains two distinct elements: (i) whether the circumstances were such as to put the relevant State on notice of a possible error; and (ii) whether the State in question contributed by its own conduct to the error. In its first written submission, India raised various arguments in a subsection that addressed, without distinction, both elements of Article 48(2). In our view, India's arguments that other Members were

[153] See paras. 7.178-7.194 below.
[154] See para. 7.195 below.
[155] India's request for interim review, para. 19.
[156] India's request for interim review, para. 19.
[157] India's request for interim review, para. 19.
[158] India's request for interim review, para. 19.
[159] India's request for interim review, para. 20.
[160] Japan's comments on India's request for interim review, paras. 29-31.
[161] India's second written submission, para. 30. See also India's first written submission, para. 56.
[162] Japan's request for interim review, paras. 35-36. Japan suggests that the Panel find that "it is not relevant whether Japan was aware … because what is at issue is whether the circumstances were such as to put India on notice of the alleged error" and not whether Japan was aware of India's alleged intentions. (Ibid. para. 36).
[163] India's comments on Japan's request for interim review, para. 6.

aware of India's intentions at the time of the transposition are not relevant to the question of whether the circumstances were such as to put India on notice. Rather, these arguments concern whether India contributed by its own conduct to the error, and we have discussed them in the relevant section of the Report addressing that distinct issue.[164] We therefore decline Japan's request.[165]

6.2 Whether India's tariff treatment is inconsistent with Articles II:1(a) and (b) of the GATT 1994

6.2.1 Tariff items 8517.12.11, 8517.12.19, and 8517.12.90 of India's First Schedule

6.30. India submits that the description of the parties' arguments regarding the tariff treatment accorded to products classified under tariff item 8517.12 is "not accurate when viewed at the 8-digit HS level".[166] India requests the deletion of language in paragraph **7.268** of the Interim Report to the effect that it is uncontested that at the Panel's establishment, India's First Schedule imposed a standard duty rate of 20% on products classified under tariff item 8517.12. India suggests that a more accurate reflection of the parties' arguments is that it is uncontested that India's First Schedule imposed a standard duty rate of 20% on products classified under tariff items 8517.12.11 and 8517.12.19, and that those tariff items "would come under the tariff item 8517.12".[167]

6.31. Japan requests the Panel to reject India's comments because the language in the Interim Report correctly describes the facts.[168]

6.32. We recall that the parties agree that at the time of the Panel's establishment, India's First Schedule imposed a standard duty rate of 20% on products classified under tariff items 8517.12.11, 8517.12.19 and 8517.12.90 (all of which fall under tariff item 8517.12).[169] Therefore, paragraph 7.268 of the Interim Report accurately reflects the parties' arguments. Moreover, that same paragraph also indicates that the tariff treatment accorded to products under tariff item 8517.12.90 differed from that set forth in the First Schedule, as products falling thereunder were exempted from customs duties. This information is also uncontested by the parties.[170] We therefore decline to make the changes requested by India.

6.2.2 Tariff items 8517.61.00, 8517.70.10, and 8517.70.90 of India's First Schedule

6.33. Japan requests us to modify certain factual findings pertaining to Serial No. 425 of Notification No. 50/2017.[171] On 14 December 2022, we sent a question to the parties concerning this issue. On 21 December 2022, the parties responded to that question. On 11 January 2023, Japan commented on India's response to that question. India indicated that it had no comments on Japan's response.

6.34. We understand that, in light of the parties' responses to our question, and on the basis of Notification No. 02/2022, Serial No. 425 of Notification No. 50/2017 was omitted from that Notification pursuant to Notification No. 02/2022.[172] Therefore, with effect from 1 February 2022, the tariff treatment applicable to base station controllers, base transreceiver stations, and antenna systems, as well as *parts* of those products, pursuant to that Serial No., is no longer applicable.[173] We have accordingly modified relevant paragraphs in sections 7.4.3 and 7.4.5.

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[164] See paras. 7.211-7.212 below.

[165] To the extent that either party considers that other Members' awareness of India's intentions might be relevant to the question of whether the circumstances were such as to put India on notice, we disagree. In our view, other Members' awareness of India's intentions regarding the transposition process does not speak to whether the circumstances of the transposition put India on notice of a possible expansion of its tariff concessions beyond the commitments undertaken by India in the ITA.

[166] India's request for interim review, para. 21.

[167] India's request for interim review, para. 21.

[168] Japan's comments on India's request for interim review, para. 33.

[169] Japan's first written submission, para. 38; India's first written submission, para. 131.

[170] Japan's first written submission, para. 39; India's response to Panel question No. 75(a), para. 58.

[171] Japan's request for interim review, paras. 41-45.

[172] India's response to Panel question No. 91; Japan's comments on India's response to Panel question No. 91, para. 8.

[173] Notification No. 02/2022, (Exhibit JPN-77).

6.2.3 Japan's additional claim under Article II:1(a) of the GATT 1994

6.35. Japan requests that certain language be added to the summary of its arguments in paragraph **7.422** of the Interim Report, regarding "why Japan believes the measures at issue lack predictability and foreseeability", in order "to make the summary of Japan's arguments more comprehensive".[174] India does not comment on Japan's request. We note that almost identical language to that which Japan wishes to have included in the summary of its arguments already appears in paragraph 7.427 of the Interim Report. In the interest of brevity, we do not consider it necessary to duplicate this aspect of Japan's arguments in the Report and therefore decline this request.

6.36. Japan requests the removal of aspects of the Panel's findings and observations in paragraph **7.441**, and footnote **1024** thereto, of the Interim Report in order "to accurately reflect Japan's claim which focuses on the specific instances where the products concerned are exempted from applicable duties".[175] India "disagrees with the deletion suggested by Japan", which in India's view seek to replace the Panel's findings and conclusions with Japan's own conclusions.[176] We consider it appropriate to make the observations which Japan requests us to remove. We therefore decline this request.

7 FINDINGS

7.1 Introduction

7.1. Japan claims that India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994 by imposing tariff treatment on certain information communications technology (ICT) products that is inconsistent with the commitments inscribed in India's WTO Schedule.[177] Japan specifically challenges the tariff treatment accorded by India to products that, at the time of the Panel's establishment, fell under the following tariff items[178] of the First Schedule in India's domestic customs regime: 8517.12.11; 8517.12.19; 8517.12.90; 8517.61.00; 8517.62.90; and 8517.70.10; and 8517.70.90. Japan considers that such tariff treatment is provided through India's domestic customs regime, comprising in particular India's First Schedule and various customs notifications. Essentially, Japan submits that the tariff treatment provided by India is inconsistent with India's WTO Schedule because: (i) duties applied by India to certain such products are in excess of the duty-free rates that India is obliged to provide under its WTO Schedule of Concessions; and (ii) duty-free treatment that is accorded to certain products is subject to conditions that are not set forth in India's WTO Schedule of Concessions. In addition, Japan argues that the measures at issue in this dispute give rise "to a lack of foreseeability for traders operating in the marketplace, which has serious effects on competition", in a manner that is inconsistent with Article II:1(a) of the GATT 1994.[179]

7.2. India argues that when India's WTO Schedule was transposed from the HS2002 to the HS2007, "an error by India and a likely oversight by other [WTO] Members" occurred, such that India's "schedule of concessions was certified in error".[180] India argues that it had "communicated to the wider WTO membership previously that it did not intend to expand its tariff commitments beyond those contained in the ITA" and that "it would not have agreed to the certification of its schedule of concessions if it were aware that such certification would effectively expand India's commitments beyond those contained in the ITA[]".[181] India submits that, pursuant to Article 48 of the Vienna Convention, the tariff commitments for these tariff items in its WTO Schedule were certified in error, and consequently are both invalid and unbound.[182] India refers to the Legal Opinion of Professor

[174] Japan's request for interim review, para. 64.
[175] Japan's request for interim review, para. 70. Japan "suggests that the panel's findings therefore focus on the specific circumstances of the dispute rather than referring to India's system of customs notifications in general". (Ibid.).
[176] India's comments on Japan's request for interim review, para. 7.
[177] Japan's first written submission, para. 3; second written submission, para. 1.
[178] As noted above, we use the term "tariff item" to refer to subheadings and tariff lines set forth in India's WTO Schedule and First Schedule. Where useful for the purposes of clarity, we use the terms "subheading" and "tariff line" as per the HS nomenclature. (See fn 72 to para. 2.1 above).
[179] Japan's second written submission, para. 19.
[180] India's second written submission, para. 1.
[181] India's second written submission, paras. 3 and 25. See also India's first written submission, para. 40.
[182] India's first written submission, paras. 73-74.

Waibel who asserts that the WTO Secretariat "bears at least some of the responsibility for the errors".[183] India also asserts that the complainant violated paragraph 3 of the GATT Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (1980 Decision) by objecting to India's request to rectify its Schedule, through that Decision.[184] India also argues that, "[a]ssuming without admitting that India's 2007 Schedule is not in error, … the applied rates of ordinary customs duty on products of Japan are not in excess" of the rates set forth in India's WTO Schedule, because imported "products at issue from Japan into India [are] subject to NIL duty pursuant to the Comprehensive Economic Partnership Agreement" between Japan and India.[185] Additionally, with respect to certain specific aspects of Japan's claims, India claims that Japan has failed to adequately identify the products at issue.[186] India also argues that a number of the conditions challenged by Japan are not of a kind that are required to be inscribed in a WTO Schedule.[187]

7.3. We proceed with our analysis in several steps. We first describe the legal standard under Articles II:1(a) and (b) of the GATT 1994. Having set forth the legal standard, we address three general issues concerning India's WTO tariff commitments and the application of Articles II:1(a) and (b) in the circumstances of this dispute, namely: (i) the relevance of the ITA; (ii) India's plea of error under Article 48 of the Vienna Convention; and (iii) India's arguments concerning its rectification request under the 1980 Decision. Having addressed these general issues, we then turn to assess whether India is acting inconsistently with Articles II:1(a) and (b) with respect to the tariff items at issue. We shall then address a third claim raised by Japan under Article II:1(a). Finally, we shall turn to India's arguments that Notification No. 69/2011, implementing India's commitments under the India-Japan Comprehensive Economic Partnership Agreement (CEPA), brings India into consistency with its WTO obligations.

7.2 The legal standard under Articles II:1(a) and (b) of the GATT 1994

7.4. Articles II:1(a) and (b) provide that:

> (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in the Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.5. Previous panels have found that "Article II generally … protects expectations of a competitive relationship (or conditions of competition) and not expectations of any particular trade volume."[188] Moreover, the Appellate Body has stated that Article II:1 "serves the important function of preventing Members from applying duties that exceed the bound rates agreed to in tariff negotiations and incorporated into their Schedules of Concessions".[189]

7.6. We agree with prior interpretations of Articles II:1(a) and (b) such that, while paragraph (a) of Article II:1 "contains a general prohibition against according treatment less favourable to imports

[183] India's response to Panel question No. 60(b), para. 15 (quoting Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-76), para. 39).
[184] India's second written submission, para. 116.
[185] India's second written submission, para. 12.
[186] See e.g. India's response to Panel question No. 75, para. 60, and No. 83, para. 72.
[187] See e.g. India's response to Panel question No. 69, paras. 47-49.
[188] Panel Report, *Russia – Tariff Treatment*, para. 7.18 (referring to Panel Reports, *EC – IT Products*, para. 7.757).
[189] Appellate Body Report, *Colombia – Textiles*, para. 5.34 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45).

than that provided for in a Member's Schedule"[190], paragraph (b) "prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule."[191] Similarly, where a measure is inconsistent with Article II:1(b), first sentence, on the ground that the tariff treatment is subject to "terms, conditions or qualifications" that are not set forth in the relevant WTO Schedule, such tariff treatment would necessarily constitute treatment less favourable than that set forth in the Schedule. In short, where a measure is inconsistent with Article II:1(b), first sentence, it is also inconsistent with Article II:1(a).[192] Thus, in a situation where a measure is challenged under both Article II:1(a) and Article II:1(b), first sentence, it is logical to begin the analysis by assessing the measure's consistency with Article II:1(b) since the language of Article II:1(b), first sentence, "is more specific and germane".[193]

7.7. Applying Article II:1(b), first sentence, in the context of this dispute entails comparing the treatment that India is obligated to provide in its WTO Schedule with the tariff treatment that India accords to the products at issue under the challenged measures.[194] If we determine that India imposes ordinary customs duties[195] on products in excess of the bound rate set forth in India's WTO Schedule, or alternatively grants the required tariff treatment to those products but subject to terms, conditions or qualifications that are not set forth in the Schedule, then we would conclude that India is acting inconsistently with Articles II:1(a) and (b).[196]

7.8. We further note that, in response to a question from the Panel, both parties agree that the reference in Article II:1(b), first sentence, to "terms, conditions or qualifications" does not extend to general conditions for importation.[197] Indeed, in our view, to the extent that a Member imposes a general condition on importation (i.e. a condition that must be satisfied in order for the product to enter the market), this would not necessarily mean that such condition constitutes a term, condition, or qualification that must be met in order to receive certain tariff treatment. Such a general condition, where it is not tied to tariff treatment, does not appear to be a term, condition, or qualification, that must be inscribed in a Member's Schedule, pursuant to Article II:1(b), first sentence. Where, however, a condition *is* tied to certain tariff treatment, such that a relevant product must satisfy the condition in order to be eligible for the tariff treatment provided for in a Member's Schedule, Article II:1(b), first sentence, requires such condition to be inscribed in the Member's Schedule.

7.9. Pursuant to Article II:7 of the GATT 1994, Members' WTO Schedules of concessions are an integral part of the GATT 1994. They are also, therefore, integral parts of the WTO Agreement, binding on all Members, pursuant to Article II:2 of the WTO Agreement. Moreover, they form part of the covered agreements listed in Appendix 1 of the DSU. Pursuant to Article 1.2 of the DSU, the rules and procedures of the DSU apply to such covered agreements. Consequently, Article 3.2 of the

[190] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.
[191] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.
[192] Panel Reports, *EC – Chicken Cuts*, para. 7.64; *EC – IT Products*, para. 7. 747.
[193] See e.g. Panel Report, *Russia – Tariff Treatment*, para. 7.48 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45).
[194] In assessing claims under Articles II:1(a) and II:1(b), previous panels have examined whether the complainant had established the following three elements: (a) the treatment accorded to the products at issue in the relevant schedule; (b) the treatment accorded to the products at issue under the challenged measures at issue; and (c) whether the challenged measures result in less favourable treatment of the products at issue than that provided for in the relevant schedule and, more specifically, whether the challenged measures result in the imposition of duties and charges on the products at issue in excess of those provided for in the relevant schedule. (Panel Reports, *EC – Chicken Cuts*, para. 7.65; *EC – IT Products*, para. 7.100).
[195] The parties do not dispute that where the tariff treatment at issue in this dispute concerns "duties" applied by India, such duties constitute "ordinary customs duties" within the meaning of Article II:1(b). We note that a previous panel found that the expression "ordinary customs duties" refers to "duties collected at the border which constitute 'customs duties' in the strict sense of the term (*stricto sensu*)" and "this expression does not cover possible extraordinary or exceptional duties collected in customs". (Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85). In our view, the duties at issue in this dispute are indeed ordinary customs duties within the meaning of Article II:1(b), first sentence.
[196] We also note that it is not necessary to find that *all* products falling under a specific tariff item are treated inconsistently with the WTO Schedule, to conclude that India is acting inconsistently with Article II:1(b), first sentence. As the panel in *EC – IT Products* found, "if we were to determine that some products fall within the scope of duty-free concessions in the EC Schedule, then if the challenged measures provide for the application of duties to those products covered by the concession, this would be sufficient to find a breach of Article II." (Panel Reports, *EC – IT Products*, para. 7.116).
[197] See parties' responses to Panel question No. 69.

DSU, which states that the provisions of the covered agreements are to be clarified "in accordance with customary rules of interpretation of public international law", applies to the interpretation of Members' WTO Schedules and the concessions set out therein.[198] When interpreting Members' Schedules in accordance with customary rules of treaty interpretation, the Harmonized System (HS) and its Explanatory Notes have been found to constitute relevant "context" pursuant to Article 31(1) of the Vienna Convention.[199] However, the relevance of the HS depends on the specific interpretative question at issue, including whether the relevant concessions were based on the HS.[200]

7.10. To our understanding, the foregoing interpretative elements of the legal standard under Article II:1(a) and Article II:1(b), first sentence, are uncontested by the parties. We turn next to address certain contested issues pertaining to the scope and content of India's WTO tariff commitments.

7.3 General issues concerning India's WTO tariff commitments

7.3.1 Overview

7.11. As explained above, under Articles II:1(a) and (b) of the GATT 1994, WTO Members are obligated to provide tariff treatment that is in accordance with the commitments set forth in "the appropriate Schedule annexed to [the GATT 1994]". Thus, to assess whether a Member is acting inconsistently with Articles II:1(a) and (b), a panel must compare a Member's obligations as set forth in the relevant WTO Schedule to the tariff treatment applied by that Member under the measures at issue.[201]

7.12. In the present dispute, it is uncontested that the "appropriate Schedule" for the purpose of assessing India's compliance with Articles II:1(a) and (b) is India's WTO Schedule. However, the parties disagree over the content of India's WTO tariff commitments.

7.13. Throughout the course of these proceedings India has argued that: (i) the relevant binding tariff commitments are set forth in the Information Technology Agreement (ITA) and those commitments are static and did not change due to their incorporation into India's WTO Schedule[202]; (ii) pursuant to Article 48 of the Vienna Convention, aspects of India's WTO Schedule are invalid (and the relevant tariff commitments unbound) as a consequence of an error on the part of India during the transposition of the Schedule from the HS2002 to the HS2007[203]; and (iii) the errors in India's WTO Schedule are of a formal nature and were therefore capable of rectification pursuant to the 1980 Decision.[204]

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[198] Along these lines, the Appellate Body found in *EC – Computer Equipment* that Members' Schedules of concessions must be interpreted in accordance with the general rules of treaty interpretation set out in the Vienna Convention. The Appellate Body stated that:

> The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of one of the parties to a treaty. Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention.

(Appellate Body Report, *EC – Computer Equipment*, para. 84. See also Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 167; and Panel Reports, *EC – Chicken Cuts*, para. 7.87)

[199] See Appellate Body Reports, *EC – Computer Equipment*, para. 89; *EC – Chicken Cuts*, paras. 195-197; and *China – Auto Parts*, paras. 146 and 149.

[200] See e.g. Panel Reports, *EC – IT Products*, para. 7.443.

[201] We understand that tariff items for which a Member has not made a tariff binding need not be included in the WTO Schedule. (See e.g. Japan's response to Panel question No. 67, para. 28).

[202] See e.g. India's opening statement at the second meeting of the Panel, para. 48.

[203] See e.g. India's first written submission, paras. 38-74.

[204] See e.g. India's response to Panel question No. 49, para. 43. In India's view, Japan's objection to India's request to rectify its Schedule under the 1980 Decision was unfounded in law, inconsistent with the 1980 Decision, and impeded India's right to rectify its Schedule, and India requests the Panel to find accordingly.

7.14. Japan, for its part, considers that: (i) India's WTO tariff commitments are set forth in India's WTO Schedule and the ITA did not render the commitments in that Schedule static[205]; (ii) Article 48 of the Vienna Convention is not applicable in this dispute, and, in any event, there was no error in the transposition of India's Schedule to the HS2007 and, even if there was such an error, India either contributed to or was put on notice of the possibility of that error, such that the requirements of Article 48 are not satisfied in this dispute[206]; and (iii) there is no basis for the Panel to make the findings requested by India regarding Japan's objection to India's rectification request under the 1980 Decision.[207]

7.15. We proceed by addressing, in turn, the parties' arguments concerning: (i) the ITA; (ii) Article 48 of the Vienna Convention; and (iii) India's rectification request under the 1980 Decision.

7.3.2 The relevance of the ITA

7.3.2.1 Introduction

7.16. As described in section 2.3 above, on 13 December 1996 a number of WTO Members concluded the ITA. India joined the ITA on 26 March 1997. The ITA participants agreed among themselves to bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the GATT 1994, with respect to certain products.[208] The Annex to the ITA requires that participants "shall incorporate" such measures into their Schedules annexed to the GATT 1994, and indicates that their Schedules should be modified in accordance with the 1980 Decision.[209] India, as a participant in the ITA, proposed a modification to its WTO Schedule, which was circulated on 2 April 1997 for review by all WTO Members, pursuant to the 1980 Decision. These changes to India's Schedule, which were based on the HS1996, were certified on 2 October 1997.[210]

7.17. In section III (titled "Factual Background") of its first written submission in this dispute, Japan, *inter alia*, describes certain aspects of India's participation in the ITA. Japan notes the ITA's conclusion in December 1996, India's participation in the ITA, and the requirement under paragraph 2 of the ITA for all participants to bind and eliminate customs duties and other duties and charges within the meaning of Article II:1(b) of the GATT 1994 on all products identified in Attachments A and B.[211] Japan further notes that, pursuant to paragraph 2 of the ITA Annex, India submitted a proposed modification of its WTO Schedule, and that modification was certified on 2 October 1997.[212] Japan also refers to two subsequent transpositions of India's WTO Schedule, including the transposition of India's WTO Schedule to the HS2007.[213] Thereafter, in setting forth its legal argument underpinning its claims that India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994, Japan does not refer to the ITA, but compares India's commitments in its present WTO Schedule to the tariff treatment provided by India to certain imported products pursuant to India's First Schedule and relevant customs notifications.[214]

7.18. In its first written submission, India states that Japan suggested that India's concessions were based on the ITA, "although without actually establishing that the products at issue were covered under the ITA[]".[215] India elaborated that it would subsequently seek to establish that the products at issue were not covered under the ITA, and therefore the 2007 Schedule was certified in error and

[205] See e.g. Japan's opening statement at the first meeting of the Panel, paras. 18-24; second written submission, paras. 209-263; and opening statement at the second meeting of the Panel, para. 24.
[206] See e.g. Japan's opening statement at the first meeting of the Panel, paras. 25-42; and second written submission, paras. 31-144.
[207] See e.g. Japan's second written submission, paras. 169-179.
[208] The relevant products are identified in the ITA as "(a) all products classified (or classifiable) with [HS1996] headings listed in Attachment A to the Annex [to the ITA]; and (b) all products specified in Attachment B to the Annex [to the ITA], whether or not they are included in Attachment A". (ITA, WT/MIN(96)/16, para. 2).
[209] Paragraphs 1 and 2 of the Annex to the ITA. See also 1980 Decision, L/4962.
[210] WT/Let/181.
[211] Japan's first written submission, paras. 14-16.
[212] Japan's first written submission, para. 16.
[213] Japan's first written submission, para. 17.
[214] Japan's first written submission, section IV.
[215] India's first written submission, para. 75.

the objections against India's rectification request under the 1980 Decision were without merit.[216] India further states that "the burden of proof is on Japan to prima facie demonstrate that the products at issue were covered by the ITA[]" and "Japan does not even offer a hint of which entries in the ITA[] allegedly covered the products at issue".[217] India devotes approximately 29 pages[218] of its first written submission to demonstrating that the products at issue are not covered by the ITA.[219] A significant component of India's argument is its view that "the intention of the parties [to the ITA] … was not to include the vast range of information technology products which would be developed in the future".[220]

7.19. In response to questions from the Panel, Japan clarified that its claim is under Articles II:1(a) and (b) of the GATT 1994, and that "[i]n the present case, the concessions at issue are those included in the currently certified schedule of India", and that while the ITA " may be relevant context for the purposes of interpreting concessions included in a schedule of concessions … this may not be the case with regard to the Schedule at issue in the present case which is not based on the same version of the HS nomenclature than the one on which the ITA[] was based."[221] According to Japan, "India itself has not explained what impact the interpretation of the provisions of the ITA[] would have upon the scope of its concessions under India's Schedule at issue, nor has it explained how this could refute Japan's claims of inconsistencies with Article II of the GATT 1994."[222]

7.20. In response to questions from the Panel, India further clarified its views regarding the relevance of the ITA in the context of this dispute. India explained that, in its view, its "obligations under the ITA[] are static, i.e., are limited to the product scope as defined in the ITA[]", and "[t]he transposition of India's schedule from HS1996 to HS2002 or HS2007 does not affect or change India's obligations under the ITA[]".[223] India elaborated that "the ITA[] did not include the range of additional products that could be developed in the future".[224] India further considered this relevant to the present dispute, because "Japan develops arguments in relation to sub-headings 8517.12, 8517.61, 8517.62, and 8517.70, which presently relate to products that were not covered by the ITA[] as they were beyond the scope of commitments made under the ITA[]".[225] India argued that its "obligations under the ITA[] are distinguishable and 'separate from' the commitments under the contested sub-headings in the 2007 Schedule", and "India has made no commitments regarding the contested products since such contested products are not covered under the ITA[]".[226]

7.21. Throughout the course of these dispute settlement proceedings, the parties continued to exchange views on the relevance of the ITA to this dispute. In India's view, Japan itself asserts that the "source of India's commitments for the products at issue is the ITA[]" and Japan's claims must fail because "the products at issue are not covered by the ITA[]".[227] India considers that "a resolution of this issue lies in interpreting the scope of ITA[] which is relevant to the present dispute in various ways".[228] In response to a question from the Panel regarding the legal relevance of the ITA, India responded that: (i) "[t]he ITA[] is an instrument that is critical to this dispute and applies in different ways for Japan and India. Indeed, it is instrumental for analysing India's claim under Article 48 of the VCLT"; and (ii) "the ITA also serves as an important comparative benchmark for determining if

[216] India's first written submission, para. 93.
[217] India's first written submission, para. 109.
[218] See India's first written submission, paras. 75-194.
[219] India's first written submission, para. 109.
[220] India's first written submission, para. 85. In addition to referring to the ordinary meaning of the text of the ITA, India considers that subsequent practice indicates that the scope of the ITA does not extend to new products. (Ibid. paras. 86-106). India highlights, in particular, that the participants in the ITA "have agreed that the product scope of the ITA[] does not adequately cover the rapid growth of information technology products, and therefore an expansion of the ITA[] was required in order to liberalize the IT product sector". (Ibid. para. 92 (underlining original)).
[221] Japan's response to Panel question No. 3, para. 11.
[222] Japan's response to Panel question No. 3, para. 11.
[223] India's response to Panel question No. 1, para. 1.
[224] India's response to Panel question No. 1, para. 5.
[225] India's response to Panel question No. 1, para. 7.
[226] India's response to Panel question No. 1, para. 8.
[227] India's opening statement at the first meeting of the Panel, para. 32. See also India's first written submission, para. 109; and response to Panel question No. 4, para. 18.
[228] India's opening statement at the first meeting of the Panel, para. 32.

the draft rectification request to the 2007 Schedule submitted by India in 2018 was of a purely formal character".[229]

7.22. Japan for its part, continues to insist that "by referring to the ITA[] as being the source of static obligations with respect to information and communications technology products, which would not cover the Products Concerned, India keeps on equating the ITA[] and the tariff concessions as included in its Schedule".[230] Japan insists that "the source of India's obligations is the GATT 1994 and its Schedule" and the ITA "is not the source of India's obligations at issue in this dispute".[231] Japan considers that the ITA is not a covered agreement and "the Panel has no jurisdiction to clarify the rights and obligations of WTO Members under the ITA[]".[232] Japan further considers that, in this dispute, neither the ITA nor the ITA Expansion can serve as relevant context for interpretation of India's WTO Schedule, pursuant to Article 31(2)(b) of the Vienna Convention, nor are they supplementary means of interpretation pursuant to Article 32 of the Vienna Convention.[233] Japan also considers that India has not explained what effect the ITA and the ITA Expansion should have on the Panel's interpretation of India's WTO Schedule.[234] In Japan's view, they "have no legal relevance to the interpretation of India's Schedule".[235]

7.23. The parties' (and in particular India's) references to the ITA raise several threshold issues concerning certain of India's WTO tariff commitments. Specifically, the parties appear to contest whether certain of India's WTO tariff commitments in this dispute are set forth in the ITA, as well as whether the ITA limits the scope of the tariff commitments set forth in India's WTO Schedule (including with respect to new products that only came into existence after the signing of the ITA).

7.24. We therefore proceed to address, in this section: (i) whether the ITA sets forth India's tariff commitments for purposes of applying Articles II:1(a) and (b) of the GATT 1994; and (ii) whether the ITA otherwise limits the scope of the tariff commitments contained in India's WTO Schedule.

7.3.2.2 Whether the ITA sets forth India's legal obligations

7.3.2.2.1 Main arguments of the parties

7.25. India argues that the legal issue that lies at "the heart of this dispute" is whether the products identified by Japan are covered under the ITA.[236] India states that "it is clear that the parties to the dispute agree that the source of the purported commitments could only be the ITA[]."[237] India states that it "consider[s] itself bound by the obligations under the ITA[]" but argues that those obligations are "separate from the commitments under the contested sub-headings that were certified in error via the HS2007 transposition".[238]

7.26. Japan argues that "India errs by referring to the ITA[] and its obligations as those which should be interpreted for the purposes of this dispute", because "[t]he relevant obligations are those laid down in Articles II:1(a) and II:1(b) of the GATT 1994 and India's Schedule which is incorporated into the GATT 1994 through Article II:7 of the GATT 1994".[239] Japan considers that "the ITA[] and its attachments are legally distinct from the concessions made by India in its Schedule, and it is only India's Schedule that must be examined in order to determine whether India violates its obligations under Articles II:1(a) and II:1(b) of the GATT 1994".[240] Japan further considers that the ITA is not

[229] India's response to Panel question No. 42, paras. 24 and 26. See also India's second written submission, para. 44.
[230] Japan's opening statement at the second meeting of the Panel, para. 24.
[231] Japan's opening statement at the second meeting of the Panel, para. 24.
[232] Japan's opening statement at the second meeting of the Panel, para. 24. See also Japan's second written submission, paras. 190-196; response to Panel question No. 2, paras. 2-7; and comment on India's response to Panel question No. 61, para. 37.
[233] Japan's second written submission, paras. 199 and 203.
[234] Japan's second written submission, para. 207.
[235] Japan's second written submission, para. 197.
[236] India's first written submission, para. 8.
[237] India's opening statement at the first meeting of the Panel, para. 33.
[238] India's first written submission, para. 75.
[239] Japan's second written submission, para. 190.
[240] Japan's opening statement at the second meeting of the Panel, para. 24.

a covered agreement within the meaning of the DSU and the Panel has no jurisdiction to interpret the ITA.[241]

7.3.2.2.2 Main arguments of the third parties

7.27. Brazil considers that the ITA "is not a covered agreement within the meaning of Article 1.1 of the DSU, and, therefore, the Panel has no authority to interpret the ITA[]".[242] In Brazil's view, "the main issue of the present dispute concerns the correct interpretation of India's Schedule, not the interpretation of the ITA[]."[243]

7.28. Canada argues that the ITA "is not a 'covered agreement' within the meaning of Article 1.1 of the DSU as it is not an agreement listed in Appendix 1 to the DSU".[244] Canada considers that "it is not necessary in the case at hand to interpret the ITA[] itself", and rather "the Panel's task is to interpret India's tariff commitments set forth in its Schedule of Concessions annexed to the GATT 1994".[245] Canada considers that the ITA "may be considered as relevant context within the meaning of Article 31 of the Vienna Convention for the purposes of interpreting the terms of the concessions at issue, but the ITA[] is not itself the subject of the Panel's analysis in this case."[246]

7.29. The European Union submits that, because the ITA is not identified in the list of covered agreements set forth in Appendix 1 to the DSU, pursuant to Article 1.1 of the DSU the ITA is not a "covered agreement" within the meaning of the DSU.[247] According to the European Union, this Panel is only empowered to apply, "and therefore to interpret", the covered agreements.[248] The European Union clarifies, however, that "[t]his does not exclude that in the interpretation and application of these covered agreements, the Panel may use the ITA[] as context within the meaning of Article 31(2)(b) VCLT".[249] The European Union further submits that the legal obligations at issue are "Article II:1 of the GATT 1994, and India's Schedules and the tariff bindings provided for in those schedules".[250] The European Union submits that the ITA "is *not* the source of India's legal obligations relevant in the present cases".[251]

7.30. Korea "is of the view that the agreement at issue in this dispute is not the ITA[], but the GATT 1994."[252] Korea considers that the ITA "may be used as 'context' to interpret India's tariff concessions at issue in this dispute".[253]

7.31. Norway submits that the ITA is not a "covered agreement" within the meaning of Article 1.1 of the DSU, but could serve as relevant context within the meaning of Article 31(2)(b) of the Vienna Convention. For Norway, the Panel's main task in this dispute is to interpret India's commitments contained in its WTO Schedule.[254]

7.32. Chinese Taipei argues that the ITA is not a covered agreement within the meaning of Article 1.1 of the DSU and consequently there is no basis for the Panel to interpret the ITA in accordance with the rules of the Vienna Convention.[255] Chinese Taipei considers that "the Panel must

[241] Japan's opening statement at the first meeting of the Panel, para. 24; second written submission, paras. 191-195.
[242] Brazil's third-party response to Panel question No. 1, para. 2.
[243] Brazil's third-party response to Panel question No. 1, para. 2.
[244] Canada's third-party response to Panel question No. 1, para. 1.
[245] Canada's third-party response to Panel question No. 1, para. 2.
[246] Canada's third-party response to Panel question No. 1, para. 2.
[247] European Union's third-party response to Panel question No. 1, para. 1.
[248] European Union's third-party response to Panel question No. 1, para. 2.
[249] European Union's third-party response to Panel question No. 1, para. 2.
[250] European Union's third-party response to Panel question No. 2, para. 10. See also European Union's third-party response to Panel question No. 15, paras. 1-2.
[251] European Union's third-party response to Panel question No. 2, para. 10. (emphasis original)
[252] Korea's third-party response to Panel question No. 3, p. 1.
[253] Korea's third-party response to Panel question No. 3, p. 1.
[254] Norway's third-party statement, para. 2.
[255] Chinese Taipei's third-party response to Panel question No. 1, para. 2, incorporating Chinese Taipei's response to panel question No. 2 in *India – Tariffs on ICT Products (Chinese Taipei)* (DS588). (In its responses of 20 September 2021 to questions from the Panel to the third parties before the first substantive meeting, Chinese Taipei responded to Panel question Nos. 1 to 12 by stating "Please see our response to this question posed to the parties in DS588". In a communication to the parties in this dispute, the Panel confirmed its understanding that Chinese Taipei's responses to the Panel's questions as a party in DS588 are on the record

interpret the relevant tariff concessions in India's Schedule in accordance with the rules of the Vienna Convention", and that "India's tariff concessions made pursuant to the ITA[] are properly inscribed in its currently certified Schedule of Concessions reflecting the 2007 HS nomenclature".[256] According to Chinese Taipei, the ITA "formed the basis for India to enter into the commitments to provide duty-free treatment to products falling under the tariff concessions at issue, and, as such, constitutes an important part of the factual background in this dispute".[257] Chinese Taipei further states, however, that the "relevant treaty for the interpretation of the tariff concessions at issue in this dispute is India's currently certified Schedule of Concessions reflecting the 2007 HS nomenclature".[258]

7.33. Türkiye submits that the claims raised in this dispute "have to be analysed with a view to ensuring that the rights of the Members of the ITA are not adversely affected as a result of any improper interpretation of the scope of this Agreement" and the Panel "should decide if products with newly developed technologies fall under [the] ITA without any further negotiations." For Türkiye, this case raises "important questions with respect to the interpretation of the tariff concessions made by WTO Members pursuant to the ITA".[259]

7.34. Ukraine notes that "ITA concessions are included in the participants' WTO schedules of concessions and become part of that Member's obligations under the WTO covered agreements".[260] Ukraine argues that "taking into account the connection between ITA[] and the GATT 1994, in Ukraine's view, the ITA[] is a 'covered agreement' within the meaning of Article 1.1 of the DSU."[261]

7.35. The United States considers that the ITA is not a covered agreement under the DSU and, pursuant to its terms of reference, the Panel "is not tasked with interpreting the ITA[] in this dispute".[262] According to the United States, "the Panel is tasked with interpreting the relevant provisions of the GATT 1994, including the tariff concessions in India's Schedule, rather than the ITA[]".[263] The United States therefore considers that "India is mistaken that its commitments are 'under the ITA[]'".[264]

7.3.2.2.3 Panel's assessment

7.36. In our view, the parties' arguments raise the question of whether certain of India's legal obligations, at issue in this dispute, are set forth in the ITA.

7.37. We recall that Japan's claim in this dispute is that India is acting inconsistently with its obligations under Articles II:1(a) and (b) of the GATT 1994.[265] Japan has not, in its panel request or in any of its submissions, articulated any claim based on a provision of the ITA. We recognize that Japan described the ITA, in its first written submission, as relevant *factual* background to explain the history of India's tariff commitments at issue in this dispute. However, we do not read Japan's references to the ITA as articulating any claim of inconsistency or requesting us to find that India is acting inconsistently with the ITA. Thus, in our view, Japan has not asserted that India is acting inconsistently with the ITA nor does Japan request us to make any such finding.[266]

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in this dispute, DS584. The parties did not object or otherwise comment. (See Japan's communication (7 July 2022); and India's communication (7 July 2022)).

[256] Chinese Taipei's third-party response to Panel question No. 1, para. 1, and No. 2, para. 2 incorporating Chinese Taipei's response to panel question No. 2, para. 4, and No. 3, para. 7, in *India – Tariffs on ICT Products (Chinese Taipei)* (DS588).

[257] Chinese Taipei's third-party response to Panel question No. 2, para. 2, incorporating Chinese Taipei's response to panel question No. 3, para. 11, in *India – Tariffs on ICT Products (Chinese Taipei)* (DS588).

[258] Chinese Taipei's third-party response to Panel question No. 2, para. 2, incorporating Chinese Taipei's response to panel question No. 3, para. 11, in *India – Tariffs on ICT Products (Chinese Taipei)* (DS588).

[259] Türkiye's third-party submission, paras. 2, 4 and 9.

[260] Ukraine's third-party response to Panel question No. 1, para. 8.

[261] Ukraine's third-party response to Panel question No. 1, para. 9.

[262] United States' third-party response to Panel question No. 1, paras. 2-3.

[263] United States' third-party response to Panel question No. 1, para. 3.

[264] United States' third-party response to Panel question No. 5, para. 9.

[265] Japan's first written submission, paras. 3-142. See also Japan's second written submission, para. 279; and panel request, p. 5.

[266] Indeed, to the extent that such a claim was brought, we struggle to see how it would fall within our terms of reference, read in light of Japan's panel request in this dispute.

7.38. As described above[267], the legal standard under Articles II:1(a) and (b) entails comparing the treatment that India is obligated to provide in its WTO Schedule with the tariff treatment that India accords to the products at issue. This provision does not refer to the ITA, nor does any other provision in the GATT 1994. We therefore see no textual link in the GATT 1994 indicating that Members' legal obligations, for the purposes of applying Articles II:1(a) and (b), could be contained in the ITA.

7.39. As to the ITA itself, we note that paragraph 2 of the ITA indicates that:

> Pursuant to the modalities set forth in the Annex to this Declaration, each party shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following: (a) all products classified (or classifiable) with Harmonized System (1996) ("HS") headings listed in Attachment A to the Annex to this Declaration; and (b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A; through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances.

7.40. With respect to the "modalities set forth in the Annex", paragraph 1 of the Annex to the ITA indicates that:

> Each participant shall incorporate the measures described in paragraph 2 of the Declaration into its schedule to the General Agreement on Tariffs and Trade 1994, and, in addition, at either its own tariff line level or the Harmonized System (1996) ("HS") 6-digit level in either its official tariff or any other published versions of the tariff schedule, whichever is ordinarily used by importers and exporters. Each participant that is not a Member of the WTO shall implement these measures on an autonomous basis, pending completion of its WTO accession, and shall incorporate these measures into its WTO market access schedule for goods.

7.41. Thus, the ITA specifically requires WTO Members who are participants in the ITA to incorporate their ITA undertakings into their WTO Schedules annexed to the GATT 1994. It appears to us, therefore, that any undertakings made under the ITA only become binding WTO obligations under Articles II:1(a) and (b) of the GATT 1994 if they are incorporated into Members' WTO Schedules. Once incorporated into a Member's WTO Schedule, such concessions shall be treated no differently to any other concession contained in that Schedule. Consequently, it is the WTO Schedule of each ITA participant that sets forth those legal obligations within the broader WTO legal structure – not the ITA.

7.42. In this respect, we observe that the ITA does not constitute a covered agreement within the meaning of the WTO Agreement and the DSU. The DSU indicates that its rules and procedures apply to disputes brought pursuant to the dispute settlement provisions of the agreements listed in Appendix 1 of the DSU and concerning Members' rights and obligations under provisions of the WTO Agreement.[268] The ITA is not listed in Appendix 1 of the DSU, nor is the ITA listed in Annexes 1 to 4 of the WTO Agreement. Thus, in contrast to India's WTO Schedule[269], the ITA is not a "covered agreement" within the meaning of the WTO Agreement and the DSU.[270]

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[267] See section 7.2 above.

[268] Article 1.1 of the DSU indicates that the rules and procedures of the DSU shall apply to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1" of the DSU, as well as "consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization … and of this Understanding taken in isolation or in combination with any other covered agreement."

[269] See para. 7.9 above.

[270] We note India's argument that "at the very least, the contents of Attachment A and Attachment B of the ITA[] were incorporated in WT/LET/181 dated July 2, 1997 which is a covered agreement within the meaning of Article 1 of the [DSU]". (India's response to Panel question No. 2, para. 13) We understand that document WT/Let/181 contained certain changes to India's WTO Schedule that were certified on 2 October 1997. For the reasons already explained above, we understand that India's WTO Schedule is indeed a covered agreement. That does not make the ITA a covered agreement. We also note India's argument that if the ITA is

7.43. We recognize that, in India's view, the ITA is the relevant instrument imposing India's legal obligations in this dispute. We also recognize that the signing of the ITA forms part of the factual and historical background to this dispute. That the ITA may have *induced* India, as a factual matter, to undertake certain WTO tariff commitments does not mean that, as a legal matter, the ITA sets forth India's WTO legal obligations at issue in this dispute. Furthermore, having reviewed India's submissions, we see no argument that explains how the ITA can be read into Articles II:1(a) and (b) as the "source" of a Member's legal obligations under those provisions. To the extent that India's arguments related to the ITA focus on its relevance for purposes of interpreting the obligations set forth in India's WTO Schedule, we address those arguments below.[271] We note India's view that Japan refers to the ITA as the relevant source of law in this dispute.[272] As explained above, however, we disagree with that understanding of Japan's arguments and claims.

7.44. As a final point of note with respect to this issue, we observe India's argument that Japan "argues against using the ITA[] as the base-line comparator on the basis that the 'Panel has no jurisdiction to clarify the rights and obligations of WTO Members under the ITA[], if any, as the ITA[] is not a covered agreement'".[273] India considers that, "by that token, Japan must establish the impossible fact that India's HS2002 Schedules continues to be a covered agreement despite being no longer in currency".[274] India considers that "[t]here is no legal basis for such an argument and Japan does little to substantiate that self-inconsistent assertion".[275]

7.45. India's argument that its HS2002 Schedule is "no longer in currency" implies that, in India's view, a newly transposed Schedule replaces the old Schedule.[276] We have examined the relevant documents surrounding each transposition of India's WTO Schedule and we understand that following a transposition exercise it is not the case that a "new" Schedule replaces an "old" Schedule. Rather, the documents that are agreed upon by Members, adopted as binding, and certified as such by the Director-General, contain certain *changes* to the relevant Schedules.[277] Indeed, the process through which these changes are certified is under the 1980 Decision.[278] That Decision does not set forth procedures for *replacing* a Member's Schedule, but rather sets forth procedures for "modification" and "rectification", and the adoption of "changes".[279] Thus, the files that are certified following each transposition process do not set forth *all* of India's tariff concessions, but rather only those tariff items that have changed as a result of the transposition exercise.[280] India is therefore incorrect when it suggests that its HS2002 Schedule was replaced with its HS2007 Schedule. To the contrary, India only has one WTO Schedule concerning trade in goods, which is indeed a covered agreement, and which has been changed several times over the years through various recourses to the 1980 Decision.[281] The fact that India's WTO Schedule is a covered agreement does not imply *ipso facto* that the ITA is a covered agreement. India's WTO Schedule is explicitly recognized as an

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not a covered agreement, then "Japan must establish the impossible fact that India's HS2002 Schedule continues to be a covered agreement despite being no longer in currency." (India's comments on Japan's response to Panel question No. 59, para. 4). We address this argument in paras. 7.44-7.45 below.

[271] See section 7.3.2.3 below.

[272] In response to a question from the Panel asking why India considered that Japan bore the burden of demonstrating that the products at issue were covered by the ITA, India responds that:

> India reiterates that Japan fails to clearly articulate the precise source of India's commitments under the contested sub-headings. For instance, as also noted previously, Japan argues that India has started imposing "customs duties on the Products Concerned which are incompatible with the tariff bindings included in 2007 Schedule which reflects India's concessions under the ITA". In light of that statement by Japan, India maintains that the burden of proof is on Japan to substantiate its claim and to prima facie demonstrate that the products at issue were covered by the ITA[], should it raise any arguments pertaining to the ITA[] in its future submissions.

(India's response to Panel question No. 5, para. 20)

[273] India's comments on Japan's response to Panel question No. 59(b), para. 4.

[274] India's comments on Japan's response to Panel question No. 59(b), para. 4.

[275] India's comments on Japan's response to Panel question No. 59(b), para. 4.

[276] India's comments on Japan's response to Panel question No. 59(b), para. 4.

[277] See WT/Let/181; WT/Let/886; and WT/Let/1072.

[278] See WT/Let/181; WT/Let/886; and WT/Let/1072.

[279] 1980 Decision, paras. 1-3 and 5.

[280] See WT/Let/181; WT/Let/886; and WT/Let/1072.

[281] In this Report, we consider it useful to use the nomenclature of "India's WTO HS1996 Schedule", "India's WTO HS2002 Schedule", and "India's WTO HS2007 Schedule" to refer to India's Schedule as it existed following each transposition to that iteration of the HS nomenclature. References in this Report to India's WTO Schedule, without identifying any version of the HS nomenclature, refer to India's WTO Schedule as most recently transposed (i.e. based on the HS2007). This nomenclature, however, should not be read to imply that India has been bound by three distinct WTO Schedules.

integral part of the covered agreements.[282] The ITA, which is a distinct legal instrument from India's WTO Schedule, is not.

7.46. To conclude, we understand that Japan's claims in this dispute are exclusively under Articles II:1(a) and (b) of the GATT 1994. Having reviewed the ITA, we understand that the undertakings contained therein were only operationalized within the WTO legal system through their incorporation into Members' Schedules. We also note that the ITA is not a covered agreement within the meaning of the WTO Agreement and the DSU.[283] While we recognize that the ITA may have been relevant to India's decision to undertake certain WTO tariff commitments, we consider that those WTO legal obligations are distinct from the ITA. Moreover, it is those WTO tariff commitments, set forth in India's WTO Schedule, that are the source of India's legal obligations for the purposes of applying Articles II:1(a) and (b). In short, we consider that India's legal obligations, for purposes of assessing its compliance with Articles II:1(a) and (b), are the tariff commitments set forth in India's WTO Schedule.[284]

7.3.2.3 Whether the ITA limits or modifies the scope of the tariff commitments set forth in India's WTO Schedule

7.3.2.3.1 Main arguments of the parties

7.47. India considers that the ITA "represents a static source of commitments on ICT products".[285] According to India, those commitments "were negotiated and agreed to in the context of HS 1996, and were then incorporated into the schedules of concessions of member countries – including India."[286] India considers that "[t]hose static commitments did not become elastic by virtue of their incorporation into concession schedules."[287] In India's view, the ITA "was a sui-generis instrument with commitments over a limited scope of products and required *those* commitments to reflect in the relevant tariff sub-headings of the schedule of concessions of parties."[288] India considers that, "[u]nder Article 31(4) of the Vienna Convention, those sub-headings would require to be interpreted in accordance with the special meaning the parties intended them to have – by engaging with HS1996 and its explanatory notes, read in the context of ITA[]."[289] As a general matter, India considers that the ITA constitutes "interpretative context to India's schedule of concessions".[290]

7.48. In support of its arguments regarding the static nature of its commitments on these ICT products, India refers, as an example, to "Transmission Apparatus for Radio-Telephony or Radio-Telegraphy" (which fell under HS1996 heading 8525, and was covered under Attachment A of the ITA). India submits that the product scope of its commitments with respect to such products "was limited by the then HS Explanatory Notes to devices capable of transmitting (1) speech, (2) messages, or (3) still pictures".[291] India notes that this "limitation [was] also reflected in HS2002".[292] India submits that, "[c]learly, that static product definition is a closed and limited one which could not have covered cellular phones capable of transmitting videos, base stations, and LTE equipment."[293]

7.49. Also in support of its arguments regarding the static nature of its commitments under the ITA, India refers to the WTO Schedules of concessions of various participants in the ITA who were later also participants in the Ministerial Declaration on the Expansion of Trade in Information

[282] See para. 7.9 above.
[283] We also recall that the ITA was not invoked in Japan's panel request.
[284] Regarding India's argument that Japan bears the burden of demonstrating that certain products fell within the scope of the ITA, since we do not consider that the ITA constitutes a source of India's legal obligations in this dispute, we also do not consider that, in order to prevail in its claims under Articles II:1(a) and (b), Japan must demonstrate that the products at issue fall within the scope of the ITA. Rather, Japan must demonstrate that the products at issue fall within the scope of relevant tariff commitments set forth in India's WTO Schedule.
[285] India's opening statement at the second meeting of the Panel, para. 48.
[286] India's opening statement at the second meeting of the Panel, para. 48.
[287] India's opening statement at the second meeting of the Panel, para. 48.
[288] India's opening statement at the second meeting of the Panel, para. 56. (emphasis original)
[289] India's opening statement at the second meeting of the Panel, para. 56.
[290] India's second written submission, para. 38.
[291] India's opening statement at the second meeting of the Panel, para. 57. See also India's first written submission; response to Panel question No. 37, para. 17; and second written submission, para. 43.
[292] India's opening statement at the second meeting of the Panel, para. 57.
[293] India's opening statement at the second meeting of the Panel, para. 57.

Technology Products (ITA Expansion).[294] India submits that, "[a]n analysis of the Schedules of Concessions of 36 such participants to the ITA[] reveal that they did not grant any concessions to certain products at issue until they modified their concessions in keeping with the ITA Expansion."[295] According to India, "the very purpose of the ITA Expansion was to extend concessions to a wider range of products accounting for technological progress and market evolution which could not be covered within the ITA[]", and "[t]he fact that the ITA Expansion covers almost all products at issue in the present case - explicitly those under sub-headings 8517.61, 8517.62, 8517.70 - is a clear affirmation that those products are in addition to and were beyond the scope of the ITA[]".[296] India also refers to what it considers constitutes "subsequent practice" in support of its interpretation, namely: "the HS2007 schedules of some WTO Members reflect NIL duty for certain contested tariff lines, whereas these Members continue to impose duties on such tariff lines"; "some ITA[] Participants have not committed to a NIL duty for certain contested tariff lines"; and "certain ITA[] participants who are not participants to the ITA Expansion continue to impose duties on products covered under certain contested tariff lines."[297]

7.50. Japan considers that the ITA and the ITA Expansion "have no legal relevance to the interpretation of India's Schedule".[298] Japan notes that, while the panel in *EC – IT Products* "found that the ITA[] *may* serve as context within the meaning of Article 31(2)(b) of the Vienna Convention for interpreting tariff concessions, this finding was made in the specific context of that case".[299] Japan notes that in that dispute "the relevant Schedule at issue was based on the same version of the HS nomenclature as the one used by the ITA[]" whereas "in the present case, India's Schedule is based on the HS 2007, while the ITA[] is based upon the HS 1996".[300] Japan also observes that "the version of the European Communities' Schedule which was examined in *EC – IT Products* explicitly referred to the ITA[], which is not the case for India's Schedule at issue".[301] Japan therefore considers that the ITA "cannot serve as part of the context pursuant to Article 31(2)(b) of the Vienna Convention for the purpose of interpreting India's Schedule in this dispute".[302]

7.51. Japan further considers that "neither the ITA[] nor the ITA Expansion can be contemplated as "supplementary means of interpretation" under Article 32 of the Vienna Convention, because the conditions for relying upon such supplementary means of interpretation are not met."[303] Japan argues that India has not "implied in any way that the terms of India's Schedule are ambiguous or obscure, or that their interpretation in accordance with Article 31 of the Vienna Convention leads to a result which is manifestly absurd or unreasonable".[304] Japan submits that "[t]herefore, there is no need to 'confirm the meaning resulting from the application of Article 31'" and "the requirements for recourse to supplementary means of interpretation are not satisfied in this case".[305]

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[294] Under ITA Expansion, the participants agreed to "bind and eliminate customs duties and other duties and charges of any kind", within the meaning of Article II:1(b) of the GATT 1994, with respect to certain specified products. (Ministerial Declaration on the Expansion of Trade in Information Technology Products, WT/MIN(15)/25, Annex, para. 1; WT/L/956, para. 1). We understand that the participants in the ITA Expansion do not include all participants in the ITA. In particular, India is not a participant in the ITA Expansion. (See India's opening statement at the first meeting of the Panel, para. 5).

[295] India's opening statement at the second meeting of the Panel, para. 50.

[296] India's opening statement at the second meeting of the Panel, para. 52.

[297] India's opening statement at the second meeting of the Panel, para. 54.

[298] Japan's second written submission, para. 197.

[299] Japan's second written submission, para. 201 (referring to Panel Reports, *EC – IT Products*, para. 7.383). (emphasis original; fn omitted) Japan argues that the panel in *EC – IT Products* found that the scope of tariff concessions is to be determined by interpreting the ordinary meaning of the actual terms of the relevant commitment, and according to the panel "there [was] no need to consider further the particular status of technology at the time of negotiating the concession in assessing the scope of the concession". (Ibid. paras. 187-188 (quoting Panel Reports, *EC – IT Products*, para. 7.600)). Japan considers that that panel's findings indicate that the fact that products did not exist at the time the concessions were made is not relevant for the purposes of interpreting the scope of the concessions.

[300] Japan's second written submission, para. 201. See also Japan's response to Panel question No. 3, para. 11; and opening statement at the second meeting of the Panel, para. 26.

[301] Japan's second written submission, para. 201. See also Japan's response to Panel question No. 4, para. 17.

[302] Japan's second written submission, para. 201. See also Japan's response to Panel question No. 3, paras. 10-11.

[303] Japan's second written submission, para. 203.

[304] Japan's second written submission, para. 206.

[305] Japan's second written submission, para. 206. See also Japan's opening statement at the second meeting of the Panel, para. 27.

7.52. Finally, Japan argues that "India has also, in fact, made no argument as to what effect the ITA[] and the ITA Expansion should have upon the Panel's interpretation of the actual terms of India's Schedule."[306] Japan considers that, "when requested by the Panel to explain whether and how the ITA[] and the ITA Expansion are relevant for the purpose of interpreting India's Schedule, India did not provide an adequate answer to that question", but "merely replied that it has no obligation to provide duty-free treatment to the Products Concerned under the ITA[]".[307] Japan also submits that, contrary to what India argues, the text of the ITA does not indicate a "static product scope", and neither the statements of the WTO Members cited by India nor the ITA Expansion constitute "subsequent practice" to the ITA.[308] Further, Japan reiterates that the ITA, including its attachments, are legally distinct from the concessions made by India in its WTO Schedule and therefore are irrelevant to the interpretation of that Schedule.[309]

7.3.2.3.2 Main arguments of the third parties

7.53. Brazil states that "the task before the Panel concerns the interpretation of India's Schedule in line with the objective of ensuring the predictability and security of the reciprocal and mutually agreed concessions that are the cornerstone of the WTO architecture."[310] Brazil further considers that "technological evolution cannot lead to unilateral reclassifications by importing Members in ways that may circumvent the tariff commitments they negotiated and registered in their WTO Schedules".[311] Brazil argues that, "[o]therwise, the security and predictability of the tariff concessions in the Schedules will be seriously undermined".[312]

7.54. Canada considers that "the scope of coverage of a concession is determined by an examination of the meaning of the terms contained in the commitments set out in a Member's Schedule".[313] Canada considers that the ITA "may be considered as relevant context for the purposes of interpreting the meaning of these terms".[314] Canada further argues that "tariff concessions under the Uruguay Round and ITA[] are not static and do not encompass only those products in existence at that time."[315] Canada considers that "[t]he HS is updated to account for new products and Members' obligations and tariff bindings will either apply to these new products to the extent that they fall within existing tariff lines or will not apply to such new products should a Member exclude them from coverage".[316] Canada argues that "the Panel's task in this case is to determine whether India has made tariff commitments with respect to the products at issue, and if so, whether duties have been imposed on the products at issue in this case in excess of the tariff bindings set out in India's 2007 Schedule."[317] Canada considers that an interpretation that finds that a Member's WTO tariff commitments "are static and unable to capture technological advancement would undermine the WTO system of tariff concessions by allowing Members to simply disregard tariff commitments on the basis that a product incorporates, or has become, a new technology".[318]

7.55. The European Union considers that the ITA could be regarded as interpretative context within the meaning of Article 31(2)(b) of the Vienna Convention, but submits that, while the ITA "certainly provides the historical background for the obligations undertaken by India … the relevance of ITA[] as context in interpreting the relevant legal texts at issue here … is very limited."[319] The European Union highlights that in *EC – IT Products* the panel had relied on the ITA as context "in a situation where *all* the main parties considered Article 31(2) VCLT to be fulfilled and where the particular document to be interpreted included an explicit reference" to the ITA.[320]

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[306] Japan's second written submission, para. 207.
[307] Japan's second written submission, para. 207.
[308] Japan's second written submission, paras. 209 and 215-227.
[309] Japan's comments on India's response to Panel question No. 61, para. 37.
[310] Brazil's third-party response to Panel question No. 2, para. 10.
[311] Brazil's third-party response to Panel question No. 6, para. 15.
[312] Brazil's third-party response to Panel question No. 6, para. 15.
[313] Canada's third-party response to Panel question No. 2, para. 4.
[314] Canada's third-party response to Panel question No. 2, para. 4.
[315] Canada's third-party response to Panel question No. 6, para. 10.
[316] Canada's third-party response to Panel question No. 6, para. 10.
[317] Canada's third-party response to Panel question No. 6, para. 13.
[318] Canada's third-party response to Panel question No. 6, para. 14.
[319] European Union's third-party response to Panel question No. 2, para. 15.
[320] European Union's third-party response to Panel question No. 2, para. 14. (emphasis original)

7.56. Korea considers that the ITA "may be used as 'context' to interpret India's tariff concessions at issue in this dispute".[321] Korea submits that "as a general matter, modifications to the scope of a Member's rights and obligations under certain schedule of concessions can only be made by actually changing the schedule itself."[322] Korea clarifies, however, that "this is not to say that the development of new technologies and new products cannot be incorporated into the previously established scope of tariff concessions in a Member's WTO Schedule as a matter of *interpretation*."[323] Korea also notes that "the mere existence of the products in the scope of the ITA Expansion does not lead to the conclusion that these products were not accounted for in the ITA[]."[324]

7.57. Norway argues that "the obvious starting point … must be the commitments made in the schedules".[325] Furthermore, in Norway's view, "an interpretation which implies that a product segment could automatically be released from binding commitments upon technological advancement would seriously undermine the system".[326] Norway therefore "strongly disagrees with India's perceived assertion that including technological advancement within a product segment falling within the tariff line listed in Attachment A would involve expansion of 'new' products".[327]

7.58. Chinese Taipei argues that "the ITA[] and India's Schedule of Concessions are two separate distinct documents" and that "[t]his dispute concerns the *implementation* of India's concessions as provided in its Schedule".[328] In Chinese Taipei's view, "if tariff concessions were not subject to HS transpositions, they would become static", which would "render tariff concessions meaningless over time, as the relevant products may no longer exist or become obsolete".[329] Chinese Taipei considers that "Members would be forced to conduct constant renegotiations for concessions on 'new' products, and the scope of tariff concessions would be uncertain", which "is not how tariff concessions are meant to operate so as to achieve security and predictability".[330]

7.59. Türkiye submits that "[a]lthough a large number of high-tech products were covered [by the ITA, it] envisages the incorporation of additional products in parallel to technological developments provided that the parties to the ITA negotiate and agree by consensus."[331] Türkiye further considers that the products at issue in this dispute are not covered by the ITA, and that as "[a]ny technologically newly developed product cannot automatically be considered as covered by ITA[], … the duty-free treatment cannot be extended to all variants of the products."[332] Türkiye considers that the Panel's "interpretation of concessions in ITA[] should not disrupt the balance which is negotiated by the parties".[333] Türkiye shares India's view that the product scope of the ITA "has remained the same since 1997", and is "defined in accordance with the product coverage envisaged in HS1996 at that point in time".[334] Türkiye also shares India's view that new "'products which are a result of technological progress are not covered under the ITA[]'".[335] Türkiye considers that the complainant seeks "an overly broad or inclusive construction of ITA[] commitments, damaging the balance established during the negotiation process of ITA[]."[336] Türkiye submits that "India has no obligation to extend concessions to products which were not included in the scope of an HS heading or sub-heading at the time ITA[] concessions were negotiated".[337]

7.60. The United States considers that "the Panel may consider the ITA[] as relevant context within the meaning of Article 31 of the Vienna Convention".[338] The United States also considers that "[t]he tariff concessions in a WTO Member's Schedule apply to all products – regardless of technological

[321] Korea's third-party response to Panel question No. 3, p. 1.
[322] Korea's third-party response to Panel question No. 7, p. 2.
[323] Korea's third-party response to Panel question No. 7, p. 2. (emphasis original)
[324] Korea's third-party response to Panel question No. 10, p. 3.
[325] Norway's third-party submission, para. 7.
[326] Norway's third-party submission, para. 8.
[327] Norway's third-party submission, para. 9.
[328] Chinese Taipei's third-party response to Panel question No. 15, para. 1. (emphasis original)
[329] Chinese Taipei's third-party response to Panel question No. 15, para. 2.
[330] Chinese Taipei's third-party response to Panel question No. 15, para. 2.
[331] Türkiye's third-party response to Panel question No. 2, p. 2.
[332] Türkiye's third-party response to Panel question No. 2, p. 3.
[333] Türkiye's third-party response to Panel question No. 3, p. 3.
[334] Türkiye's third-party response to Panel question Nos. 4-5, p. 4.
[335] Türkiye's third-party response to Panel question Nos. 8-10, p. 8 (quoting India's first written submission, para. 28).
[336] Türkiye's third-party response to Panel question Nos. 8-10, p. 9.
[337] Türkiye's third-party response to Panel question No. 15, p. 2.
[338] United States' third-party response to Panel question No. 3, para. 4.

development – that meet the terms of the concession, interpreted based on its ordinary meaning in context and in light of the GATT 1994's object and purpose".[339] The United States argues that "India's position would undermine the fundamental obligations of Article II:1 of the GATT 1994 by allowing Members to disregard tariff commitments on the basis that a product incorporates or constitutes a perceived new technology".[340] In the United States' view, "[t]he ITA Expansion is not relevant to the Panel's interpretation of India's concessions under the customary rules of interpretation reflected in the VCLT."[341] The United States also argues that "India is mistaken that the coverage of a product under the ITA Expansion necessarily excludes the product from the scope of the ITA[]".[342]

7.3.2.3.3 Panel's assessment

7.61. We understand that, in India's view, its commitments under the ITA are "static" and, therefore, India considers that its WTO tariff commitments exclude new products resulting from technological innovations that occurred after the ITA was concluded.[343]

7.62. We have addressed above the question of whether the ITA sets forth India's legal obligations in this dispute and concluded that it does not. In order to assess Japan's claims, and apply Articles II:1(a) and (b) of the GATT 1994, we will not look at the ITA, but rather at India's legal obligations as set forth in those provisions and in India's WTO Schedule. To a large extent, therefore, India's contentions regarding whether the ITA imposes "static" or "elastic" obligations are not relevant to the task before us.

7.63. Having said that, we note India's argument that its "static commitments" in the ITA "did not become elastic by virtue of their incorporation into concession schedules".[344] We also note India's argument that certain tariff items of its WTO Schedule have a "special meaning" intended by the parties, pursuant to Article 31(4) of the Vienna Convention. We therefore consider it relevant to examine whether, as a matter of legal interpretation, the ITA limits or modifies the scope of India's WTO tariff commitments as set forth in its WTO Schedule (notwithstanding that the ITA does not set forth those tariff commitments).

7.64. We start by recalling that Members' WTO Schedules, as an integral part of the GATT 1994 and the WTO Agreement, are to be interpreted in accordance with customary rules of interpretation of public international law, pursuant to Article 3.2 of the DSU.[345] We also understand that a tariff concession in a Member's WTO Schedule applies to all products, falling under the terms of the concession, as interpreted based on its ordinary meaning when read in context, and in light of the object and purpose of the agreement. This includes new products that come into existence as a result of technological innovation, and which did not exist at the time that the concession in the Schedule was agreed upon. In this respect, we agree with prior interpretations of the scope of Members' obligations under their WTO Schedules.[346]

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[339] United States' third-party response to Panel question No. 6, para. 13.
[340] United States' third-party response to Panel question No. 6, para. 14.
[341] United States' third-party response to Panel question No. 8, para. 18.
[342] United States' third-party response to Panel question No. 9, para. 21.
[343] In India's view, the ITA "did not include the range of additional products that could be developed in the future." (India's response to Panel question No. 1, para. 5).
[344] India's opening statement at the second meeting of the Panel, para. 48.
[345] See para. 7.9 above. See also Appellate Body Reports, *EC – Computer Equipment*, para. 84; *EC – Export Subsidies on Sugar*, para. 167; and Panel Reports, *EC – Chicken Cuts*, para. 7.87.
[346] In *China – Publications and Audiovisual Products*, China argued that the principle of progressive liberalization contained in Article XIX of the GATS "does not allow for the expansion of the scope of the commitments of a WTO Member by interpreting the terms used in the Schedule based on the meaning of those terms at the time of interpretation." (Appellate Body Report, *China – Publications and Audiovisual Products*, para. 390). The Appellate Body stated that "the terms used in China's GATS Schedule ('sound recording' and 'distribution') are sufficiently generic that what they apply to may change over time." (Ibid. para. 396). According to the Appellate Body, "GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995." (Ibid.). The Appellate Body elaborated that:

> [I]nterpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the

7.65. We further recall that, when interpreting Members' Schedules in accordance with customary rules of treaty interpretation, the HS has been found to constitute relevant "context" pursuant to Article 31(1) of the Vienna Convention.[347] However, the relevance of the HS depends on the specific interpretative question at issue (including whether the relevant concessions were based on the HS).[348] It is also uncontested by the parties that, pursuant to the rules of interpretation of the HS, any product at any moment in time must fall within the product scope of a tariff item in the HS nomenclature.[349] This necessarily includes new products that come into existence, for instance as a consequence of technological innovations, subsequent to a given HS nomenclature having been concluded. We agree with the parties on this point.[350]

7.66. Thus, for those Members whose WTO Schedules are based on the HS, such as India[351], where a product is classified under a particular HS heading or subheading of a Member's Schedule, that product would also fall within the scope of a WTO Member's obligations unless the Schedule specifies otherwise. This includes new products that only come into existence following the binding of a Member's commitments with respect to the relevant heading or subheading.

7.67. From the foregoing, it is clear that as a general rule the product scope of Members' tariff concessions evolves over time to capture products that may come into existence as a result of technological developments. The only question that arises in this dispute is whether that general rule is modified by virtue of the existence of the ITA. In this respect, India essentially argues that, because the product scope of the ITA is static, so is the scope of its tariff commitments in its WTO Schedule with respect to undertakings made pursuant to the ITA.

7.68. In our view, India's argument rests on two premises: (i) the product scope of Attachment A of the ITA is static, such that it "does not include technological advancements"[352]; and (ii) the ITA similarly limits the product scope of India's WTO Schedule.[353] We note that it would only be necessary to interpret the ITA for purposes of assessing India's first premise if India is correct regarding the second premise. Given that the ITA is not a covered agreement, and does not set forth the tariff concessions at issue in this dispute, we proceed on an *arguendo* basis to assess whether, assuming

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> date of a Member's accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments, which are undertaken through successive rounds of negotiations, and which must be interpreted in accordance with customary rules of interpretation of public international law.

(Ibid. para. 397 (footnotes omitted)).
Similarly, in *Greece – Phonograph Records*, a GATT 1947 Group of Experts addressed whether "long-playing" records were covered by the bound duty for "gramophone record" given that "such records did not exist at the time the Greek Government granted the … concession [at issue], that they contained a volume of recordings up to five times that of the old records, that they were lighter than conventional records, that they were made of different material and that, therefore, as a new product, they were not covered by the item bound" in Greece's Schedule. (Group of Experts Report, *Greece – Phonograph Records*, p. 1). The Group of Experts "agreed that the practice generally followed in classifying new products was to apply the tariff item, if one existed, that specified the products by name, or, if no such item existed, to assimilate the new products to existing items in accordance with the principles established by the national tariff legislation." (Ibid. p. 1). The Group found that long-playing gramophones, developed after Greece made the relevant tariff concession, were covered by the description of "gramophone records" in Greece's Schedule. (Ibid. p. 2).

[347] See Appellate Body Reports, *EC – Computer Equipment*, para. 89; *EC – Chicken Cuts*, paras. 195-197; and *China – Auto Parts*, paras. 146 and 149.

[348] See e.g. Panel Reports, *EC – IT Products*, para. 7.443.

[349] India's response to Panel question No. 10, para. 29 ("[t]he General Rules of Interpretation, annexed to the [HS Convention], allow for **all** products to be classified under one or the other heading of any version of the HS, and therefore, also the Schedule of Concessions of any given country (if unbound tariff lines are also included in the Schedule of Concessions)" (emphasis original)); Japan's response to Panel question No. 67, para. 26 ("Japan agrees, and it is actually well-established, that all products are to be classified under a subheading in any edition of the HS nomenclature").

[350] We observe that the General Rules for the Interpretation of the Harmonized System, in addition to setting out detailed rules for classification, set forth a residual interpretative rule that goods which cannot otherwise be classified "shall be classified under the heading appropriate to the goods to which they are most akin". (See General Rules for the Interpretation of the Harmonized System, (Exhibit JPN-60), Rule. 4).

[351] See para. 2.16 above.

[352] India's first written submission, subheading IV.A.

[353] India's opening statement at the second meeting of the Panel, para. 48.

that the product scope of the ITA is indeed static, the ITA limits the product scope of India's WTO Schedule.

7.69. We therefore turn to address whether, assuming that the product scope of the ITA is static, it limits the scope of certain Members' WTO tariff commitments. We recall the general rule that if, at any given point in time, a product falls within the scope of a Member's WTO tariff commitments pursuant to the general rules of interpretation under Article 31 of the Vienna Convention, then a Member's obligations extend to that product. We understand that, under India's interpretation of the relationship between the ITA and its WTO Schedule, while the general rule described above would continue to apply to WTO Members who are *not* participants in the ITA, WTO Members who *are* participants in the ITA would be subject to a different rule. In other words, under India's approach, a tariff concession set forth in an ITA participant's WTO Schedule would have a different product scope to *the same tariff concession* set forth in a non-ITA participant's Schedule.

7.70. In our view, India's interpretation is at odds with the multilateral principles of reciprocity and mutual advantageous arrangements underpinning the multilateral trading system.[354] To interpret the product scope of ITA participants' WTO Schedules differently from the Schedules of Members that are *not* participants in the ITA, when the product scope of those commitments is on its face identical, would also substantially undermine the security and predictability of Members' tariff commitments.

7.71. We note that India has not pointed to any provision in the ITA indicating that the ITA excluded from the scope of participants' WTO tariff commitments new products resulting from technological developments, if such new products were to fall within the scope of the relevant tariff commitments in Members' Schedules as interpreted pursuant to the general rules of treaty interpretation. We are aware of India's argument that the ITA specifically requires ITA participants to "meet periodically" and modify the product scope of the ITA "in light of technological developments".[355] In our view, the requirement that parties should meet periodically to review the product scope of the ITA suggests that the ITA participants anticipated expanding the scope of the ITA to include additional tariff items that were not initially included. We fail to see how this requirement could imply that products coming into existence after the conclusion of the ITA and otherwise falling within the scope of Members' tariff commitments as set forth in their WTO Schedules would be excluded from the coverage of Members' existing WTO commitments.

7.72. We also note India's argument that its WTO Schedule should be given a "special meaning", pursuant to Article 31(4) of the Vienna Convention, because the participants to the ITA "intended to limit the scope of Attachment A to the HS1996 Nomenclature".[356] Article 31 of the Vienna Convention sets forth the "General rule of interpretation" of international treaties. Paragraph 4 of Article 31 indicates that:

> A special meaning shall be given to a term if it is established that the parties so intended.

[354] See the third recital of the preamble to the WTO Agreement.

[355] India's first written submission, para. 84 (quoting ITA, Annex: Modalities and Product Coverage, para. 3).

[356] India's second written submission, para. 51. Aspects of India's arguments in this regard frame its invocation of Article 31(4) as concerning the special meaning that the participants in the ITA allegedly intended to attribute to the ITA. For the reasons explained above, we do not consider the ITA to set forth India's legal obligations, and, hence, we do not need to assess whether the participants in the ITA intended to ascribe a special meaning to certain terms in that agreement. Nevertheless, we understand that India's references to Article 31(4) may also be read as advocating an interpretation of India's WTO Schedule whereby the ITA limits the scope of India's WTO tariff commitments. We recall India's argument that the "static commitments" contained in the ITA "did not become elastic by virtue of their incorporation into concession schedules, and that the ITA "was a sui-generis instrument with commitments over a limited scope of products and required *those* commitments to reflect in the relevant tariff sub-headings of the schedule of concessions of parties." (India's opening statement at the second meeting of the Panel, para. 56 (emphasis original)). It would seem to follow that if India considers that the parties to the ITA intended for a special meaning to be ascribed to the terms of the ITA, pursuant to Article 31(4) of the Vienna Convention, and India considers that the terms of the ITA limits the terms of its WTO Schedule, then, in India's view, the terms of its WTO Schedule are also subject to a special meaning intended by the parties, pursuant to Article 31(4) of the Vienna Convention. For the sake of comprehensiveness, we address this issue hereunder.

7.73. In our view, the reference in this provision to "the parties" includes *all* parties to a treaty, and not *some* of those parties.[357] We note that India's WTO Schedule forms part of the GATT 1994 and the WTO Agreement. The "parties" to the GATT 1994 and the WTO Agreement include all Members of the WTO. Moreover, India's WTO Schedule governs its tariff obligations with respect to all imports from *all* WTO Members, and not solely the participants in the ITA. We understand that the ITA was not signed by all WTO Members. Since the ITA was agreed to by only some of the Members of the WTO, we do not see how the ITA could signal the intentions of the parties to the WTO Agreement with respect to any of its treaty terms (including the terms set forth in India's WTO Schedule). We therefore consider that the present circumstances do not satisfy the requirements of Article 31(4), since the ITA does not express the intentions of the parties to the WTO Agreement.

7.74. For these reasons, we see no basis to interpret India's WTO Schedule differently to how we would interpret the Schedule of a WTO Member who was not a participant in the ITA. Consequently, a number of India's interpretative arguments regarding the static nature of the ITA are not relevant for purposes of interpreting India's WTO Schedule, as elaborated below.

7.75. India argues that Members' intentions to maintain a static product scope for the ITA is demonstrated by the content of the ITA itself, various subsequent practice of the participants in the ITA, and the product scope of the ITA Expansion. Regarding the content of the ITA itself, India argues that "[t]here is no language [in the ITA] to suggest that all ICT products which may exist at the time of signing or in the future will be included in the product scope of the ITA[]".[358] India also refers to paragraph 3 of the Annex to the ITA, which states that "[p]articipants shall meet periodically under the auspices of the Council on Trade in Goods to review the product coverage specified in the Attachments, with a view to agreeing, by consensus, whether in the light of technological developments, experience in applying tariff concessions, or changes to HS nomenclature, the Attachments should be modified to include additional products."[359] Regarding the subsequent practice of the participants in the ITA, India argues that "various statements and pronouncements made by multiple Participants as 'subsequent practice' to the ITA[] … establish that the Participants agree that the product scope of the ITA[] is limited and not automatically updated".[360] Regarding the ITA Expansion, India argues that the scopes of the ITA and the ITA Expansion are mutually exclusive and therefore any products covered by the ITA Expansion fall outside the scope of the ITA.[361]

7.76. We understand that India's arguments in this respect pertain to the respective scope and content of the ITA and the ITA Expansion. Thus, India relies on two agreements concluded by *some* Members to interpret the rights and obligations of *all* Members. As explained above, the interpretation advocated by India would essentially read identical tariff commitments of various WTO Members differently, depending on whether they were participants in the ITA and the ITA Expansion. In our view, the scope and content of the ITA and ITA Expansion cannot modify the scope and content of India's tariff commitments as set forth in its WTO Schedule.

7.77. Similarly, the statements and pronouncements referred to by India as relevant "subsequent practice" relate to the ITA, and not to the content of India's WTO Schedule. If we were to take into consideration the actions of certain participants in the ITA for purposes of interpreting India's WTO Schedule, it would conflate these two agreements in a manner that is legally incorrect. ITA participants may debate the scope and content of their obligations under the ITA. However, even assuming that those debates constitute "subsequent practice" to the ITA – an issue on which we

[357] The plain language of Article 31(4) refers to "the parties" and not "some" or "certain" of the parties to the treaty. We also note that Article 41 of the Vienna Convention concerns "[a]greements to modify multilateral treaties between certain of the parties only". We find it meaningful that this provision uses the language in its title of "certain of the parties". The drafters of the Vienna Convention could have used similar language in Article 31(4), but chose not to do so. Furthermore, regarding the content of Article 41, the drafters of the Vienna Convention specifically accounted for a situation where *certain parties* to a treaty wish to modify the treaty as between themselves. This situation is treated distinctly under the Vienna Convention from a situation where the parties to a treaty wish to give a "special meaning" to a term in that treaty. These two provisions should not be conflated. Moreover, the existence of Article 41 suggests that Article 31(4) is not a mechanism through which *some* parties to a treaty can modify the treaty for *all* parties to the treaty.

[358] India's first written submission, para. 82.

[359] India's first written submission, para. 84 (quoting ITA, Annex, para. 3).

[360] India's second written submission, para. 62.

[361] See e.g. India's first written submission, paras. 122-130; opening statement at the second meeting of the Panel, para. 50; and response to Panel question No. 39, para. 20.

refrain from taking any position – they do not concern India's WTO Schedule and necessarily exclude a considerable portion of the WTO Membership who are *not* participants in the ITA. As stated above, we do not consider that a group of WTO Members can define treaty terms for all WTO Members.

7.78. Having said that, given the importance that India appears to attribute to the product scope of the ITA Expansion, we wish to briefly note there is no indication in the ITA Expansion that the product scope of that agreement does not overlap with the ITA. We understand, in fact, that the negotiating history of the ITA Expansion suggests that there is indeed such an overlap of products.[362] We do not consider it necessary, for purposes of resolving this dispute, to enter into the question of which products are covered by the ITA as compared to the ITA Expansion. We simply note that it does not necessarily follow that the fact that a product is covered by the ITA Expansion implies that such product did not already fall within the scope of the ITA itself (or, more importantly, the concessions set forth in relevant Members' WTO Schedules).

7.79. Finally, we note India's argument that the ITA "qualifies as context to Schedule[s] of Concessions under Article 31(2)(b) of the Vienna Convention and is therefore relevant for interpreting the tariff concessions at issue in this dispute".[363] In our view, however, India is not relying on the ITA as context to interpret its WTO Schedule but rather is seeking to replace the content of that WTO Schedule with the content of the ITA. The application of Articles II:1(a) and (b) of the GATT 1994 entails the application of Members' obligations as contained in their WTO Schedules, not the ITA. Those legal instruments are not the same and, for the reasons articulated above, we do not consider that the existence of the ITA replaces or modifies the content of India's WTO Schedule, or calls for a specific interpretative approach to certain tariff commitments contained in that Schedule. We also recall that the relevance of contextual aids to interpreting Members' Schedules can vary depending on the interpretative question at issue.[364]

7.80. We understand that India relies on the ITA as context to interpret its WTO Schedule specifically to show that the concessions set forth in its WTO Schedule cover products that were not covered by the ITA. In our view, to the extent that a product is, on its face, covered by India's WTO Schedule, that legal obligation would not be changed merely because that product is not covered by the ITA. Since India's arguments invoking the ITA as "context" for purposes of interpreting its Schedule are focused on replacing the content of the WTO Schedule with the content of the ITA (rather than on interpreting tariff commitments in that Schedule using the ITA as context), and since any differences in scope would not modify the scope of India's WTO Schedule, we do not consider it necessary to further take into account the ITA as "context" for purposes of determining the scope of India's tariff commitments as set forth in its WTO Schedule.

7.81. For the foregoing reasons, we consider it appropriate to assess the scope of India's WTO tariff commitments by looking at India's WTO Schedule. Where necessary, we will interpret the scope of that Schedule by applying the general rules of interpretation set forth in Article 31 of the Vienna Convention. For the reasons articulated above, we do not consider it relevant to examine the product scope of the ITA as "context" to interpret India's WTO Schedule. In addition, we do not consider that Members' subsequent practice with respect to the ITA (such as the scope of the ITA Expansion) can modify the scope of India's WTO Schedule.[365]

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[362] Document G/IT/SPEC/15 contains a compilation of "Proposed Additions to Product Coverage: Compilation of Participants' Submissions", and notes that for certain proposed tariff items to be included in the ITA Expansion, "part of the tariff line is already covered in the ITA". (Proposed Additions to Product Coverage: Compilation of Participants' Submissions, G/IT/SPEC/15, p. 1). We note India's argument that this document "was issued during the negotiations under Paragraph 3 of the Annex to the ITA[]", that "these negotiations ultimately failed to reach a consensus" and were "relaunched in the year 2012". (India's opening statement at the first meeting of the Panel, para. 50). Given that India itself indicates that "the negotiations were relaunched", we do not see why India considers that this document "is not a part of the negotiating history of ITA Expansion". (Ibid.).

[363] India's response to Panel question No. 4, para. 17. We note the finding of the panels in *EC – IT Products* that the ITA "may serve as context within the meaning of Article 31(2)(b) of the Vienna Convention for the purpose of interpreting tariff concessions". (Panel Reports, *EC – IT Products*, para. 7.383). The panels in that dispute considered that the ITA represented an instrument "made by one or more parties in connection with the conclusion of the treaty". (Ibid. para. 7.384).

[364] See para. 7.65 above.

[365] We note that India also relies on the ITA as evidence to demonstrate that an error occurred in the transposition of its WTO Schedule to the HS2007. We address these arguments, which concern the interpretation of the ITA as a factual question, not as a legal question, below. (See section 7.3.3.2.3.5 below).

7.3.2.4 Conclusion

7.82. We have addressed above India's contentions that the ITA is the source of India's legal obligations in this dispute. We disagree. We have also addressed above whether the ITA modifies or limits the scope of India's WTO tariff commitments set forth in its WTO Schedule. Without taking a position on whether the scope of India's concessions under the ITA is "static" in nature, we consider that the ITA cannot overwrite the tariff commitments set forth in India's WTO Schedule (which are *not* static in nature). We therefore proceed to apply Articles II:1(a) and (b) by comparing, on the one hand, the tariff treatment accorded by India to certain products, and, on the other hand, India's WTO tariff commitments as set forth in its WTO Schedule. Before doing so, however, we address India's arguments regarding Article 48 of the Vienna Convention and its rectification request under the 1980 Decision.[366]

7.3.3 Article 48 of the Vienna Convention

7.3.3.1 Introduction

7.83. As described in section 2.3 above, in 2006, in preparation for the transposition of Members' Schedules from the HS2002 to the HS2007, the General Council adopted a Decision on HS2007 Transposition Procedures. Pursuant to that Decision, developed country Members were to prepare their own transpositions from the HS2002 to the HS2007, and the WTO Secretariat was requested to "transpose the schedules of developing country Members, except for those who undertake to prepare their own transposition and submit a notification to this effect".[367] Since India did not indicate that it intended to undertake the transposition of its Schedule from the HS2002 to the HS2007, the WTO Secretariat prepared India's transposition and, on 8 November 2013, communicated to India via email the draft files for the HS2007 transposition of India's Schedule.[368] Following receipt of the draft transposition files prepared by the WTO Secretariat, India provided comments on the draft files.[369] The Secretariat then communicated a revised file to India for approval.[370] A multilateral review session was held in the Committee on Market Access on 23 April 2015, during which the draft files were approved by Members.[371] The draft modifications to the Schedule were circulated on 12 May 2015 and, since no objections were received within three months of circulation, on 12 August 2015 the changes to the Schedule were certified.[372]

7.84. India submits that, at the time of the transposition of its WTO Schedule to the HS2007, it had understood that the scope of its tariff concessions would not be expanded from the commitments it had undertaken under the ITA. However, in India's view, the transposition of its Schedule resulted in an expansion of its tariff commitments from the ITA. India contends that it "was not put on clear notice (via WTO communication or otherwise) as to the exact changes being effected due to the increased product complexity of the ITA product coverage via the contested sub-headings".[373] India argues that Article 48 of the Vienna Convention is an applicable rule of law which codifies the principle of customary international law whereby "freedom of consent [i]s an indispensable condition for treaty validity" such that "a State cannot have freely concluded a treaty if at the time of giving its consent it was under a misapprehension relating to the subject matter of the treaty".[374] India considers that "the core issue before the Panel is whether the products at issue are entitled for exemption from customs duty as a result of informed and free consent of India, or a result of

[366] In addition to the foregoing arguments regarding the ITA, India also raises the ITA in the context of arguing that certain aspects of its WTO Schedule are invalid pursuant to Article 48 of the Vienna Convention. Moreover, India considers the ITA to be relevant in relation to its request for findings concerning its rectification request under the 1980 Decision. We address these arguments below. (See sections 7.3.3-7.3.4 below).

[367] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 2.

[368] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49).

[369] India did not provide comments or seek clarifications regarding the transposition of the tariff items at issue in this dispute. (Email from Market Access Intelligence Section, WTO, to India (12 February 2014), (Exhibit IND-50)).

[370] India's response to Panel question No. 18, para. 57-58.

[371] Committee on Market Access, Rectification and Modification of Schedules, Schedule XII – India, Communication from the Secretariat, G/MA/TAR/RS/409, 12 May 2015.

[372] Committee on Market Access, Rectification and Modification of Schedules, Schedule XII – India, Communication from the Secretariat, G/MA/TAR/RS/409, 12 May 2015, as certified in WT/Let/1072, effective 12 August 2015; India's response to Panel question No. 18, para. 58.

[373] India's first written submission, fn 81 to para. 48.

[374] India's first written submission, para. 38.

technicalities invoked by" the complainant.[375] India further submits that, although Article 48 would ordinarily lead to the invalidation of the entire treaty, in these circumstances the contested tariff items are separable from the rest of the Schedule such that only the contested tariff items are invalid, in accordance with Article 44 of the Vienna Convention.[376] India submits that since the contested tariff items are invalid, they are "rendered unbound".[377]

7.85. Japan argues that Article 48 of the Vienna Convention is not applicable in this dispute.[378] Japan also considers that the present circumstances fail to satisfy the substantive requirements of paragraphs 1 and 2 of Article 48. Specifically, Japan argues that the alleged error does not relate to a "fact or situation" within the meaning of Article 48(1). Japan further argues that, in any event, India cannot avail itself of Article 48(1) because India contributed by its own conduct to the error and the circumstances were such as to put India on notice of a possible error, within the meaning of Article 48(2).[379] Japan further considers that India has not demonstrated that the requirements of Articles 44 and 45 of the Vienna Convention are satisfied in the present proceedings.[380]

7.86. Article 48 of the Vienna Convention is titled "Error" and provides as follows:

> 1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.
>
> 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.
>
> 3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

7.87. A Commentary on the Vienna Convention states that Article 48 is "based on the premise that freedom of consent … is an indispensable condition for the validity of a treaty" and a "State cannot be considered to have freely concluded a treaty if at the time of giving its consent, it was under a misapprehension about the subject matter of the treaty".[381] The Commentary also notes that "reliance on error as a ground for invalidating consent may easily be abused", and consequently Article 48 seeks to "preserve the 'reality of consent' while at the same time protecting the stability of treaties and the good faith of the other parties by clearly defining the conditions under which an error is capable of invalidating consent".[382]

7.88. Paragraph 1 of Article 48 sets out the essential criteria that must be satisfied in order for a State to claim that its consent to be bound by a treaty was invalid due to an error related to a fact or situation, including the requirements that the error both (i) was assumed to exist by the State in question at the time when the treaty was concluded, and (ii) formed an essential basis for its consent to be bound. Paragraph 2 establishes that, in certain circumstances, a State cannot invoke error as a ground for invalidating its consent to be bound, even if the requirements of paragraph 1 are satisfied. Specifically, the State in question cannot take advantage of paragraph 1 if (i) it has "contributed by its own conduct to the error" or (ii) the circumstances were "such as to put that State on notice of a possible error".

7.89. We understand that the requirements of paragraphs 1 and 2 are cumulative – if any of the requirements of either paragraph are not satisfied, then a party's invocation of error under Article 48

[375] India's second written submission, para. 5.
[376] India's first written submission, paras. 69-73.
[377] India's first written submission, para. 74.
[378] Japan's second written submission, paras. 36-67.
[379] Japan's second written submission, paras. 99-144.
[380] Japan's second written submission, paras. 145-168.
[381] T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn., Springer, 2018), (Exhibit IND-14), p. 879.
[382] T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn., Springer, 2018) (Exhibit IND-14), pp. 879-880. (emphasis omitted)

fails. Paragraph 3, which distinguishes Article 48 from Article 79 of the Vienna Convention, is not relevant in the present dispute.[383]

7.90. A threshold issue concerns whether Article 48 of the Vienna Convention constitutes an applicable rule of law that can be invoked in WTO dispute settlement. The applicability of Article 48 is contested by the parties, as well as several of the third parties.[384] We note that one panel has previously found that customary international law regarding error in treaty formation is applicable in WTO dispute settlement and that Article 48 is a codification of that customary international law.[385] In our view, it would only be necessary for us to take a position on this issue if it is the case that the substantive requirements of Article 48 are indeed satisfied. If the substantive requirements of Article 48 are not satisfied, then it is a moot question whether Article 48 is an applicable rule of law in WTO dispute settlement. We therefore defer addressing the question of applicability until after we have examined the substantive requirements of Article 48. A similar approach has been taken by several previous panels.[386]

7.91. We also note the parties' disagreement concerning Article 45 of the Vienna Convention.[387] Article 45 concerns the loss of a right to invoke a ground for, *inter alia*, invalidating the operation of a treaty.[388] The parties contest whether, even assuming that the requirements of Article 48 are satisfied, India has nonetheless lost its right to invoke Article 48 because, pursuant to Article 45(b), India "must by reason of its conduct be considered as having acquiesced in the validity of the treaty". As with the issue of Article 48's applicability, we consider that it would only be necessary to address

[383] Having said that, we note, without further comment, that India's argument that the errors set forth in its Schedule are merely "formal errors", such that objections to its rectification request were unfounded (see section 7.3.4 below), is difficult to reconcile with India's reliance on Article 48 of the Vienna Convention, which explicitly indicates in Article 48(3) that errors relating only to the wording of a treaty do not affect the validity of the treaty and are addressed under Article 79 of the Vienna Convention, and not Article 48. In this respect, we tend to agree with the European Union that "the error invoked by India under Article 48 of the VCLT in these proceedings and the error invoked by India in support of its request for a rectification under the 1980 Procedures are legally distinct and manifestly incompatible with each other." (See European Union's third-party response to Panel question No. 19, para. 21).

[384] See e.g. India's response to Panel question No. 16, paras. 45-51 and second written submission, paras. 16-19; Japan's second written submission, paras. 36-67; Chinese Taipei's third-party statement, paras. 11-13; European Union's third-party response to Panel question No. 11, para. 42; Korea's third-party response to Panel question No. 17, paras. 7-9 and third-party submission, paras. 11-12; and United States' third-party submission, paras. 42-43.

[385] See Panel Report, *Korea – Procurement*, para. 7.123. In *Korea – Procurement*, the panel found that "international law applies to the extent that the WTO treaty agreements do not 'contract out' from it" and that "to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO". (Ibid. para. 7.96). The panel further stated that "the relationship of the WTO Agreements to customary international law is broader than" indicated in Article 3.2 of the DSU. (Ibid.).

[386] For example, in *Russia – Tariff Treatment*, the panel noted the substantive requirements of Article 79 of the Vienna Convention, and concluded that there was "no need … to examine whether Article 79 applie[d] in this dispute" since, in the circumstances, there was "no basis on which the alleged error in Russia's Schedule could be considered to have been corrected under either paragraph of Article 79". (Panel Report, *Russia – Tariff Treatment*, para. 7.55). Similarly, in *India – Autos*, the panel considered that "the potential relevance of the notion of *res judicata* to this case would only arise if its commonly understood conditions of application were met on the facts". (Panel Report, *India – Autos*, para. 7.59). The panel elaborated that if it were to find that the factual circumstances for the application *res judicata* could not be met in that particular case, then "it would not be necessary to make a general ruling on the role of *res judicata* in WTO dispute settlement". (Ibid. para. 7.60). The panel ultimately concluded that the doctrine of *res judicata* could not apply to the facts of that dispute, and consequently the panel did "not seek to rule on whether the doctrine could potentially apply to WTO dispute settlement". (Ibid. para. 7.103. See also Panel Reports, *EC and certain member States – Large Civil Aircraft*, para. 6.22; and *Turkey – Textiles*, para. 9.182).

[387] See e.g. India's first written submission, paras. 62-68; Japan's second written submission, paras. 152-168.

[388] Article 45 of the Vienna Convention is titled "Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty", and states as follows:

> A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts: (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

the applicability and application of Article 45 if we were to conclude that the substantive requirements of Article 48 are satisfied and that Article 48 is applicable in WTO dispute settlement.

7.92. We further observe the parties' disagreement regarding Article 44 of the Vienna Convention.[389] We understand that under the structure and logic of the Vienna Convention, if the cumulative requirements of Articles 45 and 48 are applicable and satisfied, then, pursuant to the terms of Article 44(2) of the Vienna Convention, this would invalidate the relevant State's consent to be bound by the *entire treaty* – not specific *aspects* of that treaty.[390] In the present case, the alleged error concerns India's WTO Schedule, which is annexed to the GATT 1994, which in turn forms part of the broader package of covered agreements constituting, as a whole, the WTO Agreement.[391] India contends, however, that in accordance with the requirements of Article 44(3) of the Vienna Convention, because India invokes error "only with respect to the contested sub-headings … such contested sub-headings are separable from the sub-headings comprising the 2007 Schedule on the whole", and therefore only specific tariff items of India's WTO Schedule would need to be invalidated.[392] While this issue is contested by the parties, in accordance with our approach to issues arising under Article 45, we consider that it would only be necessary for us to address the applicability and application of Article 44(3) if we were to conclude in India's favour with respect to the substantive requirements of Article 48, and the applicability of that Article, as well as the applicability and application of Article 45.

7.93. We therefore to assess the parties' arguments regarding, in turn, Articles 48(1) and (2).

7.3.3.2 Article 48(1)

7.3.3.2.1 Main arguments of the parties

7.94. India argues that certain tariff items in its WTO Schedule are invalid, and therefore unbound, because it "was in error as to the scope of the contested sub-heading commitments in the 2007 Schedule, at the time of its certification, as a result of the complex nature of the HS2002 to HS2007 transposition".[393] India submits that it "would not have agreed to the contested sub-heading commitments if it was clear that the HS2007 transposition was effectively expanding India's commitments beyond India's obligations under the ITA[]".[394] India argues that this is "because … it never intended on joining the [ITA Expansion] and made several pronouncements regarding the same".[395] India provides considerable argumentation seeking to demonstrate that its commitments as set forth in its certified WTO Schedule cover products that are not covered by the ITA[].[396] India considers that its error "in relation to the material scope of the commitments under the contested sub-headings at the time the 2007 Schedule was certified" is a "fact or a situation" within the meaning of Article 48(1), because the word "situation" covers "the overall condition or circumstance prevailing at a particular time".[397] India notes that "a leading commentary … observes that 'Article 48 does not exclude mixed questions of fact and law and the line between one and the other may not

[389] See e.g. India's first written submission, paras. 69-74; Japan's second written submission, paras. 145-151.

[390] Article 44 of the Vienna Convention, titled "Separability of treaty provisions", sets out in its second paragraph the general principle that "[a] ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60."

[391] See Article II:2 of the WTO Agreement.

[392] India's first written submission, para. 70. Article 44(3) states that:

> If the ground [for invalidation/termination, withdrawal from or suspension of the treaty] relates solely to particular clauses, it may be invoked only with respect to those clauses where: (a) the said clauses are separable from the remainder of the treaty with regard to their application; (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust.

[393] India's first written submission, para. 40.

[394] India's first written submission, para. 46.

[395] India's first written submission, para. 46 (referring to WTO, Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 1 November 2012, G/IT/M/56). See also ibid. para. 42 and fn 70 thereto (referring to Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, paras. 1.5 and 3.11).

[396] India's first written submission, section IV.

[397] India's response to Panel question No. 44, para. 28.

always be easy to draw'".[398] India considers that "the fact that an error might have legal consequences (as indeed all contested errors would) does not make the error a legal error".[399]

7.95. Japan argues that there was no error in the transposition process, because the "Products Concerned were already covered by the duty-free concessions in the certified Schedule of India based on the HS2002".[400] Japan notes that "India is silent on the level of the tariff concessions that would have been afforded to the Products Concerned in its Schedule based on the HS2002", such that India has not shown that the scope of its tariff concessions changed during the transposition process.[401] Japan submits that "the transposition of India's Schedule into the HS2007 cannot have been the source of any 'error' by India as to the scope of the commitments when it certified the Schedule based on the HS2007, because there has been no change in the scope of the concessions concerned".[402] Japan further submits that an error of law is not a valid ground for invalidating a treaty pursuant to Article 48, as demonstrated by the fact that the language "fact or state of facts" in the draft Article 48 was revised to "fact or situation" to avoid the possibility that the French version could have been read as encompassing errors of law.[403] Japan considers that "[i]n the present case, India's alleged error clearly constitutes an error of law", since the alleged error concerns "the 'material scope' of [India's] rights and obligations under its Schedule", and this error of law "cannot be used by India to invoke Article 48".[404] Japan also considers that "the treaty as a whole to which India was giving its consent, and which would have been affected by the alleged error, was India's Schedule based on the HS2007".[405] Japan submits that India "has never argued that it would not have agreed to the transposition of its Schedule based on the HS2007 'as a whole' had it been aware of the alleged mistaken understanding", and consequently India has failed to demonstrate that the alleged error formed an essential basis of its consent to be bound by the treaty.[406] Additionally, Japan submits that "the threshold for invoking an error vitiating consent is very high"[407] and that the panel report in *Korea – Procurement* is of "limited relevance", because Article 48 was invoked in that case in the context of a non-violation claim.[408]

7.3.3.2.2 Main arguments of the third parties

7.96. Brazil considers that "the 'material scope of commitments' resulting from [HS] transpositions is a 'fact' or 'situation' in relation to which a State could hypothetically be in error."[409] Brazil refers to the complex nature of the transposition process in support of its view that a "possible change in scope of a concession resulting from a HS transposition could be portrayed as an objective fact or situation within the meaning of Article 48".[410] Brazil also states that "the current international jurisprudence regarding error in the consent of treaties and Article 48 establishes a very high threshold for demonstrating that the consent of a party to an agreement was made in error".[411]

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[398] India's response to Panel question No. 44, para. 29 (quoting M. E. Villiger, Commentary *on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), (Exhibit IND-13), p. 608).

[399] India's response to Panel question No. 44, para. 29.

[400] Japan's second written submission, para. 95.

[401] Japan's second written submission, para. 97.

[402] Japan's second written submission, para. 98. See also Japan's opening statement at the second meeting of the Panel, para. 13.

[403] Japan's second written submission, paras. 103-105 (referring to T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), pp. 886-887, para. 19). See also Japan's response to Panel question No. 44, para. 71.

[404] Japan's second written submission, paras. 106-107. See also Japan's opening statement at the second meeting of the Panel, para. 14.

[405] Japan's second written submission, para. 114.

[406] Japan's second written submission, para. 114.

[407] Japan's second written submission, para. 87 (referring to É. Wyler and R. Samson, "Article 48" in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* (Oxford University Press, 2011), (Exhibit IND-18), p. 1121, para. 8 ("invoking error as a means of invalidating a treaty has persistently failed to succeed"); and T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), p. 880, para. 1 ("The main purpose of Art 48 is therefore to preserve the "reality of consent" while at the same time protecting the stability of treaties and the good faith of the other parties by clearly defining the conditions under which an error is capable of invalidating consent".))

[408] Japan's second written submission, para. 88.

[409] Brazil's third-party response to Panel question No. 16, para. 4.

[410] Brazil's third-party response to Panel question No. 16, para. 7.

[411] Brazil's third-party submission, para. 21 (referring to International Court of Justice (ICJ), *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports

7.97. Canada argues that "it is possible that the certification of India's 2007 Schedule could be considered the conclusion of a treaty and, further, that a State's understanding as to the scope of its tariff concessions prior to certification of its Schedule could qualify as a 'fact or a situation … assumed by that State to exist at the time' within the meaning of Article 48."[412] Canada considers that "the 'fact or situation' allegedly assumed by India here … captures the products at issue, the terms used to accurately describe them, and the context surrounding the decision to accept, or choose, the terms used to describe the concession", such that "it appears to be an error that includes factual elements".[413] Canada also questions whether "purely formal or technical amendments to treaties, such as those which occur during the certification of tariff schedules following a transposition process, could satisfy the requirement of forming an 'essential basis' of a State's consent to be bound by the treaty."[414]

7.98. The European Union argues that the error alleged by India "involves a misinterpretation by India of the terms of the treaty on which the complaining parties base their claims" and "[s]uch an error is an unmixed error of law and falls squarely outside the scope of Article 48.1 of the VCLT."[415] The European Union also argues that India "has not proven that it made the error which it alleges now", because "India was not wrong to assume that the transposition to HS2007 could not 'expand' the scope of its pre-existing concessions", but "[r]ather, India is wrong to assume that its pre-existing concessions were limited to products which already existed in 1997".[416]

7.99. Korea argues that it is clear from India's statements that India's alleged error does not seem to involve an error relating to a "fact or situation", and relates, instead, to the scope of India's obligations or commitments under its Schedule.[417] Korea argues that "the scope of a Member's commitment cannot be 'the existence of a fact'" but rather "is a legal question which requires interpretation of the treaty provision".[418]

7.100. Chinese Taipei submits that "no error occurred, and India has not shown otherwise".[419] Chinese Taipei further argues that, if it exists, India's alleged error is actually an error of law which falls outside the scope of Article 48.[420] Chinese Taipei considers that "India's alleged mistaken view as to the 'material scope of the commitments' under the tariff concessions at issue is no more than a mistaken view of its obligations on tariff concessions", and "[e]rrors of law are not covered by Article 48(1) of the Vienna Convention".[421]

7.101. The United Kingdom agrees with Brazil that Article 48 establishes a very high threshold for demonstrating that a party's consent to be bound by a treaty was in error.[422]

7.102. The United States argues that "it appears that the alleged error concerns India's legal interpretation of its WTO commitments and the terms of its WTO Schedule rather than a particular 'fact or situation'".[423] The United States notes India's characterization of the error "as concerning 'the complex nature of the HS2002 to HS2007 transposition'" as well as India's position "that it 'never intended to expand its tariff commitments with respect to ICT products beyond the remit of India's obligations as contained in the ITA[]'".[424]

1962, p. 6; ICJ, *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999: ICJ Reports 1999, p. 1045; Permanent Court of International Justice (PCIJ), *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 September 1933: PCIJ (ser. A/B) No. 53.; and ICJ, *Case concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, Judgment of 20 June 1959: ICJ Reports 1959, p. 209).

[412] Canada's third-party response to Panel question No. 16, para. 3.
[413] Canada's third-party response to Panel question No. 16, para. 5.
[414] Canada's third-party response to Panel question No. 17, para. 7.
[415] European Union's third-party statement, para. 8.
[416] European Union's third-party statement, para. 6.
[417] Korea's third-party submission, para. 13.
[418] Korea's third-party response to Panel question No. 16, para. 6.
[419] Chinese Taipei's third-party response to Panel question No. 16, para. 8.
[420] Chinese Taipei's third-party response to Panel question No. 16, paras. 5-9.
[421] Chinese Taipei's third-party response to Panel question No. 16, para. 9.
[422] United Kingdom's third-party statement, para. 14.
[423] United States' third-party response to Panel question No. 16, para. 9.
[424] United States' third-party response to Panel question No. 16, para. 9 (quoting India's first written submission, para. 40).

7.3.3.2.3 Panel's assessment

7.3.3.2.3.1 General considerations

7.103. Article 48(1) indicates that:

> A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

7.104. Article 48(1) sets forth four elements that must be demonstrated: (i) at the time when the treaty was concluded, the invoking State made an assumption; (ii) that was related to a "fact or situation"; (iii) which formed an essential basis of the State's consent to be bound by the treaty; and (iv) the assumption was in error.

7.105. It is uncontested that the burden of demonstrating that the requirements of Article 48(1) are satisfied in a given case rests on the party invoking Article 48.[425] We recall that India's assertion of error is that India had assumed that the transposition of its Schedule to the HS2007 did not result in an expansion of its tariff commitments beyond those set forth in the ITA, while, according to India, such expansion did in fact occur.

7.106. Thus, in order for India to prevail under Article 48(1), India must demonstrate that: (i) at the time when the changes to its WTO Schedule were certified following the HS2007 transposition process, India assumed that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings; (ii) that assumption related to a "fact or situation" within the meaning of Article 48(1); (iii) that assumption formed an essential basis of India's consent to be bound by those changes to its Schedule; and (iv) that assumption was incorrect, because following the HS2007 transposition process the scope of India's WTO tariff commitments was expanded beyond the scope of its ITA undertakings. We proceed to address each issue in turn.

7.3.3.2.3.2 Whether, at the time when the changes to its WTO Schedule were certified following the HS2007 transposition process, India assumed that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings

7.107. The first element of the test under Article 48(1) requires the invoking party to demonstrate that, at the time when the treaty was concluded, it made a certain assumption. In this dispute, India asserts that, at the time that it certified its WTO HS2007 Schedule, India assumed that "the HS2007 transposition did not expand India's tariff commitments beyond India's obligations under the ITA[]".[426] We therefore proceed to assess whether India held this assumption.

7.108. India argues that the existence of its assumption is demonstrated by the fact that, at the time of the certification of the changes to the Schedule, "India had already made its intention clear of not expanding its obligations under the ITA[] via the HS2007 transposition or otherwise", and "India was already levying duties beginning 2014 on certain ICT products which were ostensibly at variance with the commitments under the contested sub-headings it was entering into at the same time via the HS2007 transposition".[427] India refers to "several pronouncements" made by India indicating that India did not intend to join the ITA Expansion.[428] India submits that, "[c]learly, India's intent was never to expand upon its obligations under the ITA[], with such intent having been communicated in advance via various committee meetings as well as confirmed in practice via certain customs tariff levies."[429]

7.109. Japan does not take a position regarding India's assertion of its assumption at the time that the changes to its WTO Schedule were certified. Japan submits that there is no error regarding the

[425] Japan's response to Panel question No. 14, para. 37 ("[t]he burden of proof is on the defendant alleging the error"); India's response to Panel question No. 17, para. 55 ("the party invoking error bears the burden of proving that the conditions under Article 48(1) have been met").
[426] India's first written submission, para. 11.
[427] India's first written submission, para. 47.
[428] India's first written submission, para. 46.
[429] India's first written submission, para. 47.

scope of the concessions at issue as the transposition did not change the scope of India's pre-existing concessions for the products concerned.[430]

7.110. We note at the outset that the evidence adduced by India does not conclusively indicate that, at the time of the transposition, it assumed that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings. India points primarily to the following passage from the Minutes of the meeting held on 1 November 2012[431]:

> 2.10 The representative of India thanked Korea for hosting both the technical discussions as well as the transparency session. India's position on the effects of ITA was well known as articulated during the symposium in May. India's IT manufacturing had dipped quite profusely due to the ITA I. In the spirit of constructiveness, India had conducted stakeholder consultations around the country. The general concern was the relevance of many of the IT products or the ICT sector. The consolidated list (JOB/IT/7/Rev.1) could create an inversion in the duty structure, the multiple-use of many products and the difficulty in monitoring at the customs level for many of the products which had multiple-use. He informed the Committee about his government's national electronics policy with ambitious targets in terms of manufacturing in the electronics sector, as well as the overall manufacturing sector of the country. As a result, stakeholders had expressed serious reservations and he wanted to place these reservations on record.[432]

7.111. We understand that the "technical discussions" referred to in this passage concerned a review of the product coverage of the ITA. In our view, these Minutes reveal that India had "reservations" regarding increasing the product scope *of the ITA*. We see no mention of India's WTO tariff commitments, the HS2007 transposition process or any indication of India's intentions with respect to that process.

7.112. India also refers to the following passages of the Minutes of the meeting held on 15 May 2012[433]:

> 1.5 The representative of India thanked the Chairman for his report on the IT Symposium and requested that his country's name be removed from the sentence which stated that some countries had benefited from the ITA in terms of increasing employment, IT spending and investment.
>
> …
>
> 3.11 The representative of India thanked the US delegation and other co-sponsors for the concept paper. He supported the statement made by El Salvador also on behalf of others (Guatemala, Honduras, Nicaragua and the Dominican Republic) on the fact that the Committee would need to take into account the flexibilities required by many developing countries in the expansion of IT products. He asked the United States and other co-sponsors a question on the concept paper regarding the issue of the critical mass. He wondered whether there were any specific numbers in terms of the critical mass for product expansion as proposed by the co-sponsors. His second question concerned the mandate that the co-sponsors quoted, i.e., paragraph 3 of the Annex to the Ministerial Decision. He asked whether there was reference to both tariffs as well as to NTBs in the same paragraph or how the United States and other co-sponsors were trying to delink tariffs from NTBs. At the Symposium, many of the US industry participants were adamant that only tariffs should be addressed. On NTBs, he wanted to know whether any of the ITA Participants were looking at disciplining standards on IT products which he thought was a very critical area for NTBs and which were really the fundamental market access barriers to these products. The applied tariffs were not so substantial as so to create those market access barriers and many companies were

[430] Japan's second written submission, paras. 93-98.

[431] India's first written submission, fn 68 to para. 40, fn 70 to para. 42, fns 76-78 to paras. 46-47, fn 82 to para. 49, fn 88 to para. 53, and fn 193 to para. 125.

[432] Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 1 November 2012, G/IT/M/56, para. 2.10.

[433] India's first written submission, fn 70 to para. 42.

> managing to export their products. On the issue of classification divergences, he said that it was an issue that comprised 55 products and had not been resolved for the past 15 years. He doubted that one could just brush it aside in terms of saying that these were complicated by HS96, HS2002 or HS2007 nomenclature changes as otherwise the participants would have actually solved the problem in the first place. He posed a question to the Secretariat regarding procedures for consultations concerning the decision of Paragraph 3 of the Annex to the Ministerial Declaration which gave the mandate to the CTG. He said that there was a decision which came out later on the implementation of the Ministerial Declaration, G/L/160. In his view, it talked about the mandate of this particular Committee as well as the fact that the first review would be conducted in 1997 and 1998. However, there were no procedures in place for subsequent reviews. Thus he wished to have some clarification from the Secretariat on this.[434]

7.113. Paragraph 1.5 of these Minutes appears to suggest that India did not share the feeling of some other Members that they had enjoyed certain economic benefits from participating in the ITA. This paragraph does not suggest that India assumed, at the time of the transposition of its WTO Schedule, that the transposition to the HS2007 would not expand the scope of its WTO tariff commitments beyond the scope of its ITA undertakings.

7.114. As to paragraph 3.11, we observe that India's delegate highlighted that the issue of classification divergences (presumably in relation to products covered by the ITA) was an issue that affected 55 products, which had not been resolved since the signing of the ITA, and he "doubted that one could just brush it aside in terms of saying that these were complicated by HS96, HS2002 or HS2007 nomenclature changes as otherwise the participants would have actually solved the problem in the first place".[435] This passage indicates to us that India was fully aware of differences of opinion among the Members regarding the HS classification of certain ITA products. It does *not* indicate to us that India assumed that the transposition of its Schedule would not expand the scope of its WTO tariff commitments beyond the scope of its ITA undertakings.

7.115. We also note India's argument that its understanding and intentions with respect to its Schedule were clear from the fact that, as from 2014, prior to the certification of the changes to the Schedule, India had already begun levying duties on certain products that fall under the contested tariff items. In our view, however, this argument is partially undermined by the fact that, prior to 2014, India had indeed been according duty-free treatment to almost all products at issue in this dispute.[436] Moreover, we understand that the majority of products at issue in this dispute continued to receive duty-free treatment until as recently as 2017 (and 2018 in the case of some products).[437]

7.116. We do not wish to speculate on India's reasons for applying certain duties in 2014, some months before its transposed Schedule would be certified. We are wary, however, of accepting a Member's act of potential WTO-inconsistency as evidence that the Member misunderstood the scope of its WTO obligations.[438] To a certain extent, it would be circular if parties invoking Article 48 of the Vienna Convention could rely on their violation of treaty obligations to demonstrate that they committed an "error" in agreeing to be bound by that treaty. We therefore do not consider that India's application of duties to certain products at issue in this dispute demonstrates that, at the time when the changes to its WTO Schedule were certified following the HS2007 transposition

[434] Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, paras. 1.5 and 3.11.

[435] Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, para. 3.11.

[436] Japan's first written submission, paras. 18, 33, 42, 49, 56, and 63. See also European Union's third-party submission, paras. 67-68; Chinese Taipei's third-party submission, para. 3.29 and section 4.

[437] See Japan's first written submission, paras. 33, 42, 56, and 63. We recognize, in making these observations, that even if India's tariff commitments with respect to these products were "unbound" prior to the conclusion of the transposition exercise, India was naturally free to apply duty-free treatment if it so wished. Nevertheless, the fact that India applied duty-free treatment to the overwhelming majority of the products at issue in this dispute until 2017 does undermine its assertion that its application of duties as from 2014 demonstrates its assumption regarding the transposition process.

[438] We also refer to our findings in section 7.4 below that India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994.

process, India assumed that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings.

7.117. Notwithstanding our reservations regarding the evidence adduced by India, we recognize that evidence of an "assumption" may be difficult to obtain. To the extent that such an assumption is a widely held implicit understanding, there may be little to no documentary evidence. We therefore do not consider India's lack of documentary evidence sufficient to conclude that India has not met its burden of proof with respect to the existence of its assumption. We also note India's arguments and assertions in the course of these proceedings regarding the assumptions it held during the transposition process.[439]

7.118. On balance, taking into account the necessary evidentiary limitations attached to providing proof of an assumption, we accept in good faith India's arguments and explanations in the course of these dispute settlement proceedings. Accordingly, we find that, at the time of the transposition, India assumed that the scope of its WTO commitments was limited to the scope of its ITA undertakings, with respect to those tariff commitments adopted by India in order to implement its ITA undertakings, and that the scope of those tariff commitments would not be expanded through the HS2007 transposition process.[440]

7.3.3.2.3.3 Whether India's assumption regarding the alleged expansion of its WTO tariff commitments from its ITA undertakings relates to a "fact or situation" within the meaning of Article 48(1)

7.119. The second element to be assessed in applying Article 48(1) is whether the invoking party's assumption relates to a "fact or situation" within the meaning of Article 48(1). In this dispute, this entails assessing whether India's assumption (i.e. that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings) relates to "a fact or situation" within the meaning of Article 48(1).

7.120. India argues that "the difficulty in articulating a workable distinction between errors of law and errors of fact has been evident from as early as the drafting of the VCLT".[441] According to India, "[t]hat a mistaken 'fact or situation' may have legal consequences (as indeed all contested errors would) does not make the error a legal error".[442] India submits that its "factual or situational error was in relation to the inadvertent expansion of the scope of its commitments via the 2007 transposition, which was contrary to India's stated position and intent of not expanding upon its ITA[] commitments".[443] In India's view, "similar errors relating to technical entries have previously been considered as a potential ground for invalidity in international law."[444]

7.121. Japan submits that the language "fact or state of facts" in the draft Article 48 was revised to "fact or situation" to avoid the possibility that the French version could have been read as encompassing errors of law.[445] Japan considers that "[a]s an integral part of the WTO Agreement, India's Schedule based on the HS 2007 is (part of) an international treaty and thus constitutes international law".[446] Japan asserts that "India's alleged error clearly constitutes an error of law",

[439] See e.g. India's first written submission, para. 46; and opening statement at the second meeting of the Panel, para. 26.

[440] In coming to this conclusion, we note that the application of the legal standard under Article 48 not only requires that the invoking party held an assumption, but requires the invoking party to demonstrate that such assumption constituted an essential basis for its consent. (See section 7.3.3.2.3.4 below). In our view, this latter question imposes an additional evidentiary burden on the invoking party, over and above demonstrating that they made an assumption. It therefore follows, in our view, that taking India at its word with respect to this first step of the analysis does not alleviate India from its evidentiary burden under Article 48.

[441] India's response to Panel question No. 44, para. 30. See also India's second written submission, paras. 7 and 21-23.

[442] India's second written submission, para. 23. See also India's response to Panel question No. 44, para. 30.

[443] India's second written submission, para. 23.

[444] India's response to Panel question No. 44, para. 30.

[445] Japan's second written submission, para. 105 (referring to T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), pp. 886-887, para. 19).

[446] Japan's second written submission, para. 106.

since the alleged error concerns "the 'material scope' of [India's] rights and obligations under its Schedule", and this error of law "cannot be used by India to invoke Article 48".[447]

7.122. We note that India does not dispute that purely legal errors (for instance, a mistaken interpretation of a legal obligation contained in a treaty) do not qualify as errors relating to a fact or situation, within the meaning of Article 48(1).[448] Indeed, we agree with the parties that pure legal error falls outside the scope of Article 48(1).[449] At the same time, we recognize that a Commentary to the Vienna Convention suggests that "[a]n error of law may … qualify as a ground for vitiating consent if it also raises questions of fact."[450]

7.123. We have concluded above that the ITA is *not* a covered agreement and does not set forth India's legal obligations at issue in this dispute. Thus, to the extent we take into account the ITA in this dispute, we do so as a factual matter. In our view, India's alleged error concerns the scope of the tariff commitments contained in its WTO Schedule and therefore concerns India's legal obligations. However, this, in itself, does not mean that the error necessarily falls outside the scope of Article 48(1). Since the ITA forms part of the relevant factual background to India having undertaken certain tariff commitments in its WTO Schedule, and India's alleged error concerns the product scope of the ITA, it is not immediately clear to us that the alleged error can be characterized as either an exclusively legal error or alternatively as a mixed question of fact and law.

7.124. We recall that, for India to prevail under Article 48(1), it must prevail with respect to each element thereof. Therefore, in light of our findings regarding the next element under Article 48(1) (in section 7.3.3.2.3.4 below), we do not consider it necessary to make a determination as to whether India's alleged error relates to a fact or a situation, within the meaning of Article 48(1).

7.3.3.2.3.4 Whether India's assumption that the transposition of its WTO Schedule to the HS2007 would not expand the scope of its WTO tariff commitments from its ITA undertakings formed an essential basis of India's consent to be bound by its WTO Schedule

7.125. The third element to be assessed under Article 48(1) is whether the invoking party's assumption formed an essential basis of the State's consent to be bound by the treaty. In this dispute, this entails assessing whether India's assumption (i.e. that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings) constituted an essential basis for its consent to be bound by its HS2007 Schedule.

7.126. India argues that "it should be evident that India would not have certified the contested sub-headings in its 2007 Schedule had it not been in error" and that "India had communicated to the wider WTO membership previously that it did not intend to expand its tariff commitments beyond those contained in the ITA[]".[451] As evidence of these communications, India refers to the same evidence and arguments adduced to demonstrate the existence of its assumption, specifically "several pronouncements" made by India indicating that India did not intend to join the ITA Expansion.[452] India argues that "[c]learly, India's intent was never to expand upon its obligations under the ITA[] – with such intent having been communicated in advance via various committee

[447] Japan's second written submission, paras. 106-107. See also Japan's response to Panel question No. 44, para. 71; opening statement at the second meeting of the Panel, para. 14.

[448] See e.g. India's second written submission, paras. 22-23; response to Panel question No. 44.

[449] The principle that errors of law fall outside the scope of Article 48(1) is outlined in the Commentary on the Vienna Convention. A Commentary on the Vienna Convention indicates that "[a]s a general rule, an error of law cannot in itself be regarded as 'an error relating to a fact or situation'" and that "[e]rrors relating to international law are genuine errors of law and are as such immaterial under Art 48 para. 1". (T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), pp. 886 and 888). We agree with this reasoning. We further note that in the *Eastern Greenland* case, *Petroleum Development v Sheikh of Abu Dhabi*, and the *Temple of Preah Vihear*, the relevant international tribunals consistently found that errors of law may not be invoked as invalidating consent to be bound by a treaty. (Ibid. p. 887 (referring to PCIJ, *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 September 1933: PCIJ (ser. A/B) No. 53.; *Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144; and ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961: ICJ Reports 1961, p. 17, at p. 30)).

[450] T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), p. 888. (emphasis omitted)

[451] India's second written submission, para. 25.

[452] India's first written submission, para. 46.

meetings as well as confirmed in practice via certain customs tariff levies."[453] India argues that "if India were already aware that the HS2007 transposition was going to expand its commitments beyond the ITA[] and had gone as far as to caution against such potential expansion specifically, it would not have certified the schedule in error as it did."[454]

7.127. Japan considers that "the treaty as a whole to which India was giving its consent, and which would have been affected by the alleged error, was India's Schedule based on the HS2007".[455] Japan argues that India "has never argued that it would not have agreed to the transposition of its Schedule based on the HS2007 'as a whole' had it been aware of the alleged mistaken understanding", and consequently India has failed to demonstrate that the alleged error formed an essential basis of its consent to be bound by the treaty.[456] Japan further argues that, "because the error alleged by India does not exist, there was no error at the time when the treaty was concluded."[457]

7.128. We observe that the procedures to be followed in conducting the transposition of Members' Schedules to the HS2007 were regulated in a series of documents that were approved by WTO Members and which are publicly available. The overarching procedural framework for the transposition process was established in the General Council Decision of 15 December 2006 on A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database, WT/L/673 (General Council Decision on HS2007 Transposition Procedures).[458] The General Council Decision further indicates certain procedural steps to be followed by the Secretariat. Specifically, the Secretariat had to "abide by the technical procedures described in Annex 2 to th[e] Decision".[459] Annex 2 of that Decision indicates, *inter alia*, that "[t]he transposition shall be based on the information provided by the [WCO], which is included in the WTO documents G/MA/W/67 and G/MA/W/76" and "[a] detailed concordance table between the HS2002 and the HS2007 nomenclatures shall be prepared by the Secretariat using these documents as the basis".[460] We note that documents G/MA/W/67 and G/MA/W/76 are documents circulated by the Committee on Market Access, containing certain communications from the WCO, including (in document G/MA/W/76) correlation tables drawn up by the WCO Secretariat to implement changes from the HS2002 to the HS2007, in accordance with instructions received from the HS Committee.[461]

7.129. We also note that, as part of the WTO Secretariat's preparations for the transposition of developing country Members' Schedules, the Committee on Market Access approved document G/MA/283, titled "Transposition of Members' CTS Files to the HS 2007 Nomenclature – Notes on Methodology" (hereafter "document G/MA/283").[462] This document, in its introduction, explains that

[453] India's first written submission, para. 47.
[454] India's response to Panel question No. 64, para. 32.
[455] Japan's second written submission, para. 114.
[456] Japan's second written submission, para. 114.
[457] Japan's comments on India's response to Panel question No. 61, para. 42.
[458] See e.g. India's first written submission, fn 32 to para. 21, fn 51 to para. 31, and fn 100 to para. 48; and Japan's opening statement at the first meeting of the Panel, para. 37 and fn 31 thereto.
[459] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 5.
[460] General Council Decision on HS2007 Transposition Procedures, WT/L/673, Annex 2, para. 7.
[461] Committee on Market Access, International Convention on the Harmonized Commodity Description and Coding System – Changes in the Harmonized System to be introduced on 1 January 2007, G/MA/W/67; and Committee on Market Access, Harmonized Commodity Description and Coding System – Changes in the Harmonized System to be Introduced on 1 January 2007, G/MA/W/76. We note that none of the parties appears to have referred to document G/MA/W/76 in their submissions to the Panel. It is, however, explicitly referenced in the General Council Decision on HS2007 Transposition Procedures contained in document WT/L/673, which is referred to by the parties. (See e.g. India's first written submission, fn 80 to para. 48). We therefore consider that the parties and the Panel were on notice of this document's potential relevance to the issues arising in this dispute. Moreover, since document WT/L/673 is relied upon by the parties, and explicitly refers to document G/MA/W/76, we consider that, as a publicly accessible WTO document, document G/MA/W/76 is part of the official record. In our view, this approach accords with the approach taken by a previous panel in analogous circumstances. (See Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.370). We further note that, even to the extent that this publicly available WTO document was not specifically identified in the evidence adduced by the parties, we do not consider that this would preclude us from taking it into account. In our view, panels are not obliged to disregard publicly available WTO documents of which they are aware, and which bear directly on the matters before them, simply because such documents were not raised by the parties to the dispute.
[462] Committee on Market Access, Transposition of Members' CTS Files to the HS 2007 Nomenclature – Notes on Methodology, approved on 26 April 2012, G/MA/283. We note that none of the parties referred to document G/MA/283 in their submissions to the Panel, until this document was raised by the Panel in a

it "describes the guidelines that the Secretariat intend[ed] to follow for the implementation of the HS 2007 transposition" and "provides a detailed description of the methodology that the Secretariat [would] follow in the HS 2007 transposition exercise".[463] Furthermore, Annex I of document G/MA/283 contains the HS2002 to HS2007 correlation tables prepared by the WTO Secretariat, based on document G/MA/W/76, but updated to account for "[f]urther amendments to the HS by the WCO".[464]

7.130. Having reviewed these documents governing the conduct of the transposition process, we see no mention of the ITA. We therefore understand that, for all intents and purposes, WTO Members and the WTO Secretariat did not consider the ITA to be relevant to the transposition process. Rather, WTO Members appeared to share an understanding that the transposition exercise would follow the correlation tables that were prepared at the multilateral level by the WCO, updated by the WTO Secretariat, and approved multilaterally by the WTO Members themselves at the General Council and the Committee on Market Access.[465] Importantly, these correlation tables identified the "correlations" between HS2007 tariff items and HS2002 tariff items – in other words, how the product scope of tariff items under the HS2002 overlapped with that of tariff items under the HS2007.[466] Since these procedures did not contemplate any kind of comparison or discussion of the ITA, we understand that if India, or indeed any Member, had considered the ITA to be relevant to the transposition of their WTO tariff commitments, they would have had to make that clear.

7.131. These documents indicate that, in the absence of any evidence to the contrary, India's governing assumption and intention, during the transposition of its Schedule, was for the WTO Secretariat to follow the agreed-upon procedures, including the relevant agreed-upon correlation tables. The fact that India approved the content of these documents governing the transposition process, including at the General Council and in the Committee on Market Access, without objection, indicated at the time to the WTO Members and to the WTO Secretariat (and indicates to us now) that India intended for the transposition of its Schedule to follow those multilaterally approved procedures, including the relevant correlation tables.[467]

7.132. It is in this context that we observe India's assertion that "the WTO Membership, at large, including Japan, could not have been unaware of India's very public and unequivocal stance against the expansion of the ITA[] including the fact that it was already levying duties in derogation to the 2007 Schedule at the time of its certification".[468] As evidence of its "persistent expression of its stand to not be bound by commitments beyond the ITA[] via any process which would have such an effect", India refers to "several pronouncements" that it made.[469] Specifically, India refers to the Minutes of two meetings of the Committee of Participants on the Expansion of Trade in Information Technology Products, held on 15 May 2012 and 1 November 2012.

7.133. We have reviewed the Minutes of these meetings in paragraphs 7.110 to 7.114 above. We see no indication in any of India's statements during those meetings that India's willingness to be bound by the changes to its WTO Schedule resulting from its transposition to the HS2007 Schedule was conditional on the product scope of that Schedule being limited to its undertakings under the ITA. A simple comparison of India's arguments in these dispute settlement proceedings to the statements made by India during those meetings reveals no overlap. We therefore do not see any evidence of India's alleged "persistent expression of its stand to not be bound by commitments beyond the ITA[] via any process which would have such an effect".[470]

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question to the parties. It is, however, referenced numerous times in an Exhibit submitted to the Panel by India. (See Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49), Attachment 3, CTS HS2007 Transposition Note XII - India). In accordance with our approach to document G/MA/W/76, we consider that document G/MA/283 is part of the official record. (See fn 462 to para. 7.129 above).

[463] G/MA/283, paras. 1-2.

[464] G/MA/283, Annex I, fn 1 on p. 24.

[465] See WT/L/673, Annex 2, paras. 1-7. See also G/MA/W/67; G/MA/W/76; and G/MA/283.

[466] The WCO communication emphasizes that the correlation tables "are not to be regarded as constituting classification decisions" by the HS Committee, constitute "a guide published by the [WCO] Secretariat", and "do not have legal status". (G/MA/W/76, p. 1). (emphasis omitted)

[467] WT/L/673; G/MA/W/67; G/MA/W/76; and G/MA/283.

[468] India's second written submission, para. 31.

[469] India's response to Panel question No. 64, para. 31; first written submission, para. 46; and fn 193 to para. 125.

[470] India's response to Panel question No. 64, para. 31.

7.134. In our view, aspects of these Minutes indicate that Members disagreed as to the tariff classification of products falling under the ITA.[471] Thus, India was on notice that there was a difference of opinion among ITA participants regarding certain classification issues, including with respect to the scope of their ITA undertakings. This makes India's failure to highlight its alleged assumption regarding the relationship between the ITA and its WTO tariff commitments during the transposition process even more glaring, considering its present assertion that this assumption constituted an *essential basis* for its consent to be bound by its transposed Schedule.

7.135. We also note that in these dispute settlement proceedings India has not sought to demonstrate that any *technical* errors occurred during the transposition process.[472] India does argue that the WTO Secretariat, in preparing India's transposition files, acted inconsistently with paragraph 4 of the General Council Decision on HS2007 Transposition Procedures, because the Secretariat failed to clearly flag certain tariff items "for which a change in the scope of a concession may have occurred due to the complex technical nature of the transposition".[473] We address that issue further below.[474] For our present purposes, however, we note that India has not sought to demonstrate that the Secretariat incorrectly applied the correlation tables that were agreed upon by Members (in particular the correlation tables that were approved by the General Council and the Committee on Market Access).

7.136. Thus, notwithstanding that the transposition was conducted in accordance with the agreed-upon correlation tables, India is (and asserts that it was at the time) unwilling to be bound by the transposed Schedule. India argues that it was only willing to be bound by its Schedule if the scope of its concessions in the transposed HS2007 Schedule was no broader than the scope of its obligations in the ITA. In our view, if India had held such condition to be fundamental to its willingness to be bound by the outcome of the transposition process, it would have made this condition obvious. Indeed, as discussed in greater detail below, India had numerous opportunities to do so.[475] Based on the evidence before us, we can see no point at which India made such a statement or otherwise expressed that intention.

7.137. We note that in support of its arguments under Article 48, India submits as evidence a Legal Opinion by Professor Waibel.[476] In our view, Professor Waibel's Legal Opinion is inapposite insofar as it relates to the evidentiary question of whether India's assumption (during the transposition process and at the time of certifying the changes to its Schedule resulting from that process), that the scope of its tariff concessions would be limited to the scope of its undertakings in the ITA, constituted an essential basis for India's willingness to be bound by the changes to its Schedule. There is no indication in Professor Waibel's Legal Opinion that he has any knowledge regarding this factual question.

7.138. We recognize Professor Waibel's assertion that "[t]here is no indication, given India's persistently expressed desire to the contrary, that India wished to expand the coverage of its existing tariff bindings under the ITA[]".[477] As explained above, however, India's agreement on the correlation tables and procedures and failure to mention the ITA in the context of the transposition process signalled to WTO Members and the WTO Secretariat that it intended for the Secretariat to follow those correlation tables and procedures. If India had wished otherwise, it could and should have said so. According to the evidence before us, India did not do so. In short, there is no indication in the evidence before us that India's assumption that the scope of its concessions with respect to certain ICT products would be limited to the product scope of the ITA constituted an essential basis for its consent to be bound by the changes to its Schedule.

7.139. To sum up, we recall that the burden of proof under Article 48(1) is on India. With respect to this element of Article 48(1), India has provided no persuasive evidence that its assumption constituted an essential basis of its consent to be bound by the certified Schedule. To the contrary,

[471] This may be read from the statement by India's delegate to the effect that differences of opinion of classification "comprised 55 products and had not been resolved for the past 15 years". (Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, para. 3.11).

[472] See India's response to Panel question No. 64(b).

[473] India's first written submission, fn 81 to para. 48.

[474] See section 7.3.3.3.3.2 below.

[475] See para. 7.206 below.

[476] Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-76).

[477] Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-76), para. 37.

India's conduct throughout the transposition process indicates that such a condition was not an essential basis of its consent. On the basis of the evidence before us, we consider that India has failed to satisfy its burden of demonstrating that its assumption (i.e. that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings) constituted an essential basis for its consent to be bound by its HS2007 Schedule.

7.3.3.2.3.5 Whether India's assumption that its tariff commitments would not be expanded beyond the scope of its ITA undertakings was in error

7.140. The fourth element of the test under Article 48(1) is whether the invoking party's assumption was in error. In this dispute, that entails assessing whether the scope of India's WTO tariff commitments was expanded beyond the scope of its ITA undertakings.

7.141. India argues that the scope of its WTO tariff commitments was expanded beyond the scope of its ITA undertakings, because the products covered by tariff items 8517.12, 8517.61, 8517.62, and 8517.70 of its WTO HS2007 Schedule were not covered by the ITA.[478] India explains that if it "never intended to undertake tariff commitments on ICT products beyond those contained in the ITA[] (with the commitments under the contested sub-headings being beyond those in the ITA[]) then India has only been consistent in its levy of customs duties except for the inadvertent error in understanding the scope of [its] complex HS2007 transposition (unintentionally subscribing to obligations beyond those in the ITA[])".[479] India also emphasizes that it never intended to undertake concessions with respect to products covered under the ITA Expansion, and that "[t]here were simply no negotiations or commitments undertaken by India with respect to products that are specifically covered within the ITA [Expansion]".[480]

7.142. Japan argues that "India has not provided any evidence in support of its allegation that the scope of the tariff concessions regarding the Products Concerned changed when its Schedule was transposed from the HS2002 to the HS2007", and "[g]iven that there has been no change in the scope of the concessions concerned, that transposition could not have been the source of *any* 'error' by India as to the scope of the commitments".[481] Japan argues that there is no error in relation to the scope of India's commitments, because the transposition to the HS2007 constituted "a mere process of transposing from the previous version which did not change the scope of the pre-existing concessions of India".[482] Japan considers that the fact that India's concessions already covered the products at issue "is demonstrated by the correlation tables between the HS2002/HS1996 and the HS2007 which were prepared by the WTO Secretariat and circulated to the WTO Members."[483] Moreover, Japan considers that a document prepared by the WTO Secretariat at the request of the Chairman of the Committee of Participants on the Expansion of Trade in Information Technology Products, which was circulated to WTO Members, "clearly indicates that the Products Concerned were included in the duty-free concessions in India's Schedule based on the HS2002".[484]

7.143. We recall that the ITA is not a covered agreement. Moreover, given the cumulative nature of the elements under Article 48(1) and our finding that India has failed to meet its burden of proof with respect to the third element, it is not strictly necessary for us to address the fourth element of the test. Nevertheless, given the extensive debate by the parties regarding this issue, we wish to offer some observations, in the interest of assisting the parties in resolving their dispute.

7.144. First, we emphasize that India's assertion of error concerns a purported expansion in the scope of its WTO tariff commitments as compared to the ITA. We recall that the HS2007 transposition process did not take into account and did not purport to transpose Members' ITA undertakings. Rather, the HS2007 transposition process sought to transpose Members' WTO tariff commitments from the HS2002 to the HS2007. In this respect, India does not argue that any technical mistakes

[478] India's first written submission, paras. 49 and 75-194.
[479] India's first written submission, para. 49.
[480] India's first written submission, para. 51.
[481] Japan's opening statement at the second meeting of the Panel, para. 13. See also Japan's second written submission, para. 95.
[482] Japan's opening statement at the first meeting of the Panel, para. 39.
[483] Japan's response to Panel question No. 44, para. 70 (referring to document JOB(07)/96 (25 June 2007)).
[484] Japan's second written submission, para. 96 (referring to document JOB(07)/96 (25 June 2007)).

occurred in the transposition of its Schedule to the HS2007.[485] As noted above, it is uncontested that the WTO Secretariat correctly followed the correlation tables communicated by the WCO, updated by the WTO Secretariat, and approved by the General Council and the Committee on Market Access.[486]

7.145. As indicated, however, India argues that its mistaken assumption at the time that it agreed to be bound by its HS2007 Schedule was not in relation to the transposition of its tariff commitments from the HS2002 to the HS2007, but rather in relation to the scope of its ITA undertakings as compared to its WTO Schedule.[487] In this respect, we have already concluded above that India is mistaken with respect to the relationship between the ITA and its WTO Schedule.[488] Specifically, we concluded that as a general rule the product scope of Members' tariff concessions contained in their WTO Schedules evolves over time to capture products that may come into existence as a result of technological developments, and that this general rule is not changed for certain WTO Members by virtue of their participation in the ITA.[489]

7.146. Second, we also note that the parties have conducted a substantial exchange of views regarding whether the ITA and India's WTO tariff commitments in its HS1996 Schedule covered "telephones for cellular networks or for other wireless networks". We note, in particular, that India's arguments with respect to several other products at issue in this dispute appear to be premised on its argument that telephones for cellular networks or for other wireless networks were not covered by the ITA.[490] Given the importance that the parties attribute to this issue, we consider it useful to address the parties' arguments as to whether these products were covered by India's tariff concessions in its WTO HS1996 Schedule.

7.147. In this respect, India argues that it is not obliged to provide duty-free treatment to "telephones for cellular networks or for other wireless networks" in its WTO HS2007 Schedule, because its commitments under the ITA did not extend to such products.[491] India argues that "transmission apparatus" within the meaning of tariff item 8525.20 of the HS1996 referred specifically to "transmission apparatus for radio-telephony or radio telegraphy".[492] India submits that such transmission apparatus were defined in the HS1996 Explanatory Notes as apparatus "which allowed the transmission of signals representing (1) speech, (2) messages, or (3) still pictures".[493] India considers that "apparatus which could transmit signals representing videos or any other media (other than the three listed above) could not be included in the scope of sub-heading 8525.20 under HS1996".[494] Regarding an amendment to the HS1996 Explanatory Notes adopted in 1998, India argues that "[s]ince LET/181 was certified on October 2, 1997, the product scope agreed upon by India is what is delineated by the Explanatory Notes as on October 2, 1997" and "such amendment is subject to the main definition of Transmission Apparatus for Radio Telephony or Radio

[485] See India's responses to Panel question No. 64. Specifically, while India considers that certain changes were not flagged by the WTO Secretariat, as required under the relevant procedures, India "does not argue or emphasize any other facets of the technical exercise of transposing India's Schedules in accordance with the multilaterally agreed and approved procedures and correlation tables". (Ibid. para. 33). India also agrees that no mistakes occurred in any prior transpositions of its WTO Schedule. (India's response to Panel question No. 59).

[486] We therefore see no need to examine the accuracy of the WCO's correlation tables, the updated correlation tables prepared by the WTO Secretariat and approved by the General Council and the Committee on Market Access, or the transposition process as undertaken by the WTO Secretariat. (See also para. 7.206 below).

[487] India's opening statement at the second meeting of the Panel, para. 26.

[488] See section 7.3.2.3 above.

[489] See para. 7.67 above.

[490] The parties' arguments with respect to "telephones for cellular networks or for other wireless networks" appear to be determinative as to whether products falling under tariff items 8517.12, 8517.61, and 8517.70 of India's WTO HS2007 Schedule were already covered by the ITA. (See India's first written submission, paras. 131-158 and 176-194).

[491] India considers that "[t]he issue before the Panel is whether sub-heading 8525.20 [of the HS1996] – 'Transmission apparatus incorporating reception apparatus' could cover telephones for cellular networks." (India's first written submission, para. 133).

[492] India's first written submission, para. 134. India highlights that tariff heading 8525 of the HS1996, referred to "transmission apparatus for radio-telephony, radio-telegraphy, …, whether or not incorporating reception apparatus or sound recording or reproducing apparatus". (Ibid. (referring to HS1996 Explanatory Notes to Heading 8525 (Exhibit IND-6)).

[493] India's second written submission, para. 87.

[494] India's second written submission, para. 43.

Telegraphy".[495] India submits that mobile phones capable of transmitting video were, in fact, classified under tariff item 8543.89 of the HS1996, which covers "other" products falling under heading 8543, which covers "electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter".[496]

7.148. Japan argues that telephones for cellular networks or for other wireless networks were classified as "transmission apparatus incorporating reception apparatus" under tariff item 8525.20 of the HS1996, and were therefore covered by India's ITA undertaking with respect to this tariff item.[497] Japan considers that this is revealed by the ordinary meaning of India's WTO Schedule based on the HS1996.[498] Japan also argues that the Explanatory Notes to headings 8517 and 8525 of the HS1996 reveal that cellular telephones or mobile phones, including car telephones, were classified under heading 8525.[499]

7.149. It is uncontested that, under the ITA, India undertook to provide duty-free treatment to "transmission apparatus incorporating reception apparatus", falling under tariff item 8525.20 of the HS1996.[500] India implemented this undertaking in its WTO HS1996 Schedule, such that a bound duty rate of 0% was inscribed with respect to "[t]ransmission apparatus incorporating reception apparatus" falling under tariff item 8525.20 of the HS1996.[501] The issue debated by the parties is whether cellular telephones or mobile phones (presently classified under tariff item 8517.12 of India's WTO HS2007 Schedule) were classified under tariff item 8525.20 of India's WTO HS1996 Schedule.

7.150. We understand that mobile phones, on their face, are indeed transmission apparatus incorporating reception apparatus.[502] Based on its ordinary meaning, we therefore see no reason to consider that telephones for cellular networks or other wireless networks would not fall within the scope of tariff item 8525.20 of India's WTO HS1996 Schedule.

7.151. It is also uncontested that the HS1996 and its Explanatory Notes constitute relevant contextual aids for interpreting the scope of India's WTO tariff commitments as set forth in its HS1996 Schedule. We note India's argument that the HS1996 Explanatory Notes exhaustively defined transmission apparatus falling under tariff item 8525.20 as apparatus "which allowed the transmission of signals representing (1) speech, (2) messages, or (3) still pictures", such that "apparatus which could transmit signals representing videos or any other media (other than the three listed above) could not be included in the scope of sub-heading 8525.20 under HS1996".[503]

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[495] India's opening statement at the second meeting of the Panel, para. 48.

[496] India's second written submission, para. 104; response to Panel question No. 63, para. 27.

[497] Japan's second written submission, para. 232.

[498] Japan considers that "'telephones for cellular networks' refer to devices which are used for the transmission of voice by means of a wireless system distributed over cells which are served by radio signal transmission machines" and that "'telephones for other wireless networks' refers to an unspecified group of devices which are used for the transmission of voice data on the basis of a wireless network which is distinct from a cellular network". (Japan's second written submission, para. 233). Japan notes that the term "transmission apparatus" in tariff item 8525.20 of India's WTO Schedule based on the HS1996 "refers to a piece of equipment which is designed for transmitting, that is transferring a form of intelligence by means of a communication system". (Ibid. para. 234). Japan further observes that the wording of heading 8525 in that Schedule refers to transmission apparatus for "radio-telephony", which is defined as "a two-way transmission of sounds by means of modulated radio waves, without interconnecting wires". (Ibid. (referring to McGraw-Hill Dictionary of Scientific and Technical Terms (6th edn), definitions of "carrier", "carrier current" and "radiotelephony" (McGraw-Hill, 2002), (Exhibit JPN-68), p. 1740)).

[499] Japan's second written submission, paras. 236-238 (referring to HS1996 Explanatory Notes to Headings 8517 and 8525, (Exhibit JPN-69), p. 1487a).

[500] See e.g. India's first written submission, para. 132.

[501] WT/Let/181.

[502] A mobile phone is "[o]riginally: a radio telephone installed in a vehicle. In later use: a portable wireless telephone that transmits and receives signals via a cellular … network; a cell phone; *esp*. (in later use) a smartphone" (Oxford English Dictionaries online, definition of "mobile phone" https://www.oed.com/view/Entry/253434?redirectedFrom=mobile+phone& (accessed 17 October 2022)); "a phone that is connected to the phone system by radio instead of by a wire, and can be used anywhere its signals can be received" (Cambridge Dictionary online, definition of "mobile phone" https://dictionary.cambridge.org/dictionary/english/mobile-phone (accessed 17 October 2022)); "a phone that you can carry with you and use to make or receive calls wherever you are" (Collins Dictionary online, definition of "mobile phone" https://www.collinsdictionary.com/dictionary/english/mobile-phone (accessed 17 October 2022)).

[503] India's second written submission, para. 43.

India considers that because "[t]elephones for cellular networks can transmit signals representing data other than speech, messages or still pictures", they fall outside the scope of heading 8525 of the HS1996.[504]

7.152. The parties do not dispute that mobile phones are indeed apparatus capable of transmitting speech, messages, or still pictures. In our view, the fact that mobile phones can *also* transmit other signals does not eliminate the fact that they are capable of transmitting signals representing speech, messages, or still pictures.

7.153. We further note that the HS1996 Explanatory Notes, as of June 1998, unambiguously indicate that cellular and mobile phones were indeed classified under tariff item 8525.20 of the HS1996.[505] Regarding India's argument that these Explanatory Notes are not relevant because they are based on an amendment that was adopted in 1998, and "the product scope agreed upon by India is what is delineated by the Explanatory Notes as on October 2, 1997"[506], as we have explained above, we consider that Members' WTO commitments are not static, and India has not pointed to any provision of the ITA indicating that Members' WTO tariff commitments undertaken in relation to the ITA would exclude products that subsequently come into existence due to technological development and that would otherwise fall within the scope of that tariff item. In short, we see no basis to exclude an amendment of the Explanatory Notes from our consideration. As stated, the HS1996 Explanatory Notes suggest that tariff item 8525.20 of the HS1996 covered mobile phones.

7.154. We note that as an alternative to tariff item 8525.20, India submits that mobile phones were in fact classified under tariff item 8543.89 of the HS1996, which covers "other" products falling under heading 8543 (covering "electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter").[507] Under the General Rules for the Interpretation of the HS, when goods are classifiable under two or more headings, "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description."[508] Moreover, if goods cannot otherwise be classified, they shall be "classified under the heading appropriate to the goods to which they are most akin".[509] In our view, heading 8525 of India's WTO HS1996 Schedule provides a more specific description of "telephones for cellular networks or for other wireless networks" than heading 8543 of that Schedule and, in any event, such products are more akin to transmission apparatus capable of transmitting speech, messages, and still pictures than they are to the more generic definition of "electrical machines and apparatus, having individual functions".

7.155. We therefore understand that India's WTO tariff commitments in its HS1996 Schedule with respect to "[t]ransmission apparatus incorporating reception apparatus" falling under tariff item 8525.20 covered, *inter alia*, telephones for cellular networks or for other wireless networks. We note that when India's Schedule was transposed to the HS2002, these commitments remained unchanged.[510] Following the transposition of its Schedule to the HS2007, the commitments under tariff item 8525.20 of the HS2002 were split into four distinct HS2007 tariff items, including tariff item 8517.12 of the HS2007, which covers "[t]elephones for cellular networks or for other wireless networks".[511] Thus, India's WTO tariff commitments with respect to telephones for cellular networks or for other wireless networks were initially set forth as an undertaking in the ITA, were made binding WTO tariff commitments pursuant to certain amendments introduced into India's WTO HS1996 Schedule, were not affected by the changes to India's Schedule during the HS2002 transposition

[504] India's second written submission, para. 43.
[505] The HS1996 Explanatory Notes, as of June 1998, indicate that "[c]ellular telephones or mobile phones, including car telephones, are classified in heading 85.25" and that the group of apparatus constituting "transmission apparatus for radio-telephony or radio-telegraphy" includes, *inter alia*, "[p]ortable radio-telephones, usually battery operated, of the 'walkie-talkie' type, as well as portable radio-telephones (cellular telephones also called 'mobile phones') including apparatus which can be fitted inside a vehicle (car telephones)". (HS1996 Explanatory Notes to Headings 8517 and 8525, (Exhibit JPN-69)).
[506] India's opening statement at the second meeting of the Panel, para. 58.
[507] India's second written submission, para. 104; response to Panel question No. 63, para. 27.
[508] See General Rules for the Interpretation of the Harmonized System, (Exhibit JPN-60), Rule 3(a).
[509] See General Rules for the Interpretation of the Harmonized System, (Exhibit JPN-60), Rule 4.
[510] WT/Let/886.
[511] See G/MA/283; and WT/Let/1072.

process, and following the HS2007 transposition exercise are presently set forth in tariff item 8517.12 of India's HS2007 Schedule.[512]

7.156. To conclude, we recall that, in light of our findings with respect to the third element of Article 48(1), it is not necessary for us to form a definitive conclusion on the fourth element. We nevertheless considered it useful to make certain observations regarding the parties' arguments on whether India erred in assuming that the scope of its WTO tariff commitments did not expand as compared to the ITA. To that end, we have observed, first, that India has not argued that any transpositions of its WTO Schedule were conducted inconsistently with the relevant correlation tables agreed to by Members. We have further observed that India's argument of "error" in invoking Article 48 relates to the scope of the ITA as compared to its WTO HS2007 Schedule and, in this respect, we have already concluded that India misunderstands the relationship between the ITA and its WTO Schedule. Second, we have observed that India's tariff commitments in its HS2007 Schedule with respect to products presently classified under tariff item 8517.12 did not expand from India's tariff commitments in its WTO HS1996 Schedule.[513] While we do not consider these findings necessary to resolve the legal issues in this dispute, we nevertheless hope that they may be useful to the parties.

7.3.3.2.3.6 Conclusion regarding Article 48(1)

7.157. To conclude, we consider that India has failed to demonstrate that India's assumption that the scope of its tariff concessions in its WTO Schedule would be limited to the scope of its ITA undertakings constituted an essential basis for India's willingness to be bound by the changes to its Schedule. We therefore consider that India has failed to meet its burden of proof with respect to Article 48(1) of the Vienna Convention, and consequently reject India's invocation of error under Article 48 of the Vienna Convention as a ground for invalidating aspects of its WTO Schedule.

7.158. Having come to this conclusion with respect to Article 48(1), it could suffice for us to conclude our analysis of Article 48 here.[514] Nevertheless, we consider it useful for purposes of resolving the parties' dispute to continue to address the parties' arguments regarding Article 48(2).

7.3.3.3 Article 48(2)

7.3.3.3.1 Main arguments of the parties

7.159. India submits that the burden of "proving the vitiating circumstances" described in Article 48(2) falls on the "party opposing the plea of error" (i.e. the complainant).[515] In any event, India argues that its error "was in the context of a complex and technical transposition exercise undertaken by the WTO Secretariat" and that it "neither contributed actively to such an error nor was there a circumstance that put it on notice of such possible error".[516] India submits that "for a State to be put on notice of a possible error, the circumstances should be such that no interested party should fail to notice the error or be under any misapprehension about it."[517] India further submits that Article 48(2) requires the party claiming error "to have employed all reasonable (rather

[512] We further understand that, as a consequence of the foregoing interpretation, India's WTO tariff commitments with respect to products falling under tariff items 8517.61 and 8517.70 of its WTO HS2007 Schedule similarly have not expanded. This is because India's arguments that products falling under tariff items 8517.61 and 8517.70 of its WTO Schedule fall outside the scope of the ITA are directly premised on India's understanding that products falling under tariff item 8517.12 of its WTO Schedule fall outside the scope of the ITA. (See India's first written submission, paras. 156, 184, and 192).

[513] We also noted that this interpretation of India's tariff commitments with respect to tariff item 8517.12 of Its WTO HS2007 Schedule implies that India's tariff commitments with respect to products falling under tariff items 8517.61 and 8517.70 of its WTO HS2007 Schedule similarly have not expanded. (See fn 512 to para. 7.155 above).

[514] See para. 7.88 above.

[515] India's second written submission, para. 26 (referring to T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), p. 893).

[516] India's first written submission, para. 53.

[517] India's first written submission, para. 56. See also India's second written submission, para. 30.

than possible) means of establishing the facts when concluding the treaty and of having taken precautions to avoid any error".[518]

7.160. India submits that its error "was not unlikely given the surrounding circumstances (including that of an admittedly complex technical transposition which was not flagged)".[519] India also notes that "the communication (Transposition Note) received from the Secretariat accompanying the Transposition Files specifically mentioned certain 'technical issues' and 'complex changes' – but … those notations by the Secretariat did not cover the tariff lines at issue in the present dispute."[520] India also submits that prior to the certification of the Schedule, its "unequivocal public stance" had been that "it would not commit to obligations beyond those under the ITA[]".[521] India considers that the panel's findings in *Korea – Procurement* suggest that "there exists a duty for all negotiating parties to verify the concessions being offered" and "[i]n the present context, that would imply that Japan ought to have reconciled India's stance of intending no further commitments on ICT products vis-à-vis its certification of the 2007 Schedule".[522]

7.161. Japan submits that the party alleging an error bears the burden of proof under Article 48, including Article 48(2).[523] Japan further argues that "the applicable standard for a state's due diligence is that expected of qualified government officials".[524] Japan also considers that " Article 48 of the Vienna Convention does not require that the contribution to the error be 'substantial'".[525] Japan highlights that during the process "leading to the certification of the 2007 Schedule, India's representatives repeatedly examined the relevant documents and had ample opportunity to avoid or correct the alleged error".[526] According to Japan, "India cannot be relieved of its obligations by hiding behind the allegedly 'complex' transposition process."[527] Japan highlights that India "chose to seek assistance from the WTO Secretariat", with the consequence that "India assumed the responsibility to verify the accuracy of th[e] file".[528] Japan notes that in accordance with the Transposition Procedure, "concordance tables outlining the changes between the HS 2002 and the HS 2007" were provided by the WTO Secretariat to Members in January 2007, "well in advance of India's certification process in 2015".[529] Japan notes that India "failed to make any inquiries about or objections to the tariff lines at issue, even when it was requested to review the revised file containing those tariff lines".[530] Japan therefore submits that "India, by its own negligent behavior

[518] India's first written submission, para. 52 (quoting M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), (Exhibit IND-13), p. 609; and referring to T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), p. 894). (emphasis omitted) See also India's second written submission, para. 29.

[519] India's second written submission, para. 31. In a Legal Opinion submitted by India as evidence in support of its assertions, Professor Waibel submits that "for the most part, the error was not of India's making, and any contribution by India to the error is minor and excusable rather than substantial". (Prof. M. Waibel, Legal Opinion on Error (Exhibit IND-76), para. 39). Professor Waibel states that the "WTO Secretariat carried out the transposition with limited input from India … It was the Secretariat rather than India that was holding the pen. Consequently, the Secretariat bears at least some of the responsibility for the errors in this transposition process". (Ibid.). Professor Waibel emphasizes that "[e]ven though [the transposition] procedure was not meant to lead to any change in the scope of concessions and other commitments, it did result in such changes, without the WTO Secretariat flagging the disputed changes to India." (Ibid. (referring to WT/L/673, para. 3) (emphasis omitted)).

[520] India's response to Panel question No. 18, para. 57 (referring to Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49), Attachment 3, CTS HS2007 Transposition Note XII – India).

[521] India's first written submission, para. 58.

[522] India's first written submission, para. 60.

[523] Japan's response to panel question No. 48, para. 84; second written submission, para. 76; opening statement at the second meeting of the Panel, para. 16. Japan notes that "India that has most of the relevant information and evidence to prove that the conditions of Article 48(2) of the Vienna Convention are met, and that it is difficult for Japan to access such information and evidence". (Japan's response to panel question No. 48, para. 86. See also Japan's second written submission, para. 85).

[524] Japan's second written submission, para. 124.

[525] Japan's opening statement at the second meeting of the Panel, para. 17.

[526] Japan's second written submission, para. 126. Japan states that "[a]s a sovereign state engaging in international trade and concluding international treaties, India is bound by the actions of its competent representatives." (Ibid.).

[527] Japan's second written submission, para. 126.

[528] Japan's second written submission, para. 128.

[529] Japan's second written submission, para. 131 (referring to General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 1; Canada's third-party submission, paras. 13 and 15).

[530] Japan's second written submission, para. 132.

and failure to properly verify its tariff commitments, caused or at least contributed to the alleged error, assuming *arguendo* that such error exists".[531]

7.162. Japan also argues that even if India did not contribute to the alleged error, "it is clear that India was put on notice of what would allegedly constitute its error".[532] Specifically, Japan considers that "India had sufficient time and materials to carefully study the proposed transposition file, including all changes in India's concessions which would occur as a result of the transposition if any, and was aware of what it must do if it did not agree to have its updated Schedule certified."[533] Japan also considers that the fact that the contested tariff items were not flagged does not demonstrate that India was not on notice of the alleged error.[534] Japan submits that "the fact that the contested sub-headings were not flagged indicates that there were *no changes* in the scope of concessions" and, in any event, "India was informed of how the transposition process would be conducted", such that "India must have known of … the alleged error".[535]

7.3.3.3.2 Main arguments of the third parties

7.163. Brazil does not take a position on the application of Article 48(2) in this dispute, but considers that "the current international jurisprudence regarding error in the consent of treaties and Article 48 establishes a very high threshold for demonstrating that the consent of a party to an agreement was made in error".[536]

7.164. Canada argues that "[u]pon review of the draft HS07 file, despite the available information, India did not inquire further as to the scope of the concessions and thus, by its own conduct, arguably contributed to the alleged error regarding the scope of such concessions."[537] Furthermore, according to Canada, "the availability of …[HS] 2007 concordance documentation may further suggest that the circumstances were such as to put India on notice as to a possible error in understanding the scope of the concessions".[538] Canada considers that "[i]n the draft HS07 file prepared for India by the Secretariat, the tariff lines at issue in this case were not flagged by the Secretariat as possibly changing the scope of the concessions".[539] Canada also considers that "[t]he jurisprudence on Article 48 further suggests that it is difficult to invoke Article 48 where qualified personnel of a State review the documentation at issue".[540] Canada considers that, "absent any indication to the contrary by India, there is a presumption that qualified personnel reviewed the draft HS07 file prior to its certification by India".[541] Canada also considers that the jurisprudence on Article 48 "suggests that there is a certain level of diligence that is required on the part of the State invoking the error in order to demonstrate that its conduct did not contribute to the error".[542] Canada submits that "the Secretariat offered the results of its transposition procedures to India, and India, in exchange, was required to review and verify the Schedule and to make any relevant inquiries if something was uncertain or unclear."[543]

7.165. The European Union considers that India "had ample opportunity to review the drafts, to request clarifications and provide comments and, if necessary, to object to the transposition to

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[531] Japan's second written submission, para. 133.
[532] Japan's second written submission, para. 135.
[533] Japan's second written submission, para. 137.
[534] Japan's second written submission, para. 138.
[535] Japan's second written submission, paras. 138-139. (emphasis original)
[536] Brazil's third-party submission, para. 21 (referring to ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6; ICJ, *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999: ICJ Reports 1999, p. 1045; PCIJ, *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 September 1933, PCIJ (ser. A/B) No. 53; and ICJ, *Case concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, Judgment of 20 June 1959: ICJ Reports 1959, p. 209). See also Brazil's third-party response to Panel question No. 17.
[537] Canada's third-party submission, para. 13.
[538] Canada's third-party submission, para. 13.
[539] Canada's third-party submission, para. 15.
[540] Canada's third-party submission, para. 19 (referring to ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6 (Exhibit IND-3), at p. 26).
[541] Canada's third-party submission, para. 19.
[542] Canada's third-party submission, para. 16 (referring to ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6 (Exhibit IND-3), at p. 26).
[543] Canada's third-party submission, para. 18.

HS 2007 prepared by the WTO Secretariat", and by failing to do so "India contributed by its own conduct to the alleged error."[544] The European Union further argues that "[i]t was clear from the terms of draft transposition prepared by the WTO Secretariat that the concessions for the HS 2007 subheadings at issue in this dispute did cover 'new products' which did not exist when the ITA[] was negotiated" and, moreover, "the findings made by the panel in the *EC – IT Products* case, as well as the views expressed by a large number of Members in that dispute, should have alerted India to the possibility that India's assumption that GATT concessions linked to the ITA[] did not cover 'new products' could be in error."[545] The European Union thus considers that the error alleged by India is "clearly inexcusable according to Article 48.2 of the VCLT".[546]

7.166. Korea contends that "India appears to have contributed to the alleged error and was duly put on notice about it."[547] According to Korea, "India had ample opportunity and access to appropriate redress mechanisms to avoid the alleged error and to fix it."[548] Korea notes that "the process of transposition was done in accordance with a detailed procedure that allowed India to carefully examine the proposed updates and comment on them."[549] Korea also notes that the transposition procedures "provided for a multilateral review process during which modifications could be made to the updated schedules", but "India did not object to the now disputed tariff lines during the multilateral review".[550] In Korea's view, "India should not be entitled to shift responsibility for its error onto the WTO Secretariat as India had not been proscribed from preparing its own HS2007 transposition, and India neglected to verify the specifics of the transposition's effects despite knowing that it had the potential to change the scope of its concessions."[551]

7.167. The United Kingdom does not take a position on the application of Article 48(2) in this dispute, but agrees with Brazil that Article 48 establishes a "very high threshold" for vitiating a party's consent to be bound by a treaty on the basis of an alleged error.[552]

7.168. The United States observes that "India participated in the process for transposition of its Schedule into HS2007 nomenclature in accordance with established WTO procedures, and … failed to raise any specific concern or objection during that process with respect to the tariff subheadings at issue".[553] According to the United States, "India has not established that it did not contribute by its own conduct to the alleged error, or that the circumstances were such that India was not on notice of the alleged error."[554]

7.3.3.3.3 Panel's assessment

7.3.3.3.3.1 General considerations

7.169. Article 48(2) states that:

> Paragraph 1 [of Article 48] shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

7.170. For the purposes of applying Article 48(2) we proceed on an *arguendo* basis and assume that India was indeed in error at the time that it agreed to the changes to its Schedule resulting from the transposition to the HS2007. Specifically, we assume that: (i) an essential basis for India's consent to be bound by the changes to its Schedule was India's assumption that the transposition of that Schedule to the HS2007 did not expand the scope of its tariff commitments beyond the scope of its ITA undertakings; and (ii) such an expansion occurred.

[544] European Union's third-party statement, para. 10.
[545] European Union's third-party statement, para. 11.
[546] European Union's third-party statement, para. 9.
[547] Korea's third-party submission, para. 14.
[548] Korea's third-party submission, para. 15.
[549] Korea's third-party submission, para. 15.
[550] Korea's third-party submission, paras. 16-17.
[551] Korea's third-party submission, para. 19.
[552] United Kingdom's third-party statement, para. 14.
[553] United States' third-party response to Panel question No. 16, para. 8.
[554] United States' third-party response to Panel question No. 16, para. 8.

7.171. The question before us is whether India contributed by its own conduct to that error and/or the circumstances were such as to put India on notice of a possible error. The parties have expressed differing opinions on the burden of proof under Article 48(2). Japan considers that India, as the party invoking Article 48, must demonstrate that it did not contribute to the error and the circumstances were not such as to put India on notice of a possible error.[555] India considers that the burden is on Japan, as the party objecting to the invocation of Article 48, to demonstrate that India either contributed to the error or that the circumstances were such as to put India on notice of a possible error.[556] In our view, there is ample information before us (in the form of the arguments and evidence adduced by the parties) to apply Article 48(2), regardless of which party bears the burden of proof. As explained below, we do not consider the arguments and evidence of the parties to be in *equipoise*. We therefore do not consider it necessary to resolve the question of which party bears the burden of proof under Article 48.[557]

7.172. We proceed by assessing in turn whether: (i) the circumstances were such as to put India on notice of a possible expansion of its WTO tariff commitments from its ITA undertakings; or (ii) India contributed by its own conduct to the alleged expansion in the scope of its WTO tariff commitments from its ITA undertakings.

7.3.3.3.3.2 Whether the circumstances were such as to put India on notice of a possible expansion of its WTO tariff commitments from its ITA undertakings

7.173. We first assess whether the circumstances were such as to put India on notice of a possible error. In light of how India defines the alleged error, we examine whether the circumstances were such as to put India on notice of a possible expansion of its WTO tariff commitments from its ITA undertakings.

7.174. We recall that the evidence adduced by India in this dispute indicates that in 2012, three years prior to the certification of the changes to India's WTO Schedule resulting from the HS2007 transposition process, India was aware of differences of opinion among the Members regarding the HS classification of certain products falling within the scope of the ITA.[558] Specifically, the Minutes of a meeting of the Committee of Participants on the Expansion of Trade in Information Technology Products indicate that "[o]n the issue of classification divergences, [India's delegate] said that it was an issue that comprised 55 products and had not been resolved for the past 15 years."[559] India's delegate "doubted that one could just brush it aside in terms of saying that these were complicated by HS96, HS2002 or HS2007 nomenclature changes as otherwise the participants would have actually solved the problem in the first place."[560] This statement by India suggests that India was aware not only of product classification differences among ITA participants, but that HS transpositions (including the HS2007 transposition process) could have substantial implications for those classification differences.

7.175. We further recall that Members agreed on the procedures to be followed in that transposition process, including the relevant correlation tables prepared by the WCO, updated by the WTO Secretariat, and agreed upon by WTO Members.[561] In addition to setting forth the correlation tables indicating the relevant overlaps in product coverage as between the HS2002 and the HS2007, those procedures also indicate that the scope of Members' tariff concessions could *potentially* change through the transposition process.

7.176. In this respect, the General Council Decision on HS2007 Transposition Procedures instructs that, "*to the extent possible*, the scope of the concessions and other commitments shall remain

[555] Japan's second written submission, paras. 76-82.
[556] India's second written submission, para. 26 (referring to T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), p. 893).
[557] See e.g. Panel Report, *India – Solar Cells*, fn 269 to para. 7.104.
[558] See para. 7.114 above.
[559] Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, para. 3.11. We recall that India adduced these Minutes. (See India's first written submission, para. 42 and fn 70 thereto).
[560] Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, para. 3.11.
[561] See paras. 7.128-7.130 above.

unchanged".[562] The General Council Decision further indicates that "[a]ny tariff line for which a change in the scope of a concession may have occurred due to the complex technical nature of the transposition shall be clearly flagged."[563] The General Council Decision also provides for the procedures to be followed in the event that a Member disagrees with the way in which the scope of a concession has changed.[564] Specifically, paragraph 15 of the General Council Decision states that "[*w]here the scope of a concession has been modified* as a result of the transposition in a way that impairs the value of the concession, GATT Article XXVIII consultations and renegotiations shall be entered into by the Member concerned."[565]

7.177. Thus, in our view, India was on notice that the scope of its tariff concessions could, potentially, be modified through the transposition process. Given that India, as a Member of the WTO, is also a member of the General Council, we consider that India was aware of the content of the General Council Decision on HS2007 Transposition Procedures, and of the possibility that its tariff concessions might be modified through the transposition process, notwithstanding that this was to be avoided "to the extent possible".

7.178. Indeed, India acknowledges that, pursuant to paragraph 15 of the General Council Decision, "[i]n ordinary circumstances, it would be the WTO Member … concerned aided by the procedures of the transposition exercise that would be responsible for determining whether a transposition process resulted in changes to the scope of its concessions".[566] India argues, however, that "in the present instance, the role of the WTO Secretariat is nevertheless also relevant to the extent it was an active participant in the transposition process."[567] India refers to Professor Waibel's Legal Opinion, which states that since "it was the Secretariat rather than India that was holding the pen … the Secretariat bears at least some of the responsibility for the errors in this transposition process".[568] Professor Waibel's Legal Opinion echoes multiple submissions by India in which India argues that "the contested tariff lines – all of which comprised complex technical transpositions which changed the scope of India's concessions – were required to be adequately flagged according to the procedure for transposition".[569]

7.179. We observe that India, referring to Professor Waibel's Legal Opinion, asserts that because the WTO Secretariat conducted the transposition of India's WTO Schedule on behalf of India, if there was a change in the scope of Members' concessions then the burden was on the WTO Secretariat to identify that change in scope. A close reading of the General Council Decision on HS2007 Transposition Procedures, however, indicates *not* that the WTO Secretariat had to affirmatively identify any changes in concessions, but rather that they had to clearly flag "[a]ny tariff line for which a change in the scope of a concession *may have occurred due to the complex technical nature of the transposition*".[570] In other words, the General Council Decision did not place an affirmative burden on the WTO Secretariat – or indeed Members preparing their own transpositions – to decisively conclude on the question of whether there was a change in the scope of concessions. Rather, in any situation where the scope of a concession "may" have changed due to the "complex technical nature of the transposition", this possibility had to be flagged. To the extent that the WTO Secretariat faithfully followed the correlation tables approved by the General Council and the

[562] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4. (emphasis added)
[563] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4.
[564] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4.
[565] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 15. (emphasis added)
[566] India's response to Panel question No. 60(b), para. 14. We note India's argument, regarding paragraph 15 of the General Council Decision on HS2007 Transposition Procedures, that "the phrase 'the scope of [the] concession has been modified … in a way that impairs the value of the concession' does not necessarily apply to the present circumstance" because "the ordinary meaning of the term impair is to 'weaken or damage something so that it is less effective' … [and i]n the present instance, the value of concessions given by India has not been impaired, but in fact, has been extended without any reciprocal benefits." (Ibid. para. 16 (quoting Cambridge Advanced Learner's Dictionary online, definition of "impair" https://dictionary.cambridge.org/dictionary/english/impair (accessed 22 May 2022), (Exhibit IND-83)). We do not consider it necessary to take a position on whether paragraph 15 was applicable to India. Rather, we simply note that the existence of paragraph 15 (along with paragraph 4) put India on notice of the *possibility* that the transposition process could result in a change to the value of the tariff concessions.
[567] India's response to Panel question No. 60(b), para. 14.
[568] India's response to Panel question No. 60(b), para. 15 (quoting Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-76), para. 39).
[569] India's response to Panel question No. 52, para. 49.
[570] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4. (emphasis added)

Committee on Market Access, this, it seemed, would substantially mitigate against the possibility that there would be any disagreement as to whether the scope of any Member's concessions changed through the transposition process. Since these correlation tables were specifically prepared and approved in order to indicate the overlaps in product coverages as between the HS2002 and the HS2007, it would seem to follow that if the Secretariat followed those correlation tables (and it is uncontested that they did so), then there would have been *no change* in the scope of Members' concessions.

7.180. Nevertheless, we recognize that the General Council Decision on HS2007 Transposition Procedures acknowledged that such a possibility could occur, and required the WTO Secretariat (and Members in their preparation of their own transpositions) to clearly flag any tariff line for which a change in the scope of a concession may have occurred due to the complex technical nature of the transposition.[571]

7.181. In this context, we recall that on 8 November 2013 the WTO Secretariat transmitted to India, via email, the draft HS2007 transposition files prepared by the Secretariat.[572] The Secretariat's cover email referred to four attached documents: (i) the draft HS07 file; (ii) an Excel version of the database; (iii) notes and comments from the Secretariat, titled "HS2007 Transposition Note" (hereafter "Transposition Note"); and (iv) "document G/MA/283 describing in detail the methodology used by the Secretariat for th[e] exercise".[573] Attachment 3 to that email, containing the Secretariat's Transposition Note for India's Schedule, also refers to document G/MA/283. Specifically, that Transposition Note, under the heading "Processing strategy", indicates that "[a] detailed description of the transposition methodology is presented in documents G/MA/283 of 22 May 2012 and WT/L/673 of 18 December 2006."[574]

7.182. Document G/MA/283, titled "Transposition of Members' CTS Files to the HS 2007 Nomenclature – Notes on Methodology", was approved by the Committee on Market Access on 26 April 2012. The introduction to that document explains that it "describes the guidelines that the Secretariat intend[ed] to follow for the implementation of the HS 2007 transposition" and "provides a detailed description of the methodology that the Secretariat [would] follow in the HS 2007 transposition exercise".[575]

7.183. At the most general level, document G/MA/283 indicates that two types of changes to Members' Schedules could result from the transposition process: (i) "clarifying changes" (which did not change the scope of the HS subheadings); and (ii) "structural changes" (which *always* changed product coverage of one or more HS subheadings).[576] Specifically with respect to structural changes, document G/MA/283 identifies 196 structural changes, defined by 355 groups of correlations, and elaborates that each of these structural changes can be categorized as: (i) one-to-one relationships, where one HS2002 subheading corresponds exactly to one HS2007 subheading; (ii) splitting of one HS2002 subheading into two or more new HS2007 subheadings; (iii) merging two or more HS2002 subheadings into one new HS2007 subheading; or (iv) more complex cases, involving both splitting and merging of whole or part of different HS2002 subheadings.[577] With respect to the last of these categories, namely "complex changes", document G/MA/283 explains that:

> A complex change includes both splitting and merging of the whole or part of different subheadings. Since a specific change can combine splits and mergers differently, it is difficult to find a standard way of dealing with the transposition as it was in the previous cases. It is for this reason that manual intervention will be required for most of the complex changes. Moreover, some complex changes could involve as many as 20 to 30 subheadings from different HS 2002 headings, Chapters, and even Sections. In order to maintain all these concessions in the new HS 2007 nomenclature, complicated coding

[571] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4.
[572] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49).
[573] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49), p. 1.
[574] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49), Attachment 3, CTS HS2007 Transposition Note XII - India, p. 1.
[575] G/MA/283, paras. 1-2.
[576] G/MA/283, para. 1.2.
[577] G/MA/283, para. 1.5.

> structures and descriptions need to be introduced. And the situation could be even more complicated if national breakouts are involved.[578]

7.184. Document G/MA/283 elaborates that "[t]he categorization for each individual correlation is indicated in Annex I".[579] Annex I of document G/MA/283 contains a correlation table prepared by the WTO Secretariat, which identifies, *inter alia*, all 355 groups of correlations (of HS2002 tariff items to HS2007 tariff items), the "category" of the correlation group, and any remarks in the WCO's concordance table.

7.185. We observe that all the tariff items that changed during the HS2007 transposition process, and in respect of which India invokes Article 48 in this dispute, are identified in the table of correlations set forth in Annex I of document G/MA/283.[580] Their inclusion in that table indicates that such changes are "structural" in nature. The table also explicitly identifies the changes to these tariff items as "complex" and includes certain comments on the changes to these tariff items, namely that "[t]he structure of heading 85.17 has been revised based on technological progress in the high technology sector" and "[a]t the same time, the scope of heading 85.17 has been expanded and the transposition of heading 85.25 entails the transfer of certain products to heading 85.17".[581] We note that these comments on the changes to these tariff items also appear in document G/MA/W/76, containing the correlation tables as communicated to the WTO by the WCO.[582]

7.186. From the foregoing, we wish to highlight certain salient points. First, regarding the WTO Secretariat's communication to India of the draft transposition files: (i) in its cover email, the Secretariat highlighted that document G/MA/283 described in detail the methodology used by the Secretariat to conduct the transposition; (ii) in the Transposition Note attached to that email the Secretariat again highlighted that a detailed description of its transposition methodology was presented in document G/MA/283; and (iii) document G/MA/283 was one of four attachments that the Secretariat included in that email to India. We therefore consider that India could not have been unaware of the contents of that document, and indeed its importance to the transposition process.

7.187. Second, regarding the contents of document G/MA/283 itself: (i) this document unambiguously identifies the changes from the transposition process resulting in HS2007 tariff items 8517.12, 8517.61, 8517.62, and 8517.70 as both "structural" and "complex in nature"; and (ii) the comments attached to these tariff items explicitly indicate that the scope of heading 8517 was expanded, and included the transfer of certain products to that heading. We note, in this respect, that this does not necessarily imply that the scope of Members' *tariff concessions* was expanded. Rather, this reference in document G/MA/283 to an expansion in the scope of heading 8517 simply means that products formerly falling under *other* tariff headings of the HS2002 had been transferred to heading 8517 of the HS2007. It is entirely plausible (and indeed it was the intention of the transposition exercise) that there was *no* change in the scope of the tariff concessions, to the extent that the bound duty rates inscribed in Members' Schedules for products falling under these HS2007 tariff items, under heading 8517, were identical to the bound duty rates inscribed on the relevant correlated tariff items of the HS2002 Schedule. Nevertheless, document G/MA/283 highlighted that these changes were complex in nature and emphasized that the product scope of heading 8517 had expanded. In our view, by doing so, document G/MA/283 clearly flags that the scope of Members' concessions in their HS2007 Schedules, with respect to products falling under heading 8517 (and specifically set forth at tariff items 8517.12, 8517.61, 8517.62, and 8517.70 of their HS2007 Schedules) *may* have undergone a change as a consequence of the complex changes to those tariff items.

7.188. We note India's assertions that "the language in [document G/MA/283] is, at best, ambiguous and indicates a restructuring (between sub-heading 85.17 and sub-heading 85.25) and not the flagging of a clear expansion in scope due to a complex technical transposition".[583] India considers that "the complex technical nature of the transposition was such that India was not put on clear notice (via communication from the WTO Secretariat or otherwise) as to the exact changes

[578] G/MA/283, para. 2.10.
[579] G/MA/283, para. 1.6.
[580] See para. 7.129 above.
[581] G/MA/283, Annex I, entries 299-300, p. 41.
[582] G/MA/W/76, p. 30.
[583] India's response to Panel question No. 60(a), para. 8.

being effected due to the increased product complexity of the ITA[] product coverage via the contested sub-headings".[584]

7.189. We recall that the General Council Decision on HS2007 Transposition Procedures did not require the WTO Secretariat to determine whether there had been a "clear expansion" in the scope of concessions. Rather, the Secretariat was expected to clearly flag "[a]ny tariff line for which a change in the scope of a concession *may have occurred due to the complex technical nature of the transposition*".[585] Document G/MA/283 identifies the changes to the relevant tariff items as complex in nature, indicates that new products have been added to the scope of heading 8517, and highlights that the scope of heading 8517 has expanded. This, in our view, suffices to identify to Members that the changes to these tariff items *may* have implicated the scope of concessions under those tariff items.

7.190. We also note India's argument that the Secretariat's Transposition Note contained in its email to India "described certain complex changes to India's Schedule in specific relation to sub-heading 28.52 and sub-heading 3006.10" and India "sought clarifications and commented on HS 2007 sub-heading 28.52 via an email to the Secretariat".[586] In India's view, the Secretariat's Transposition Note was an "exhaustive document in relation to entries that were sought to be 'clearly flagged' for the exercise of transposition".[587]

7.191. In this respect, we emphasize that document G/MA/283 is itself explicitly referenced in that same Transposition Note. The Transposition Note, the cover email, and the inclusion of document G/MA/283 in the Secretariat's email to India all advised India to scrutinize document G/MA/283, which unambiguously identifies a significant number of changes occurring during the transposition process as "complex" in nature. Moreover, a very brief review of the "comments" included in the correlation table contained in document G/MA/283 would have enabled India to observe that, according to the WCO, the product scope of numerous headings and subheadings was expanded through the transposition process, including heading 85.17.[588] The fact that these possible changes of scope, all of which related to explicitly *complex* changes, were comprehensively flagged in document G/MA/283 means that India is incorrect that the only complex changes flagged by the Secretariat were those identified in the Secretariat's Transposition Note.

7.192. Moreover, we note that the specific section of the Secretariat's Transposition Note that, in India's view, contains this allegedly "exhaustive"[589] list of complex changes possibly changing the scope of the concessions appears under the subheading, "Additional Technical Issues". That is one of six subheadings in the Transposition Note: (i) "Introduction"; (ii) "Sources"; (iii) "Processing strategy"; (iv) "Additional Technical Issues"; (v) "Problems encountered during processing"; and (vi) "Content of HS07 transposition database".[590] Under this subheading, "Additional Technical Issues", the Transposition Note identifies certain issues pertaining to: (i) "AG – non-AG breakdown"; and (ii) "Simplified correlations".[591] Under "[s]implified correlations", the Transposition Note states that "[b]ased on an analysis of HS2007 changes included in the WCO correlation table, the Secretariat proposed the simplification of some correlations as described in detail in Annex I of

[584] India's response to Panel question No. 60(a), para. 8.
[585] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4. (emphasis added)
[586] India's response to Panel question No. 60(a), para. 10.
[587] India's response to Panel question No. 60(a), para. 10.
[588] Document G/MA/283 indicates, *inter alia*, the following: "[t]he scope of subheading 3006.10 was expanded to cover also sterile absorbable surgical or dental yarn and sterile surgical or dental adhesion barriers, whether or not absorbable"; "[t]he scope of heading 38.21 was expanded to cover also prepared culture media for maintenance of micro-organisms and prepared culture media for the development and maintenance of plant, human or animal cells"; "[t]he scope of new subheadings 7321.19 and 7321.89 has been expanded to cover other cooking appliances and plate warmers, and other appliances of heading 73.21"; "the scope of heading 85.17 has been expanded"; "[t]he scope of subheading 9030.20 has been expanded to cover all kinds of oscilloscopes and oscillographs"; "[t]he scope of instruments and apparatus of subheadings 9030.31 and 9030.39 is no longer limited to instruments and apparatus without a recording device". (G/MA/283, Annex I, pp. 28, 30, 37, 41, and 43).
[589] India's response to Panel question No. 60(a), para. 10.
[590] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49), Attachment 3, CTS HS2007 Transposition Note XII - India), pp. 1-3.
[591] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49), Attachment 3, CTS HS2007 Transposition Note XII - India), p. 1. The technical issues arising in relation to "AG – non-AG breakdown" pertained to specific issues arising due to negotiating texts as well as two cases "where the HS2007 transposition results in a mix of AG and non-AG products". (Ibid.)

G/MA/283. If a Member intends to make use of the standard correlation table or take other approaches, it would need to inform the Secretariat."[592] The Transposition Note further states that:

> Two cases are described in G/MA/283 for new HS2007 heading 28.52 and subheading 3006.10. Although the scope of HS2007 subheading 3006.10 was expanded to cover items classified under 34 different HS2002 subheadings, the main property of this subheading remains the same. Thus, the new HS2007 subheading 3006.10 is kept as one tariff line without adding any new breakouts for the ex-outs. In the case of subheading 2852.00 a simple average of all the HS2002 tariff lines under the 29 HS2002 candidate subheadings was used for the duty of the new HS2007 subheading. The binding coverage was expanded if the subheading is partially bound, that is the new HS2007 subheading is fully bound.

7.193. It is not clear to us why India interpreted this paragraph as setting forth an exhaustive list of tariff items whose scope may have changed due to complex changes occurring during the transposition process. Notwithstanding that this paragraph of the Transposition Note does not purport to do so, a cursory review of document G/MA/283 would have revealed to India numerous other tariff items that were flagged by the Secretariat as having undergone complex changes, and whose scope was indicated by the WCO to have changed. We understand from the content of the Transposition Note that the reason two such instances are specially identified in this paragraph of the Transposition Note is because they were subject to a very specific issue addressed by the Secretariat, namely the simplification of complex changes. We understand that these changes were therefore particularly worthy of mention. This did not mean – and the Transposition Note did not assert or otherwise represent – that these were the only two instances of complex changes that may have changed the scope of concessions.

7.194. Thus, with respect to whether the WTO Secretariat complied with its procedural obligations such as to put India on notice as to possible changes of scope, we consider that: (i) pursuant to the General Council Decision on HS2007 Transposition Procedures, the WTO Secretariat was required to flag any tariff item for which a change in the scope of a concession "*may* have occurred" due to the complex technical nature of the transposition[593]; and (ii) through document G/MA/283 (and the numerous references to this document in its communication to India), the WTO Secretariat satisfied that requirement. In our view, the WTO Secretariat clearly flagged all tariff items (including the tariff items at issue in this dispute) for which a change in the scope of the concession "may have occurred" due to the complex technical nature of the transposition.[594]

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[592] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-49), Attachment 3, CTS HS2007 Transposition Note XII - India), p. 2. We observe that document G/MA/283 describes in detail how there was a "need for simplification", in order to avoid excessively complex Schedules which would undermine the purpose of the transposition exercise. Specifically, according to document G/MA/283:

> In the HS 2002 transposition exercise, a significant amount of manual work by the Secretariat focused on a number of changes relating to chemical wastes in HS Chapter 38 and to paper in HS Chapter 48. These changes involved many subheadings and implied very complicated correlations between the HS 1996 and HS 2002. Since the methodology followed by the Secretariat was a pure technical transposition without altering any concessions for these subheadings, the result was complex coding structures, and sometimes very complex technical descriptions, which had to be introduced in order to retain all the details of concessions. The advantage of this methodology is that it is technically correct (in the sense of representing exactly the same concessions as before), and thus it helps Members to avoid potential disputes and lengthy negotiations on changes in the concessions resulting from the transposition. On the other hand, the disadvantage is that in many cases it resulted in very complicated product codes and descriptions, which often deviate from those found in national applied tariff schedules and caused difficulties when making links between bound and applied tariffs. Moreover, this practice led to a proliferation of HS 1996 duty rates in HS 2002 tariff lines which may in fact represent somewhat theoretical allocations, covering little or no actual trade. In fact, some of the new breakouts might be virtually empty, with no traded products actually being classified under them. It could therefore be argued that the complication of the WTO schedules of concessions is in contradiction with the original purpose of these HS changes, namely, a simplification of the tariff structure to better deal with current needs and to allow for a comparison of the bound and the applied duties.

(G/MA/283, para. 4.2)

[593] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4. (emphasis added)

[594] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4.

7.195. We recognize that both parties to this dispute assert that the WTO Secretariat did *not* flag the relevant tariff items at issue.[595] We have addressed India's arguments above. As to Japan, we note Japan's view that "in the case the contested subheadings were not flagged"[596], that would indicate that there was no change in the scope of the tariff concessions. Japan's argument appears to imply that the WTO Secretariat was required to flag those tariff items for which there had, in fact, been a change in the scope of tariff concessions. We recall, however, that the Secretariat was required to flag those tariff items with respect to which a change in product scope *may have occurred due to the complex nature of the transposition*.[597] In our view, the Secretariat did exactly that with respect to all relevant complex structural changes. The onus then shifted to the Members, in reviewing these complex changes, to assess whether they considered that "the scope of a concession has been modified as a result of the transposition in a way that impairs the value of the concession".[598] Thus, pursuant to the General Council Decision on HS2007 Transposition Procedures, the WTO Secretariat was only required to flag those tariff items with respect to which the product scope of the concession *may* have changed. In our view, the WTO Secretariat did precisely that, and Japan's arguments do not imply otherwise.

7.196. From the foregoing we consider that India was on notice, prior to and during the transposition process, that the HS2007 transposition process could have substantial implications for the classification differences among ITA participants regarding their ITA undertakings. Furthermore, as a general matter, India was on notice, throughout the transposition process, that the scope of its tariff concessions could change. Moreover, we consider that the WTO Secretariat clearly flagged the relevant tariff items at issue in this dispute as having undergone complex changes that may have changed the scope of India's concessions.

7.197. Before concluding as to whether the foregoing factual circumstance satisfies the requirements of Article 48(2), we note India's interpretation of the legal standard under Article 48 such that, "for a state to be put on notice of a possible error, the circumstances should be such that no interested party should fail to notice the error or be under a misapprehension about it."[599] As support for this interpretation, India refers to two judgments by the International Court of Justice (ICJ), in which cases error was invoked as a basis to invalidate a State's consent to be bound by a treaty. India refers to *Case concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, where "in the contested map 'which was to become part of the Boundary Convention, it was shown clearly, and in a manner which could not escape notice, that the disputed plots belonged to Belgium'".[600] India also refers to *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, where the ICJ concluded that "the map itself drew such pointed attention to the *Preah Vihear* region that no interested person, nor anyone charged with the duty of scrutinizing it, could have failed to see what the map was purporting to do in respect of that region".[601] India also states that "Article 48 of the VCLT does not regard as relevant whether the error was the result of an intentional act or of negligence, or of bad faith".[602]

7.198. We note that the two findings relied upon by India as support for its interpretation are both *factual* findings regarding the *circumstances* of those cases. In neither case did the ICJ conclude as a matter of legal interpretation that a State can only invoke an error if the State could not but have been aware of the existence of the error. Rather, the ICJ's factual findings indicate that, regardless of how high or low that legal standard may be, the circumstances of those cases were such that the States in question must have been aware of the error.

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[595] India's second written submission, para. 31; Japan's second written submission, para. 138.

[596] Japan's comments on India's response to Panel question No. 60(a), para. 10.

[597] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4.

[598] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 15.

[599] India's response to Panel question No. 60(a), para. 11. See also India's second written submission, para. 30.

[600] India's second written submission, para. 30 (quoting ICJ, *Case concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, Judgment of 20 June 1959: ICJ Reports 1959, p. 209 (Exhibit IND-2), at pp. 225-227).

[601] India's second written submission, para. 30 (quoting ICJ, *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6 (Exhibit IND-3), at p. 26).

[602] India's response to Panel question No. 19, para. 64. In response, Japan refers to *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* as an example which demonstrates that the standards for examining the fulfilment of conditions under Article 48(2) have become increasingly strict. (Japan's second written submission, para. 121).

7.199. We also note that neither of the cases cited by India pertains to the application of Article 48 of the Vienna Convention. Indeed, we find the plain language of Article 48(2) impossible to square with India's interpretation of the legal standard applicable thereto. Article 48(2) refers to the invoking State being put on notice of "a possible error". India asserts that for a State to be put on notice of a *possible error*, the circumstances should be such that "no interested party should fail to notice *the error*".[603] India's interpretation of Article 48(2) deletes the word "possible", and requires that the State in question be unmistakeably aware of the actual error.

7.200. In our view, Article 48(2) is clear on its face. Contrary to India's argument that a State must necessarily have known of the error in order to meet the standard of being "put on notice of a possible error", we consider that Article 48(2) merely requires that the State was on notice of the possibility that such an error could occur.

7.201. Applying that legal standard to the facts, as described above, we recall that India alleges that its "error" at the time of the certification of its Schedule was its mistaken assumption that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings. We consider that India was on notice that the HS2007 transposition exercise could have implications for the classification differences of ITA participants regarding their ITA undertakings. Furthermore, in the circumstances of the HS2007 transposition exercise, India was on notice of the possibility that the scope of the concessions set forth in tariff items 8517.12, 8517.61, 8517.62, and 8517.70 of its HS2007 Schedule *may* have expanded as a consequence of the complex changes to those tariff items. If India was on notice of the possibility that its WTO tariff commitments in its HS2007 Schedule may have expanded from the scope of the commitments set forth in its HS2002 Schedule, then India was also necessarily on notice that its WTO tariff commitments may have expanded as compared to the scope of its commitments in its HS1996 Schedule, and the scope of its ITA undertakings. In our view, therefore, India was put on notice of the possibility of an "error", as India defines its error, within the meaning of Article 48(2).

7.202. It follows that, even if India had satisfied the requirements of Article 48(1), the requirements of Article 48(2) would not have been satisfied. Thus, pursuant to the terms of Article 48(2), paragraph 1 of Article 48 "shall not apply", and India's plea of error under Article 48 fails. Having reached this conclusion, it is unnecessary for us to determine whether India "contributed by its conduct" to the alleged error. Nevertheless, we consider it useful in the circumstances of this dispute to make certain observations regarding this issue.

7.3.3.3.3.3 Whether India contributed by its own conduct to the alleged expansion in the scope of its WTO tariff commitments from its ITA undertakings

7.203. Turning to assess whether India contributed by its own conduct to the alleged error, we note that this entails examining whether India contributed to the alleged expansion of its WTO tariff commitments from its ITA undertakings.

7.204. We recall that, having scrutinized the relevant documents available to us concerning the procedures and obligations governing the transposition process, we see no indication that in the HS2007 transposition process WTO Members or the Secretariat were expected to identify any differences in the product scope of the ITA as compared to the product scope of the HS2007. It appears to us that no Member, in preparing its own Schedule, was expected to identify any such differences in product coverage. This similarly applies to the WTO Secretariat, in its preparation of developing countries' transpositions on their behalf. Rather, Members and the WTO Secretariat were explicitly told by the General Council and the Committee on Market Access to follow the HS2002-HS2007 correlation tables that had been reviewed and approved by Members.

7.205. We also note that India had multiple opportunities to intervene in the transposition process and to make clear that its consent to be bound by its transposed Schedule was contingent on the scope of its WTO tariff commitments being limited to the scope of its ITA undertakings. Moreover, India could have explicitly indicated to Members and the WTO Secretariat that its interpretation of those undertakings was such that they were static in nature, and did not extend to new products resulting from technological advances that did not exist at the time that India joined the ITA.

[603] India's first written submission, para. 56. (emphasis added)

7.206. India could have objected or made comments during any of the multilateral sessions reviewing and approving the correlation tables to be used by Members and the WTO Secretariat during the transposition process (i.e. the General Council when it decided on the Transposition Procedures and the Committee on Market Access when it approved document G/MA/283). India could also have objected or made comments when it received the draft transposition files from the WTO Secretariat in 2013. India could further have raised objections or made comments during the multilateral review session held in April 2015. Notwithstanding these three specific opportunities set forth in the transposition procedures, India, on its own initiative, could have raised any concerns or objections either bilaterally (to the WTO Secretariat) or multilaterally (in the Committee on Market Access or other relevant WTO committees) at any time during the nine-year transposition process, which started in 2006 and (in the case of India) ended in 2015. India did not do so.

7.207. Additionally, we recall that India itself was aware of Members' differences of opinion with respect to product classification under the ITA.[604] Indeed, India was also on notice of the possibility that such differences of opinion with respect to product classification could have implications for the HS2007 transposition process.[605] To the extent that India remained silent on such issues in the context of the transposition exercise, WTO Members and the WTO Secretariat could only assume that India was satisfied that the transposition exercise would follow the multilaterally approved correlation tables.

7.208. In our view, if India had raised its concerns, they could have been appropriately addressed in a timely fashion. Indeed, if India's concerns were not addressed in a manner satisfactory to India, then India could have refused to certify the changes to its WTO Schedule. By failing to raise its concerns, and by then agreeing to certify the changes to its WTO Schedule, India agreed to become bound by the HS2007 Schedule, including with respect to any tariff items whose scope may have expanded. Moreover, by agreeing to the relevant correlation tables that unambiguously extended India's tariff concessions to the products at issue in this dispute, it appears to us that any differences in the scope of the ITA and the scope of India's WTO tariff commitments (regardless of whether the ITA is static in scope) are directly attributable to India's silence.

7.209. In short, we consider that India had both specific and general opportunities to highlight to Members and to the WTO Secretariat any concerns that it may have had regarding the relationship between the ITA and its HS2007 Schedule. India did not do so. In our analysis of Article 48(1) above, we concluded that India's failure to raise such concerns means that there is no evidence that India's concerns in this respect constituted an "essential basis" for its consent to be bound.[606] For the purposes of applying Article 48(2), we moreover note that India's failure to raise those concerns would appear to have directly contributed to the alleged error arising in the first place.

7.210. We also highlight that, as a Member of the WTO, it was India's responsibility to verify the scope of its legal commitments before undertaking to accept those commitments. Indeed, the transposition procedures which had been approved by India, explicitly required the Members to assess whether the "scope of a concession has been modified as a result of the transposition in a way that impairs the value of the concession". This was not a minor responsibility. Moreover, India has not asserted that its customs officials or government representatives lacked sufficient expertise to properly review or understand the implications of India's commitments as set forth in the draft Schedule prepared by the WTO Secretariat. India's failure to properly review its legal commitments is not a "minor and excusable"[607] contribution to the creation of the alleged error, and would indeed seem to be a significant contributing factor in causing the error to occur, especially taking into account that India had already approved the correlation tables relied upon by the Secretariat, and was on notice that the changes to the tariff items at issue were complex, accounted for technological developments, and, in some instances, might have increased the scope of the tariff items.

[604] See para. 7.114 above.

[605] We recall that in the Committee of Participants on the Expansion of Trade in Information Technology Products, India's delegate stated that "[o]n the issue of classification divergences, … it was an issue that comprised 55 products and had not been resolved for the past 15 years. He doubted that one could just brush it aside in terms of saying that these were complicated by HS96, HS2002 or HS2007 nomenclature changes as otherwise the participants would have actually solved the problem in the first place." (Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, para. 3.11).

[606] See para. 7.157 above.

[607] Prof. M. Waibel, Legal Opinion on Error (Exhibit IND-76), para. 39.

7.211. We note that India appears to consider that other actors, such as other WTO Members and the WTO Secretariat, also contributed to the error. We understand however, that the WTO Secretariat correctly followed the transposition procedures that had been multilaterally agreed (including by India). While India has asserted that the Secretariat failed to follow the transposition procedures by failing to flag the relevant tariff items, this is contradicted by the existence of document G/MA/283, which was referred to numerous times in the Secretariat's communications to India, and which was included in the bundle of documents transmitted by the Secretariat to India with the draft transposition files.[608] Moreover, since India did not communicate any concerns regarding the ITA to the WTO Secretariat during the transposition process, the WTO Secretariat could not have contributed to India's apparent misunderstanding regarding the scope of its commitments under the ITA and the Schedule (even assuming that there was an increase in the scope of those commitments).

7.212. As to the contribution of other WTO Members, we note that, because the transposition procedures had been multilaterally approved and were followed to the letter, and since India itself had approved both the transposition procedures as well as the draft files prepared by the WTO Secretariat, there was no reason for any other Member to doubt India's willingness to be bound by the changes to its Schedule. Indeed, even assuming *arguendo* that there was any expansion of India's commitments, other WTO Members would have been justified in assuming that since all Members had approved the correlation tables, and since India had already approved the draft Schedule, India was content with expanding the scope of its commitments. Thus, India's error cannot be attributed to other WTO Members or the WTO Secretariat.

7.213. In our view, India's inaction in the circumstances of its transposition would seem to satisfy the standard of "contributing by its conduct" to the error. We nevertheless do not consider it necessary to resolve this interpretative question, in light of our conclusion above that India was undoubtedly put on notice of the possibility of the error.

7.3.3.3.3.4 Conclusion regarding Article 48(2)

7.214. We consider that, even assuming the existence of an error, India was put on notice of the possibility that the scope of its tariff concessions under heading 8517 of its HS2007 Schedule may have expanded from the scope of its tariff concessions set forth in its HS2002 Schedule. Consequently, India was also on notice that the scope of its WTO tariff commitments may have expanded from its ITA undertakings. While India's actions (or inaction) could also be read as having contributed to that error, we do not consider it necessary to make a definitive finding on that question. It suffices to note that India was on notice of the possibility that its tariff concessions may have been expanded. Consequently, pursuant to the terms of Article 48(2), India may not rely on Article 48(1) to invalidate its WTO Schedule, in whole or in part.

7.3.3.4 Conclusion

7.215. We have concluded that India has failed to demonstrate that an essential basis for its consent to be bound by its HS2007 Schedule was its assumption that its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings. We have also concluded that, during the transposition process, India was on notice of the possibility that the scope of its WTO tariff commitments could be expanded from the scope of its ITA undertakings.

7.216. For these reasons we do not consider that the circumstances of the present case satisfy the substantive requirements of Articles 48(1) and (2) of the Vienna Convention. There is therefore no basis under Article 48 for us to read aspects, or the entirety, of India's WTO Schedule as invalid. It is also unnecessary for us to address the parties' arguments regarding the applicability of Articles 44, 45 and 48 of the Vienna Convention, or the substantive requirements under Articles 44 and 45.

[608] India's only ground for arguing that the Secretariat did not follow the transposition procedures correctly is that "the contested tariff items were not adequately flagged". (India's response to Panel question No. 52, paras. 49 and 51. See also India's response to Panel question No. 64, para. 33). We have addressed that argument and dismissed it. In our view, the Secretariat followed the agreed-upon transposition procedures, including with respect to flagging possible changes of product scope.

7.3.4 India's rectification request under the 1980 Decision

7.3.4.1 Introduction

7.217. As described in section 2.3 above, on 25 September 2018, India requested a rectification of its WTO Schedule in accordance with the 1980 Decision, "for the purpose of correcting certain errors contained in its HS2007 Schedule".[609] India stated that the supposed errors occurred while transposing its HS2002 Schedule to its HS2007 Schedule.[610] India also stated that the draft rectification did not "alter India's commitments either under GATT 1994 or the ITA[], as contained in the WTO document WT/Let/181 dated 2 October 1997."[611]

7.218. Several WTO Members, including Japan, objected to India's draft rectification.[612] Japan took the view that the proposed modifications "would alter the scope of India's concessions … [and] could not be considered to be purely formal in nature."[613]

7.219. In these proceedings, India argues that through its rectification request it sought to correct an "inadvertent error of a purely formal character", and that the draft rectification was in accordance with the 1980 Decision.[614] According to India, the HS2007 Schedule is to be read in light of the originally negotiated concessions such that products that "have never been negotiated upon remain outside the scope of the 2007 Schedule."[615] India requests us to "recognize and declare that the Draft Rectification was of a purely formal character and Japan's objections on the same were unfounded."[616] Specifically, India requests us to:

> [A]ssess the objection raised by Japan. If the Panel were to find that the ITA[] did not cover the products at issue, it will be evident that the Draft Rectification was of a purely formal character. Therefore, the objection raised by Japan to the Draft Rectification would be unfounded in law and would be contrary to Paragraph 3 of the 1980 [Decision]. Further, such a determination shall also establish that Japan's action impeded India's right to rectify its Schedule under the 1980 [Decision].[617]

7.220. India clarifies that it does not seek the certification of the draft rectification by the Panel through the dispute settlement mechanism.[618]

7.3.4.2 Main arguments of the parties

7.221. India argues that Japan "acted beyond the prescriptions of Paragraph 3 of the 1980 Decision by raising an objection unfounded in law", and that "Japan's objections were an impediment to India's right to make a formal rectification to its Schedule of Concessions under the 1980 [Decision]".[619] As to the legal basis for the Panel to make findings requested by India, India maintains that the 1980 Decision is a "covered agreement" within the meaning of Article 1.1 of the DSU, by virtue of it being an "other decision[] of the Contracting Parties to the GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994.[620] Therefore, India posits that the Panel has authority to interpret the draft rectification and clarify the rights and obligations of the Members

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[609] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-75), p. 1.
[610] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-75), p. 1.
[611] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-75), p. 1.
[612] Letter from Japan to India (9 November 2018), (Exhibit JPN-4); Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, para. 18.13.
[613] Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, para. 18.13. See also Letter from the Permanent Mission of Japan titled "Rectification and Modification of Schedule (India's WTO Schedule XII)", (Exhibit JPN-4).
[614] India's first written submission, para. 10.
[615] India's first written submission, para. 36. See also India's response to Panel question No. 15, fn 44 to para. 36.
[616] India's first written submission, para. 36.
[617] India's response to Panel question No. 49, para. 43. See also India's second written submission, para. 122.
[618] India's second written submission, para. 123.
[619] India's response to Panel question No. 49, para. 39. See also India's second written submission, para. 116.
[620] India's response to Panel question No. 49, paras. 40-41; second written submission, paras. 117-118 (referring to Panel Report, *US – FSC*, para. 7.63).

under it pursuant to Article 3.2 of the DSU.[621] India adds that Article 11 of the DSU obliges the Panel to "objectively assess the facts of the dispute and examine the conformity of Members' actions with covered agreements."[622] India also submits that the Panel has an obligation to assess "if the objection raised by Japan is in good faith or if it is merely an instrument to force India to grant concessions on products, which it never agreed to."[623] Moreover, India posits that if it is found that the proposed draft rectification is of a purely formal character, "it would lead to the conclusion that the bound rates assigned to the products at issue were clearly in error and that such concessions were capable of rectification via the 1980 [Decision]."[624] India also contends that as a consequence of such a finding, "it would be found that the bound rates assigned to the products at issue are a consequence of a formal error and are therefore severally void. Therefore, there can be no violation of Article II:1(a) and Article II:1(b) of the GATT if the contested tariff lines of India's schedule of concessions are void."[625]

7.222. For its part, Japan submits that there is no legal basis, under the DSU, for the Panel to "recognize and declare that the Draft Rectification was of a purely formal character" and that Japan's objections on the same were unfounded.[626] Japan submits that such request is outside the Panel's terms of reference in the present dispute, because Japan has not referred to the Draft Rectification or the 1980 Decision in its panel request.[627] Japan also argues that India's Draft Rectification and the 1980 Decision are not "covered agreements" within the meaning of Article 1.1 of the DSU, and therefore the Panel has no authority under its terms of reference to make any findings with respect to these two documents.[628] Japan also submits that there is "no absolute right for a WTO Member to have a proposed rectification automatically accepted and no corresponding obligation of other WTO Members to accept that rectification request", rather, rectification requests are subject to multilateral review under the 1980 Decision.[629] For Japan, the 1980 Decision "only establish[es] the *procedures* for modification and rectification of the Schedules."[630] Japan argues that "if there is a disagreement between WTO Members as to whether the requested changes to a Schedule 'alter the scope of a concession' and affect the rights and obligations of other WTO Members, the WTO Member requesting to change its Schedule needs to follow the procedure set out in Article XXVIII of the GATT 1994 in order to effectuate that change. It is therefore not for the Panel to rule on the nature of a rectification request or of the objections submitted by WTO Members on that request."[631] Japan also submits that, given that other WTO Members which are not parties to this and the parallel disputes raised objections to India's Draft Rectification, "[a]ny Panel's finding pursuant to India's request would thus risk to undermine the rights of those other WTO Members and raise serious systemic concerns in respect of reliability and predictability of the system of tariff concessions."[632] Moreover, any findings by the Panel "would not affect the validity of the objections by those other WTO Members that are not parties to this dispute, there would still remain valid objections to the Draft Rectification."[633] Japan maintains that even if the Panel were to make the findings requested by India, "the Draft Rectification which was submitted by India in 2018 would not automatically become certified or deemed effective, unless the procedure set out in the 1980 Procedures is followed."[634]

[621] India's response to Panel question No. 49, para. 42; second written submission, para. 120 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53).
[622] India's response to Panel question No. 49, para. 42.
[623] India's response to Panel question No. 49, para. 42; second written submission, para. 121.
[624] India's response to Panel question No. 49, para. 45. See also India's comments on Japan's response to Panel question No. 65, para. 18.
[625] India's second written submission, para. 123.
[626] Japan's response to Panel question No. 49 (b), para. 90.
[627] Japan's response to Panel question No. 49(b), para. 90, and No. 65, para. 20-22. See also Japan's second written submission, para. 170.
[628] Japan's response to Panel question No. 65, para. 22.
[629] Japan's response to Panel question No. 49 (b), para. 91. See also Japan's second written submission, para. 172.
[630] Japan's second written submission, para. 172.
[631] Japan's response to Panel question No. 49 (b), para. 92. See also Japan's second written submission, para. 175.
[632] Japan's response to Panel question No. 49 (b), para. 93; second written submission, para. 178.
[633] Japan's response to Panel question No. 49(c), para. 99.
[634] Japan's response to Panel question No. 49, paras. 94, 97-98; Japan's second written submission, para. 177 (referring to Panel Report, *EU – Poultry Meat (China)*, para. 7.536).

7.3.4.3 Main arguments of the third parties

7.223. Brazil submits that because "[t]here seems to be agreement amongst the parties that India's draft rectification has not been certified …, India's schedule has not been modified by virtue of the draft rectification, since the procedures under the 1980 Decision have not been completed given the objections that were raised."[635] Brazil therefore "does not see any basis in the DSU or in the Panel's terms of reference in [this] dispute[] for the Panel to overturn the objections that were raised in connection with India's draft rectification."[636]

7.224. Canada considers that a determination on whether India's draft rectification was of a purely formal character is not within the purview of a panel, and would amount to the Panel substituting its views for those of WTO Members, thereby overriding the procedures that have been agreed to by all WTO Members.[637] Canada also maintains that even assuming *arguendo* the Panel had capacity to consider India's request for findings, the Panel would still need to analyse whether the products at issue were covered by the tariff items as amended by the draft rectification, and determine whether India imposes on those products duties in excess of those set forth in its Schedule.[638]

7.225. The European Union maintains that the 1980 Decision does not envision the possibility of referring the matter to dispute settlement where parties disagree on existence of an error.[639] Moreover, the European Union argues that the alleged error in India's Schedule was not a formal one, and the proposed rectification would have required a substantial modification of India's certified commitments.[640]

7.226. Korea submits that the Panel's mandate is confined to its terms of reference, which do not include recognizing and declaring the invalidity of the complainant's objections to India's rectification request.[641] Further, Korea considers that negotiation and agreement among Members are the "essence of the modification and/or rectification procedure" under Article XXVIII of the GATT 1994 and the 1980 Decision. Therefore, Korea is concerned that the possibility of negotiations under those procedures would be undermined if a Member's objection to a proposed rectification is declared unfounded by the Panel.[642] Korea maintains that regardless of the Panel's findings on India's draft rectification, India's obligations are to be assessed in light of India's existing Schedule because "treaty terms are not based on a subjective intent of one Party, but rather on a common intent of all relevant Parties interpreted through the general rule of treaty interpretation".[643]

7.227. Chinese Taipei submits that the DSU does not provide a legal basis for the Panel to "recognize and declare that the Draft Rectification was of a purely formal character and [the complainant's] objections on the same were unfounded".[644] For Chinese Taipei, neither "India's Draft Rectification nor the 1980 [Decision] are 'covered agreements' within the meaning of Article 1.1 of the DSU".[645] Chinese Taipei also argues that pursuant to its terms of reference, the Panel in this dispute "is neither required nor authorized" to make findings with respect to India's draft rectification or the 1980

[635] Brazil's third-party response to Panel question No. 19, para. 13.
[636] Brazil's third-party response to Panel question No. 19, para. 14.
[637] Canada's third-party response to panel question No. 19, para. 14, and No.20, para. 16.
[638] Canada's third-party response to panel question No. 20, para. 17.
[639] European Union's third-party response to Panel question No. 20, para. 26.
[640] European Union's third-party response to Panel question No. 20, para. 27. The European Union also considers that there is an incompatibility between the error India invokes under Article 48 of the Vienna Convention and that invoked in the context of the rectification request. This is because the error India invokes under Article 48 of the Vienna Convention is an error in India's consent relating to the scope of the commitments included in the HS2007 certification, and not an error in the text of the treaty. On the other hand, according to the European Union, the error invoked in the context of the rectification request "presupposes necessarily that there is no error in the text of the treaty". The European Union also notes that while the error invoked under Article 48 is "a very material one", absent which India would not have given consent to the certification of its HS2007 Schedule, the error invoked in the context of the rectification request is a "purely formal error". (European Union's third-party response to Panel question No. 19, paras. 20-23).
[641] Korea's third-party response to Panel question No. 19, para. 12 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22).
[642] Korea's third-party response to Panel question No. 19, para. 13.
[643] Korea's third-party response to Panel question No. 20, para. 14 (referring to Appellate Body Report, *EC – Computer Equipment*, para. 84).
[644] Chinese Taipei's third-party response to Panel question No. 19, para. 16.
[645] Chinese Taipei's third-party response to Panel question No. 19, para. 17.

Decision.[646] Chinese Taipei maintains that certification of a Schedule pursuant to the 1980 Decision is subject to the agreement of all WTO Members, who are provided an opportunity to object to the proposed modifications, and therefore such a matter is not to be decided by a dispute settlement panel.[647] Thus, for Chinese Taipei, the Panel is "called upon to determine whether India violates its commitments under Articles II:1(a) and II:1(b) of the GATT 1994 based on India's last certified Schedule under HS2007."[648]

7.228. The United Kingdom considers that it is not necessary to make the findings requested by India because neither Japan nor India relies on the draft rectification when determining the relevant tariff commitments for India.[649]

7.229. The United States argues that there is no legal basis in the DSU for the Panel to determine that India's draft rectification request was of a purely formal character and the objections to that request were unfounded.[650] According to the United States, although the 1980 Decision was agreed upon by WTO Members, it is not a "covered agreement" within the meaning of Article 1.1 of the DSU. Thus, the DSU does not contemplate that a panel would make findings regarding Member's actions under the 1980 Decision.[651] The United States also considers that the findings requested by India could raise questions on altering the balance of rights and obligations struck with respect to India's WTO Schedule.[652] Moreover, the United States argues that the 1980 Decision does not contemplate recourse to WTO dispute settlement where an objection is made.[653] Finally, the United States maintains that pending any resolution of the objections raised by other WTO Members, the authentic text of India's Schedule remains unaltered.[654]

7.3.4.4 Panel's assessment

7.230. We recall that India requests us to find that: (i) Japan violated paragraph 3 of the 1980 Decision by raising an objection "unfounded in law", and (ii) Japan's objection constituted an "impediment to India's rights to make a formal rectification to its schedule of concessions under the 1980 [Decision]."[655] The parties disagree on whether we have a legal basis under the DSU to address India's request for findings.

7.231. According to India, the 1980 Decision is a covered agreement within the meaning of Article 1.1 of the DSU. Therefore, in India's view, we have the authority to "interpret the Draft Rectification and clarify the rights and obligations of the Members under it" under Article 3.2 of the DSU.[656] India also argues that Article 11 of the DSU imposes an obligation on us to objectively assess the facts of the dispute and examine the conformity of Members' actions with the covered agreements.[657] Japan disagrees that the 1980 Decision is a covered agreement within the meaning of Article 1.1 of the DSU.[658] Japan also submits that because its panel request did not refer to India's draft rectification or the 1980 Decision, we lack jurisdiction to assess India's request and make the requested findings.[659]

7.232. The parties' arguments raise two issues concerning the existence of a legal basis for us to address India's request for findings: (i) whether our terms of reference allow us to assess India's request for findings; and (ii) whether the 1980 Decision is a covered agreement within the meaning of Article 1.1 of the DSU. We consider it logical to first determine whether, pursuant to our terms of

[646] Chinese Taipei's third-party response to Panel question Nos. 19, para. 18.
[647] Chinese Taipei's third-party response to Panel question No. 20, para. 21.
[648] Chinese Taipei's third-party response to Panel question No. 20, para. 22.
[649] United Kingdom's third-party response to Panel question Nos. 19 and 20, paras. 4-5.
[650] United States' third-party response to Panel question Nos. 19-20, para. 16.
[651] United States' third-party response to Panel question Nos. 19-20, para. 17.
[652] United States' third-party response to Panel question Nos. 19-20, para. 18.
[653] United States' third-party response to Panel question Nos. 19-20, para. 19 (referring to Panel Report, *Russia – Tariff Treatment*, paras. 7.50-7.56).
[654] United States' third-party response to Panel question Nos. 19-20, para. 20.
[655] India's second written submission, para. 116.
[656] India's response to Panel question No. 49, paras. 40-41; second written submission, paras. 11-117 (referring to Panel Report, *US – FSC*, para. 7.63).
[657] India's response to Panel question No. 49, para. 42.
[658] Japan's response to Panel question No. 65, para. 22.
[659] Japan's response to Panel question No. 49(b), para. 90, and No. 65, paras. 20-22. See also Japan's second written submission, para. 170.

reference, we have jurisdiction over India's request for findings. We will only evaluate whether the 1980 Decision is a "covered agreement" within the meaning of Article 1.1 of the DSU if we determine that we have jurisdiction to address India's request.[660] Moreover, if we determine that we lack the legal mandate to address India's request for findings, we would not proceed to address the substance of that request (i.e. whether the rectification request was purely of a formal character and whether Japan's objection was "unfounded in law").

7.233. Article 7.1 of the DSU sets out the "Terms of Reference of Panels". Specifically, this provision sets forth the terms of reference that shall apply "unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel". In this dispute, the parties did not "agree otherwise", and consequently the standard terms of reference set out in Article 7.1 apply to us. Accordingly, our terms of reference are:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Japan in [its panel request] and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[661]

7.234. Regarding the "matter referred to the DSB", Article 6.2 of the DSU stipulates that a complainant's panel request shall, *inter alia*: (i) identify the specific measures at issue; and (ii) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In our view, these two elements of Article 6.2 define the "matter referred to the DSB".

7.235. We consider that, pursuant to Articles 6.2 and 7.1, our terms of reference as defined by the panel request delimit the scope of the dispute and in turn our jurisdiction.[662] We note that Japan's panel request identifies the specific measures at issue as the legal instruments through which India applies customs duties on imports of certain ICT products in excess of the bindings set forth in its WTO Schedule. The panel request then indicates that the legal basis of Japan's complaint is India's tariff treatment of certain ICT products inconsistently with Articles II:1(a) and (b) of the GATT 1994.[663]

7.236. Consequently, our mandate, pursuant to the explicit terms of the DSU, is limited to examining whether the tariff treatment imposed by India on certain ICT products is inconsistent with Articles II:1(a) and (b) of the GATT 1994. To the extent that India's request for findings does not concern this matter, it would not fall within our terms of reference.

7.237. Turning to assessing whether India's request for findings is within those terms of reference, we note that in response to a question from the Panel concerning the effect of the requested findings on Japan's claims under Articles II:1(a) and (b), India stated that "if it is found that the proposed Draft Rectification is, in fact, of a purely formal character, it would lead to the conclusion that the bound rates assigned to the products at issue were clearly in error and that such concessions were capable of rectification via the 1980 [Decision]."[664] We also note India's argument in its second written submission that "[i]f it is found that the Draft Rectification is, in fact, of a purely formal character, it would be found that the bound rates assigned to the products at issue are a consequence of a formal error and are therefore severally void. Therefore, there can be no violation of Articles II:1(a) and Article II:1(b) of the GATT if the contested tariff items of India's schedule of concessions are void."[665]

7.238. We do not see how findings that the rectification request was "of a purely formal character" and that Japan's objection was "unfounded in law" would modify India's WTO tariff commitments or otherwise affect our application of Articles II:1(a) and (b) of the GATT 1994. India has clarified that it is not requesting us to certify its rectification request.[666] In any case, we do not read the 1980

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[660] See also Panel Report, *EU – Poultry Meat (China)*, fn 39 to para. 7.27.

[661] Constitution Note of the Panel, WT/DS584/10, para. 2.

[662] See e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.11*; US – Countervailing Measures (China)*, para. 4.6; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

[663] Japan's panel request.

[664] India's response to Panel question No. 49, para. 45.

[665] India's second written submission, para. 123.

[666] India's second written submission, para. 123 ("India clarifies that it does not seek … certification of the Draft Rectification through the dispute settlement mechanism").

Decision to permit a panel to certify a rectification request made under the 1980 Decision. We note that pursuant to paragraph 3 of the 1980 Decision, changes to a Schedule requested through the 1980 Decision "become a Certification provided that no objection has been raised by a [Member] within three months". We recall that WTO Members other than Japan – including the European Union and Chinese Taipei, complainants in the other two disputes in which the same panelists were appointed[667] – objected to India's rectification request. Consequently, even assuming *arguendo* that we determined that India's draft rectification was of a "purely formal character" and that Japan's objection on the same was "unfounded", our findings would not have any effect *vis-à-vis* India's WTO Schedule. Until *all* objections to India's rectification request are withdrawn (including objections by WTO Members who are not parties to this dispute), and India's proposed changes are certified, India's WTO Schedule, as a legal matter, remains unmodified.[668] Contrary to India's arguments, our findings in this regard would not render its bound rates "severally void" and would not in any way modify India's WTO obligations under Articles II:1(a) and (b) or under its WTO Schedule.

7.239. Indeed, from our review of India's arguments, we understand that India is in fact raising a claim that Japan acted inconsistently with its own WTO obligations. We note that a "claim" in WTO dispute settlement refers to an allegation that another Member has violated a provision of a covered agreement, thereby nullifying or impairing the benefits accruing to the aggrieved Member.[669] India, in its own words, requests us to find that "Japan *violated* paragraph 3 of the 1980 [Decision]" and "imped[ed] India's rights … under the 1980 [Decision]".[670] This, in our view, constitutes a claim by India that Japan has violated, and in effect nullified or impaired the benefits that accrue to India under, the 1980 Decision.[671]

7.240. Therefore, we consider that India's claim does not concern the matter before the Panel, as defined in Japan's panel request, namely whether the tariff treatment imposed by India on certain ICT products is inconsistent with Articles II:1(a) and (b) of the GATT 1994.[672] Consequently, India's request for findings appears to fall outside our terms of reference, pursuant to Articles 6.2 and 7.1 of the DSU.

7.241. We note India's argument that Article 11 of the DSU requires us to "objectively assess the facts of the dispute and examine the conformity of Members' actions with [the] covered agreements".[673] We agree that Article 11 requires us to make an objective assessment of the facts of the case and the applicability of, and conformity with, the relevant covered agreements. However, we understand that India is not requesting factual or even legal findings that would be relevant for assessing the consistency of the measures challenged by Japan with the covered agreements. To the contrary, India is requesting legal findings that Japan acted inconsistently with its own WTO obligations.

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[667] The same panelists were appointed in *India – Tariffs on ICT Goods (EU)* (DS582), *India – Tariffs on ICT Goods (Japan)* (DS584), and *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588).

[668] We note that several third parties agree with this understanding. (See e.g. Canada's third-party response to panel question No. 19, and No. 20, para. 16; European Union's third-party response to Panel question No. 19, para. 26; Korea's third-party response to Panel question No. 20, para. 14; and United States' third-party response to Panel question Nos. 19-20, para. 20). A previous panel took a similar view, stating that "a proposed rectification to correct an alleged error in a Schedule would have no legal effect until such time as the text of the Schedule is changed through certification." (Panel Report, *EU – Poultry Meat (China)*, para. 7.536. See also Panel Report, *Russia – Tariff Treatment*, para. 7.54).

[669] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (referring to Appellate Body Report, *Korea – Dairy*, para. 139).

[670] India's second written submission, para. 116. (emphasis added)

[671] We note that India itself refers to its request for findings as a "claim". India states in its second written submission:

> As pointed out by India in its previous submissions, the objections made by Japan were unfounded and lacked legal merit. Therefore, India is claiming that: (i) Japan violated Paragraph 3 of the 1980 [Decision] by raising an [objection] unfounded in law, and (ii) Japan's action was an impediment to India's rights to make a formal rectification to its schedule of concessions under the 1980 [Decision]. Such claims warrant an exercise to establish that the 1980 [Decision] is a "covered agreement."

(India's second written submission, para. 116)

[672] We note that a respondent is not precluded from invoking in its defence a provision other than those which the complainant claims have been violated. However, as we have noted above, India is not raising a defence, but rather is making a claim against Japan.

[673] India's second written submission, para. 121.

7.242. Article 11 requires that "a panel should make an objective assessment *of the matter before it*, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[674] In our view, "the matter" before us (under Article 11) constitutes the "matter referred to the DSB" (under Article 7.1), and is delimited by the complainant's panel request. We have found above that India's request for findings is outside the scope of our terms of reference. We therefore see nothing in Article 11 of the DSU that permits us to make the findings requested by India.

7.243. India also refers to the findings of the Appellate Body in *Mexico – Taxes on Soft Drinks* to support its position that Article 3.2 of the DSU requires us to "interpret the Draft Rectification and clarify the rights and obligations of the Members under it".[675] India quotes the following finding by the Appellate Body:

> A decision by a panel to decline to exercise validly established jurisdiction would seem to 'diminish' the right of a complaining Member to 'seek the redress of a violation of obligations' within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU. We see no reason, therefore, to disagree with the Panel's statement that a WTO panel 'would seem … not to be in a position to choose freely whether or not to exercise its jurisdiction'.[676]

7.244. We note, however, that India is not a complaining party in this dispute. By declining to "interpret the Draft Rectification"[677], we are not diminishing India's rights to bring a dispute pursuant to the DSU. India is not precluded from requesting the establishment of a panel with appropriate terms of reference to determine whether Japan's actions "violated" the 1980 Decision. Moreover, we note that India has neither entered into consultations with Japan under Article 4 of the DSU, nor requested the establishment of a panel by the DSB under Article 6 of the DSU. In our view, if we were to assess the substance of India's request for findings, this would in fact diminish the rights of the *complainant* in this dispute, namely its right to seek a positive solution through consultations. The Appellate Body's findings in *Mexico – Taxes on Soft Drinks* therefore do not support India's view that we are required to address India's requests for findings.

7.245. India also refers to certain observations of the panel in *Russia – Traffic in Transit*. According to India, that panel found that: (i) "WTO Members have an obligation to perform treaties in good faith, and if Members' actions are not in conformity with the relevant provisions, the Panel has an obligation to review it"; and (ii) "systemic issues might arise if Members abuse provisions to circumvent obligations".[678] India argues that for these reasons, we have an obligation to "assess if the objection raised by Japan is in good faith or if it is merely an instrument to force India to grant concessions on products, which it never agreed to."[679]

7.246. In our view, the observations of the panel in *Russia – Traffic in Transit* not only fail to provide a legal basis for us to address India's request, but further reinforce our view on this issue. Regarding the requirement to assess whether Members' actions are in conformity with relevant provisions, we have explained above that this obligation under Article 11 of the DSU is delimited by our terms of reference, and our terms of reference do not extend to the findings requested by India. As to whether systemic issues might arise if Members abuse provisions to circumvent obligations, we strongly agree. Addressing India's claim in the present proceedings would seem to allow India to bring a claim before a panel without following the relevant procedural steps set forth in the DSU. This would not only amount to India circumventing its obligations under the DSU, but could indeed raise significant systemic issues concerning the function of panels and the procedural rights and obligations of Members with respect to WTO dispute settlement.

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[674] Emphasis added.

[675] India's second written submission, para. 120.

[676] India's second written submission, para. 120 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53).

[677] India's second written submission, para. 120.

[678] India's second written submission, para. 121 (referring to Panel Report, *Russia – Traffic in Transit*, paras. 7.132-7.133).

[679] India's second written submission, para. 121.

7.247. In sum, we conclude that, in accordance with the provisions of the DSU, our terms of reference do not permit us to assess in the present proceedings whether: (i) Japan violated paragraph 3 of the 1980 Decision by raising an objection unfounded in law; or (ii) Japan's action was an impediment to India's rights to make a formal rectification to its Schedule of concessions under the 1980 Decision. We also note that, even if we did indeed have the legal mandate to make the findings requested by India, doing so would not assist in resolving this dispute.[680] For these reasons, we do not consider it necessary to assess whether the 1980 Decision is a "covered agreement" within the meaning of Article 1.1 of the DSU, or the substance of India's arguments that its rectification request was purely of a formal nature and Japan's objection was inconsistent with its obligations under the 1980 Decision.[681]

7.3.5 Conclusion

7.248. We have addressed above the parties' arguments concerning the ITA, Article 48 of the Vienna Convention, and India's rectification request under the 1980 Decision. We have concluded that the ITA is not a covered agreement within the meaning of the WTO Agreement and the DSU, and does not set forth the legal obligations at issue in this dispute. Moreover, the ITA does not otherwise limit the scope of India's tariff commitments as set forth in its WTO Schedule. In our view, the circumstances of this case do not satisfy the substantive requirements of Article 48 of the Vienna Convention, and we therefore decline to read aspects of India's WTO Schedule as invalid. Finally, we consider that India's request for findings that the complainant acted inconsistently with the 1980 Decision is not within our terms of reference, and we consequently do not have the legal mandate to make such findings. Moreover, even assuming *arguendo* that we had the legal mandate to address India's request for findings, we do not see how such findings would contribute to a positive resolution of this dispute.

7.249. We therefore proceed with the application of Articles II:1(a) and (b) of the GATT 1994 in this dispute by comparing, on the one hand, India's WTO tariff commitments as set forth in its WTO Schedule[682], and, on the other hand, the tariff treatment applied by India to imported products.

7.4 Whether India's tariff treatment is inconsistent with Articles II:1(a) and (b) of the GATT 1994

7.4.1 Overview

7.250. Japan claims that India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994 by imposing on certain products tariff treatment that is inconsistent with the commitments inscribed in India's WTO Schedule. Japan specifically challenges the tariff treatment accorded by India to products falling under the following tariff items of India's First Schedule at the time of the Panel's establishment: 8517.12.11, 8517.12.19, 8517.12.90, 8517.61.00, 8517.62.90, 8517.70.10 and 8517.70.90.[683] Japan also claims that, even where India unconditionally exempts certain products from customs duties, India acts inconsistently with Article II:1(a) of the GATT 1994.

7.251. For its part, India contests certain assertions by Japan regarding the scope and content of its WTO tariff commitments, and considers that Japan has failed to substantiate its burden of demonstrating that the tariff treatment of certain products is inconsistent with Articles II:1(a) and (b).[684] India also argues that pursuant to the India-Japan Comprehensive Economic Partnership Agreement (CEPA), and implementing Notification No. 69/2011, India exempts the products at issue when originating from Japan from ordinary customs duties. Regarding Japan's additional claim under Article II:1(a), India considers that it has discretion to effectuate its obligations under the covered agreements as it sees fit, and Japan's claim essentially requests an interpretation specifying the manner in which India must satisfy its obligations under Articles II:1(a) and (b).

[680] See para. 7.238 above.
[681] See also Panel Report, *EU – Poultry Meat (China)*, fn 39 to para. 7.27.
[682] Unless otherwise specified, all references in this Report to India's "WTO Schedule" are to the HS2007 version of that Schedule.
[683] See para. 7.1 above.
[684] See para. 7.2 above.

7.252. We proceed with our analysis by assessing each tariff items in turn. We recall that where a measure is inconsistent with Article II:1(b), it is also inconsistent with Article II:1(a).[685] We also recall that applying Article II:1(b) in the context of this dispute entails comparing the treatment that India is obligated to provide in its WTO Schedule with the tariff treatment that India accords to the products at issue under the challenged measures.[686] We therefore conduct our assessment of each tariff item by: (i) identifying, as a legal matter, India's WTO tariff commitments; (ii) assessing, as a factual matter, the parties' assertions regarding the tariff treatment accorded by India to certain products; (iii) comparing the challenged tariff treatment to India's WTO tariff commitments; and (iv) on the basis of that comparison, forming a conclusion as to whether India is acting inconsistently with Articles II:1(a) and (b). In addition to these four steps, we also consider it useful to address certain general issues arising with respect to certain of the tariff items. Where necessary, we address these general issues at the outset, before conducting our four-step analysis of whether India is acting inconsistently with Articles II:1(a) and (b). Following our assessment of each tariff item, we turn to address Japan's additional claim of inconsistency with Article II:1(a), and finally India's argument that any inconsistency with Articles II:1(a) and (b) is negated because products originating from Japan are exempt from customs duties pursuant to Notification No. 69/2011.

7.4.2 Tariff items 8517.12.11, 8517.12.19, and 8517.12.90 of India's First Schedule

7.4.2.1 General issues

7.4.2.1.1 Main arguments of the parties

7.253. Japan challenges the tariff treatment accorded by India to products falling under tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of India's First Schedule at the time of the Panel's establishment, covering telephones for cellular networks or for other wireless networks.[687] Japan acknowledges that India amended its First Schedule during the Panel proceedings to reflect the HS2022. Japan submits that pursuant to those amendments, "subheading 8517 12 has been replaced by two new subheadings, i.e. subheadings 8517 13 and 8517 14", and that the products at issue "now fall under two different subheadings, the descriptions of which are 'smartphones' and 'other telephones for cellular networks or for other wireless networks'".[688] In response to an argument by India that the measure challenged by Japan has ceased to exist, Japan argues that "the entry into force of the HS 2022 has merely reshaped the structure of heading 8517 of the First Schedule, pursuant to which subheading 8517 12 has been replaced by two new subheadings, i.e. subheadings 8517 13 and 8517 14" and that "the 20% customs duty is still applied to 'telephones for cellular networks and other wireless networks' which now fall under two different subheadings".[689] Thus, for Japan, the measure continues to exist.[690] Japan also submits that the changes to India's First Schedule enacted through the Finance Act 2021 constitute an "amendment or replacement" which falls within the Panel's terms of reference.[691] In response to India's argument that the Panel cannot issue any rulings or recommendations on the measures pertaining to tariff item 8517.12, Japan submits that even if the measures have expired (which it disputes), the Panel must still make findings with regard to those measures.[692]

7.254. India argues that the measures identified by Japan have ceased to exist, as its First Schedule was amended to align it with the HS2022, with effect from 1 January 2022, and therefore the Panel cannot issue rulings or recommendations on the measures pertaining to tariff item 8517.12.[693] According to India, "if a product is to be classified under a tariff entry, then the heading and description both must be examined to determine the commitments prescribed in the schedule."[694] In this regard, India argues that the scopes and descriptions of tariff items 8517.13 and 8517.14

[685] See para. 7.6 above.
[686] See para. 7.7 above.
[687] Japan's first written submission, para. 32.
[688] Japan's response to Panel question No. 72(a), para. 51.
[689] Japan's opening statement at the second meeting of the Panel, para. 48. See also Japan's response to Panel question No. 72(a), para. 51.
[690] Japan's opening statement at the second meeting of the Panel, para. 48. See also Japan's response to Panel question No. 72(a), para. 53.
[691] Japan's opening statement at the second meeting of the Panel, paras. 49-53; response to Panel question No. 72(b), paras. 58-59.
[692] Japan's opening statement at the second meeting of the Panel, paras. 45-46.
[693] India's second written submission, paras. 105-107.
[694] India's response to Panel question No. 68, para. 45.

are different from those of tariff items 8517.12.[695] India also submits that "the term 'smartphones' does not appear in the ITA[] or in the 2007 Schedule. Accordingly, no commitments exist with respect to such smartphones. Further, there exists no certified schedule with respect to sub-headings 8517.13 and 8517.14."[696] India asserts that "[t]he burden of proof is on the complainant to identify the sub-heading under which smartphones were classified under [the] HS2007, and whether India has violated its commitments viz-a-viz such sub-headings. However, the complainant [has] not made any such claims with regard to smartphones."[697] India also submits that "[w]ith regard to 'other telephones for cellular networks' classified under sub-heading 8517.14, … such phones would have been classified under 8517.12.11 or 8517.12.19 of the HS2007 and India's other legal arguments would continue to apply."[698]

7.4.2.1.2 Panel's assessment

7.255. Before turning to assess the merits of the parties' arguments with respect to Japan's claim concerning products classified under tariff item 8517.12 of India's First Schedule at the time of the Panel's establishment, we consider it useful to briefly address certain threshold issues concerning our terms of reference.

7.256. We recall that the measures challenged by Japan are the imposition of customs duties on products falling within the scope of tariff item 8517.12 of India's First Schedule.[699] Japan argues that the product description of tariff item 8517.12 of the First Schedule is an exact match to the product description of tariff item 8517.12 of India's WTO Schedule. Thus, for Japan, tariff item 8517.12 of India's WTO Schedule reflects India's WTO tariff commitments regarding products classified under tariff item 8517.12 of India's First Schedule, namely, telephones for cellular networks or other wireless networks.[700]

7.257. India argues that: (i) the measures as challenged by Japan have ceased to exist, as a result of certain amendments to India's First Schedule; and (ii) Japan has failed to demonstrate that "smartphones" fall within the scope of tariff item 8517.12 of India's WTO Schedule. We note that the first of these arguments, on its face, appears to raise threshold issues concerning the scope of Japan's claim and our terms of reference. The second of these arguments relates to whether the tariff commitments set forth in tariff item 8517.12 of India's WTO Schedule apply to the products covered by Japan's claim. In our view, it is not possible to address the merits of these arguments without assessing: (i) the effect, if any, of India's amendments to its First Schedule on the measures as challenged by Japan and our terms of reference; and (ii) whether smartphones are products covered by tariff item 8517.12 of India's WTO Schedule, such that the tariff commitments set forth therein apply to the products covered by Japan's claim.

7.258. We therefore consider it appropriate to proceed with our analysis by first identifying India's WTO tariff commitments with respect to products classified under tariff item 8517.12 of its WTO Schedule. We then address, as a factual matter, the parties' arguments concerning the tariff treatment applied by India to certain products, including smartphones. In our view, this factual assessment is essential to our determination of whether, as alleged by India, the measures at issue have ceased to exist. Finally, we will compare our factual findings concerning India's tariff treatment to India's WTO tariff commitments for purposes of determining whether India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994. In that context, we will also assess whether Japan has demonstrated that smartphones are classified under tariff item 8517.12 of India's WTO Schedule, such that India's tariff commitments for tariff item 8517.12 extend to smartphones, classified under tariff item 8517.13.00 of India's First Schedule as of 1 January 2022; and whether the measures challenged by Japan have ceased to exist or have otherwise been amended.

[695] India's response to Panel question No. 68, para. 45.
[696] India's second written submission, para. 107. See also India's response to Panel question No. 102, para. 45.
[697] India's response to Panel question No. 75(a), para. 60.
[698] India's response to Panel question No. 75(a), para. 59.
[699] Japan's panel request, p. 1.
[700] Japan's first written submission, paras. 92-94.

7.4.2.2 India's WTO tariff commitments

7.4.2.2.1 Main arguments of the parties

7.259. Japan asserts that India's bound duty rate for products falling under tariff item 8517.12 of India's WTO Schedule, covering telephones for cellular networks or for other wireless networks, is 0%.[701]

7.260. India contends that the tariff commitments under tariff item 8517.12 as reflected in its WTO Schedule based on the HS2007 were certified in error.[702] India maintains that it did not intend to make commitments on telephones for cellular networks, which in its view were not covered under the ITA or the HS1996.[703] According to India, the commitments under tariff item 8517.12 were undertaken in error, are void pursuant to Article 48 of the Vienna Convention, and are therefore rendered unbound.[704]

7.4.2.2.2 Panel's assessment

7.261. We have addressed India's arguments that its WTO Schedule was certified in error above, and held that India's tariff commitments are set forth in India's WTO Schedule.[705] We have also rejected India's arguments that the ITA sets forth, or otherwise limits the scope of, its tariff commitments in its WTO HS2007 Schedule.[706] Moreover, we have declined to make the findings requested by India regarding its request to rectify its WTO Schedule pursuant to the 1980 Decision.[707]

7.262. Therefore, we turn to India's WTO Schedule to assess India's tariff commitments. India's WTO HS2007 Schedule provides, *inter alia*, the following [708]:

	Product description	Bound rate
8517	Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28.	
8517.1	- Telephone sets, including telephones for cellular networks or for other wireless networks:	
8517.12.00	-- Telephones for cellular networks or for other wireless networks	0%

7.263. Given that the relevant tariff binding for "[t]elephones for cellular networks or for other wireless networks" set forth in India's WTO Schedule is 0%, and given that the WTO Schedule indicates no terms, conditions, or qualifications attached to that bound duty rate, we observe that India is obligated to provide unconditional duty-free treatment to telephones for cellular networks or for other wireless networks falling under tariff item 8517.12 of its WTO Schedule.

7.4.2.3 India's tariff treatment

7.4.2.3.1 Main arguments of the parties

7.264. Japan submits that at the time of the Panel's establishment, India's First Schedule imposed a standard duty rate of 20% on imports of telephones for cellular networks and telephones for other wireless networks, which were classified under tariff items 8517.12.11, 8517.12.19 and 8517.12.90

[701] Japan's first written submission, paras. 92 and 94.
[702] India's first written submission, paras. 40-74.
[703] India's first written submission, paras. 132-146.
[704] India's first written submission, paras. 69-74.
[705] See para. 7.216 above.
[706] See para. 7.82 above.
[707] See para. 7.247 above.
[708] WT/Let/1072.

of that Schedule.[709] Japan also notes that Notification No. 57/2017 exempted from customs duties "[t]elephones for other wireless networks, other than cellular networks", classified under tariff item 8517.12.90 of India's First Schedule.[710] Japan submits that telephones for cellular networks classified under tariff items 8517.12.11 and 8517.12.19 of the First Schedule remained subject to the 20% duty rate set out in the First Schedule, as Notification No. 57/2017 did not apply to such products.[711] Japan acknowledges that during these proceedings tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of India's First Schedule were replaced with tariff items 8517.13.00 and 8517.14.00. Japan submits that, following these amendments, India's First Schedule imposes a standard duty rate of 20% on imports of such products, namely smartphones and other telephones for cellular networks or other wireless networks.[712] Japan also notes that Notification No. 57/2017, as amended by Notification No. 57/2021, exempts "other telephones for other wireless networks", presently classified under tariff item 8517.14.00, from customs duties.[713]

7.265. India does not dispute that at the time of the Panel's establishment, it imposed a 20% duty rate on telephones for cellular networks, and exempted telephones for other wireless networks from customs duties.[714] India also does not dispute that, following its amendments to the First Schedule, India imposes a 20% duty rate on products classified under tariff item 8517.13.00 (smartphones) and certain products classified under tariff item 8517.14.00 (namely other telephones for cellular networks).[715] India submits that Notification No. 57/2017, as amended by Notification No. 57/2021, exempts certain products classified under tariff item 8517.14.00 (namely other telephones for other wireless networks) from customs duties.[716]

7.4.2.3.2 Panel's assessment

7.266. We proceed with our assessment by first examining the tariff treatment accorded to products that, at the time of the Panel's establishment, fell under tariff item 8517.12 of India's First Schedule. We then turn to assess the effects of India's amendment of the First Schedule during these proceedings.

7.267. It is uncontested that at the time of the Panel's establishment, India's First Schedule imposed a standard duty rate of 20% on products classified under tariff item 8517.12, covering "[t]elephones for cellular networks or for other wireless networks".[717] It is also uncontested that, through Notification No. 57/2017, India exempted "[t]elephones for other wireless networks, other than cellular networks" from customs duties.[718] Therefore, at the time of the Panel's establishment, India's tariff treatment of products under tariff item 8517.12 of its First Schedule was as follows:

Tariff item	Product description	Applied duty rate
8517.12	-- Telephones for cellular networks or for other wireless networks: --- Telephones for cellular networks:	
8517.12.11	---- Mobile phones, other than push button type	20%
8517.12.19	---- Mobile phones, push button type	20%
8517.12.90	--- Telephones for other wireless networks	0%

7.268. During the Panel proceedings, India amended its First Schedule through the Finance Act 2021 to align it with the HS2022. The Finance Act 2021 came into effect on 1 January 2022. The Finance Act 2021 provides that the words "including telephones" occurring against heading 8517 be

[709] Japan's first written submission, para. 38 (referring to First Schedule as of 12 February 2020, (Exhibit JPN-10), p. 1578).
[710] Japan's first written submission, para. 39 (referring to Notification No. 57/2017, (Exhibit JPN-27), p. 5; General Exemption No. 239, (Exhibit JPN-28), p. 2206)).
[711] Japan's first written submission, para. 40.
[712] Japan's response to Panel question No. 78, para. 76.
[713] Japan's comments on India's response to Panel question No. 77, para. 100.
[714] India's first written submission, para. 131.
[715] India's response to Panel question No. 77, para. 64.
[716] India's response to Panel question No. 75(a), para. 58 (referring to Notification No. 57/2017 as amended by Notification No. 57/2021, (Exhibit IND-82)).
[717] Japan's first written submission, para. 38; India's first written submission, para. 131. See also First Schedule as of 12 February 2020, (Exhibit JPN-10), p. 1578.
[718] Notification No. 57/2017, (Exhibit IND-82). See also Japan's first written submission, para. 39; and India's response to Panel question No. 75(a), para. 58.

substituted with the words "including smartphones and other telephones". The Finance Act 2021 also amended the First Schedule, as follows: "for sub-heading 8517 12, tariff items 8517 12 11 to 8517 12 90 and the entries relating thereto" were substituted with tariff item 8517.13.00, relating to "smartphones", and tariff item 8517.14.00, relating to "other telephones for other cellular networks or other wireless networks".[719] Therefore, following the amendments to the First Schedule, tariff item 8517.12 was replaced with tariff items 8517.13.00 and 8517.14.00. India's First Schedule as of 1 January 2022 imposes a standard duty rate of 20% on products classified under tariff items 8517.13.00 and 8517.14.00.[720]

7.269. We also observe that pursuant to India's Notification No. 57/2017, as amended by Notification No. 57/2021, India exempts certain products covered by tariff item 8517.14.00, namely "telephones for other wireless networks, other than cellular networks", from customs duties.[721] It is uncontested that all other products covered by tariff items 8517.13.00 and 8517.14.00, (i.e. "smartphones" and "other telephones for cellular networks") are subject to a tariff treatment of 20%.[722] Therefore, pursuant to Notification No. 57/2017 (as amended) as well as the First Schedule, India's tariff treatment of products classified under tariff item 8517.13.00 and 8517.14.00 of its First Schedule is presently as follows:

Tariff item	Product description	Applied duty rate
8517.13.00	-- Smartphones	20%
8517.14.00	-- Other telephones for cellular networks	20%
8517.14.00	-- Other telephones for other wireless networks	0%

7.4.2.4 Comparison of India's tariff treatment to its WTO tariff commitments

7.4.2.4.1 Preliminary issues

7.270. As indicated above, India argues that the measures as challenged by Japan have ceased to exist, as a consequence of the amendments to India's First Schedule to reflect the HS2022, and are therefore outside the terms of reference of the Panel. Japan argues that both the original and the amended measures are within the Panel's terms of reference and requests us to make distinct assessments of WTO-consistency for both measures. India also argues that Japan has failed to demonstrate that smartphones are products classified under tariff item 8517.12 of India's WTO Schedule.

7.271. Below, we assess whether the amended measures are within the Panel's terms of reference. If we find that the amended measures are within our terms of reference, we shall then assess whether it is necessary for the resolution of this dispute to make distinct assessments of WTO-consistency regarding both the original and the amended measures. Third, we shall assess whether smartphones are classified under tariff item 8517.12 of India's WTO Schedule. Having addressed these three preliminary issues, we shall compare India's tariff treatment to its WTO tariff commitments.

7.4.2.4.1.1 Whether the measures are within the Panel's terms of reference

Main arguments of the parties

7.272. India argues that, following the "amendments" to its First Schedule which took effect on 1 January 2022, "subheading 8517.12 has ceased to exist", and therefore the measures challenged by Japan have ceased to exist. India submits that "[s]martphones and [t]elephones for cellular networks are now classified under sub-headings 8517.13 and 8517.14, respectively." India observes that "[t]he description of sub-headings 8517.13 and 8517.14 is different from the description of the erstwhile sub-heading 8517.12." According to India, "if a product is to be classified under a tariff

[719] Finance Act 2021, (Exhibit IND-60), p. 176.
[720] First Schedule, as amended by Finance Act 2021, (Exhibit IND-60), p. 176.
[721] Notification No. 57/2017 as amended by Notification No. 57/2021, (Exhibit IND-82), p. 12. See also India's response to Panel question No. 75(a), para. 58 (referring to Notification No. 57/2017 as amended by Notification No. 57/2021, (Exhibit IND-82)); and Japan's comments on India's response to Panel question No. 77, para. 100.
[722] Japan's response to Panel question No. 78, paras. 74-77; India's response to Panel question No. 77, para. 64.

entry, then the heading and description … would have to be seen together to determine the commitments prescribed in the schedule." India also maintains that "the term 'smartphones' does not appear in the ITA[] or in the 2007 Schedule. Accordingly, no commitments exist with respect to such smartphones."[723] Further, according to India, "there exists no certified schedule with respect to sub-headings 8517.13 and 8517.14." Therefore, India submits that "the measure identified by Japan has ceased to exist, and the Panel cannot issue any rulings or recommendation on the measures pertaining to sub-heading 8517.12."[724]

7.273. Japan disagrees that the measures have ceased to exist. Japan maintains that the measures at issue consist of "acts and notifications through which the 20% customs duty is applied by India to 'telephones for cellular networks or other wireless networks'".[725] Japan observes that India continues to apply a 20% customs duty on such products, which are presently classified under tariff items 8517.13 and 8517.14 of India's First Schedule.[726] For Japan, "the entry into force of the HS 2022 has merely reshaped the structure of heading 8517 of the First Schedule, pursuant to which subheading 8517 12 has been replaced by two new subheadings, i.e. subheadings 8517 13 and 8517 14."[727] Japan also submits that the changes introduced by the Finance Act 2021 constitute "an amendment or a replacement" in the First Schedule which falls within the Panel's terms of reference.[728] Japan argues that (i) the terms of reference are broad enough to include subsequent amendments to the First Schedule[729], (ii) the amendments introduced by the Finance Act do not change the essence of the original measures identified in the panel request[730], and (iii) the inclusion of this amendment within the Panel's terms of reference is necessary to secure a positive solution to the dispute.[731]

Panel's assessment

7.274. In this section, we assess whether, as argued by India, the challenged measures have ceased to exist and are outside our terms of reference following the amendments to India's First Schedule.

7.275. We observe that in its panel request, Japan challenges various legislation through which India applies a 20% duty on telephones for cellular networks or for other wireless networks falling under tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of the First Schedule. Japan's panel request indicates that "[t]he measures at issue through which the duties are imposed include: … the Customs Tariff Act, 1975 ('Customs Tariff Act') including the First Schedule…; and any amendments, replacements, extensions, implementing measures or other related measures regarding the measures referred to above".[732]

7.276. We recall that the product description attached to tariff item 8517.12 of India's First Schedule at the time of the Panel's establishment was "[t]elephones for cellular networks or for other wireless networks".[733] Specifically, India classified these products under tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of its First Schedule.[734] Following the Panel's establishment, the Finance Act 2021, which amended India's First Schedule by *substituting* tariff items 8517.12.11, 8517.12.19 and 8517.12.90 with tariff items 8517.13.00 and 8517.14.00, was passed into law.[735] Therefore, as India argues, tariff item 8517.12 no longer exists in its First Schedule subsequent to the amendments. We also observe that, as India argues, the product descriptions attached to tariff items 8517.13.00

[723] India's second written submission, para. 107.
[724] India's second written submission, para. 107.
[725] Japan's opening statement at the second meeting of the Panel, para. 47.
[726] Japan's opening statement at the second meeting of the Panel, para. 48.
[727] Japan's opening statement at the second meeting of the Panel, para. 48.
[728] Japan's opening statement at the second meeting of the Panel, para. 49; response to Panel question No. 68, para. 32.
[729] Japan's opening statement at the second meeting of the Panel, paras. 49-50 (referring to Panel Reports, *EC – IT Products*, para. 7.141).
[730] Japan's opening statement at the second meeting of the Panel, paras. 49 and 51.
[731] Japan's opening statement at the second meeting of the Panel, paras. 49 and 52 (referring to Appellate Body Report, *Chile – Price Band System*, para. 143; and Panel Reports, *EC – IT Products*, paras. 7.144-7.145).
[732] Japan's panel request, p.1.
[733] India's First Schedule as of 12 February 2020, (Exhibit JPN-10).
[734] India's First Schedule as of 12 February 2020, (Exhibit JPN-10).
[735] Finance Act 2021, (Exhibit IND-60), p. 176.

and 8517.14.00 differ from those attached to 8517.12.11, 8517.12.19 and 8517.12.90 of the First Schedule at the time of the Panel's establishment, as follows:

India's First Schedule in HS2017 (at the time of the Panel's establishment)[736]	India's First Schedule in HS2022 (as of 1 January 2022)
8517 Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus … - Telephone sets, including telephones for cellular networks or for other wireless networks: 8517.12 -- Telephones for cellular networks or for other wireless networks --- Telephones for cellular networks or other wireless networks 8517.12.11---- Mobile phones, other than push button type 8517.12.19---- Mobile phones, push button type 8517.12.90--- Telephones for other wireless networks	8517 Telephone sets, including smartphones and other telephones for cellular networks or for other wireless networks; other apparatus … - Telephone sets, including smartphones and other telephones for cellular networks or for other wireless networks: 8517.13.00-- Smartphones 8517.14.00-- Other telephones for cellular networks or for other wireless networks

7.277. Given that the measures challenged by Japan concern legal instruments through which customs duties are imposed, and that certain such legal instruments, in particular India's First Schedule, have since been amended, we consider that the challenged measures, as identified in Japan's panel request, have been amended.

7.278. We therefore turn to assess whether the amended measures are within our terms of reference. In this regard, we note that Article 6.2 of the DSU provides that a panel request shall identify, *inter alia*, the "specific measures at issue". The term "specific measures at issue" has been understood to suggest that, as a general rule, the measures at issue are those that are in existence at the time of a panel's establishment.[737] However, where a legal instrument enacted after a panel's establishment amends a measure identified in the panel request, such legal instrument may be within the panel's terms of reference, provided that the amendment does not change the essence of the measure identified in the panel request.[738] In our view, an analysis of whether an amended measure falls within a panel's terms of reference requires a consideration of whether: (i) the terms of the panel request are broad enough to include subsequent amendments; (ii) the new measure changes the essence of the original measure included in the panel request or has legal implications overly different from those of the original measure; and (iii) the inclusion of the amendment within a panel's terms of reference is necessary to secure a positive solution of the dispute.[739] We address each of these elements in turn.

Whether the terms of Japan's panel request include amendments to the First Schedule

7.279. Japan submits that in its panel request, Japan indicated that the measures it challenges consist of "acts and notifications through which a 20% duty is applied to 'telephones for cellular networks or for other wireless networks' including *inter alia* the Customs Tariff Act including the First Schedule, as well as 'any amendments, replacements, extensions, implementing measures or other related measures regarding the measures referred to above'".[740] Given this wording of its panel request, Japan submits that its panel request is "sufficiently broad to account for the possibility of amendments or replacements in the First Schedule, taking into account the nature of the First Schedule."[741]

7.280. We observe that Japan's panel request states that the "measures at issue through which the duties are imposed include: … (b) the Customs Tariff Act, 1975 ('Customs Tariff Act') including the

[736] We recall that India's First Schedule at the time of the Panel's establishment was based on the HS2017. However, tariff item 8517.12 remained unchanged between the HS2007 and the HS2017.
[737] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[738] Appellate Body Report, *EC – Customs Matters*, para. 184 (referring to Appellate Body Report, *Chile – Price Band System*, para. 139).
[739] Panel Reports, *EC – IT Products*, para. 7.139.
[740] Japan's opening statement at the second meeting of the Panel, para, 50.
[741] Japan's opening statement at the second meeting of the Panel, para, 50.

First Schedule; … and (l) any amendments, replacements, extensions, implementing measures or other related measures regarding the measures referred to above".[742] Given that Japan's panel request includes "amendments" and "replacements" to the measures explicitly listed therein, we consider that the terms of the panel request are broad enough to include the amendments to India's First Schedule brought into effect by the Finance Act 2021.

Whether the amendments to the First Schedule change the essence of the measures identified in Japan's panel request

7.281. Japan submits that the amendments to the First Schedule do not change the scope of the "portion of the First Schedule which was identified in the panel request since 'telephones for cellular networks or for other wireless networks' which fall under the then … subheading 8517 12 have simply been transferred to the new subheadings 8517 13 and 8517 14".[743] Japan submits that correlation tables prepared by India show that tariff items 8517.12.11 and 8517.12.19 of the original First Schedule correspond to tariff item 8517.13.00 of the First Schedule as of 1 January 2022, while tariff item 8517.12.90 of the original First Schedule corresponds to tariff item 8517.14.00 of the First Schedule as of 1 January 2022.[744]

7.282. India does not explicitly address whether the amendments to its First Schedule changed the essence of the measures challenged by Japan. We observe, however, that India more generally submits that "other telephones for cellular networks" presently classified under tariff item 8517.14 of the First Schedule as of 1 January 2022 "would have been classified under [tariff items] 8517.12.11 or 8517.12.19 of the HS2007".[745] India maintains that smartphones could not have been classified under tariff item 8517.12 of the HS2007.[746] According to India, the "HS2007, HS2012 and HS2017 solely used the 'type of network' a particular telephone uses to classify telephones under sub-headings 8517.11 and 8517.12" while tariff item 8517.13.00 is based on "functionality of the phone and the type of network".[747] India submits that since "smartphones" were not granted a dedicated tariff subheading in the HS2007, they were classifiable under different tariff items, depending on the functionality of the smartphones.[748]

7.283. We recall that the measures identified by Japan in its panel request are the set of legal instruments through which India accords certain tariff treatment to products falling under certain tariff items of India's First Schedule. In assessing whether India's amendment of the First Schedule changes the essence of the measures identified by Japan, we consider whether: (i) the amendment is linked to the measures identified in Japan's panel request[749]; (ii) the amended measures cover a similar product scope as the original measures[750]; and (iii) the legal implications of the amended measures are similar to those of the original measures.[751] We consider these three elements in turn.[752]

7.284. Starting with the link between the amended measures and the original measures, it is uncontested that the Finance Act 2021 amended India's First Schedule.[753] As indicated above, the

[742] Japan's panel request, pp. 1-2.
[743] Japan's opening statement at the second meeting of the Panel, para. 51. See also Japan's response to Panel question No. 68, para. 34.
[744] Japan's response to Panel question No. 72(a), para. 52 (referring to CBIC, Correlation of Customs Tariff between 2021 and 2022 (December 2021), (Exhibit JPN-74), pp. 326-327)).
[745] India's response to Panel question No. 75(a), para. 59.
[746] India's comments on Japan's response to Panel question No. 72(a), para. 33.
[747] India's comments on Japan's response to Panel question No. 72(a), para. 33.
[748] India's comments on Japan's response to Panel question No. 72(a), para. 33.
[749] The situation before us differs from that in *EC – Chicken Cuts*. In that dispute, the Appellate Body stated that "[t]he two subsequent measures in this dispute make no explicit reference to the two original measures, which continue to remain in force." (Appellate Body Report, *EC – Chicken Cuts*, para. 158). In this dispute, the Finance Act 2021 makes an explicit reference to legislation included in the original measure, i.e. the First Schedule. (Finance Act 2021, (Exhibit IND-60), p. 132).
[750] Appellate Body Report, *EC – Chicken Cuts*, paras. 158-159. See also Panel Reports, *EC – IT Products*, para. 7.186.
[751] Panel Reports, *EC – IT Products*, para. 7.139.
[752] In our view, whether the essence of a measure remains unchanged shall be determined on a case-by-case basis depending on the relevant facts before the panel. We are also of the view that consideration of these three elements, and indeed any other elements a panel may deem relevant, is a holistic exercise and the weight to be ascribed to them may depend on the circumstances of the case.
[753] India's second written submission, para. 105. See also Finance Act 2021, (Exhibit IND-60), p. 132.

Finance Act 2021 "substituted" tariff items 8517.12.11, 8517.12.19 and 8517.12.90 with tariff items 8517.13.00 and 8517.14.00.[754] Subsequent to the amendments, tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of the First Schedule ceased to exist.[755] These amendments therefore establish a direct link between the amended measures (tariff treatment of products presently classified under tariff items 8517.13.00 and 8517.14.00) and the original measures (tariff treatment of products previously classified under tariff items 8517.12.11, 8517.12.19 and 8517.12.90).

7.285. Regarding the scope of products covered by the measures, it is uncontested that products covered under tariff item 8517.14.00 were covered by the original measures, i.e. India's First Schedule at the time of the panel's establishment.[756] Japan also maintains that smartphones, which are presently covered under tariff item 8517.13.00 of the First Schedule as of 1 January 2022, were covered under tariff item 8517.12 of the First Schedule at the time of the panel's establishment.[757] We note that India's arguments explicitly relate to whether smartphones were classified under tariff item 8517.12 of the HS2007. India submits that "no commitments exist with respect to … smartphones"[758] and that smartphones "could not be classified under HS2007 8517.12".[759] We understand India's arguments to relate to the classification of such products in India's *WTO* Schedule, and consequently India's WTO tariff commitments with regard to smartphones, an issue we address in section 7.4.2.4.1.3 below. This section of our assessment, however, relates to whether the amendments to the First Schedule changed the essence of the measures, specifically, whether the product scope of tariff items 8517.13.00 and 8517.14.00 of the First Schedule as of 1 January 2022 differs from the product scope of tariff item 8517.12 of India's First Schedule at the time of the Panel's establishment.

7.286. As indicated above, the Finance Act 2021 "substituted" tariff items 8517.12.11, 8517.12.19 and 8517.12.90 with tariff items 8517.13.00 and 8517.14.00. We also observe that the correlation table prepared by India indicates that the product scope of tariff items 8517.13.00 and 8517.14.00 comprises those products previously classified under tariff items 8517.12.11, 8517.12.19, and 8517.12.90.[760] The correlation tables provide as follows:

Tariff 2021	Tariff 2022	Correlation code
85171211	85171300	NP
85171219	85171300	NP
85171290	85171400	NF

7.287. India's Guidance Note on the Correlation Table clarifies that the correlation code "NP" indicates that the "[right hand side] tariff is new and relatable to multiple entries in the [left hand side]".[761] The Correlation Table, read together with the Guidance Note, indicates that India itself previously classified smartphones (presently classified under tariff item 8517.13.00 of the First Schedule as of 1 January 2022) under tariff item 8517.12 of its First Schedule. We also observe that India's Finance Act 2021 provides that "[f]or the purposes of heading 8517, the term 'smartphones' means telephones for cellular networks, …" which indicates that India's domestic classification classified smartphones as a type of telephone for cellular networks. Therefore, subsequent to the amendment to India's First Schedule, the product scope of the amended measures has remained similar to that of the original measures.

[754] Finance Act 2021, (Exhibit IND-60), p. 176.
[755] First Schedule as of 1 February 2022, (Exhibit JPN-75), p. 1404. See also India's second written submission, paras. 105-107.
[756] India's response to Panel question No. 75(a), para. 59. India argues that "[w]ith regard to 'other telephones for cellular networks' classified under sub-heading 8517.14, it is submitted that such phones would have been classified under 8517.12.11 or 8517.12.19 of the HS2007 and India's other legal arguments would continue to apply."
[757] Japan's response to Panel question No. 72(a), para. 51.
[758] India's second written submission, para. 107.
[759] India's response to Panel question No. 75(b), para. 62.
[760] CBIC, Correlation of Customs Tariff between 2021 and 2022 (December 2021), (Exhibit JPN-74), pp. 326-327.
[761] CBIC, Correlation of Customs Tariff between 2021 and 2022 (December 2021), (Exhibit JPN-74), p. 2. The first letter "N" in the correlation code indicates that the tariff item on the right-hand side did not exist in the previous HS Version, while the second letter "P" indicates that the tariff entry on the right-hand side is only partially covered within the tariff entry at the left-hand side. (Ibid. p. 2).

7.288. We now turn to the third element – whether the legal implications of the original measures are similar to those of the amended measures. We observe that India's First Schedule, as amended by the Finance Act 2021, presently imposes a customs duty of 20% on products classified under tariff items 8517.13.00 and 8517.14.00.[762] As indicated above, those products comprise telephones for cellular networks and for wireless networks, previously classified under tariff item 8517.12 of India's First Schedule and subject to a 20% duty rate. Thus, the amendment to India's First Schedule does not appear to have modified the tariff treatment that was accorded under the First Schedule to the products at issue at the time of the panel's establishment, and which is the basis for Japan's claim in this dispute. We consider, therefore, that the amended measures have similar legal implications as the original measures.

7.289. Taking into account that the amended measures are directly linked to the original measures, and that the original and amended measures apply to the same product scope and have similar legal implications, we find that the Finance Act 2021 amends India's First Schedule without changing the essence of the measures identified in Japan's panel request.

Whether the inclusion of the amendments within the panel's terms of reference is necessary to secure a positive solution to the dispute

7.290. Japan submits that the inclusion of the amendment to the First Schedule in the panel's terms of reference is necessary to secure a positive solution to the dispute in accordance with Articles 3.7 and 3.4 of the DSU.[763]

7.291. We recall that, in India's view, the measures as challenged by Japan have ceased to exist. We have found above that the amended measures, similarly to the original measures, impose customs duties on the products covered by Japan's panel request, namely, telephones for cellular networks and for wireless networks. We consider that the essence of the measures as challenged remains the same. We also recall that Japan claims that India accords tariff treatment that is inconsistent with Articles II:1(a) and (b) to such products. In light of the parties' arguments, we consider that if we were to refrain from making findings on the amended measures, it would leave unresolved the question of whether India is presently acting consistently with its WTO obligations. We therefore consider that assessing the WTO-consistency of the amended measures is necessary to positively resolve this dispute.[764]

Conclusion

7.292. In conclusion, we find that the amended measures, which comprise the imposition of customs duties on products classified under tariff item 8517.12 of India's First Schedule at the time of the Panel's establishment, and presently classified under tariff items 8517.13.00 and 8517.14.00 of the First Schedule as of 1 January 2022, are within our terms of reference.

7.4.2.4.1.2 Relevant measures on which to make findings

7.293. Turning to the second preliminary issue, India submits that the Panel cannot issue any rulings and recommendations pertaining to tariff item 8517.12, which it maintains has ceased to exist.[765]

7.294. Japan argues that even if the challenged measures have ceased to exist, the Panel must still make findings regarding those measures. Japan submits that the Panel ought to take into account

[762] Finance Act 2021, (Exhibit IND-60), p. 176.

[763] Japan's response to Panel question No. 68, para. 35. India does not respond to this argument by Japan.

[764] We agree with the findings of the Appellate Body in *Chile – Price Band System* that "generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'". The Appellate Body further considered that if the terms of reference in a dispute are broad enough to include amendments to a measure and if it is necessary to consider an amendment in order to secure a positive solution to the dispute, it is appropriate to consider the measure as amended in coming to a decision in a dispute. (Appellate Body Report, *Chile – Price Band System*, para. 144).

[765] India's response to Panel question No. 68, paras. 40-45.

that (i) the measures expired after the panel establishment[766], (ii) the complainant continued to request that the panel make findings[767], (iii) the respondent argued that the measures at issue are consistent with its obligations[768], and (iv) the respondent could take measures that may give rise to certain, or materially similar, WTO inconsistencies.[769] Moreover, Japan requests the Panel to assess the consistency of the measures as they existed on the date of the Panel's establishment and as it was amended thereafter.[770]

7.295. Regarding India's view that the measures pertaining to tariff item 8517.12 have ceased to exist, we note that even assuming *arguendo* that the challenged measures had ceased to exist, those measures would be within our terms of reference as they existed at the time of the Panel's establishment.[771] We recall that, consistent with previous findings of panels and the Appellate Body, once a panel is established and its terms of reference set, a panel has discretion to decide how to take into account subsequent repeals of measures covered by its terms of reference.[772] Some panels have exercised that discretion by making findings on the WTO-consistency of the expired measures, while refraining from making recommendations pursuant to Article 19 of the DSU.[773] In this case, we consider the measures as they existed at the time of the Panel's establishment are within our terms of reference and we therefore have discretion to assess whether those measures were consistent with India's WTO obligations.

7.296. That we have jurisdiction to assess the WTO-consistency of the measures as they existed at the time of the Panel's establishment does not mean that we necessarily have to do so.[774] In this case, we observe that both the original and the amended measures concern India's tariff treatment for telephones for cellular networks or for other wireless networks, and, as we found above, the essence of the challenged measures has not changed. We also understand that the basis for Japan to claim that the measures are inconsistent with Articles II:1(a) and (b) has not changed. We therefore see no reason to make distinct findings regarding the WTO-consistency of the measures as they existed at the time of the Panel's establishment *and* as they presently exist. We therefore assess the WTO-consistency of the measures at issue based on the most up-to-date information available to the Panel (i.e. based on the situation as it stands following India's amendment of the First Schedule on 1 January 2022).

7.4.2.4.1.3 Whether "smartphones" are classified under tariff item 8517.12 of India's WTO Schedule

7.297. Turning now to the third preliminary issue identified in paragraph 7.270 above, we examine whether Japan has demonstrated that smartphones are classified under tariff item 8517.12 of India's WTO Schedule.

Main arguments of the parties

7.298. Japan asserts that "smartphones" are "telephones for cellular networks" and are covered by India's commitments under tariff item 8517.12 of India's WTO Schedule. Japan submits that item 5 of the Chapter Notes of Chapter 5 of the First Schedule states that "smartphones" should be understood as telephones for cellular networks equipped with certain functions.[775] Japan also

[766] Japan's opening statement at the second meeting of the Panel, para. 46 (referring to Panel Reports, *Dominican Republic – Import and Sales of Cigarettes*, para. 7.343; *Indonesia – Autos*, para. 14.9; and *EC - Approval and Marketing of Biotech Products*, paras. 7.1307-7.1308).

[767] Japan's opening statement at the second meeting of the Panel, para. 46 (referring to Panel Reports, *US – Wool Shirts and Blouses*, para. 6.2; *Indonesia – Autos*, paras. 14.134-14.135; and *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343).

[768] Japan's opening statement at the second meeting of the Panel, para. 46 (referring to Panel Reports, *EC – IT Products*, para. 7.166; and *US – Poultry (China)*, para. 7.55).

[769] Japan's opening statement at the second meeting of the Panel, para. 46 (referring to Panel Report, *US – Poultry (China)*, para. 7.55).

[770] Japan's response to Panel question No. 68, para. 30.

[771] See e.g. Panel Reports, *US – Poultry (China)*, para. 7.54; and *Indonesia – Autos*, para. 14.9.

[772] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270.

[773] See e.g. Panel Reports, *US – Poultry (China)*, paras. 7.55-7.56; and *Indonesia – Autos*, para. 4.97.

[774] See also Panel Reports, *US – Renewable Energy*, para. 7.17; and *Russia – Tariff Treatment*, para. 7.84.

[775] Japan's response to Panel question No. 76, para. 70; comments on India's response to Panel question No. 75, para. 92 (referring to First Schedule as of 1 February 2022, (Exhibit JPN-75), p. 1396).

considers that the structure of the First Schedule indicates that smartphones are a subgroup of "[t]elephone sets, including smartphones and other telephones, telephones for cellular networks or for other wireless networks".[776] Thus, for Japan, smartphones are a subgroup of "telephone sets" and were therefore classified under heading 8517 of the First Schedule based on the HS2017.[777] Japan also submits that tariff item 8517.14.00 covers "[*o*]*ther* telephones for cellular networks or for other wireless networks" and considers that this structure of the First Schedule indicates that smartphones are a subgroup of "telephones for cellular or for other networks".[778] Japan maintains that tariff items 8517.13.00 and 8517.14.00 of India's First Schedule have "replaced subheading 8517 12 of the First Schedule based on the HS 2017 for which India bears obligations to provide duty-free treatment pursuant to its Schedule."[779] Relying on correlation tables prepared by India, Japan argues that products previously classified under tariff item 8517.12 of the First Schedule are presently classified under tariff items 8517.13.00 and 8517.14.00.[780] Japan also submits that a WCO classification opinion adopted in 2018 confirms that "smartphones" were classified under tariff item 8517.12 of India's WTO Schedule.[781]

7.299. India maintains that "the term 'smartphones' does not appear in the ITA[] or in the [HS] 2007 Schedule."[782] India submits that the "HS2007, HS2012 and HS2017 solely used the 'type of network' a particular telephone uses to classify telephones under sub-headings 8517.11 and 8517.12", while tariff item 8517.13.00 in the HS2022 is "based on functionality of the phone and the type of network".[783] In India's view, smartphones could not have been classified under tariff item 8517.12, which "solely used the 'type of network'" to classify telephones.[784] Relying on Chapter Note 5 to Chapter 85 of the HS2022, India considers that "smartphones are multifunctional devices, and the principal function of these devices is not that of telephones".[785] India also submits that "since 'smartphones' were not granted a dedicated tariff sub-heading in HS2007, they were classifiable under different tariff items, depending on the functionality of the smartphones".[786] India also notes that tablet computers were classified under HS2007 subheading 8471.30, and while "not tak[ing] a definitive position on the issue", considers that "tablets too could potentially be classifiable as 'smartphones' (within the meaning of HS2022), being capable of making calls over a cellular network."[787] India argues that "smartphones could have been classified under various tariff items under HS2007 (on the basis of the primary functionality of the machine) and not just under sub-heading 8517.12."[788]

[776] Japan's comments on India's response to Panel question No. 75, para. 91.
[777] Japan's comments on India's response to Panel question No. 75, para. 91.
[778] Japan's response to Panel question No. 76, para. 71. (emphasis original)
[779] Japan's comments on India's response to Panel question No. 75, para. 93.
[780] Japan's response to Panel question No. 76, para. 72 (referring to CBIC, Correlation of Customs Tariff between 2021 and 2022 (December 2021), (Exhibit JPN-74), pp. 1 and 326-327).
[781] Japan's comments on India's response to Panel question No. 75, para. 94 (referring to WCO, Classification Opinion on "smartphones" (2018), (Exhibit JPN-79)).
[782] India's second written submission, para. 107.
[783] India's response to Panel question No. 75(a), para. 60, and No. 76(b), para. 63.
[784] India's response to Panel question No. 76, para. 63.
[785] India's response to Panel question No. 76, para. 63 (referring to Chapter 85 of the HS2022, (Exhibit IND-85), Note 5). Chapter Note 5 to Chapter 85 reads: "[f]or the purposes of heading 85.17, the term 'smartphones' means telephones for cellular networks, equipped with a mobile operating system designed to perform the functions of an automatic data processing machine such as downloading and running multiple applications simultaneously, including third-party applications, and whether or not integrating other features such as digital cameras and navigational aid systems."
[786] India's response to Panel question No. 75, paras. 60 and 62. See also India's comments on Japan's response to Panel question No. 76, para. 41.
[787] India's comments on Japan's response to Panel question No. 76(a), para. 41. India notes that tablets were defined in a WCO Classification Opinion as "machines which are 'designed to be primarily operated by using its touch screen. It can process data, execute programs, and connect to the Internet via a wireless network in order to, for example, exchange and manage e-mails, exchange or download files, download software applications, conduct video or VoIP ('Voice over Internet Protocol') communications, etc." (Ibid. (quoting WCO, HS Committee, 49th Session, "Classification of the Machines Commercially Referred to as 'Tablet Computers'" (13 February 2012) document NC1730E1a; and WCO, HS Committee, 50th Session, "Possible Amendments to the Compendium of Classification Opinions and Explanatory Notes arising from the Decisions taken by the Committee at its 49th Session" (19 July 2012) document NC1775E1a, (Exhibit IND-86))).
[788] India's comments on Japan's response to Panel question No. 76(a), para. 41.

Panel's assessment

7.300. We note at the outset that the product description of subheading 8517.12 of India's WTO Schedule is "telephones for cellular networks or for other wireless networks".[789] Japan submits that "smartphones" are "telephones for cellular networks", and are therefore classified under this tariff item.[790] India maintains that smartphones could have been classified under other subheadings of its WTO Schedule depending on their primary functionality, and not just under tariff item 8517.12.[791] We also note that Japan is not arguing that smartphones are classified under any other tariff item of India's WTO Schedule and, hence, our assessment focuses on tariff item 8517.12 of India's WTO Schedule, which is the source of India's obligations according to Japan. Therefore, to the extent that smartphones are not classified under tariff item 8517.12 of India's WTO Schedule, India's tariff commitments under that tariff item would not extend to such products. Should we find that India's WTO obligations under tariff item 8517.12 of India's WTO Schedule do not extend to smartphones, then Japan would have failed to establish India's bound duty rate with respect to smartphones for purposes of assessing the consistency of India's tariff treatment with Articles II:1(a) and (b).

7.301. We recall India's argument that the term "smartphones" does not appear in the ITA or in the HS2007 Schedule.[792] We have rejected India's arguments that the ITA limits the scope of its tariff commitments in its WTO HS2007 Schedule.[793] Therefore, we consider that the absence of the term "smartphones" from the ITA is not determinative of the scope of India's WTO tariff commitments. Further, the absence of the term "smartphones" in the HS2007 Schedule is not determinative of this issue either because tariff concessions in Members' WTO Schedules apply to all products falling within the terms of the concession, when interpreted in accordance with customary rules of interpretation.[794] We will therefore assess whether "smartphones" are covered by subheading 8517.12 of India's WTO Schedule by interpreting the relevant terms in such Schedule in accordance with customary rules of interpretation.

7.302. The terms of the treaty at issue as reflected in subheading 8517.12 of India's WTO Schedule are "telephones for cellular networks". We note that the phrase "telephones for cellular network" is not defined in India's WTO Schedule.

7.303. We consider, however, that the HS2007 Explanatory Notes may serve as relevant context when interpreting India's WTO Schedule, which is based on the HS2007.[795] In this regard, we observe that the HS2007 Explanatory Notes provide that the product description "[t]elephones for cellular networks or for other wireless networks" covers "telephones for use on any wireless networks", and indicate that "[s]uch telephones receive and emit radio waves which are received and retransmitted, e.g. by base stations or satellites", including, *inter alia* "[c]ellular phones or mobile phones" and "[s]atellite phones".[796] The key point of disagreement between the parties is whether "smartphones" are "cellular phones or mobile phones".

7.304. The dictionary meaning of "smartphone" is "a mobile phone capable of running general-purpose computer applications, now typically with a touch-screen interface, camera, and internet access".[797] Other dictionaries define "smartphone" as a "cell phone that includes additional software functions (such as email or an Internet browser)"[798] and "a mobile telephone with computer features that may enable it to interact with computerized systems and access the web".[799] The foregoing

[789] See para. 7.262 above.
[790] Japan's response to Panel question No. 76, paras. 67-73.
[791] India's response to Panel question No. 75, paras. 60 and 62; India's comments on the Japan's response to Panel question No. 76, para. 41.
[792] India's second written submission, para. 107.
[793] See para. 7.82 above.
[794] See para. 7.66 above.
[795] Appellate Body Report, *EC – Computer Equipment*, para. 89.
[796] HS2007 Explanatory Notes to Heading 8517, (Exhibit JPN-72), p. XVI-8517-2.
[797] Oxford English Dictionary online, definition of "smartphone" https://www.oed.com/view/Entry/381083?redirectedFrom=smartphones#eid (accessed 17 October 2022).
[798] Merriam-Webster Dictionary online, definition of "smartphone" https://www.merriam-webster.com/dictionary/smartphone (accessed 17 October 2022).
[799] Collins Dictionary online, definition of "smartphone" https://www.collinsdictionary.com/dictionary/english/smartphone (accessed 17 October 2022).

suggests that "smartphones" are indeed "telephones for cellular networks", to the extent that they have the same functions as (and indeed are *defined* as) "mobile phones" and "cell phones".

7.305. However, the dictionary definitions described above indicate that "smartphones" have functions *additional* to those of "telephones", such as "computer features". Given that smartphones have various functions, India submits that "the principal function no longer appears to be that of a telephone" and therefore smartphones "were classifiable under different tariff items, depending on the functionality of the smartphones", and such products would not necessarily be classified under subheading 8517.12.[800] In this regard, we observe that, pursuant to the General Rules for the Interpretation of the HS, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. These Rules further provide that classification of goods shall be determined according to the terms of those subheadings and any related Subheading Notes.[801]

7.306. We note that Chapter Note 3 to Section XVI provides as follows regarding Chapter 85, the relevant Chapter relating to the products at issue:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component *or as being that machine which performs the principal function*.[802]

7.307. Therefore, for composite machines falling under Chapter 85, including subheading 8517.12, the general rule is to classify such products "as being that machine which performs the *principal function*". We observe that the definitions of "smartphone" set out above indicate that the principal function of a smartphone is that of a "cell phone" or a "mobile phone". The other functionalities, which indeed differ among smartphones, are *additional* functions or capabilities. In this light, we understand that the General Rules for the Interpretation of the HS and the Chapter Note to Section XVI of the HS2007 suggest that smartphones are classified under tariff item 8517.12 of India's WTO Schedule.

7.308. We also note that the WCO, applying the General Rules for the Interpretation referred to above, issued a Classification Opinion in which it classified "smartphones" under subheading 8517.12.[803] Classification Opinions, which are issued by the Harmonized System Committee of the WCO, are not binding upon parties to the WCO. However, pursuant to Article 7(1)(b) of the HS Convention, such Classification Opinions serve as guides to interpreting the HS. In this regard, we agree with a previous panel which considered WCO decisions to be "a very useful source of information on the subsequent practice of WTO Members, a large proportion of whom are signatories to the HS Convention and, therefore, are members of the HS Committee".[804] We therefore consider it relevant to our interpretative exercise that this WCO Classification Opinion indicates that smartphones are "telephones for cellular networks", and are appropriately classified under subheading 8517.12 of India's WTO Schedule.[805]

7.309. We understand that the term "smartphones" was introduced into the HS nomenclature through the HS2022 amendment. We consider that the HS2022 may constitute relevant context to verify our understanding of where such products were classified in the HS2007. In this regard, we note that Chapter Note 5 to Chapter 85 of the HS2022 provides that for the purposes of heading 8517, the term "smartphones" means "*telephones for cellular networks*, equipped with a mobile operating system designed to perform the functions of an automatic data processing machine such as downloading and running multiple applications simultaneously, including third-party applications, and whether or not integrating other features such as digital cameras and navigational aid

[800] India's response to Panel question No. 75, paras. 60 and 62; comments on Japan's response to Panel question No. 76, para. 41.

[801] General Rules for the Interpretation of the Harmonized System, (Exhibit JPN-60), paras. 1 and 6.

[802] HS2007 Section Notes to Section XVI, (Exhibit IND-9), Note 3. (emphasis added)

[803] WCO, Classification Opinion on "smartphones" (2018), (Exhibit JPN-79).

[804] Panel Reports, *EC – Chicken Cuts*, para. 7.298. See also Appellate Body Report, *EC – Computer Equipment*, para. 90.

[805] We note that this Classification Opinion was issued in 2018, with regard to the HS2017. We also observe that subheading 8517.12 remains unchanged between the HS2007 and the HS2017. Therefore, this Classification Opinion is relevant to our interpretation of India's WTO Schedule, which is based on the HS2007.

systems."[806] This definition is consistent with the dictionary definitions we have referred to above. Moreover, it supports our assessment that the principal function of smartphones is that of telephones for cellular networks, with their additional capabilities being ancillary functions. Indeed, as this definition indicates, some of the additional functions that India refers to, such as "photography and videography"[807] are not core functions of smartphones.[808]

7.310. The structure and content of the HS2022 further supports this interpretation. The relevant sections of the HS2022 read as follows[809]:

	Product description
8517	Telephone sets, *including smartphones and other telephones for cellular networks* or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28.
	- Telephone sets, *including smartphones and other telephones for cellular networks* or for other wireless networks:
8517.11	-- Line telephone sets with cordless handsets
8517.13	-- Smartphones
8517.14	-- Other telephones for cellular networks or for other wireless networks

7.311. We observe that the product descriptions of heading 8517 of the HS2022 and the single-hyphen entry immediately following it read "[t]elephone sets, including *smartphones and other telephones for cellular networks* or for other wireless networks."[810] Subheading 8517.14, in turn, refers to "[o]ther telephones for cellular networks or for other wireless networks". The use of the word "other"[811] preceding the term "telephones for cellular networks" in heading 8517 and in subheading 8517.14 indicates that products in addition to smartphones are also telephones for cellular networks. Thus, the HS2022 indicates that "smartphones" are "telephones for cellular networks". The fact that the HS2022 further splits the classification of "telephones for cellular networks" into two subheadings (namely smartphones, and a residual category, comprising "other telephones for cellular networks") confirms this conclusion.

7.312. Finally, we note that the manner in which India amended its First Schedule indicates that, in India's domestic customs regime, smartphones are telephones for cellular networks. We observe that the product description attached to heading 8517 of the First Schedule as of 1 January 2022 reads "including smartphones and *other telephones for other cellular networks*".[812] Moreover, the product description attached to tariff item 8517.14.00 of the First Schedule is "*[o]ther telephones for cellular networks*".[813] These product descriptions suggest that smartphones are a type of telephone for cellular networks. We further note that the Finance Act 2021 itself confirms that "[f]or the purposes of heading 8517, *the term 'smartphones' means telephones for cellular networks*."[814]

7.313. While India argues that "smartphones could have been classified under various tariff items under HS2007 (on the basis of the primary functionality of the machine)", India does not demonstrate under which subheading of its WTO Schedule it considers such products should have

[806] Chapter 85 of the HS2022, (Exhibit IND-85), Note 5. (emphasis added)
[807] India's response to Panel question No. 76(b), para. 63. See also India's response to Panel question No. 75(a), para. 60.
[808] We emphasize that the definition of a smartphone includes the language "*whether or not* integrating other features such as digital cameras". (Chapter 85 of the HS2022, (Exhibit IND-85), Chapter Note 5). (emphasis added)
[809] Emphasis added.
[810] Chapter 85 of the HS2022, (Exhibit IND-85). (emphasis added)
[811] The word "other" means "[s]eparate or distinct from that or those already specified or implied; different; (hence) further, additional." (Oxford English Dictionary online, definition of "other" https://www.oed.com/view/Entry/133219?rskey=Z7lVMl&result=1&isAdvanced=false#eid (accessed 17 October 2022)).
[812] Emphasis added. We recall that the description of heading 8517 in the First Schedule at the time of the Panel's establishment read "including telephones for other cellular networks". India's Finance Act 2021 provides that the words "including telephones" in the description attached to heading 8517 be substituted with the words "including smartphones and other telephones". (Finance Act 2021, (Exhibit IND-60), p. 176. See also First Schedule as of 1 February 2022, (Exhibit JPN-75), p. 1404).
[813] Finance Act 2021, (Exhibit IND-60), p. 176.
[814] Finance Act 2021, No. 13 of 2021, (Exhibit IND-60), p. 44. (emphasis added)

been classified. We note that India suggests that tablet computers, which are defined as "machines which are 'designed to be primarily operated by using its touch screen" because they "can process data, execute programs, and connect to the Internet via a wireless network in order to, for example, exchange and manage e-mails, exchange or download files, download software applications, conduct video or VoIP ('Voice over Internet Protocol') communications, etc" could "potentially be classifiable as 'smartphones' (within the meaning of HS2022), being capable of making calls over a cellular network."[815] India also submits that it "does not take a definitive position on the issue".[816] We do not consider it necessary to discuss whether tablet computers could potentially be classifiable as smartphones. Notwithstanding that India does not take a firm view on the issue, the question before us is not whether tablets are classified as smartphones in India's WTO Schedule (indeed, the term "smartphone" does not appear in that Schedule), but rather whether smartphones are classified as "telephones for cellular networks" within the meaning of India's WTO Schedule.

7.314. In light of the foregoing, we conclude that smartphones are cellular mobile phones within the meaning of subheading 8517.12 of India's WTO Schedule.

7.4.2.4.2 Comparison of applied and bound duty rates

7.4.2.4.2.1 Main arguments of the parties

7.315. Japan argues that India imposes customs duties on imports of telephones for cellular mobile networks in excess of the bound rate of 0% set forth in India's WTO Schedule.[817] Japan acknowledges that telephones for other wireless networks are exempted from customs duties pursuant to Notification No. 57/2017, and submits that such products are not subject to customs treatment in a manner inconsistent with Article II:1(b).[818] Japan however maintains that India is providing less favourable treatment than what is provided for in its Schedule, which is inconsistent with its obligations under Article II:1(a) because "this exemption is subject to the possibility of repeal at any time and, therefore, there remains uncertainty and unpredictability regarding the customs duties which will apply to such product".[819]

7.316. India submits that it imposes a 20% customs duty on products classified under tariff item 8517.13.00 (smartphones) and certain products classified under tariff item 8517.14.00 (other telephones for cellular networks), but exempts from customs duties certain products classified under tariff item 8517.14.00 (other telephones for other wireless networks).[820]

7.4.2.4.2.2 Panel's assessment

7.317. We recall that pursuant to its WTO Schedule, India is obligated to accord unconditional duty-free treatment to products falling under tariff item 8517.12 of that Schedule, namely telephones for cellular networks or for other wireless networks.[821] We also recall that, effective 1 January 2022, such products are classified under tariff items 8517.13.00 and 8517.14.00 of India's First Schedule.

7.318. We have also found that India applies a 20% duty rate on smartphones covered under tariff item 8517.13.00, and other telephones for cellular networks covered under tariff item 8517.14.00. India exempts "other telephones for other wireless networks" covered under tariff item 8517.14.00 from customs duties.

7.319. Therefore, with regard to smartphones and other telephones for other cellular networks, India imposes a duty rate that is in excess of the bound duty rate set forth in India's WTO Schedule. India exempts "other telephones for other wireless networks" from customs duties, and therefore

[815] India's comments on Japan's response to Panel question No. 76(a), para. 41.
[816] India's comments on Japan's response to Panel question No. 76(a), para. 41.
[817] Japan's opening statement at the second meeting of the Panel, paras. 47-49; response to Panel question No. 78, paras. 74-76; first written submission, paras. 113-114.
[818] Japan's response to Panel question No. 73, para. 61, and No. 74(a), para. 63; comments on India's response to Panel question No. 77, para. 100.
[819] Japan's response to Panel question No. 73, para. 62, and No. 74(a), para. 64.
[820] India's response to Panel question No. 77, para. 64; comments on Japan's response to Panel question No. 78, para. 43.
[821] See para. 7.263 above.

accords to such products unconditional duty-free treatment, in accordance with the terms of its WTO Schedule.

7.4.2.5 Conclusion

7.320. Based on the foregoing, we find that India's tariff treatment of telephones for cellular networks, which at the time of the Panel's establishment fell within the scope of tariff items 8517.12.11 and 8517.12.19 of India's First Schedule and which presently fall within the scope of tariff items 8517.13.00 and 8517.14.00 of India's First Schedule, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, because such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule. We also find that India accords unconditional duty-free treatment to telephones for other wireless networks, which at the time of the Panel's establishment fell within the scope of tariff item 8517.12.90 of India's First Schedule and which presently fall within the scope of tariff item 8517.14.00 of India's First Schedule, in accordance with the terms of its WTO Schedule, and is therefore acting consistently with Article II:1(b), first sentence, of the GATT 1994.[822]

7.321. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that India's tariff treatment of such products is less favourable than that provided in its WTO Schedule, and India is therefore acting inconsistently with Article II:1(a) of the GATT 1994.

7.4.3 Tariff item 8517.61.00 of India's First Schedule

7.4.3.1 India's WTO tariff commitments

7.4.3.1.1 Main arguments of the parties

7.322. Japan asserts that India's bound duty rate for products falling under tariff item 8517.61 of India's WTO Schedule, base stations, is 0%.[823]

7.323. India contends that the tariff commitments under tariff item 8517.61 as reflected in its WTO Schedule based on the HS2007 were certified in error.[824] India maintains that it did not intend to make commitments on base stations, which in its view were not covered under the ITA or the HS1996, and were introduced to the HS Nomenclature in the 2007 edition.[825] According to India, the commitments under tariff item 8517.61 were undertaken in error, are void pursuant to Article 48 of the Vienna Convention, and are therefore rendered unbound.[826]

7.4.3.1.2 Panel's assessment

7.324. We have addressed India's arguments that its WTO Schedule was certified in error above, and held that India's tariff commitments are set forth in India's WTO Schedule.[827] We have also rejected India's arguments that the ITA sets forth, or otherwise limits the scope of, its tariff commitments in its WTO HS2007 Schedule.[828] Moreover, we have declined to make the findings requested by India regarding its request to rectify its WTO Schedule pursuant to the 1980 Decision.[829]

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[822] Japan makes an additional claim to the effect that "even where exemptions are not subject to any terms or conditions, those exemptions do not eliminate the inconsistency with Article II:1(a) as far as the exempted products are concerned … because of the potential of deleterious effects on competition arising from these exemptions." (Japan's first written submission, para. 133. See also Japan's second written submission, paras. 19-20). Given that this claim, as we understand it, applies to all four tariff items covered by Japan's panel request, we consider it appropriate to provide our assessment in section 7.4.6 below.

[823] Japan's first written submission, para. 97.

[824] India's first written submission, paras. 38-74.

[825] India's first written submission, paras. 148-158.

[826] India's first written submission, paras. 73-74.

[827] See para. 7.216 above.

[828] See para. 7.82 above.

[829] See para. 7.247 above.

7.325. Therefore, we turn to India's WTO Schedule to assess India's tariff commitments. India's WTO HS2007 Schedule provides, *inter alia*, the following[830]:

	Product description	Bound rate
8517.61	-- Base stations	0%

7.326. A review of India's WTO Schedule shows that India committed to a bound duty rate of 0% for products falling under tariff item 8517.61, namely "[b]ase stations".[831] We also note that India's WTO Schedule does not indicate any terms, qualifications or conditions that must be met in order for products under tariff item 8517.61 to receive the 0% bound duty rate.[832] Therefore, in accordance with its WTO Schedule, India is obligated to provide unconditional duty-free treatment to base stations falling under tariff item 8517.61 of its WTO Schedule.

7.4.3.2 India's tariff treatment

7.4.3.2.1 Main arguments of the parties

7.327. Japan argues that India's First Schedule imposes a standard duty rate of 20% on imports of base stations, which India classifies under tariff item 8517.61.00 of its First Schedule.[833] Japan also submits that pursuant to Serial No. 425 of Notification No. 50/2017, India exempts base station controllers, base transreceiver stations, and antenna systems from customs duties, subject to the condition that they are imported by a person licenced by the Department of Telecommunications of India for the purpose of providing Public Mobile Trunked Service.[834] Japan maintains that if this condition is not fulfilled, "relevant goods can be imported into India upon completion of the applicable customs procedures" but "such imports would be subject to the basic customs duty rate exceeding 0% rather than the reduced rate applicable under the exemption".[835]

7.328. India does not dispute that the applied duty rate on base stations is 20%.[836] India also does not dispute that certain products are exempt from customs duties if they meet the condition set out in Serial No. 425. However, India maintains that "the licensing requirement is applicable for the possession of the specified wireless apparatus in the country – whether it is procured domestically or imported."[837] According to India, there is no requirement to record such "procedural and documentary formalities for the importation of goods" in the WTO Schedule.[838] India also submits that Serial No. 425 was omitted from Notification No. 50/2017 through Notification No. 02/2022.[839] Finally, India maintains that the products covered by Serial No. 425 (base station controllers, base transreceiver stations, and antenna systems) are "sub-systems and not complete base stations", and are therefore not covered by tariff item 8517.61.00.[840]

7.4.3.2.2 Panel's assessment

7.329. India's First Schedule imposes a standard duty rate of 20% on products falling under tariff item 8517.61.[841]

7.330. At the time of the Panel's establishment, Serial No. 425 of Notification No. 50/2017 exempted from customs duties base station controllers, base transreceiver stations, and antenna

[830] WT/Let/1072.
[831] WT/Let/1072.
[832] WT/Let/1072.
[833] Japan's first written submission, para. 45 (referring to First Schedule as of 12 February 2020, (Exhibit JPN-10), p. 1578).
[834] Japan's first written submission, para. 46 (referring to Notification No. 50/2017, (Exhibit JPN-32); and General Exemption No. 183, (Exhibit JPN-33)).
[835] Japan's response to Panel question No. 70, para. 40; Japan's comments on India's response to Panel question No. 70, paras. 75-78.
[836] India's first written submission, para. 147.
[837] India's response to Panel question No. 69, para. 48 (referring to Indian Wireless Telegraphy Act 1933, (Exhibit IND-79); and Notification No. 71 (25 September 1953), (Exhibit IND-80)).
[838] India's response to Panel question No. 69, para. 48.
[839] India's response to Panel question No. 91.
[840] India's response to Panel question No. 91.
[841] First Schedule as of 12 February 2020, (Exhibit JPN-10), p. 1578.

systems if imported by a person licenced by the Department of Telecommunications for the purpose of providing Public Mobile Radio Trunked Service.[842] Notification No. 02/2022 amended Notification No. 50/2017 and omitted Serial No. 425 from that Notification with effect from 1 February 2022.[843] Therefore, with effect from 1 February 2022, the three products at issue are not eligible for exemption, even assuming that such products are classified under tariff item 8517.61 of the First Schedule.[844] Therefore, all products falling under tariff item 8517.61 are subject to the duty rate of 20% stipulated in the First Schedule.

7.331. In sum, we find that India imposes a duty rate of 20% on products falling under tariff item 8517.61.

7.4.3.3 Comparison between India's WTO tariff commitments and its tariff treatment

7.332. We recall our finding above that pursuant to its WTO Schedule, India is obligated to provide unconditional duty-free treatment to base stations, under tariff item 8517.61 of that Schedule.

7.333. We have found that India imposes a 20% customs duty on products falling under tariff item 8517.61.00 of its First Schedule. We consider that such products are covered by India's WTO tariff commitments with respect to base stations, falling under tariff item 8517.61 of India's WTO Schedule. A comparison between India's bound duty rate and India's tariff treatment indicates that India is imposing ordinary customs duties on those products in excess of the bound duty rate set forth in India's WTO Schedule.

7.4.3.4 Conclusion

7.334. Based on the foregoing, we find that India's tariff treatment of base stations, falling within the scope of tariff item 8517.61.00 of India's First Schedule, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, because such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule.

7.335. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, or subject to terms, conditions or qualifications not set forth in the Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that India's tariff treatment of such products is less favourable than that provided in its WTO Schedule, and India is therefore acting inconsistently with Article II:1(a) of the GATT 1994.

7.4.4 Tariff item 8517.62.90 of India's First Schedule

7.4.4.1 India's WTO tariff commitments

7.4.4.1.1 Main arguments of the parties

7.336. Japan asserts that India's bound duty rate for products falling under tariff item 8517.62 of India's WTO Schedule, machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus, is 0%.[845]

7.337. India contends that the tariff commitments under tariff item 8517.62 as reflected in its WTO Schedule based on the HS2007 were certified in error.[846] India maintains that it did not make commitments on machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus, which in its view were not covered

[842] Serial No. 425 of Notification No. 50/2017, (Exhibit JPN-32), pp. 259-260 and 339.
[843] Notification No. 02/2022, (Exhibit JPN-77).
[844] We note India's arguments that base station controllers, base transreceiver stations, and antenna systems are "sub-systems and not complete base stations", and are therefore not necessarily classified under tariff item 8517.61.00 of India's First Schedule. (India's response to Panel question No. 91). Given that Serial No. 425 is no longer in effect, we do not consider it necessary for the resolution of this dispute to address the classification of these products.
[845] Japan's first written submission, para. 98.
[846] India's first written submission, paras. 40-74.

under the ITA or the HS1996.[847] India also submits that the commitments under tariff item 8517.62 were undertaken in error, are void pursuant to Article 48 of the Vienna Convention, and are therefore rendered unbound.[848]

7.4.4.1.2 Panel's assessment

7.338. We have addressed India's arguments that its WTO Schedule was certified in error above, and held that India's tariff commitments are set forth in India's WTO Schedule.[849] We have also rejected India's arguments that the ITA sets forth, or otherwise limits the scope of, its tariff commitments in its WTO HS2007 Schedule.[850] We have also considered that the fact that a product is covered by the ITA Expansion does not necessarily imply that such product did not already fall within the scope of tariff concessions set forth in relevant Members' WTO Schedules.[851] Moreover, we have declined to make the findings requested by India regarding its request to rectify its WTO Schedule pursuant to the 1980 Decision.[852]

7.339. Therefore, we turn to India's WTO Schedule to assess India's tariff commitments. India's WTO HS2007 Schedule provides, *inter alia*, the following[853]:

	Product description	Bound rate
8517.62	--Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus	0%

7.340. A review of India's WTO Schedule shows that India committed to a bound duty rate of 0% for products falling under tariff item 8517.62, namely "[m]achines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus".[854] We also note that India's WTO Schedule does not indicate any terms, qualifications or conditions that must be met in order for products falling under tariff item 8517.62 to receive the 0% bound duty rate.[855] Therefore, in accordance with its WTO Schedule, India is obligated to provide unconditional duty-free treatment to machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus falling under tariff item 8517.62 of its WTO Schedule.

7.4.4.2 India's tariff treatment

7.4.4.2.1 Main arguments of the parties

7.341. Japan submits that its claim relate to products classified under tariff item 8517.62.90, i.e. products which fall under item 8517.62 of the First Schedule, but do not fall under tariff items 8517.62.10, 8517.62.20, 8517.62.30, 8517.62.40, 8517.62.50, 8517.62.60, and 8517.62.70 of the First Schedule.[856] Japan argues that India's First Schedule sets a standard duty rate of 20% on imports of products which India classifies under tariff item 8517.62.90 of its First Schedule, namely certain machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus.[857] Japan also submits that the applied duty rate is limited by certain customs notifications. First, Japan submits that Notification No. 24/2005 and its succeeding amending notifications exempts "routers" from customs duties.[858] Second, Japan

[847] India's first written submission, paras. 170-173.
[848] India's first written submission, paras. 73-74.
[849] See para. 7.216 above.
[850] See para. 7.82 above.
[851] See para. 7.78 above.
[852] See para. 7.247 above.
[853] WT/Let/1072.
[854] WT/Let/1072.
[855] WT/Let/1072.
[856] Japan's first Written submission, para. 48.
[857] Japan's first written submission, paras. 51-52 (referring to First Schedule as amended by the Finance Act 2018, (Exhibit JPN-23)).
[858] Japan's first written submission, para. 53 (referring to Notification No. 24/2005, (Exhibit JPN-40), p. 81, as amended by Notification No. 132/2006, (Exhibit JPN-41), pp. 48- 49, Notification No. 58/2017,

submits that Notification No. 57/2017 and its succeeding amending notifications exempts all products falling under the tariff item 8517.62.90 of the First Schedule from the portion of customs duty exceeding 10%, except a specified list of goods.[859] Thus, according to Japan, India imposes a duty rate of 10% or 20% to products falling under tariff item 8517.62.90[860], except for routers which are exempted from customs duties.[861]

7.342. India submits that the applied duty rate on products classified under tariff item 8517.62.90 of the First Schedule is 10% or 20%.[862] India notes that Notification No. 57/2017 which reduces the applicable duty rate to 10% for certain products covered by tariff item 8517.62.90 applies to products covered by tariff item "8517.62.90 or 8517.69.90".[863] India submits that the products described in that Notification "may not be classified under tariff item 8517.62.90".[864] India argues that Japan has failed to demonstrate that these products listed in Notification No. 57/2017 fall within the scope of tariff item 8517.62.90 of India's First Schedule.[865] Thus, according to India, to the extent that those goods are appropriately classified under tariff item 8517.69, they are outside the scope of the present Panel request.[866]

7.4.4.2.2 Panel's assessment

7.343. We observe that India's First Schedule provides as follows with regard to tariff item 8517.62[867]:

Tariff item	Product description	Standard duty rate
8517.62	-- Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus	
8517.62.10	--- PLCC equipment	0%
8517.62.20	--- Voice frequency telegraphy	0%
8517.62.30	--- Modems (modulators-demodulators)	0%
8517.62.40	--- High bit rate digital subscriber line system (HSDL)	0%
8517.62.50	--- Digital loop carrier system (DLC)	0%
8517.62.60	--- Synchronous digital hierarchy system (SDH)	0%
8517.62.70	--- Multiplexers, statistical multiplexers	0%
8517.62.90	--- Other	20%

7.344. India's First Schedule thus imposes a standard duty rate of 20% on products falling under tariff item 8517.62.90, covering "other" machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus.

7.345. The applied duty rate for products classified under tariff item 8517.62.90 is subject to several customs notifications. We observe that Notification No. 36/2019 presently exempts routers, falling

(Exhibit JPN-42), p. 9, and Notification No. 36/2019, (Exhibit JPN-43), pp. 8-9; General Exemption No. 181, (Exhibit JPN-44), pp. 1753-1754).

[859] Japan's first written submission, para. 53 (referring to Notification No. 57/2017, (Exhibit JPN-27), as amended by Notification No. 22/2018, (Exhibit JPN-45), p. 29, Notification No. 75/2018, (Exhibit JPN-46), p. 3, and Notification No. 02/2019, (Exhibit JPN-47), pp. 3-4; General Exemption No. 239, (Exhibit JPN-28), pp. 2206 and 2210). According to Japan, the goods which do not benefit from the reduced duty rate are: (i) Wrist wearable devices (commonly known as smart watches); (ii) Optical transport equipment; (iii) Combination of one or more of Packet Optical Transport Product or Switch; (iv) Optical Transport Network products; (v) IP Radios; (vi) Soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; (vii) Carrier Ethernet Switch, Packet Transport Node products, and Multiprotocol Label Switching Transport Profile products; and (viii) Multiple Input/Multiple Output and Long Term Evolution products.

[860] Japan's first written submission, para. 54.

[861] Japan's first written submission, para. 53.

[862] India's first written submission, para. 159.

[863] India's first written submission, paras. 159 and 161-162.

[864] India's first written submission, para. 162.

[865] India's response to Panel question No. 79, para. 68.

[866] India's response to Panel question No. 71, para. 53.

[867] First Schedule as of 12 February 2020, (Exhibit JPN-10), p. 1578.

under tariff item 8517.62.90, from customs duties. Thus, India accords unconditional duty-free treatment to such products.[868]

7.346. Additionally, Notification No. 57/2017, as amended by Notification No. 22/2018, subjects all other goods falling under tariff item 8517.62.90 of the First Schedule "other than wrist wearable devices (commonly known as smart watches)" to a reduced duty rate of 10%.[869] Thus, while smart watches classified under tariff item 8517.62.90 remained subject to the standard duty rate of 20% set forth in the First Schedule, all other products classified under tariff item 8517.62.90 (other than routers[870]) became subject to a duty rate of 10%.

7.347. Subsequently, Notification No. 57/2017 was amended by Notification No. 75/2018 to expand the list of goods subject to the standard duty rate of 20%, as follows:[871]

S. No.	Tariff item	Description
20	8517.62.90	(a) Wrist wearable devices (commonly known as smart watches) (b) Optical transport equipment (c) Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS) (d) Optical Transport Network (OTN) products (e) IP Radios
21	8517.69.90	(a) Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers (b) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products (c) Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) products

7.348. All other goods falling under tariff item 8517.62.90 that were not listed under Serial No. 20 remained subject to a reduced duty rate of 10% (except for routers, which, as indicated above, are subject to unconditional duty-free treatment).

7.349. Finally, Notification No. 57/2017 was amended by Notification No. 02/2019, which merged Serial Nos. 20 and 21 as follows[872]:

S. No.	Tariff item	Description
20	8517.62.90 or 8517.69.90	(a) Wrist wearable devices (commonly known as smart watches) (b) Optical transport equipment (c) Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS) (d) Optical Transport Network (OTN) products (e) IP Radios (f) Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers (g) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products (h) Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) products

7.350. Thus, taking into account all evidence before us, we understand that:

[868] Notification No. 24/2005, (Exhibit JPN-40), as amended by Notification No. 36/2019, (Exhibit JPN-43). See also Japan's first written submission, para. 53.

[869] Notification No. 57/2017 as amended by Notification No. 22/2018, (Exhibit IND-82).

[870] We recall that in India's customs regime, two or more customs notifications may apply simultaneously, such that an importer can benefit from the most beneficial tariff treatment available under any applicable notification. (See para. 2.13 above).

[871] Notification No. 57/2017 as amended by Notification No. 75/2018, (Exhibit IND-82).

[872] Notification No. 02/2019, (Exhibit JPN-47).

a. Pursuant to Notification No. 36/2019, routers, classified under tariff item 8517.62.90 of India's First Schedule, are unconditionally exempted from all customs duties; and

b. All other goods falling under tariff item 8517.62.90 are subject to a reduced duty rate of 10%, except for those products listed under Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, which are subject to the standard duty rate of 20%.

7.351. We note that the parties disagree on whether the products listed under Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, are classified under tariff items 8517.62.90 or 8517.69.90 of India's First Schedule. Japan submits at least some of those products are covered by tariff item 8517.62.90[873], while India maintains that Japan has failed to demonstrate that they are classified under that tariff item.[874] For India, to the extent that these products are appropriately classified under tariff item 8517.69, "such products are … outside the scope of the present [p]anel request".[875]

7.352. At this stage of our analysis, we do not consider it necessary to address whether the tariff treatment of certain products falls outside the scope of Japan's claim. We simply note, as a factual matter, the tariff treatment described above. We address below, in the context of our comparison of that tariff treatment to India's WTO legal obligations, the question of whether certain tariff treatment falls outside the scope of Japan's claim.

7.4.4.3 Comparison between India's WTO tariff commitments and its tariff treatment

7.4.4.3.1 Main arguments of the parties

7.353. Japan argues that products falling under tariff item 8517.62.90 of India's First Schedule are classified under tariff item 8517.62 of India's WTO Schedule, which are therefore required to be subject to duty-free treatment.[876] In response to India's argument that the products listed in Notification No. 02/2019 and subject to a 20% duty rate may be classified under tariff item 8517.62.90 or 8517.69.90, Japan submits that, in order to establish a claim pursuant to Article II:1, it is sufficient for a complainant to demonstrate that some of the products falling within the duty-free tariff concessions at issue bear certain import duties or otherwise are subject to less favourable treatment than is given under the tariff concessions.[877] Japan also argues that "whether certain products listed in Customs Notification No. 02/2019 may or may not be classified under tariff item 8517 62 90 of the First Schedule does not affect its claim, because a portion of tariff item 8517 62 90 of the First Schedule is subject to 20% customs duties … and another portion of the tariff item is subject to 10% customs duties".[878] For Japan, to the extent that such products fall under tariff item 8517.62.90 of India's First Schedule, they are subject to a 20% duty rate and are covered by Japan's claims.[879] Japan also argues that "even if some of the goods described in Serial No. 20 of Customs Notification No. 02/2019 are classified under tariff item 8517 69 90 of the First Schedule rather than tariff item 8517 62 90 of the First Schedule, this only indicates that the scope of the portion of the products that fall under tariff item 8517 62 90 of the First Schedule and are subject to 10% customs duties instead of 20% custom duties becomes narrower."[880]

7.354. India argues that Japan is obligated to identify the specific products at issue and their correct classification in order to demonstrate that there has been a violation of Articles II:1(a) and (b) of the GATT 1994.[881] According to India, Japan has not provided any evidence to show that the products described in Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, are classified under tariff item 8517.62.90 of the First Schedule and not tariff item 8517.69.90.[882] India further argues that, because Japan's claim is limited to products classified under tariff item 8517.62,

[873] Japan's response to Panel question No. 79, paras. 83-84.
[874] India's response to Panel question No. 79, para. 68.
[875] India's first written submission, para. 162. See also India's response to Panel question No. 79, paras. 66-68.
[876] Japan's first written submission, paras. 98 and 117.
[877] Japan's comment on India's response to Panel question No. 71, para. 83.
[878] Japan's response to Panel question No. 26, para. 53.
[879] Japan's response to Panel question No. 79, para. 84.
[880] Japan's response to Panel question No. 79, para. 84.
[881] India's response to Panel question No. 71, para. 52.
[882] India's response to Panel question No. 71, para. 53.

"to the extent that the products described [in Notification No. 57/2017] are appropriately classified under sub-heading 8517.69, such products are outside the scope of the present [p]anel request."[883]

7.4.4.3.2 Panel's assessment

7.355. We recall our finding above that pursuant to its WTO Schedule India is obligated to provide unconditional duty-free treatment to machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus, classified under tariff item 8517.62 of that Schedule. We note that tariff item 8517.62 of India's First Schedule covers machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus. It is uncontested that products falling under tariff item 8517.62 of India's First Schedule are products covered by tariff item 8517.62 of India's WTO Schedule. We therefore understand that all products falling under tariff item 8517.62 of India's First Schedule are required to be subject to unconditional duty-free treatment.

7.356. We recall that routers classified under tariff item 8517.62.90 of India's First Schedule are unconditionally exempted from all customs duties. These products therefore receive tariff treatment in accordance with India's WTO tariff commitments. We further recall that *all* other products classified under tariff item 8517.62.90 of India's First Schedule are either subject to a duty rate of 10% or, if they fall within the scope of Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, the standard duty rate of 20%.

7.357. We note that the parties disagree over whether Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, covers products falling within the scope of Japan's claim. In this respect, we recall that Japan's claim concerns products falling within the scope of tariff item 8517.62.90 of India's First Schedule.[884] We also recall that since the product description of tariff item 8517.62 of India's First Schedule perfectly matches the product description of tariff item 8517.62 of India's WTO Schedule, it follows that India is obligated to provide unconditional duty-free treatment to all products classified under tariff item 8517.62 of India's First Schedule. In order for Japan to prevail in its claim, it needs to demonstrate that at least some products falling under tariff item 8517.62 of India's First Schedule are subject to tariff treatment that is inconsistent with India's WTO obligations.[885]

7.358. Japan has established that India's First Schedule imposes a 20% duty rate on products classified under tariff item 8517.62.90.[886] Moreover, it is uncontested that India's customs notifications modify the tariff treatment accorded to certain products classified under tariff item 8517.62.90 (namely routers) by exempting them from customs duties in whole, or by exempting certain other products from customs duties in part (subjecting such products to a reduced duty rate of 10%).[887] In addition, we have found that India's exemptions do not extend to products listed under Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, (which may be classified under tariff item 8517.62.90[888]) and that those products are subject to the 20% duty rate set forth in India's First Schedule. We therefore consider that Japan has established that *some* of the products classified under tariff item 8517.62 of India's First Schedule are subject to a duty rate of 10% or 20%, and are therefore taxed in excess of the bound duty rate relating to tariff item 8517.62 of India's WTO Schedule. In light of the foregoing, we do not consider it necessary to identify which of the products listed under Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, are classified under tariff item 8517.62.90.[889] This, in our view, suffices

[883] India's first written submission, para. 162. See also India's response to Panel question No. 71, para. 53.

[884] Japan's first written submission, para. 13; panel request, p. 1.

[885] See also fn 196 to para. 7.7 above; and Panel Reports, *EC – IT Products*, para. 7.116.

[886] See para. 7.343 above.

[887] See para. 7.356 above.

[888] Indeed, Notification No. 02/2019 relates to products classified under tariff items "8517.62.90 *or* 8517.69.90". (emphasis added) This wording indicates that at least some of the products listed therein may be classified under tariff item 8517.62.90. If no products described therein fell within the scope of that tariff item, there would be no reason for the Notification to refer to that tariff item in the first place.

[889] Nevertheless, for the purpose of providing clarity, we consider it useful to note that the evolution of Notification No. 57/2017, as amended by Notification No. 02/2019, suggests that certain of the products described in Serial No. 20 can be classified under tariff item 8517.62.90. Specifically, Notification No. 22/2018 amended the duty rate applied to smart watches falling under tariff item 8517.62.90. (See para. 7.346 above). Similarly, Notification No. 75/2018 amended the duty rate applied to optical transport equipment, combination

for the purposes of assessing whether India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994.

7.4.4.4 Conclusion

7.359. Based on the foregoing, we find that India's tariff treatment of certain machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus, falling within the scope of tariff item 8517.62.90 of India's First Schedule, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, because certain such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule.

7.360. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, or subject to terms, conditions or qualifications not set forth in the Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that India's tariff treatment of certain such products is less favourable than that provided in its WTO Schedule, and India is therefore acting inconsistently with Article II:1(a) of the GATT 1994.

7.4.5 Tariff items 8517.70.10 and 8517.70.90 of India's First Schedule

7.4.5.1 General issues

7.4.5.1.1 Main arguments of the parties

7.361. Japan challenges the legal instruments regulating the tariff treatment accorded by India to products that, at the time of the Panel's establishment, fell under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule.[890] In response to a question from the Panel following the second substantive meeting, Japan clarified that, following certain amendments to India's First Schedule, pursuant to the Finance Act 2021, the challenged tariff treatment is presently accorded to products falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90.[891] Japan considers that "the creation of new tariff items by the Finance Act, 2021 does not affect Japan's claims"[892] and "the scope of the Products Concerned has not changed".[893] Japan considers that "the Panel should make findings regarding the inconsistency with Articles II:1(a) and II:1(b) of the GATT 1994 of the measures as they existed at the time of the establishment of the panel, as well as the measures as they now exist following the changes brought into the First Schedule by the Finance Act, 2021".[894]

7.362. India notes that "as opposed to the replacement of tariff line 8517.12 with tariff lines 8517.13 and 8517.14, the replacement of tariff lines 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions" and therefore "India has not raised any defense concerning the replacement of HS2007 tariff lines 8517.70.10 and 8517.70.90 with HS2022 tariff lines 8517.79.10 and 8517.79.90".[895] India also argues that "all submissions made by it with regard to sub-heading 8517.70, including that the complainant has failed to identify the products at issue under HS2007 tariff lines 8517.70.10 and 8517.70.90, extend to sub-headings 8517.79.10 and 8517.79.90, respectively".[896] In this respect, India argues, *inter alia*, that the burden is on the complainant to "identify the specific products at issue and their correct classification in order to demonstrate that there has been a violation of Articles II:1(a) and (b) of the GATT 1994."[897] Specifically with respect to tariff item 8517.70.90 of the First Schedule, as it existed at the time of the Panel's establishment, India acknowledges that certain products[898] fell under tariff item

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of one or more of Packet Optical Transport Product or Switch, Optical Transport Network products, and IP radios falling under tariff item 8517.62.90. (See para. 7.347 above). This suggests that certain of the products described in Serial No. 20 are classified under tariff item 8517.62.90 of India's First Schedule.

[890] Japan's first written submission, para. 13(f)-(g).
[891] Japan's response to Panel question No. 83, paras. 91-95.
[892] Japan's response to Panel question No. 83, para. 91.
[893] Japan's response to Panel question No. 68, para. 34.
[894] Japan's response to Panel question No. 68, para. 36.
[895] India's response to Panel question No. 83, para. 72.
[896] India's response to Panel question No. 83, para. 72.
[897] India's response to Panel question No. 71, para. 52.
[898] Namely "[a]ll goods other than the parts of cellular mobile phones", "[i]nputs for all goods other than the parts of cellular mobile phones", "connectors for use in manufacture of cellular mobile phones", and

8517.70.90 of the First Schedule, but considers that "[f]or all other products mentioned in Japan's Panel Request and first written submissions, Japan has not established that such products are classified under tariff item 8517.70.90" and consequently "such products must be held to be outside the scope of the present dispute".[899]

7.4.5.1.2 Panel's assessment

7.363. Before turning to assess the merits of the parties' arguments with respect to Japan's claims concerning products that, at the time of the Panel's establishment, were classified under tariff item 8517.70.10 and 8517.70.90 of India's First Schedule, we consider it useful to address two general issues. First, we address the impact, on our assessment, of India's amendment of the First Schedule during these proceedings. Second, we address the complainant's burden of proof under Articles II:1(a) and (b) of the GATT 1994 with respect to the domestic tariff classification of the products at issue.

7.364. First, regarding India's amendments to the First Schedule during these proceedings, we recall that India's Finance Act 2021 came into effect on 1 January 2022, resulting in certain amendments to India's First Schedule.[900] Specifically, products previously classified under tariff items 8517.70.10 and 8517.70.90 of the First Schedule are presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90.[901] India has clarified that "the replacement of tariff items 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions".[902]

7.365. We note that Japan considers that the Panel should make findings regarding "the measures as they existed at the time of the establishment of the panel, as well as the measures as they exist following the changes brought into the First Schedule by the Finance Act, 2021".[903] In other words, Japan requests us to make distinct assessments of the WTO-consistency of the measures at issue with respect to the situation before and after India's amendment of its First Schedule. We also note that India does not argue that the amendments to its First Schedule have modified the tariff treatment accorded to the products at issue, nor does India argue that those amendments have resolved any potential WTO-inconsistency.[904] Moreover, Japan acknowledges that "the creation of new tariff items by the Finance Act, 2021 does not affect Japan's claims"[905] and "the scope of the Products Concerned has not changed".[906] From the foregoing, we understand that, while the measures as challenged by Japan have been amended through the Finance Act 2021, the basis for Japan to claim that the measures are inconsistent with Articles II:1(a) and (b) has not changed.[907] We therefore see no reason to make distinct findings regarding the WTO-consistency of the measures as they existed at the time of the establishment of the panel *and* as they exist "now".[908] We therefore proceed with our analysis by observing the evolution of India's tariff treatment during these proceedings, and assessing the WTO-consistency of the measures at issue based on the most up-to-date information available to the Panel (i.e. based on the situation as it stands following India's amendment of the First Schedule on 1 January 2022).

7.366. Turning to the second issue, we note India's argument that the Panel should reject Japan's claim on the grounds that the burden is on Japan to demonstrate India's domestic classification of the products at issue, that Japan has failed to confirm the domestic classification of certain products, and that they consequently fall "outside the scope of the present dispute".[909] We agree with India that the burden of demonstrating India's inconsistency with Articles II:1(a) and (b) of the GATT 1994

"certain limited camera modules such as those used in the manufacture of cellular mobile phones". (India's first written submission, para. 188).

[899] India's first written submission, para. 188.

[900] See para. 7.268 above.

[901] Japan's response to Panel question No. 83, paras. 91-94; India's response to Panel question No. 83, para. 72.

[902] India's response to Panel question No. 83, para. 72.

[903] Japan's response to Panel question No. 68, para. 36.

[904] India's response to Panel question No. 83, para. 72.

[905] Japan's response to Panel question No. 83, para. 91.

[906] Japan's response to Panel question No. 68, para. 34.

[907] It is uncontested that the amended measures fall within the scope of the Panel's terms of reference. In any event, for the reasons explained above, we consider that the amended measures fall within the scope of the Panel's terms of reference. See also para. 7.292 above.

[908] Japan's response to Panel question No. 68, para. 36.

[909] India's first written submission, para. 210. See also India's response to Panel question No. 71, para. 55.

falls on the complainant. We note, however, that there is a distinction between the burden of demonstrating a violation of a WTO provision, and the burden of demonstrating a particular factual assertion.[910] In this respect, "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof".[911]

7.367. We recall that Japan's claim concerns products that, at the time of the Panel's establishment, fell within the scope of tariff items 8517.70.10 and 8517.70.90 of India's First Schedule.[912] Japan alleges that these products fall within the scope of tariff item 8517.70.00 of India's WTO Schedule.[913] In order to apply the legal standard under Articles II:1(a) and (b) of the GATT 1994, we will first identify India's WTO tariff commitments with respect to products falling under tariff item 8517.70.00 of India's WTO Schedule. We will then turn to assess the parties' respective factual assertions regarding the tariff treatment applied by India to certain products under its domestic customs regime. In that context, we will assess whether Japan's factual assertions are supported by sufficient evidence to raise a presumption that such assertions are correct and, if so, whether India has adduced sufficient evidence to rebut that presumption. As a final step, we will compare our factual findings concerning India's tariff treatment to India's WTO tariff commitments. In that context, we will assess, *inter alia*, whether the challenged tariff treatment concerns products falling within the scope of India's WTO tariff commitments concerning tariff item 8517.70.00 of its WTO Schedule.

7.4.5.2 India's WTO tariff commitments

7.4.5.2.1 Main arguments of the parties

7.368. Japan submits that tariff items 8517.70.10 and 8517.70.90 of India's First Schedule, as it existed at the time of the Panel's establishment, "correspond" to tariff item 8517.70.00 of India's WTO Schedule, in respect of which the bound rate is 0%.[914]

7.369. India contends that the tariff commitments under tariff item 8517.70 as reflected in its WTO Schedule based on the HS2007 were certified in error.[915] India maintains that it did not intend to make commitments on printed circuit assemblies for telephones for cellular networks, or on parts of telephones for cellular networks, which in its view were not covered under the ITA or the HS1996, and were introduced to the HS Nomenclature in the 2007 edition.[916] According to India, the commitments under tariff item 8517.70 were undertaken in error, are void pursuant to Article 48 of the Vienna Convention, and are therefore rendered unbound.[917]

7.4.5.2.2 Panel's assessment

7.370. We have addressed India's arguments that its WTO Schedule was certified in error above, and held that India's tariff commitments are set forth in India's WTO Schedule.[918] We have also rejected India's arguments that the ITA sets forth, or otherwise limits the scope of, its tariff commitments in its WTO HS2007 Schedule.[919] Moreover, we have declined to make the findings

[910] As the Appellate Body stated in *Japan – Apples*, "[i]t is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof. In fact, the two principles are distinct." (Appellate Body Report, *Japan – Apples*, para. 157). (footnotes omitted)

[911] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at p. 335. The Appellate Body also observed that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." (Ibid.).

[912] Japan's first written submission, para. 13(f)-(g); panel request, pp. 3-5.

[913] Japan's first written submission, paras. 101-104.

[914] Japan's first written submission, paras. 101-104.

[915] India's first written submission, paras. 38-74.

[916] India's first written submission, paras. 176-194.

[917] India's first written submission, paras. 74.

[918] See para. 7.216 above.

[919] See para. 7.82 above.

requested by India regarding its request to rectify its WTO Schedule pursuant to the 1980 Decision.[920]

7.371. Therefore, we turn to India's WTO Schedule to assess India's tariff commitments. A review of India's WTO HS2007 Schedule shows that India committed to a bound duty rate of 0% for products falling under tariff items 8517.70 ex01, ex02, and ex03.[921] Such tariff items collectively cover "parts" (tariff item 8517.70.00) of "telephone sets, including telephones for cellular networks or for other wireless networks" and "other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28" (hereafter we refer to these products as "parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data")[922]:

	Product description	Bound rate
8517	Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28	
8517.70.00	- Parts	
8517.70.00 ex01	-- Parts and accessories of the machines of heading 84.71: For populated PCBs	0%
8517.70.00 ex02	-- Parts and accessories of the machines of heading 84.71: Other	0%
8517.70.00 ex03	-- Other	0%

7.372. India's WTO Schedule does not indicate any terms, qualifications or conditions that must be met in order for such products to receive the 0% bound duty rate. Therefore, in accordance with its WTO Schedule, India is obligated to provide unconditional duty-free treatment to parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data falling under tariff items 8517.70 ex01, ex02, and ex03 of its WTO Schedule.

7.4.5.3 India's tariff treatment

7.4.5.3.1 Main arguments of the parties

7.373. Japan's arguments focus on the tariff treatment that was, at the time of the Panel's establishment, accorded by India to products falling under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule.[923] With respect to the tariff treatment of products falling under tariff item 8517.70.10 of the First Schedule, Japan argues that, under the First Schedule, as amended by the Finance Act 2020, the duty rate applied to such products was 20%, unless exempted from that duty rate pursuant to a customs notification.[924] Japan argues in this regard that: (i) pursuant to Notification No. 24/2005, except for certain specified products, products falling under tariff item 8517.70.10 of India's First Schedule were subject to a total exemption from the standard duty rate if they satisfied certain conditions; (ii) subject to certain conditions, Notification No. 50/2017 also exempted certain products from the entirety of the duty[925]; and (iii) Notification No. 57/2017 further exempted certain products from "the portion of customs duty exceeding 10%", without being subject

[920] See para. 7.247 above.
[921] WT/Let/1072.
[922] WT/Let/1072. With respect to tariff items 8517.70 ex01 and 8517.70 ex02 we note that "machines of heading 84.71" of the HS2007 are "[a]utomatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included". (Ibid.).
[923] Japan's first written submission, paras. 55-68, 101-104, and 119-122.
[924] Japan's first written submission, paras. 55-59 (referring to Notification No. 36/2018, (Exhibit JPN-50), p. 2; Lok Sabha Statutory Resolution Approving Notification No. 36/2018, (Exhibit JPN-48), p. 32; Rajya Sabha Statutory Resolution Approving Notification No. 36/2018, (Exhibit JPN-49), p. 548; Finance Bill 2020, (Exhibit JPN-51), pp. 40 and 59; and Finance Act 2020, (Exhibit JPN-52), p. 1).
[925] Japan's first written submission, para. 60(b) (referring to Notification No. 50/2017, (Exhibit JPN-32), pp. 256 and 283; and General Exemption No. 183, (Exhibit JPN-33), pp. 1785 and 1807).

to any conditions.[926] Japan submits that products falling within the scope of tariff item 8517.70.10 of India's First Schedule, that did not benefit from a complete exemption, were subject to either a 10% or 20% duty rate.[927]

7.374. With respect to products falling under tariff item 8517.70.90 of India's First Schedule, Japan submits that pursuant to the Finance Act 2018, the standard duty rate applicable to such products was 15%.[928] Japan argues that a number of specified products falling under tariff item 8517.70.90 were exempted from duties pursuant to Notification Nos. 50/2017 and 57/2017, read in conjunction with their succeeding notifications.[929] However, according to Japan, products "other than those which benefit from the tariff exemption pursuant to the relevant notifications … [we]re subject to either 10% or 15% customs duty".[930]

7.375. Japan acknowledges that, as of 1 January 2022, tariff items 8517.70.10 and 8517.70.90 of India's First Schedule were replaced with tariff items 8517.71, 8517.79.10, and 8517.79.90.[931] Japan highlights, however, that the "Finance Act, 2021 has merely reshaped the structure of subheading[s] covering 'Parts' of products falling under heading 8517 of the First Schedule, pursuant to which subheading 8517 70 of the First Schedule has been replaced by two new subheadings (i.e. subheadings 8517 71 and 8517 79)" such that "'Parts' of products falling under heading 8517 of the First Schedule are still subject to a 20% or 15% customs duty regardless of changes due to the Finance Act, 2021."[932] Japan further elaborates that "as long as the necessary amendments were made to the relevant customs notifications, the exemptions which applied to tariff items 8517 70 10 and 8517 70 90 of the First Schedule at the time of the establishment of the Panel apply to tariff items 8517 79 10, as well as tariff items 8517 71 00 and 8517 79 90, of the new version of the First Schedule."[933]

7.376. With respect to tariff item 8517.70.10 of the First Schedule at the time of the Panel's establishment, India "does not contest that the current duty is 20% on the [PCBA] for Cellular Mobile Phones and 10%" for certain items covered under heading 8517.70.10.[934] India considers, however, that it provides duty-free treatment to all other products falling under tariff item 8517.70.10.[935] With respect to tariff item 8517.70.90 of the First Schedule, India does not contest that "'connectors for use in manufacture of cellular mobile phones' and certain limited camera modules such as those used in the manufacture of cellular mobile phones" are subject to a 10% duty rate.[936]

7.377. With respect to the tariff treatment accorded after 1 January 2022, India states that "the replacement of tariff lines 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions", and therefore "India has not raised any defense concerning the replacement of HS2007 tariff lines 8517.70.10 and 8517.70.90 with HS2022 tariff lines 8517.79.10 and 8517.79.90".[937] India states, however, "that all submissions made by it with regard to

[926] Japan's first written submission, para. 60(c) (referring to Notification No. 57/2017, (Exhibit JPN-27), as amended by Notification No. 22/2018, (Exhibit JPN-45), and Notification No. 02/2020, (Exhibit JPN-55)); and General Exemption No. 239, (Exhibit JPN-28), pp. 2206 and 2210-2211).

[927] Japan's first written submission, para. 61.

[928] Japan's first written submission, paras. 65-66.

[929] Japan's first written submission, para. 67. See also Japan's response to Panel question No. 81.

[930] Japan's first written submission, para. 68.

[931] Japan's response to Panel question No. 83, paras. 91-94.

[932] Japan's response to Panel question No. 83, para. 93.

[933] Japan's response to Panel question No. 83, para. 95. As an example of such an amendment, Japan notes that Serial No. 402 of Notification No. 50/2017 has been amended to replace a reference to tariff item 8517.70.10 with a reference to tariff item 8517.79.10 of India's First Schedule. (Japan's response to Panel question No. 83, para. 95 (referring to Notification No. 55/2021, (Exhibit JPN-76)). Japan notes, however, that "the tariff exemption applicable to populated printed circuit boards falling under tariff item 8517 70 10 of the First Schedule was subsequently repealed by Customs Notification No. 2/2022, effective from 2 February 2022". (Ibid. fn 137 to para. 95 (referring to Notification No. 02/2022, (Exhibit JPN-77)).

[934] India identifies these products as printed circuit board assemblies of the following goods: base stations; Optical Transport Equipment; Combination of one or more of Packet Optical Transport Product or Switch; Optical Transport Network Products; IP Radios; Soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; Carrier Ethernet Switch, Packet Transport Node products, and Multiprotocol Label Switching-Transport Profile products; and Multiple Input/Multiple Output and Long Term Evolution products. (India's first written submission, para. 176 (referring to Notification No. 57/2017, (Exhibit IND-82))).

[935] India's first written submission, para. 177.

[936] India's first written submission, para. 188. (emphasis omitted)

[937] India's response to Panel question No. 83, para. 72.

sub-heading 8517.70, including that the complainant has failed to identify the products at issue under HS2007 tariff lines 8517.70.10 and 8517.70.90, extend to sub-headings 8517.79.10 and 8517.79.90, respectively".[938]

7.4.5.3.2 Panel's assessment

7.378. We proceed with our assessment by examining the tariff treatment accorded to products that, at the time of the Panel's establishment, fell under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule. We then assess the effects of India's amendment of the First Schedule during these proceedings.

7.4.5.3.2.1 Tariff treatment at the time of the Panel's establishment

7.379. It is uncontested that, at the time of the Panel's establishment, India's First Schedule imposed: (i) a standard duty rate of 20% on products falling under tariff item 8517.70.10, covering "[p]opulated, loaded or stuffed printed circuit boards" constituting parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data; and (ii) a standard duty rate of 15% on products falling under tariff item 8517.70.90, covering "[o]ther" parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data[939]:

Tariff item	Product description	Standard duty rate
8517	Telephone sets, including telephones for cellular networks or for other wireless networks: other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528	
	- Parts	
8517.70.10	-- Populated, loaded or stuffed printed circuit boards	20%
8517.70.90	-- Other	15%

7.380. It is further uncontested that the duty rate applied to certain products falling within the scope of these tariff items was subject to several customs notifications. We have examined the assertions and evidence adduced by the parties and certain third parties[940] regarding the content of relevant customs notifications, in order to determine, as a factual matter, the tariff treatment accorded to products falling under these tariff items.[941] Based on our examination of the evidence, we consider the following factual findings to be adequately supported by the evidence on the record.

7.381. Turning, first, to products falling under tariff item 8517.70.10 of India's First Schedule, we note that this tariff item covered populated, loaded or stuffed printed circuit boards constituting parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data.[942] As indicated above, the standard duty rate applicable to such products under the First Schedule was 20%.[943] However, the applied duty rate is subject to customs notifications, as follows:

[938] India's response to Panel question No. 83, para. 72.
[939] First Schedule as of 12 February 2020, (Exhibit JPN-10), p. 1578.
[940] Specifically, the European Union and Chinese Taipei.
[941] We recall that the burden of demonstrating a factual assertion falls on the party making that factual assertion. (See para. 7.366 above).
[942] See para. 7.379 above.
[943] See para. 7.379 above.

a. Pursuant to Serial No. 22 of Notification No. 57/2017, as amended by Notification No. 02/2020, PCBAs for certain specified products[944], falling under this tariff item, became unconditionally subject to a 10% duty rate.[945]

b. Pursuant to Serial No. 13S of Notification No. 24/2005, as amended by Notification No. 76/2018, products falling under this tariff item *other than* PCBAs for cellular mobile phones and the products identified in footnote 944 above were eligible for duty-free treatment if they satisfied certain conditions.[946] Specifically, in order for the product to receive such duty-free treatment: (i) the importer had to follow the procedures set out in the Customs Rules 2017; and (ii) at the time of importation, the importer had to furnish an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of the Customs, as the case may be, to the effect that imported goods would not be used in the manufacture of certain specified goods[947] and in the event of failure to comply with that condition the importer would be liable to pay an amount equal to the difference between the duty leviable on the imported goods but for the exemption under this notification and that already paid at the time of importation.[948]

c. Pursuant to Serial No. 402 of Notification No. 50/2017, *all* populated printed circuit boards falling under tariff item 8517.70.10 of India's First Schedule were eligible for duty-free treatment if they were used in the manufacture of static converters for automatic data processing machines and units thereof of tariff items 8443.31.00, 8443.32.00, 8471, 8517.62, 8528.42.00, 8528.49.00, 8528.52.00 or 8528.62.00 of India's First Schedule.[949]

7.382. Any products falling under tariff item 8517.70.10 that did not benefit from the tariff treatment available under these customs notifications (for instance PCBAs for cellular mobile phones[950]) remained subject to the 20% standard duty rate set forth in the First Schedule.

7.383. We recall that Article II:1(b) does not require Members to inscribe general conditions for importation in their WTO Schedules. However, where conditions are tied to tariff treatment, such that a product must satisfy those conditions in order to be eligible for the tariff treatment set forth in a Member's WTO Schedule, Article II:1(b) requires that such conditions must be inscribed in the Member's WTO Schedule.

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[944] Specifically PCBAs for: base stations; optical transport equipment; combination of one or more of Packet Optical Transport Product or Switch; Optical Transport Network products; IP radios; soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; carrier ethernet switches, Packet Transport Node products, and Multiprotocol Label Switching-Transport Profile products; and Multiple Input/Multiple Output and Long Term Evolution products. (See fn 945 to para. 7.381 below).

[945] Serial No. 22 of Notification No. 57/2017 as amended by Notification No. 02/2020, (Exhibit IND-82). See also General Exemption No. 239, (Exhibit JPN-28).

[946] Serial No. 13S of Notification No. 24/2005, (Exhibit JPN-40), as amended by Notification No. 132/2006, (Exhibit JPN-41), Notification No. 58/2017, (Exhibit JPN-42), Notification No. 38/2018, (Exhibit JPN-53), and Notification No. 76/2018, (Exhibit JPN-54). See also General Exemption No. 181, (Exhibit JPN-44).

[947] Specifically, the imported goods were not to be used in the manufacture of: cellular mobile phones; base stations; optical transport equipment; combination of one or more of Packet Optical Transport Product or Switch; Optical Transport Network products; IP radios; soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; carrier ethernet switches, Packet Transport Node products, and Multiprotocol Label Switching-Transport Profile products; and Multiple Input/Multiple Output and Long Term Evolution products. (Serial No. 13S of Notification No. 24/2005, (Exhibit JPN-40), as amended by Notification No. 132/2006, (Exhibit JPN-41), Notification No. 58/2017, (Exhibit JPN-42), Notification No. 38/2018, (Exhibit JPN-53), and Notification No. 76/2018, (Exhibit JPN-54)). See also General Exemption No. 181, (Exhibit JPN-44).

[948] Serial No. 13S of Notification No. 24/2005, (Exhibit JPN-40), as amended by Notification No. 132/2006, (Exhibit JPN-41), Notification No. 58/2017, (Exhibit JPN-42), Notification No. 38/2018, (ExhibitJPN-53), and Notification No. 76/2018, (Exhibit JPN-54). See also General Exemption No. 181, (Exhibit JPN-44).

[949] Serial No. 402 of Notification No. 50/2017, (Exhibit JPN-32).

[950] Pursuant to Serial No. 21 of Notification No. 57/2017, PCBAs for cellular mobile phones were subject to a duty rate of 10%, without being subject to any conditions, until 31 March 2020 when this partial exemption expired. (Notification No. 57/2017 as amended by Notification No. 02/2020, (Exhibit IND-82)). PCBAs for cellular mobile phones do not appear to fall within the scope of any of the exemptions applicable to products falling under tariff item 8517.70.10 of India's First Schedule.

7.384. In our view, the conditions attached to the duty-free treatment available under Serial No. 13S of Notification No. 57/2012 and Serial No. 402 of Notification No. 50/2017 are not general conditions for importation. Regarding the condition that the importer follow the procedures set out in the Customs Rules 2017, we note that India argues that this condition "merely requires the intimation of intent to avail concessional rates of duties and registration of bills of entry" and that "[t]hese processes have been automated, where all details can be uploaded on a common portal."[951] In support of its assertion, India submits Circular No. 04/2022 as an exhibit.[952] We note that Circular No. 04/2022 makes certain amendments to the Customs Rules 2017.[953] Circular No. 04/2022 indicates that these amendments are "aimed at simplifying the procedures with a focus on automation and making the entire process contact-less".[954] We also note that Circular No. 04/2022 provides the procedure to be followed by "[a]n importer *who intends to import goods at a concessional rate of duty*."[955] On the basis of the procedures set out in Circular No. 04/2022, the "Deputy Commissioner or Assistant Commissioner of Customs at the port of importation *shall allow the benefit of exemption notification*."[956] The language in Circular No. 04/2022 therefore indicates that the conditions therein relate to the tariff treatment accorded to the goods at issue, and not to importation *per se*. The foregoing indicates that the requirement that the importer follow the procedure set out in the Customs Rules 2017 is a condition that an importer must meet in order to be eligible for exemption from customs duties. There is no indication that a failure to comply with such conditions would prevent the importer from importing the products. We therefore do not see anything on the record to suggest that these are general conditions for importation of goods.

7.385. As to the requirement that the importer undertake not to use the products in the manufacture of certain specified goods, this condition makes clear on its face that failure to comply will lead to the application of the "duty leviable … but for the exemption".[957] This, on its face, is a condition for beneficial tariff treatment. As to the condition that certain products be used in the manufacture of other specified products, we understand that failure to comply with this condition would not prevent the products from being imported – rather, they would be imported subject to the 20% standard duty rate. Indeed, with respect to all relevant conditions described above, we understand that failure to comply with those conditions would not prevent the products from being imported, but rather would result in importation subject to the 20% standard duty rate set forth in the First Schedule. Thus, these conditions are conditions for tariff treatment and not general conditions for importation.

7.386. Turning to products falling under tariff item 8517.70.90 of India's First Schedule, at the time of the Panel's establishment this tariff item covered "other" parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data, (namely "other" than populated, loaded or stuffed printed circuit boards).[958] The standard duty rate applicable to such products under the First Schedule was 15%.[959] However, the applied duty rate was subject to customs notifications, as follows:

a. Pursuant to Serial Nos. 468, 506-508, and 513 of Notification No. 50/2017, as amended by Notification Nos. 37/2019 and 01/2020, certain products falling under tariff item 8517.70.90 of the First Schedule: (i) were unconditionally eligible for duty-free

[951] India's response to Panel question No. 69, para. 47 (referring to Circular No. 04/2022 (27 February 2022), (Exhibit IND-78)).
[952] Circular No. 04/2022 (27 February 2022), (Exhibit IND-78), p. 1.
[953] Circular No. 04/2022 (27 February 2022), (Exhibit IND-78), p. 1.
[954] Circular No. 04/2022 (27 February 2022), (Exhibit IND-78), p. 1.
[955] Circular No. 04/2022 (27 February 2022), (Exhibit IND-78), para. 4.1. (emphasis added)
[956] Circular No. 04/2022 (27 February 2022), (Exhibit IND-78), para. 4.8. (emphasis added)
[957] Serial No. 13S of Notification No. 24/2005, (Exhibit JPN-40), as amended by Notification No. 132/2006, (Exhibit JPN-41), Notification No. 58/2017, (Exhibit JPN-42), Notification No. 38/2018, (Exhibit JPN-53), and Notification No. 76/2018, (Exhibit JPN-54). See also General Exemption No. 181, (Exhibit JPN-44).
[958] See para. 7.379 above.
[959] See para. 7.379 above.

treatment[960]; or (ii) were eligible for duty-free treatment subject to the condition that the importer followed the procedures set out in the Customs Rules 2017.[961]

b. Similarly, pursuant to Serial Nos. 5 to 8 of Notification No. 57/2017, as amended by Notification Nos. 22/2018, 37/2018, 02/2019, 24/2019, 01/2020, and 02/2020, certain products falling under tariff item 8517.70.90 of the First Schedule: (i) were unconditionally eligible for duty-free treatment[962]; (ii) were eligible for duty-free treatment subject to the condition that the importer followed the procedures set out in the Customs Rules 2017[963];

[960] Pursuant to Serial No. 468 of Notification No. 50/2017, the following products falling under Chapter 84 or 85 of the First Schedule (i.e. including products falling under tariff item 8517.70.90) of the First Schedule were unconditionally eligible for duty-free treatment: (i) micro ATMs as per standards version 1.5.1; (ii) fingerprint readers/scanners other than fingerprint readers/scanners for use in manufacturing of cellular mobile phones; (iii) iris scanners; (iv) miniaturized POS card readers for mPOS (other than mobile phones or tablet computers). (Notification No. 50/2017, (Exhibit JPN-32), as amended by Notification No. 01/2020, (Exhibit JPN-56)). See also General Exemption No. 183, (Exhibit JPN-33), pp. 1759, 1791-1792 and 1807).

[961] The following products falling under tariff item 8517.70.90 of the First Schedule, subject to the condition that the importer follow the procedures set out in the Customs Rules 2017, were eligible for duty-free treatment under Notification No. 50/2017: **(1)** pursuant to Serial No. 468, parts and components for use in the manufacture of: (i) micro ATMs as per standards version 1.5.1; (ii) fingerprint readers/scanners other than fingerprint readers/scanners for use in manufacturing of cellular mobile phones; (iii) iris scanners; and (iv) miniaturized POS card readers for mPOS (other than mobile phones or tablet computers); **(2)** pursuant to Serial Nos. 506, 507, and 508: (i) parts, components and accessories for use in manufacture of broadband modem falling under tariff item 8517.62.30 of the First Schedule, other than populated printed circuit boards, chargers and power adapters; (ii) parts, components and accessories for use in the manufacture of routers falling under tariff item 8517.62.90 of the First Schedule, other than populated printed circuit boards, chargers, and power adapters; (iii) parts, components and accessories for use in the manufacture of set-top boxes for gaining access to internet falling under tariff item 8517.69.60 of the First Schedule, other than populated printed circuit boards, chargers, and power adapters; and (iv) sub-parts for use in the manufacture of items covered in (i) through (iii) above; and **(3)** pursuant to Serial No. 513: (i) parts or components for use in the manufacture of populated printed circuit boards of; (a) broadband modems falling under tariff item 8517.62.30 of the First Schedule; (b) routers falling under tariff item 8517.62.90 of the First Schedule; and (c) set-top boxes for gaining access to internet falling under tariff item 8517.69.60 of the First Schedule; and (ii) sub-parts for use in the manufacture of the parts or components in item (i) above. (Notification No. 50/2017, (Exhibit JPN-32), as amended by Notification No. 37/2019, (Exhibit JPN-57), and Notification No. 01/2020, (Exhibit JPN-56). See also General Exemption No. 183, (Exhibit JPN-33), pp. 1759, 1791-1792 and 1807). In making these factual findings, we observe that other Serial Nos. of Notification No. 50/2017 set forth conditional exemptions for other products, over and above the products we have identified above. Since no party or third-party has argued or asserted that the exemptions for those other products are relevant to Japan's claims concerning products falling under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule, as they existed at the time of the Panel's establishment, we consider it uncontested that the exemptions for those products are not relevant. We also note that pursuant to Serial No. 425 of Notification No. 50/2017, parts for manufacture of base station controllers, base transreceiver stations, and antenna system equipment, required for the manufacture of Public Radio Mobile Trunked Service, were eligible for exemptions from customs duties subject to the condition that the importer followed the procedures set out in the Customs Rules 2017. We further note that India contends that such products were not "always classified under tariff item 8517.70.90 of India's First Schedule" and that they must be examined individually to ascertain their correct classification. (India's response to Panel question No. 91). As noted in paragraph 7.330 above, Serial No. 425 was repealed by Notification No. 02/2022 and is no longer in effect, as from 1 February 2022. (Notification No. 02/2022, (Exhibit JPN-77)). Hence, we do not consider it necessary for the resolution of this dispute to make further factual findings regarding the tariff treatment accorded under Serial No. 425 of Notification No. 50/2017 at the time of the Panel's establishment.

[962] Pursuant to Serial No. 5 of Notification No. 57/2017, the following products falling under tariff item 8517.70.90, without being subject to any conditions, were eligible for duty-free treatment: (i) all goods other than parts of cellular mobile phones; and (ii) inputs or sub-parts for use in manufacture of parts mentioned at (i) above. (Notification No. 57/2017, (Exhibit IND-82). See also General Exemption No. 239, (Exhibit JPN-28), p. 2206)).

[963] The following products falling under tariff item 8517.70.90 of the First Schedule, subject to the condition that the importer follow the procedures set out in the Customs Rules 2017, were eligible for duty-free treatment under Notification No. 57/2017: **(1)** pursuant to Serial Nos. 5C, 5D, and 5E: (i) inputs or sub-parts for use in the manufacture of vibrator motors/ringers for use in the manufacture of cellular mobile phones, display assemblies for use in the manufacture of cellular mobile phones, or touch panels/cover glass assemblies for use in manufacture of cellular mobile phones; and (ii) inputs or sub-parts for use in the manufacture of parts mentioned at (i) above; **(2)** pursuant to Serial Nos. 6A, 6B, and 6C: i. (a) inputs or parts for use in manufacture of PCBA of cellular mobile phones and (b) inputs or sub-parts for use in manufacture of PCBAs of cellular mobile phones, provided that both of these categories exclude the following goods; (i) connectors; (ii) microphones; (iii) receivers; (iv) speakers; and (v) SIM sockets; ii. (a) inputs or parts for use in manufacture of camera modules of cellular mobile phones and (b) inputs or sub-parts for use in manufacture of camera modules of cellular mobile phones; and iii. (a) inputs or parts for use in manufacture of

or (iii) became eligible for a 10% duty rate (rather than the 15% standard duty rate set forth in the First Schedule) subject to the condition that the importer followed the procedures set out in the Customs Rules 2017.[964]

7.387. Regarding the conditional nature of the tariff treatment accorded to certain products falling under tariff item 8517.70.90, we recall our finding that the condition that an importer follow the procedures set out in the Customs Rules 2017 in order to receive beneficial tariff treatment constitutes a condition for tariff treatment and not a general condition for importation.[965] We understand that if the relevant products failed to satisfy such conditions they could be imported into India, but at the standard duty rate set forth in the First Schedule instead of the beneficial tariff treatment available under these Notifications.

7.4.5.3.2.2 Tariff treatment as of 1 January 2022

7.388. Having addressed the tariff treatment applicable to products falling under tariff items 8517.70.10 and 8517.70.90 at the time of the Panel's establishment, we recall that on 1 January 2022 the First Schedule was amended, such that "[tariff items] 8517 70 10 and 8517 70 90 and the entries relating thereto" were substituted with the following entries[966]:

Tariff item	Product description	Standard duty rate
	- Parts	
8517.71.00	-- Aerials and aerial reflectors of all kinds; parts suitable for use therewith	20%
8517 79	*-- Other:*	
8517.79.10	--- Populated, loaded or stuffed printed circuit boards	20%
8517.79.90	--- Other	15%

7.389. Following the second substantive meeting with the parties, the Panel asked the parties to confirm its understanding that no party had identified any customs notifications on the Panel's record setting forth any exemptions pertaining to products falling under tariff items 8517.71.00, 8517.79.10, or 8517.79.90. Japan indicated that "as long as the necessary amendments were made to the relevant customs notifications, the exemptions which applied to tariff items 8517 70 10 and

connectors of cellular mobile phones and (b) inputs or sub-parts for use in manufacture of connectors of cellular mobile phones; **(3)** pursuant to Serial No. 7: (i) wired headsets; (ii) battery covers; (iii) front covers; (iv) front covers (with zinc casting); (v) middle covers; (vi) GSM antennae/antennae of any technology; (vii) side keys; (viii) main lenses; (ix) camera lenses; (x) screws; (xi) microphone rubber cases; (xii) sensor rubber cases/sealing gaskets including sealing gaskets/cases from rubbers like SBR, EPDM, CR, CS, silicone and all other individual rubbers or combination/combination of rubbers; (xiii) PU cases/sealing gasket – other articles of polyurethane foam like sealing gaskets/case; (xiv) sealing gaskets/cases from PE, PP, EPS, PC and all other individual polymers or combination/combination of polymers; (xv) SIM sockets/other mechanical items (Metal); (xvi) SIM sockets/other mechanical items (plastic); (xvii) back covers; (xviii) conductive cloths; (xix) heat dissipation sticker battery covers; (xx) sticker-battery slot; (xxi) protective film for main lens; (xxii) mylar for LCD FPC; (xxiii) LCD conductive foam; (xxiv) film-front flash; (xxv) LCD foam; (xxvi) BT foam; (xxvii) microphones and receivers; (xxviii) key pads; (xxix) USB cables; and (xxx) fingerprint readers/scanner; **(4)** pursuant to Serial No. 7A: inputs and raw material, other than PCBAs (falling under the tariff item 8504.90.90 of the First Schedule) and moulded plastics (falling under the tariff items 3926.90.99 or 8504.90.90 of the First Schedule) for use in the manufacture of chargers or adapters for cellular mobile phones; and **(5)** pursuant to Serial No. 8: inputs or raw material for use in manufacture of the following goods: (i) base stations; (ii) all goods falling under tariff item 8517.62.90 of the First Schedule; and (iii) all goods falling under tariff item 8517.69.90 of the First Schedule. (Notification No. 57/2017 as amended by Notification No. 22/2018, 37/2018, 02/2019, 24/2019, and 02/2020, (Exhibit IND-82). See also General Exemption No. 239, (Exhibit JPN-28), pp. 2206, 2209 and 2211)).

[964] The following products falling under tariff item 8517.70.90 of the First Schedule, subject to the condition that the importer follow the procedure set out in the Customs Rules 2017, were eligible to be exempted from the portion of customs duty exceeding 10% under Notification No. 57/2017: **(1)** pursuant to Serial Nos. 5A and 5B: (i) camera modules for use in manufacture of cellular mobile phones; and (ii) connectors for use in manufacture of cellular mobile phones; and **(2)** pursuant to Serial Nos. 5C, 5D, and 5E: (i) vibrator motors/ringers for use in manufacture of cellular mobile phones; (ii) display assemblies for use in manufacture of cellular mobile phones; and (iii) touch panels/cover glass assemblies for use in manufacture of cellular mobile phones. (Notification No. 57/2017 as amended by Notification Nos. 37/2018 and 02/2020, (Exhibit IND-82). See also General Exemption No. 239, (Exhibit JPN-28), pp. 2206-2207 and 2211).

[965] See paras. 7.384-7.385 above.

[966] Finance Act 2021, (Exhibit IND-60), p. 176.

8517 70 90 of the First Schedule at the time of the establishment of the Panel apply to tariff items 8517 79 10, as well as tariff items 8517 71 00 and 8517 79 90, of the new version of the First Schedule."[967] Japan further submitted, as an example of such an amendment, that Serial No. 402 of Notification No. 50/2017 was amended to replace a reference to tariff items 8517.70.10 with a reference to tariff item 8517.79.10 of India's First Schedule.[968] Japan noted, however, that "the tariff exemption applicable to populated printed circuit boards falling under tariff item 8517 70 10 of the First Schedule was subsequently repealed by Customs Notification No. 2/2022, effective from 2 February 2022".[969] India did not dispute the Panel's understanding. India stated that the "the replacement of tariff lines 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions."[970]

7.390. Having reviewed the most recent evidence submitted by Japan, we understand that although Serial No. 402 of Notification No. 50/2017 was indeed initially amended to refer to tariff items 8517.79.10 instead of tariff items 8517.70.10, Notification No. 50/2017 was subsequently further amended to "omit" Serial No. 402 from that Notification.[971] Thus, based on the most up-to-date evidence submitted to us, the conditional duty-free treatment that was available for products falling under tariff item 8517.70.10 of the First Schedule, as it existed at the time of the Panel's establishment, pursuant to Serial No. 402 of Notification No. 50/2017[972], is *not* presently available for products falling under tariff item 8517.79.10 of India's First Schedule.

7.391. We also note that, in the context of responding to certain questions from the Panel regarding Japan's claim pertaining to products falling under tariff item 8517.12 of India's WTO Schedule, India refers to Notification No. 57/2021.[973] Notwithstanding that neither party refers to this Notification in the context of Japan's claim concerning products that at the time of the Panel's establishment fell under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule, our review of this exhibit suggests that it is indeed relevant for such products. Such products are presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of India's First Schedule. Specifically, we understand that Notification No. 57/2021 amended Notification Nos. 24/2005 and 57/2017 such that certain exemptions set forth in those Notifications may continue to apply to products presently classified under those tariff items.

7.392. Having reviewed this evidence, we understand that, in light of the amendments to various customs notifications introduced by Notification No. 57/2021:

a. With respect to products classified under tariff item 8517.71.00 of the First Schedule, pursuant to Serial No. 5 of Notification No. 57/2017, goods other than parts of cellular mobile phones, as well as the inputs or sub-parts for use in the manufacture of goods other than parts of cellular mobile phones, are eligible for duty-free treatment[974];

b. With respect to products classified under tariff item 8517.79.10 of the First Schedule:

    i. Pursuant to Serial No. 13S of Notification No. 24/2005, all products other than PCBAs for cellular mobile phones and the products identified in footnote 944 above are eligible for duty-free treatment if they satisfy certain conditions – specifically, in order for the product to receive such duty-free treatment: (i) the importer must follow the procedures set out in the Customs Rules 2017; and (ii) at the time of importation, the importer must furnish an undertaking to the Deputy Commissioner of Customs or the

[967] Japan's response to Panel question No. 83, para. 95.
[968] Japan's response to Panel question No. 83, para. 95 (referring to Notification No. 55/2021, (Exhibit JPN-76)).
[969] Japan's response to Panel question No. 83, para. 95, fn 137 to para. 95 (referring to Notification No. 02/2022, (Exhibit JPN-77)).
[970] India's response to Panel question No. 83, para. 72. India also argues that "all submissions made by [India] with regard to sub-heading 8517.70, including that the complainant has failed to identify the products at issue under HS2007 tariff lines 8517.70.10 and 8517.70.90, extend to sub-headings 8517.79.10 and 8517.79.90, respectively". (Ibid.).
[971] Serial No. 402 of Notification No. 50/2017, (Exhibit JPN-32), as amended by Notification No. 55/2021, (Exhibit JPN-76), and Notification No. 02/2022, (Exhibit JPN-77).
[972] See para. 7.381c above.
[973] India's responses to Panel question No. 75, para. 58, and Panel question No. 77, para. 64 (referring to Notification No. 57/2021, (Exhibit IND-82)).
[974] See Notification No. 57/2017 as amended by Notification No. 57/2021, (Exhibit IND-82).

Assistant Commissioner of the Customs, as the case may be, to the effect that imported goods would not be used in the manufacture of certain specified goods[975] and in the event of failure to comply with that condition the importer is liable to pay an amount equal to the difference between the duty leviable on the imported goods but for the exemption under this notification and that already paid at the time of importation[976];

ii. Pursuant to Serial No. 22 of Notification No. 57/2017, PCBAs for certain specified products[977] are unconditionally subject to a 10% duty rate; and

c. With respect to products classified under tariff item 8517.79.90 of the First Schedule:

i. Pursuant to Serial No. 5 of Notification No. 57/2017, goods other than parts of cellular mobile phones, as well as the inputs or sub-parts for use in the manufacture of goods other than parts of cellular mobile phones, are eligible for duty-free treatment[978];

ii. Pursuant to Serial Nos. 5A and 5B of Notification No. 57/2017, camera modules for use in the manufacture of cellular mobile phones and connectors for use in the manufacture of cellular mobile phones are eligible to receive a 10% duty rate, subject to the condition that the importer follow the procedure set out in the Customs Rules 2017.[979]

7.393. We recognize that India may amend its customs notifications such that other exemptions applying to products falling under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule, at the time of the Panel's establishment, may continue to apply to products presently falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule. In such a case, our analysis of the tariff treatment accorded by India to products falling under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule at the time of the Panel's establishment would be equally applicable to the tariff treatment accorded by India to products presently falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule. We note in this regard India's argument that its "submissions" with regard to items 8517.70.10 and 8517.70.90 continue to apply to items 8517.79.10 and 8517.79.90.[980] We therefore do not preclude the possibility that such notifications may continue to apply to the products presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90. However, nothing on the record of this dispute allows us to make a determination in this regard.

7.394. To summarize, at the time of the Panel's establishment, certain specified products falling under tariff item 8517.70.10 of India's First Schedule were unconditionally subject to a 10% duty

[975] Specifically, the imported goods are not to be used in the manufacture of: cellular mobile phones; base stations; optical transport equipment; combination of one or more of Packet Optical Transport Product or Switch; Optical Transport Network products; IP radios; soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; carrier ethernet switches, Packet Transport Node products, and Multiprotocol Label Switching-Transport Profile products; and Multiple Input/Multiple Output and Long Term Evolution products. (Serial No. 13S of Notification No. 24/2005, (Exhibit JPN-40), as amended by Notification No. 132/2006, (Exhibit JPN-41), Notification No. 58/2017, (Exhibit JPN-42), Notification No. 38/2018, (Exhibit JPN-53), and Notification No. 76/2018 (Exhibit JPN-54)).

[976] Serial No. 13S of Notification No. 24/2005, (Exhibit JPN-40), as amended by Notification No. 132/2006, (Exhibit JPN-41), Notification No. 58/2017, (Exhibit JPN-42), Notification No. 38/2018, (Exhibit JPN-53), and Notification No. 76/2018, (Exhibit JPN-54) and Notification No. 57/2021, (Exhibit IND-82). We note that these conditions are attached to the tariff treatment and are not general conditions for importation. (See para. 7.383 above).

[977] Specifically PCBAs for: base stations; optical transport equipment; combination of one or more of Packet Optical Transport Product or Switch; Optical Transport Network products; IP radios; soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; carrier ethernet switches, Packet Transport Node products, and Multiprotocol Label Switching-Transport Profile products; and Multiple Input/Multiple Output products and Long Term Evolution products. (Serial No. 22 of Notification No. 57/2017 as amended by Notification Nos. 02/2020, 03/2021, and 57/2021, (Exhibit IND-82)).

[978] See Notification No. 57/2017 as amended by Notification No. 57/2021, (Exhibit IND-82).

[979] Notification No. 57/2017 as amended by Notification Nos. 37/2018, 02/2020, and 57/2021, (Exhibit IND-82).

[980] India's response to Panel question No. 83, para. 72.

rate.[981] Certain other products falling under this tariff item were eligible for duty-free treatment if they satisfied certain conditions.[982] All other products classified under this tariff item, as well as products that failed to satisfy the conditions for duty-free treatment, were subject to the 20% duty rate set forth in the First Schedule. As for products falling under tariff item 8517.70.90 of India's First Schedule, certain such products were eligible for unconditional duty-free treatment.[983] Subject to certain conditions, certain other products were eligible for either duty-free treatment or a 10% duty rate.[984] All other products classified under this tariff item, as well as products that failed to satisfy the conditions for the duty-free treatment or the 10% duty rate, were subject to the 15% duty rate set forth in the First Schedule.

7.395. Regarding the tariff treatment as of 1 January 2022, we note, based on the evidence before us, that: (i) with respect to products falling under tariff item 8517.71.00 of the First Schedule, certain specified products are unconditionally subject to duty-free treatment, while all other products are subject to the 20% duty rate set forth in the First Schedule[985]; (ii) with respect to products falling under tariff item 8517.79.10 of the First Schedule, certain specified products are eligible for duty-free treatment if they satisfy certain conditions, other specified products are unconditionally subject to a 10% duty rate, and all other products are subject to the 20% duty rate set forth in the First Schedule[986]; and (iii) with respect to products falling under tariff item 8517.79.90 of the First Schedule, certain specified products are unconditionally subject to duty-free treatment, other specified products are subject to a 10% duty rate subject to certain conditions, and all other products are subject to the 15% duty rate set forth in the First Schedule.[987]

7.4.5.4 Comparison of India's tariff treatment to its WTO tariff commitments

7.4.5.4.1 Main arguments of the parties

7.396. Japan argues that, at the time of the Panel's establishment, the products classified under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule were products falling within the scope of India's WTO tariff commitments as set forth at tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule.[988] Japan argues that the duty rates for such products as set forth in India's First Schedule were in excess of the 0% bound duty rate set forth in India's WTO Schedule.[989] Japan further considers that although the customs duty was "waived" with respect to some of those products, if those conditions were not fulfilled, "a customs duty would apply at a rate higher than 0% and this amounts to an inconsistency with India's obligations under Article II:1(b), first sentence, of the GATT 1994".[990] According to Japan, "[f]or those exemptions that are subject to conditions, the inconsistency with Article II:1(b), first sentence, of the GATT 1994 remains, since no such conditions are provided for in India's Schedule to benefit from duty-free treatment".[991] Moreover, in Japan's view, "any deviation from Article II:1(b) 'will always [also] be inconsistent with' Article II:1(a) of the GATT 1994".[992] Regarding India's amendment of the First Schedule, Japan considers that "the creation of new tariff items by the Finance Act, 2021 does not affect Japan's claims".[993] In response to India's argument that "the complainant has failed to identify the products at issue under HS2007 tariff lines 8517.70.10 and 8517.70.90" of India's First Schedule, Japan submits that "it is sufficient for the complainant making a claim under Article II:1 of the GATT 1994 to demonstrate that some of the products falling under the duty-free tariff concessions at issue bear certain import duties or otherwise are subject to less favourable treatment than that under the tariff concession."[994]

[981] See para. 7.381a above.
[982] See paras. 7.381b-7.381c above.
[983] See paras. 7.386a-7.386b above.
[984] See paras. 7.386a-7.386b above.
[985] See para. 7.392a above.
[986] See para. 7.392b above.
[987] See para. 7.392c above.
[988] Japan's first written submission, paras. 101-104.
[989] Japan's first written submission, paras. 119-122.
[990] Japan's first written submission, paras. 119 and 121.
[991] Japan's second written submission, para. 15.
[992] Japan's first written submission, para. 129 (quoting Panel Reports, *EC – IT Products*, para. 7.747).
[993] Japan's response to Panel question No. 83, para. 91.
[994] Japan's comments on India's response to Panel question No. 83, para. 112.

7.397. India notes that a Section Note to Section XVI of the HS2007 indicates that "[p]arts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 84.09, 84.31, 84.48, 84.66, 84.73, 84.87, 85.03, 85.22, 85.29, 85.38 and 85.48) are in all cases to be classified in their respective headings", and "[o]ther parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 84.79 or 85.43) are to be classified with the machines of that kind".[995] India submits that "[g]iven that the Section Notes make a nuanced distinction on the kinds of goods that may be covered as 'Parts' (classifiable under 8517.70) and those 'Parts which are goods' (classifiable under the appropriate heading of Chapter 84 or Chapter 85), the complainant's failure to explicitly confirm the classification of the products at issue must lead to the rejection of its claim."[996] Specifically with respect to tariff item 8517.70.90 of the First Schedule (as it existed at the time of the Panel's establishment), India argues that "'[a]ll goods other than the parts of cellular mobile phones' and 'Inputs for all goods other than the parts of cellular mobile phones' falling under tariff item 8517.70.90 of the Customs Tariff Act are exempt from duties", and submits that "[f]or all other products mentioned in Japan's Panel Request and first written submissions", Japan has failed to demonstrate that such products are classified under this tariff item.[997] According to India, such products "must be held to be outside the scope of the present dispute".[998] India also notes "the replacement of tariff items 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions" and therefore "India has not raised any defense concerning the replacement of HS2007 tariff items 8517.70.10 and 8517.70.90 with HS2022 tariff items 8517.79.10 and 8517.79.90".[999] India nevertheless argues that "all submissions made by it with regard to sub-heading 8517.70, including that the complainant has failed to identify the products at issue under HS2007 tariff lines 8517.70.10 and 8517.70.90, extend to sub-headings 8517.79.10 and 8517.79.90, respectively".[1000]

7.4.5.4.2 Panel's assessment

7.398. We recall that tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule indicate that India is obligated to accord unconditional duty-free treatment to parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data.[1001]

7.399. We note that, at the time of the Panel's establishment, tariff item 8517.70.10 of India's First Schedule covered populated, loaded or stuffed printed circuit boards constituting parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data. Tariff item 8517.70.90 of India's First Schedule covered "other" parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data. It is uncontested that the products that, at the time of the Panel's establishment, were classified under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule fell within the scope of India's WTO tariff commitments under tariff items 8517.70 ex01, ex02, and ex03 of its WTO Schedule.

7.400. Following India's amendment of its First Schedule on 1 January 2022, the products previously covered by tariff items 8517.70.10 and 8517.70.90 became classified under tariff items 8517.71.00[1002], 8517.79.10[1003], and 8517.79.90[1004] of the First Schedule. Since the products previously classified under tariff items 8517.70.10 and 8517.70.90 fell within the scope of India's WTO tariff commitments under tariff items 8517.70 ex01, ex02, and ex03 of its WTO Schedule, it logically follows that the products presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 also fall within the scope of those WTO tariff commitments. We understand that

[995] India's response to Panel question No. 71, para. 54 (quoting HS2007 Section Notes to Section XVI (Exhibit IND-9)). See also India's response to Panel question No. 71, paras. 54-55.
[996] India's response to Panel question No. 105, para. 55.
[997] India's first written submission, para. 188.
[998] India's first written submission, para. 188.
[999] India's response to Panel question No. 83, para. 72.
[1000] India's response to Panel question No. 83, para. 72.
[1001] See para. 7.372 above.
[1002] Aerials and aerial reflectors of all kinds, and parts suitable for use therewith, constituting parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data. (See para. 7.388 above).
[1003] Populated, loaded or stuffed printed circuit boards constituting parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data. (See para. 7.388 above).
[1004] Other parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data. (See para. 7.388 above).

India does not dispute this.[1005] We find therefore that, as of 1 January 2022, these tariff items of India's First Schedule cover parts of telephone sets and "other" certain apparatus for transmission or reception of voice, images, or data, which are products covered by India's WTO tariff commitments under tariff items 8517.70 ex01, ex02, and ex03 of its WTO Schedule.[1006]

7.401. Regarding India's argument that aspects of Japan's claims must fail because Japan allegedly failed to demonstrate that certain products were, at the time of the Panel's establishment, classified under tariff item 8517.70.90 of India's First Schedule, we recall that Japan's claim under Articles II:1(a) and (b) of the GATT 1994 concerns the tariff treatment accorded by India to products falling, at the time of the Panel's establishment, within the scope of tariff items 8517.70.10 and 8517.70.90 of India's First Schedule.[1007] We have concluded above that these same products are presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of India's First Schedule. Based on the arguments and evidence adduced by the parties, we have made factual findings regarding the tariff treatment accorded by India to such products. In our view, this tariff treatment concerns products that properly fall within the scope of Japan's claim.

7.402. We have also concluded above that India's WTO tariff commitments with respect to such products are those set forth at tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule. We proceed therefore to compare the challenged tariff treatment to the relevant tariff commitments set forth in India's WTO Schedule. We emphasize that this comparison is limited to the tariff treatment of products that were classified under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule, and which therefore fall within the scope of Japan's claim.[1008]

7.403. For the reasons explained above, India is obligated to accord unconditional duty-free treatment to products falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule. We recall that, as of 1 January 2022: (i) with respect to products falling under tariff item 8517.71.00 of the First Schedule, certain specified products are unconditionally subject to duty-free treatment, while all other products are subject to the 20% duty rate set forth in the First Schedule[1009]; (ii) with respect to products falling under tariff item 8517.79.10 of the First Schedule, certain specified products are eligible for duty-free treatment if they satisfy certain conditions, other specified products are unconditionally subject to a 10% duty rate, and all other products are subject to the 20% duty rate set forth in the First Schedule[1010]; and (iii) with respect to products falling under tariff item 8517.79.90 of the First Schedule, certain specified products are unconditionally subject to duty-free treatment, other specified products are subject to a 10% duty rate subject to certain conditions, and all other products are subject to the 15% duty rate set forth in the First Schedule.[1011] We understand that the unconditional duty-free treatment accorded to certain products is consistent with India's WTO Schedule. The 10%, 15%, and 20% duty rates applied to certain

[1005] India explained that "as opposed to the replacement of tariff line 8517.12 with tariff lines 8517.13 and 8517.14, the replacement of tariff lines 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions". (India's response to Panel question No. 83, para. 72).

[1006] See fns 1002, 1003, and 1004 to para. 7.400 above.

[1007] Specifically, Japan challenges the tariff treatment applied by India to products that, at the time of the Panel's establishment, were classified under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule. (Japan's first written submission, para. 13; panel request, pp. 3-5).

[1008] We note that certain of the tariff treatment described in section 7.4.5.3 above, in addition to being available for some specified products that fall within the scope of Japan's claim, may also have been available for other products (i.e. products presently classified under tariff items of India's First Schedule *other than* 8517.71.00, 8517.79.10, or 8517.79.90). This is because those exemptions are available for a wide number of products, including some products that fall within the scope of Japan's claim *and others which do not*. We wish therefore to clarify that our factual and legal findings in section 7.4.5 of this Report do not concern products which did not, at the time of the Panel's establishment, fall within the scope of tariff items 8517.70.10 and 8517.70.90 of India's First Schedule (and which do not presently fall under tariff items 8517.71.00, 8517.79.10, and 8517.70.90). In our view, the tariff treatment, in India's domestic customs regime, of the products challenged by Japan is clear. In this respect, we also consider India's references to the Section Note of Section XVI of the HS2007 to be inapposite. (See para. 7.397 above). The tariff treatment identified by Japan is that applied to products classified under certain tariff items of India's First Schedule. We have concluded that the products falling under those tariff items fall within the scope of tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule. It is not necessary for us (or for Japan) to independently identify each individual product falling under the relevant tariff items (8517.71.00, 8517.79.10 and 8517.79.90 of the First Schedule, since all products falling under those tariff items are covered by India's WTO legal obligations and, as indicated, the tariff treatment of those products is clear.

[1009] See para. 7.392a above.

[1010] See para. 7.392b above.

[1011] See para. 7.392c above.

products falling under these tariff items is in excess of the bound duty of 0% set forth in India's WTO Schedule. Finally, the requirement that certain products must satisfy conditions[1012] that are not set forth in India's WTO Schedule in order to receive unconditional duty-free treatment is inconsistent with India's WTO tariff commitment, as contained in its WTO Schedule, to provide unconditional duty-free treatment to such products.

7.404. We also recall that, at the time of the Panel's establishment, India either partially or completely exempted certain products falling under tariff items 8517.70.10 and 8517.70.90 of the First Schedule from the standard duty rates set forth in that First Schedule, through a number of customs notifications. Several such exemptions have been amended to cover products that, after 1 January 2022, fall under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of India's First Schedule.

7.405. We do not preclude the possibility that other exemptions may also, through relevant amendments, continue to apply to the products presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90. However, nothing on the record of this dispute allows us to make a determination in this regard. Nevertheless, for the sake of facilitating the resolution of this dispute, we proceed to compare the duty rate that may be applicable pursuant to customs notifications on the assumption that customs notifications that applied prior to 1 January 2022 may, through relevant amendments, continue to apply to the products at issue.[1013]

7.406. In this respect, we recall that certain products that, at the time of the Panel's establishment, fell under tariff item 8517.70.10 of India's First Schedule were unconditionally subject to a 10% duty rate.[1014] Other products falling under this tariff item were eligible for duty-free treatment if they satisfied certain conditions.[1015] All other products classified under this tariff item, as well as products that failed to satisfy the conditions for duty-free treatment, were subject to the 20% duty rate set forth in the First Schedule. As for products falling under tariff item 8517.70.90 of India's First Schedule, certain such products were eligible for unconditional duty-free treatment.[1016] Subject to certain conditions, other products were eligible for either duty-free treatment or a 10% duty rate.[1017] All other products classified under this tariff item, as well as products that failed to satisfy the conditions for the duty-free treatment or the 10% duty rate, were subject to the 15% duty rate set forth in the First Schedule.

7.407. In comparing the tariff treatment applied pursuant to these Notifications to India's WTO tariff commitments, we note at the outset that only certain products classified under tariff items 8517.70.10 and 8517.70.90 were eligible for the beneficial tariff treatment set forth in those Notifications. Thus, at least some products falling under those tariff items remained subject to the standard duty rates set forth in the First Schedule. Those standard duty rates of 20% and 15%, respectively, were in excess of the bound duty rate of 0%. To the extent that the relevant customs notifications are amended to refer to products presently falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule, those exemptions would continue to apply to a specific subset of products falling under those tariff items. All other products would be subject to the standard duty rates of 20% or 15% set forth in the First Schedule. Such applied duty rate is in excess of the bound duty rate of 0%.

7.408. With respect to those specified products that were eligible for unconditional duty-free treatment, we consider that the tariff treatment accorded to these products was consistent with India's WTO tariff commitments. However, with respect to those specified products that were eligible for duty-free treatment subject to satisfying certain conditions, we note that those conditions for

[1012] See para. 7.392b.i above.

[1013] We note that this approach is different to our approach to tariff item 8517.12. In this respect, we recall that at the time of the Panel's establishment certain products falling under tariff item 8517.12 of India's First Schedule (namely, telephones for other wireless networks) were exempted from customs duties through Notification No. 57/2017. The evidence on the record indicates that, following India's amendment of its First Schedule, Notification No. 57/2017 was amended by Notification No. 57/2021, such that the exemptions available under Notification No. 57/2017 continued to be available to the same products. (See section 7.4.3.3.2 above).

[1014] See para. 7.381a above.

[1015] See paras. 7.381b-7.381c above.

[1016] See paras. 7.386a-7.386b above.

[1017] See paras. 7.386a-7.386b above.

duty-free treatment[1018] are not set forth in India's WTO Schedule. To the extent that the relevant customs notifications are amended to refer to products falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule: (i) the unconditional duty-free treatment accorded to certain specified products is consistent with India's WTO tariff commitments; and (ii) the conditional duty-free treatment accorded to certain specified products is subject to conditions that are not set forth in India's WTO Schedule.

7.409. Finally, with respect to those specified products that were eligible for a partial exemption from the duty rates imposed under the First Schedule, such that they were subject to a 10% duty rate, we note that such applied duty rate was in excess of the bound duty rate of 0%. Among those specified products, certain products were unconditionally subject to the 10% duty rate while for other such products the reduced 10% duty rate was only applicable if the importer followed the procedures set out in the Customs Rules 2017. This is not a condition set out in India's WTO Schedule. To the extent that the relevant customs notifications are amended to refer to products falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule: (i) the unconditional tariff treatment accorded to certain specified products continues to be in excess of the bound duty rate; and (ii) the conditional tariff treatment accorded to certain specified products continues to be in excess of the bound duty rate and subject to a condition that is not set forth in India's WTO Schedule.

7.4.5.5 Conclusion

7.410. Based on the foregoing, we find that India's tariff treatment of certain parts of telephone sets and other apparatus for transmission or reception of voice, images, or data, which at the time of the Panel's establishment fell within the scope of tariff items 8517.70.10 and 8517.70.90 of India's First Schedule and which presently fall within the scope of tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of India's First Schedule, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, because: (i) certain such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule; and (ii) certain such products are subject to ordinary customs duties in excess of those set forth in India's WTO Schedule, unless they satisfy certain conditions not set forth in that WTO Schedule.

7.411. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, or subject to terms, conditions or qualifications not set forth in the Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that India's tariff treatment of such products is less favourable than that provided in its WTO Schedule, and India is therefore acting inconsistently with Article II:1(a) of the GATT 1994.

7.4.6 Additional claim under Article II:1(a) of the GATT 1994

7.4.6.1 Main arguments of the parties

7.412. Japan submits that the challenged measures are inconsistent with Article II:1(a) in three "ways".[1019] Japan argues, first, that because "India's measures are inconsistent with Article II:1(b), first sentence, of the GATT 1994, they are also necessarily inconsistent with Article II:1(a) of the GATT 1994."[1020] Second, Japan argues that "India exempts some of the Products Concerned from the duties", that "[s]ome of the applicable exemptions are subject to conditions", and where "[t]hose conditions constitute additional terms and conditions not provided for in India's Schedule … [t]here

[1018] The relevant conditions for duty-free treatment are: (i) that the importer follow the procedures set out in the Customs Rules 2017; (ii) the importer furnish an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of the Customs, as the case may be, to the effect that imported goods would not be used in the manufacture of certain specified goods and in the event of failure to comply with that condition the importer would be liable to pay an amount equal to the difference between the duty leviable on the imported goods but for the exemption under this notification and that already paid at the time of importation; or (iii) that the imported product be used in the manufacture of static converters for automatic data processing machines and units thereof of tariff items 8443.31.00, 8443.32.00, 8471, 8517.62, 8528.42.00, 8528.49.00, 8528.52.00 or 8528.62.00 of India's First Schedule (as it existed at the time of the Panel's establishment). (See paras. 7.381-7.387 above).

[1019] Japan's second written submission, para. 17.

[1020] Japan's second written submission, para. 18. See also Japan's first written submission, para. 131.

is an inconsistency with Article II:1(b) and therefore also with Article II:1(a)."[1021] Third, Japan argues that "even where exemptions are not subject to any terms or conditions, those exemptions do not eliminate the inconsistency with Article II:1(a) as far as the exempted products are concerned … because of the potential of deleterious effects on competition arising from these exemptions."[1022] With respect to its third claim, Japan refers to the findings of the panels in *EC – IT Products* and argues that "a measure may be found to provide for less favourable treatment in a manner inconsistent with Article II:1(a) even in cases where there is no inconsistency with Article II:1(b)."[1023] Japan considers that the measures at issue in this dispute give rise "to a lack of foreseeability for traders operating in the marketplace, which has serious effects on competition".[1024] Japan submits that these "three claims under Article II:1(a) of the GATT 1994 are distinct and independent from each other", and that "while the first claim is consequential to the claims under Article II:1(b) of the GATT 1994, the remaining claims are independent from the claims under Article II:1(b)".[1025]

7.413. With respect to Japan's third claim, India argues that "Japan essentially requests an interpretation from the Panel, which would specify the manner in which India is required to meet its obligations under Article II of the GATT."[1026] India disagrees with such an interpretation because, in its view, "that would lead to the Panel adjudicating on the … efficacy of a particular legal system over all others and essentially prescribing a uniform legal system to be followed by all members of the WTO for implementing the commitments under Article II of the GATT."[1027] India submits that it, like other Members, "has the discretion … to effectuate its rights and obligations in the manner it deems fit".[1028] India also submits that none of the factual features identified by Japan as leading to lack of predictability resemble the factual features in *EC – IT Products*[1029], and emphasizes that India's exemptions "remain in place until there has been a modification by the Government of India".[1030] India considers that "the manner in which it implements its duty suspension regime to afford the relevant tariff treatment to the products corresponding to that provided in the 2007 Schedule under the GATT 1994 is different and distinct from the EU duty suspension regime, which was considered by the Panel in *EC – IT Products*".[1031] India further points out that the Appellate Body "recognized that ordinary customs dut[ies] are legitimate instruments to accomplish certain trade policies and can be applied through an act of a Member's legislature as well as the executive at any time".[1032]

7.4.6.2 Main arguments of the third parties

7.414. The United States submits that "if the Panel finds that the measures at issue impose duties in excess of the bound rates set forth in India's Schedule, then it should also find those measures inconsistent with Article II:1(a) on that basis, and need not reach Japan's other claim."[1033] The United States "agrees that Article II:1(a) does not require a Member to implement its tariff commitments in a specific manner."[1034] The United States further submits that "even if India's argument that exemptions are available for the product at issue is correct, it is not clear to what extent importers are able to identify and claim the applicable exemptions and in turn benefit from

[1021] Japan's first written submission, para. 132. See also Japan's second written submission, para. 21.
[1022] Japan's first written submission, para. 133. See also Japan's second written submission, paras. 19-20.
[1023] Japan's first written submission, para. 130.
[1024] Japan's second written submission, para. 19.
[1025] Japan's second written submission, para. 22.
[1026] India's first written submission, para. 256; second written submission, para. 133.
[1027] India's first written submission, para. 256; second written submission, para. 133.
[1028] India's second written submission, para. 133. India submits that "Japan cannot insist that the Panel dictate the manner or procedure through which India is required to apply a measure for providing certainty regarding tariff commitments under its Schedule as India submits that such an exercise is not contemplated and entirely outside the purview of Article II." (India's first written submission, para. 259).
[1029] India's second written submission, paras. 128-130 (referring to Panel Report, *Russia – Tariff Treatment*, para. 7.140 (referring, in turn, to Panel Reports, *EC – IT Products*, para. 7.761)).
[1030] India's second written submission, para. 132. See also India's first written submission, paras. 253 and 255.
[1031] India's first written submission, para. 248.
[1032] India's first written submission, para. 250 (referring to Appellate Body Reports, *India - Additional Import Duties*, para. 159 and *Chile – Price Band System*, para. 233).
[1033] United States' third-party submission, para. 56.
[1034] United States' third-party submission, para. 57.

the tariff treatment set forth in those exemptions."[1035] The United States "understands that importers bear certain responsibilities in import transactions; the ability to exercise those responsibilities would seem to depend on the availability of information regarding applicable requirements."[1036] The United States concludes that "[r]egardless of how a WTO Member chooses to implement its tariff commitments, Article II:1(a) obligates it to provide treatment 'no less favourable' than that set forth in its Schedule."[1037]

7.4.6.3 Panel's assessment

7.415. We note at the outset that Japan has identified three "claims" that it raises under Article II:1(a) of the GATT 1994. Its *first* claim is that of a "consequential" finding of inconsistency.[1038] Japan claims that because the challenged measure is inconsistent with Article II:1(b) of the GATT 1994, it is also inconsistent with Article II:1(a) of the GATT 1994. Japan's *second*[1039] claim is that certain conditions attached to duty exemptions in India's domestic customs regime "constitute additional terms and conditions not provided for in India's Schedule", which are inconsistent with "Article II:1(b) and therefore also with Article II:1(a)."[1040] Japan's *third* claim is that the measures at issue in this dispute give rise "to a lack of foreseeability for traders operating in the marketplace, which has serious effects on competition".[1041]

7.416. In sections 7.4.2 -7.4.5 above we have addressed Japan's arguments that India is acting inconsistently with Articles II:1(a) and (b) because: (i) India imposes customs duties in excess of those provided for in the Schedule; and (ii) certain products must satisfy conditions that are not set forth in India's WTO Schedule in order to receive the tariff treatment set forth in that Schedule. In our view, our assessment and our findings above comprehensively address both Japan's *first* and *second* claims that India is acting inconsistently with Article II:1(a).

7.417. We therefore turn to address Japan's *third* claim under Article II:1(a). In this respect, Japan argues that "even if specific Products Concerned are exempt from customs duties, there remains an inconsistency with Article II:1(a) of the GATT 1994 because those exemptions are subject to the possibility of repeal at any time, and thus create a lack of foreseeability for traders operating in the marketplace."[1042] Japan submits that: (i) Section 25 of the Customs Act 1962 authorizes India to apply, modify, or repeal the tariff exemptions of any product, at any time, on a discretionary basis; (ii) the notifications establishing tariff exemptions do not provide an explanation or objective criteria for the granting of exemptions; (iii) the notifications do not provide any information concerning conditions under which the exemptions may be terminated or modified; and (iv) there is no predictability as to how long and under what conditions the exemptions would continue to apply, and this lack of predictability has serious effects on competition in the Indian market.[1043]

7.418. Japan's third claim under Article II:1(a) relates to India's use of customs notifications issued pursuant to Section 25 of the Customs Act 1962 to exempt imported products from the standard duty rates set forth in the First Schedule.[1044] We understand that Japan considers that India is acting inconsistently with Article II:1(a) in situations where the products at issue receive unconditional duty-free treatment in accordance with the terms of India's WTO Schedule, because the Government of India may modify such tariff treatment at any point in time, through customs notifications issued pursuant to Section 25.

7.419. On its face, this claim appears to challenge India's system of exemptions through customs notifications, and in particular Section 25, pursuant to which those notifications are issued by the

[1035] United States' third-party submission, para. 57.
[1036] United States' third-party submission, para. 57.
[1037] United States' third-party submission, para. 57.
[1038] See Japan's response to Panel question No. 85, para. 99.
[1039] In its first written submission, Japan indicates that a *second* ground for finding that India is acting inconsistently with Article II:1(a) is that certain exemptions are subject to conditions not set forth in India's WTO Schedule. In its second written submission, Japan refers to this as its "third" claim of inconsistency with Article II:1(a). (See Japan's first written submission, para. 132; second written submission, para. 21). For the purpose of our analysis in this section, we refer to this claim as Japan's "second" claim.
[1040] Japan's first written submission, para. 132. See also Japan's second written submission, para. 21.
[1041] Japan's second written submission, para. 19.
[1042] Japan's response to Panel question No. 86, para. 101.
[1043] Japan's second written submission, para. 20.
[1044] See paras. 2.11 -2.13 above.

Government of India. We note in this regard that Japan's panel request, which delimits our terms of reference, does not raise any such claims regarding India's system of exemptions or notifications.

7.420. In response to a question from the Panel, Japan clarified, however, that it is not requesting us to find that Section 25 is "as such" inconsistent with Article II:1(a) of the GATT 1994.[1045] According to Japan, its reference to Section 25 is "simply in order to explain the legal grounds upon which the Government of India has authority to amend or repeal the exemptions at any time through customs notifications"[1046] and Section 25 is therefore "part of the evidence showing the lack of foreseeability and predictability, for the purposes of establishing that India's measures are inconsistent with Article II:1(a) of the GATT 1994 even with regard to those products that benefit from an exemption".[1047] In response to another question from the Panel, Japan confirms that the measures challenged under Japan's third claim under Article II:1(a) "are not different from the measures challenged under the other claims. They refer to the tariff treatment applied through the acts and notifications on imports of the Products Concerned".[1048] Japan further explains that "the exemptions granted to some of the Products Concerned do not eliminate the inconsistency with Article II:1(a) … Rather, those exemptions … generate 'deleterious effects on competition', because such exemptions can be enacted, … modified or revoked at any time by simple act of the Government of India, in contrast to the basic duty rate exceeding 0% which can only be changed through an act of the Parliament."[1049]

7.421. In light of Japan's clarifications regarding the nature of this claim, we proceed with our assessment by examining whether Japan has demonstrated that India acts inconsistently with Article II:1(a) when unconditionally exempting the products at issue from customs duties through customs notifications, on the ground that such exemptions lack foreseeability and predictability, thus affecting conditions of competition for traders.

7.422. We recall that Article II:1(a) requires that:

> Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

7.423. Article II:1(a) thus prohibits treatment less favourable than "that provided for *in … the appropriate Schedule*".[1050]

7.424. We note that Japan's claim of inconsistency concerns situations where India is according tariff treatment that is consistent with the tariff bindings and other obligations set forth in India's WTO Schedule (in other words, situations where India is acting consistently with Article II:1(b) of the GATT 1994). Indeed, Japan has not identified any terms or obligations set forth in India's WTO Schedule against which we can assess whether the challenged measures accord treatment less favourable. Rather, Japan's argument is premised on the notion that Article II:1(a) prohibits the application of tariff treatment through legal instruments that allegedly result in a lack of foreseeability or predictability, thus affecting conditions of competition for traders.[1051]

7.425. As a general matter, we see nothing in the text of Article II:1(a) suggesting that a finding of inconsistency with this provision is necessarily dependent on a finding of inconsistency with Article II:1(b). While Article II:1(b) refers specifically to the application of ordinary customs duties and other duties or charges, Article II:1(a) refers more broadly to the treatment of the commerce of the other Members provided for in the Schedule. Thus, Article II:1(a) may encapsulate obligations, as set forth in Members' Schedules, notwithstanding that such obligations are not implicated by Article II:1(b).

[1045] Japan's response to Panel question No. 86, para. 100.
[1046] Japan's response to Panel question No. 86, para. 103.
[1047] Japan's response to Panel question No. 86, para. 104.
[1048] Japan's response to Panel question No. 87, para. 106. See also Japan's response to Panel question No. 31(c)(iv), para. 15.
[1049] Japan's response to Panel question No. 87, paras. 107-108 (quoting Panel Reports, *EC – IT Products*, para. 7.761).
[1050] Emphasis added.
[1051] See e.g. Japan's closing statement at the second meeting of the Panel, para. 13.

7.426. Turning to the more specific question of whether Article II:1(a) prohibits tariff treatment resulting in a lack of foreseeability or predictability, we note that in support of its proposed interpretation of Article II:1(a), Japan refers *inter alia* to several findings by the panels in *EC – IT Products*. Specifically, Japan highlights the panels' findings that: (i) the term "less favourable treatment" in Article II:1(a) should be understood as referring to "conditions of competition"; (ii) "negotiated tariff concessions and the certainty thereof are important market access guarantees"; and (iii) in that dispute a duty suspension with an expiry clause did not eliminate the challenged measure's inconsistency with Article II:1(a) because there remained "the potential of deleterious effects on competition".[1052]

7.427. We do not disagree with Japan that the expression "treatment no less favourable" in Article II:1(a) can be interpreted as referring to conditions of competition. We observe, however, that the phrase "treatment no less favourable *than*"[1053] necessarily entails a comparison – in other words, for a measure to be inconsistent with Article II:1(a), there must be something against which the challenged treatment is *less* favourable. That comparator is explicitly identified in Article II:1(a) as the treatment "provided for in … the appropriate Schedule". As the panels in *EC – IT Products* found, "if a measure adversely affects the conditions of competition for a product *from that which it is entitled to enjoy under a Schedule*, this would be less favourable treatment under Article II:1(a)".[1054]

7.428. Thus, to succeed in its third claim under Article II:1(a), Japan would need to demonstrate that the lack of foreseeability or predictability allegedly attached to the use of customs notifications and exemptions by the Government of India results in treatment that is less favourable than the treatment set forth in India's WTO Schedule. In the context of this third claim, however, and in contrast to its other two claims under Article II:1(a), Japan has conducted no comparison of the tariff treatment at issue to India's WTO Schedule. While Japan makes a passing reference to India's WTO Schedule in the context of this claim[1055], Japan does not attempt to explain how the challenged measures – certain customs notifications unconditionally exempting the products at issue from customs duties – would adversely affect the conditions of competition of the products of Japan at issue "from that which [they are] entitled to enjoy under"[1056] India's WTO Schedule. Thus, Japan has not tried to show how such customs notifications have "the potential of deleterious effects on competition"[1057] for those products, as compared to the conditions of competition such products are entitled to under India's WTO Schedule.

7.429. We note Japan's arguments that customs notifications issued pursuant to Section 25 are discretionary, do not provide an explanation or objective criteria for the granting of exemptions, and do not provide any information concerning conditions under which the exemptions may be terminated or modified. Japan has not sought to demonstrate how any such aspects of the customs notifications exempting certain products at issue from duties are inconsistent with the obligations set forth in India's WTO Schedule.[1058] Mere statements to the effect that India's system of duty exemptions through customs notifications "lacks foreseeability or predictability" because the exemptions "do not provide any explanation or refer to any objective criteria" and may be modified or repealed "at any time"[1059], do not amount to a demonstration that the measures at issue accord

[1052] Japan's first written submission, para. 130 (referring to Panel Reports, *EC – IT Products*, paras. 7.756-7.757 and 7.761). Japan also refers to the Panel Report in *Argentina – Textiles and Apparel*, para. 6.46.

[1053] Emphasis added.

[1054] Panel Reports, *EC – IT Products*, para. 7.757. (emphasis added)

[1055] See Japan's second written submission, para. 19 ("even where specific Products Concerned are exempted from customs duties, India accords to such products a less favourable treatment than that provided for in India's Schedule, because such exemptions are subject to the possibility of repeal at any time and, therefore, there is uncertainty and unpredictability regarding the customs duties which will apply to the Products Concerned").

[1056] Panel Reports, *EC – IT Products*, para. 7.757. (emphasis added)

[1057] See Japan's first written submission, para. 133. See also Japan's second written submission, paras. 19-20.

[1058] For instance, in the context of its claim concerning the tariff treatment accorded by India to "telephones for other wireless networks, other than cellular networks" (see section 7.4.2 above), Japan states, without elaboration, that "even if [such products] are exempted from customs duties, India is still providing a less favourable treatment than what is provided for in its Schedule, which is inconsistent with its obligations under Article II:1(a) of the GATT 1994, because this exemption is subject to the possibility of repeal at any time and, therefore, there remains uncertainty and unpredictability regarding the customs duties which will apply to such product." (Japan's response to Panel question No. 73, para. 62).

[1059] Japan's second written submission, para. 20.

treatment less favourable than that provided for in India's WTO Schedule. There is therefore no baseline identified by Japan by which we can assess whether any lack of foreseeability or predictability allegedly attached to the measures at issue in this dispute constitutes treatment less favourable than that set forth in India's WTO Schedule, inconsistent with Article II:1(a).

7.430. With respect to Japan's references to the panels' findings in *EC – IT Products*, we note that the panels in *EC – IT Products* interpreted Article II:1(a) as requiring that products' conditions of competition are not adversely affected from that which they are entitled to under the relevant WTO Schedule.[1060] Moreover, the panels' findings of inconsistency with Article II:1(a) were based on the facts that: (i) "but for the duty suspension, the European Communities' measures [we]re inconsistent with its obligations under Article II:1(b)"; and (ii) the duty suspension at issue was scheduled to "automatically expire" on a specific date.[1061] As noted by India[1062], the factual circumstances of that dispute are distinct from the present circumstances, where the relevant customs notifications exempting the products at issue from customs duties contain no general expiry date that we can see, and none has been brought to our attention.[1063]

7.431. As a final observation on this issue, we note that Article II:1(a) does not, on its face, regulate the manner in which a Member implements the obligations under that provision. India has adopted a system whereby the executive may exempt certain products from ordinary customs duties through customs notifications and we see nothing in Article II:1(a) or in India's WTO Schedule that would prevent India from implementing its WTO obligations in that manner. In short, in the circumstances of this dispute, Japan has provided no argument or evidence demonstrating that India's use of customs notifications to apply the tariff treatment set forth in its WTO Schedule results in tariff treatment less favourable than that set forth in its WTO Schedule.[1064] There is therefore no basis for us to find that the manner in which India implements its WTO obligations under Article II:1(b) is inconsistent with Article II:1(a).[1065]

7.432. For these reasons we consider that Japan has failed to demonstrate that the measures at issue in this dispute impose treatment less favourable than that set forth in India's WTO Schedule, inconsistent with Article II:1(a) of the GATT 1994, on the ground that India's customs notifications lack foreseeability or predictability, thus affecting conditions of competition for traders.

[1060] See para. 7.427 above.

[1061] Panel Reports, *EC – IT Products*, para. 7.758.

[1062] India's first written submission, para. 248; second written submission, para. 130.

[1063] We note that where certain individual exemptions have indeed contained expiry dates, we have addressed these exemptions in the context of our analysis of the relevant tariff items above and found that the tariff treatment accorded to the relevant products is inconsistent with Articles II:1(a) and (b). Since that tariff treatment has already been found to be inconsistent with Articles II:1(a) and (b) we understand that it is not subject to this claim by Japan, which concerns situations where there is no inconsistency with Article II:1(b).

[1064] We note Japan's argument that "India has applied and progressively increased the customs duties applicable to the Products Concerned", and that "even after the Panel's establishment, India again increased the tariff rate on some of the Products Concerned through new customs notifications and the Finance Act, 2021". (Japan's opening statement at the second meeting of the Panel, para. 39). In particular, Japan argues that "India's application of customs duties in February (effective in April) 2021, through Customs Notification No. 3/2021, read in conjunction with its preceding notifications, on some products that had been exempted from all customs duties … shows the uncertainty and unpredictability for traders regarding customs duties in the Indian marketplace". (Japan's response to Panel question No. 29, para. 6. See also Japan's opening statement at the second meeting of the Panel, para. 39). Given that Japan refers to this Notification as evidence of "the application of customs duties" in excess of India's bound duty rates, it is not clear to us exactly how this Notification is relevant to Japan's third claim under Article II:1(a) which, as described above, concerns situations where India *exempts* products from customs duties. We also note that to the extent that Japan's arguments imply that India is acting inconsistently with Article II:1(a) simply because, in Japan's view, India frequently modifies its applied duty rates through customs notifications, we reiterate that Japan has not demonstrated that customs notifications imposing unconditional duty-free treatment, in accordance with India's WTO Schedule, constitutes treatment less favourable than that set forth in the Schedule.

[1065] Indeed, in light of our findings above that India is acting inconsistently with its obligations under Articles II:1(a) and (b), to the extent that India seeks to come into compliance with its obligations we understand that India could in fact rely on the same system of customs notifications which Japan challenges under this third claim. We see no basis in Article II:1(a) of the GATT 1994 to proscribe (or indeed prescribe) any particular mechanism for India to comply with its WTO obligations, at least to the extent that India accords treatment no less favourable than that set forth in its WTO Schedule.

7.4.7 Notification No. 69/2011

7.4.7.1 Main arguments of the parties

7.433. India argues that, pursuant to the India-Japan Comprehensive Economic Partnership Agreement (CEPA), the Government of India issued Notification No. 69/2011, which reduced the ordinary customs duty rate to "Nil" on all items covered under heading 8517 when originating in Japan.[1066] India submits that it "applies a 0% rate of ordinary customs duty on imports of all goods of Japan under heading 8517 and all its sub-headings and therefore, Japan's claim that India applies a rate of duty in excess of 0% at the 6-digit level for, *inter alia*, sub-headings 8517.12, 8517.61, 8517.62, and 8517.70 is incorrect."[1067] In India's view, therefore, assuming *arguendo* that India's WTO Schedule is not in error, the measures at issue identified by Japan are not inconsistent with Articles II:1(a) and (b) of the GATT 1994 "because they do not accord less favourable treatment to products of Japan than that provided for in India's [WTO Schedule]".[1068] For India, "Notification No. 69/2011 negates Japan's claims under Article II:1(a) and II:1(b) of the GATT 1994."[1069]

7.434. Japan responds that Notification No. 69/2011 does not eliminate the inconsistency of India's measures with Article II:1 of the GATT 1994.[1070] According to Japan, this is because: (i) "the India-Japan CEPA only covers products which qualify as being of Japanese origin under the rules of origin of the India–Japan CEPA, whereas India is required under Article II:1 of the GATT 1994 to provide duty-free treatment in accordance with India's Schedule to imports from all WTO Members"[1071]; (ii) "even for those Products Concerned which may benefit from duty-free treatment under the provisions of the India–Japan CEPA, this does not eliminate the inconsistency of India's measures with Articles II:1(a) and II:1(b) of the GATT 1994, because receiving duty-free treatment under the India–Japan CEPA is subject to fulfilment of additional conditions"[1072]; and (iii) "even for those Products Concerned which may benefit from duty-free treatment under the India–Japan CEPA, this does not eliminate the inconsistency of India's measures with Articles II:1(a) and (b) of the GATT 1994, since such duty-free treatment is conditioned on the existence of the India–Japan CEPA itself."[1073]

7.4.7.2 Main arguments of the third parties

7.435. Canada asserts that the obligations under Article II of the GATT 1994 exist independently of any preferential trade agreement (PTA).[1074] According to Canada, the concessions set out in Members' WTO Schedules establish the maximum most-favoured-nation (MFN) duties that may apply to WTO Members, and these rates are unaffected by particular PTAs.[1075] Canada submits that the concessions contained in India's WTO Schedule still apply to products that are not eligible for preferential treatment under the India-Japan CEPA and that the Panel remains able to assess whether products falling under the tariff items at issue have been subject to treatment inconsistent with Articles II:1(a) and (b) of the GATT 1994.[1076]

7.436. The European Union asserts that "tariff treatment pursuant to a [PTA] is relevant in principle in order to determine whether the overall tariff treatment accorded by … [a] Member to imports of products of other Members is consistent with the obligations imposed on the first Member by Article II:1 of the GATT 1994."[1077] The European Union notes, however, that "tariff concessions granted pursuant to a [PTA] are usually subject to specific conditions stipulated in that agreement", including those requiring compliance with certain rules of origin, and "those conditions are usually different and more demanding than those stipulated in Article II:1 of the GATT 1994 and each

[1066] India's first written submission, para. 204 (referring to Notification No. 69/2011, (Exhibit IND-41)).
[1067] India's first written submission, para. 205.
[1068] India's first written submission, paras. 13 and 206.
[1069] India's second written submission, para. 125.
[1070] Japan's second written submission, paras. 264 and 278.
[1071] Japan's second written submission, paras. 265-267.
[1072] Japan's second written submission, paras. 268-276.
[1073] Japan's second written submission, para. 277. See also Japan's response to Panel question No. 27, paras. 57-61.
[1074] Canada's third-party submission, para. 22.
[1075] Canada's third-party submission, para. 22.
[1076] Canada's third-party submission, para. 23.
[1077] European Union's third-party response to Panel question No. 13, para. 60.

Member's own GATT Schedule."[1078] According to the European Union, "to that extent, tariff treatment accorded pursuant to a [PTA] may not be sufficient to ensure compliance with Article II:1 of the GATT 1994 in respect of imports of the products of the other Member which is a party to that preferential agreement."[1079] The European Union argues that a Member is not precluded from bringing a claim under Article II:1 of the GATT 1994 concerning the tariff treatment accorded to imports of products of other Members that are not parties to the [PTA], and a Member may have a legitimate trade interest in doing so.[1080]

7.437. Korea notes that prior panels and the Appellate Body have acknowledged the limited relevance of bilateral agreements in the context of WTO disputes.[1081] Korea agrees with Japan that "the requirement of no 'less favourable treatment' under Article II:1(a) should be understood by reference to 'conditions of competition'".[1082] Korea stresses that tariff concessions are "legal instruments that describe the treatment a Member must provide to the trade in goods of other WTO Members" and are "one of the main WTO tools to ensure transparency, security, and predictability for world trade".[1083] In Korea's view, a Member would therefore "not be free from violation of Article II:1(a) even if it applies a NIL rate pursuant to its bilateral agreement while maintaining [a] WTO-inconsistent rate" as this would otherwise "impinge on a Member's right to transparency, security, and predictability of the trade in goods".[1084]

7.438. Chinese Taipei argues that "a Member must exempt ordinary customs duties in excess of the bound rates on 'products of territories of other [Members]'".[1085] Chinese Taipei emphasizes that "it is not enough for a Member to exempt duties on the products of the complaining Member."[1086] According to Chinese Taipei, "even assuming *arguendo* that India does accord duty-free treatment on imports of the products at issue from Japan, it would still apply duties on imports of products at issue from other Members, inconsistent with its obligation under Article II:1(b)."[1087]

7.439. The United States submits that, even if goods of Japan are entitled to duty-free treatment under India's preferential measures, this does not establish a defence to a breach of Article II:1(b).[1088] For the United States, "it does not follow from India's argument that a Member may determine for purposes of the tariff treatment provided for in its WTO Schedule that *some* goods of a Member will be afforded that treatment (such as goods that meet a preferential rule of origin under the terms of a non-WTO agreement), but not others, or that goods from *some* Members may qualify for the treatment provided in its Schedule, but not others."[1089]

7.4.7.3 Panel's assessment

7.440. In sections 7.4.2.5, 7.4.3.4, 7.4.4.4 and 7.4.5.5 above, we have found that by imposing ordinary customs duties on certain products in excess of those set forth and provided in its WTO Schedule, or subject to terms, conditions or qualifications not set forth in that Schedule, India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994. The question before us now is whether, as alleged by India, Notification No. 69/2011 brings India into compliance with its obligations under the aforementioned provisions.

7.441. Notification No. 69/2011 was put on the record of these proceedings by India to support its argument that it applies a 0% duty rates to the products at issue in this dispute. We note at the

[1078] European Union's third-party response to Panel question No. 13, para. 61.
[1079] European Union's third-party response to Panel question No. 13, para. 61.
[1080] European Union's third-party response to Panel question No. 13, para. 62.
[1081] Korea's third-party response to Panel question Nos. 13 and 14 (referring to Appellate Body Report, *EC – Poultry*, paras. 84-85; and Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 50).
[1082] Korea's third-party response to Panel question Nos. 13 and 14. See also Korea's third-party submission, para. 26.
[1083] Korea's third-party response to Panel question Nos. 13 and 14.
[1084] Korea's third-party response to Panel question Nos. 13 and 14.
[1085] Chinese Taipei's third-party response to Panel question No. 14, para. 14.
[1086] Chinese Taipei's third-party response to Panel question No. 14, para. 14.
[1087] Chinese Taipei's third-party response to Panel question No. 14, para. 14.
[1088] United States' third-party submission, para. 52 (referring to Panel Reports, *EC – IT Products*, para. 7.113).
[1089] United States' third-party submission, para. 54. (emphasis original) See also United States' third-party responses to Panel question Nos. 13 and 14, paras. 29-33; and third-party statement, paras. 10-12.

outset that we are not called upon to assess the consistency of Notification No. 69/2011 with India's WTO obligations.[1090] We also note that the parties do not dispute that Japan's claims are limited to the tariff treatment granted by India to "products of the territory of Japan" (hereinafter "products of Japan").[1091] We will therefore confine our analysis to the WTO-consistency of the tariff treatment accorded by India to products of Japan. In light of the foregoing, we will examine whether, pursuant to Notification No. 69/2011, India grants to the products of Japan at issue in this dispute unconditional duty-free treatment, as required by India's WTO Schedule.[1092]

7.442. Turning, first, to the content of Notification No. 69/2011, we note that it reads in relevant part:

> In the exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962, the Central Government, … hereby exempts goods … as specified in column (3) of the Table appended hereto and falling under the Chapter, Heading, Subheading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as specified in the corresponding entry on column (2) of the said Table, when imported from Japan, from so much of the duty of customs leviable thereon as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the aforesaid Table:
>
> Provided that the exemption shall be available only if the importer proves to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, that the goods in respect of which the benefit of this exemption is claimed are of the origin of Japan, in terms of rules as may be notified in this regard by the Central Government by publication in the official Gazette.

7.443. The relevant entry in the table appended to Notification No. 69/2011 is as follows.[1093]

S. No.	Chapter or heading or subheading or tariff item	Description	Rate
663	8517	All goods	0.0

7.444. India also refers to Notification No. 55/2011, which sets forth rules for the "Determination of Origin of Goods" under the CEPA (hereinafter "CEPA Rules 2011").[1094] India submits that "if the products are classified under tariff heading 8517 and are determined as originating from Japan or products of Japan in accordance with CEPA Rules 2011, they are eligible for the treatment provided for" in Notification No. 69/2011.[1095] We observe that Rule 3 ("Originating goods") of CEPA Rules 2011 provides, *inter alia*, that "goods imported by a Party … shall be deemed to be originating and eligible for preferential tariff treatment if … the goods are wholly obtained or produced entirely in the Party, as provided for in [R]ule 4."[1096] When goods are "not wholly obtained or produced in the Party", they must meet certain requirements in terms of value content and change in tariff item, as provided for in Rules 5 and 6.[1097]

7.445. Our review of the evidence placed on the record by India shows that Notification No. 69/2011 "exempts" from customs duties "goods … when imported from Japan", including goods falling under

[1090] As noted by India, Notification No. 69/2011 is not a measure at issue in this dispute. (India's second written submission, para. 124).

[1091] India submits that Japan's claims are limited to products and commerce of Japan, and posits that the Panel's terms of reference "do not allow the Panel to expand its analysis … *viz-a-viz* all WTO Members". (India's response to Panel question No. 89, para. 77). Japan agrees that "[a]s stated in Japan's request for the establishment of a panel, Japan's claims … are limited to the tariff treatment accorded to Japan's commerce and the products of the territory of Japan". (Japan's response to Panel question No. 88, para. 115). We note that, when setting out the legal basis for its complaint under Articles II:1(a) and (b), Japan's panel request refers to "Japan's commerce" and "products of the territory of Japan" respectively. (Japan's panel request, p. 5).

[1092] See sections 7.4.2.2, 7.4.3.1, 7.4.4.1, and 7.4.5.2 above.

[1093] Notification No. 69/2011, (Exhibit IND-41).

[1094] Notification No. 55/2011, (Exhibit IND-42), Rule 1.

[1095] See India's first written submission, para. 241.

[1096] Notification No. 55/2011, (Exhibit IND-42), Rule 3. Rule 4 defines which goods shall be considered as being "wholly obtained or produced in a Party" for the purpose of Rule 3.

[1097] Notification No. 55/2011, (Exhibit IND-42), Rules 3, 5, and 6. Rule 5 sets forth the conditions that "goods produced using non-originating materials" must satisfy to qualify as "originating goods" of a Party. Rule 6 provides for a formula for calculating the qualifying value content of goods.

heading 8517. In order to benefit from the exemption provided for in that Notification, the importer must prove that "the goods in respect of which the benefit of this exemption is claimed are of the origin of Japan." To that end, the importer must show that the goods comply with the origin requirements set forth in CEPA Rules 2011. Thus, pursuant to Notification No. 69/2011, products of Japan falling under the tariff items at issue in this dispute are subject to a preferential 0% duty rate provided that they comply with the origin requirements set forth in CEPA Rules 2011.

7.446. We recall that the relevant MFN tariff treatment set forth in India's WTO Schedule for the products falling under the tariff items at issue in this dispute is 0%, with no terms, conditions, or qualifications attached.[1098] Pursuant to Articles II:1(a) and (b), India is therefore obligated to provide, with respect to all WTO Members, unconditional duty-free treatment to all products covered by the tariff items at issue.[1099] Accordingly, for India to establish that it is acting consistently with its WTO tariff commitments, India must establish that, pursuant to Notification No. 69/2011, it accords unconditional duty-free treatment to all products of Japan falling under the tariff items at issue.

7.447. As noted above, Notification No. 69/2011 grants a 0% duty rate to the products of Japan falling under the tariff items at issue provided that such products comply with the origin requirements set forth in CEPA Rules 2011. We note that, according to India, "the determination of origin is inbuilt into the phrase 'products of territories of other contracting parties' for which the countries are at liberty to design their own specific laws. Such origin-related laws and regulations do not constitute additional terms and conditions which must be recorded in the 2007 Schedule."[1100] For India, "[t]he equivalency of or the effect of difference between (a) origin criteria inbuilt into Article II:1(a) and II:1(b) of GATT; and (b) origin criteria spelt out in [the CEPA] could be a subject matter of provisions contained elsewhere in the GATT 1994. Japan has not raised such claims in the present dispute."[1101] Japan "fails to see the basis of India's arguments that the origin-related laws do not constitute terms and conditions" and submits that "even if origin-related laws are inbuilt into the phrase 'products of territories of other contracting parties' and do not constitute 'terms' or 'conditions' within the meaning of Article II:1(b), first sentence of the GATT 1994, which Japan contests, this only applies to non-preferential rules of origin."[1102]

7.448. We understand that, for India, origin requirements, such as those set forth in CEPA Rules 2011, are "inbuilt" in the phrase "products of territories of other contracting parties" in Article II:1(b) and, therefore, do not constitute "terms, conditions or qualifications" within the meaning of that provision. Japan disputes India's proposed interpretation. The disagreement between the parties appears to rest on whether origin requirements are encompassed in the phrase "products of territories of other Members" in Article II:1(b), first sentence.

7.449. We note that it is uncontested that the origin requirements set forth in CEPA Rules 2011 constitute preferential rules of origin, and that India has no non-preferential rules of origin in place for imports.[1103] Keeping in mind the MFN nature of the obligations contained in Articles II:1(a) and (b), we do not see how the phrase "products of territories of other Members" in Article II:1(b) can encompass preferential rules of origin such as those applied by India pursuant to CEPA Rules 2011. In other words, even assuming that *non-preferential* rules of origin are "inbuilt" in the phrase

[1098] See sections 7.4.2.2, 7.4.3.1, 7.4.4.1, and 7.4.5.2 above.

[1099] See section 7.2 above.

[1100] India's first written submission, para. 240. See also India's response to Panel question No. 57, para. 60.

[1101] India's second written submission, para. 126.

[1102] Japan's second written submission, para. 273.

[1103] India clarifies that:

> India has no non-preferential rules of origin in place for imports entering the country. Ordinarily, the country of origin is determined by the certificate of origin issued by the authorities of the exporting country under the relevant rules of origin. In this context, India has Preferential Rules of Origin for preferential imports under FTAs or under other preferential schemes like Duty Free Tariff Preference (DFTP) scheme provided for the Least Developed Countries (LDCs). However, as of now India has no Preferential Rules of Origin in place for imports.

(India's response to Panel question No. 89, para. 73)

According to Japan, "no specific non-preferential rules of origin apply in India" but India does use preferential rules of origin in its free trade agreements, such as the CEPA. Japan also notes that India has notified the Committee on Rules of Origin of the WTO that India does not have non-preferential rules of origin. (Japan's response to Panel question No. 89, paras. 117-119 (referring to G/RO/N/1, 9 May 1995; India's Trade Policy Review, WT/TPR/S/403, section 3.1.2)).

"products of territories of other Members" in Article II:1(b) – an issue which is not before us in this dispute – nothing in the text of this provision indicates that *preferential* rules of origin, such as those contained in CEPA Rules 2011, are "inbuilt" in that phrase. We consider, therefore, that the origin requirements set forth in CEPA Rules 2011 are not encompassed in the phrase "products of territories of other Members" in Article II:1(b), first sentence. To the extent that, pursuant to Notification No. 69/2011, products of Japan are required to comply with origin requirements set forth in CEPA Rules 2011 to be exempted from customs duty, it follows that Notification No. 69/2011 does not accord unconditional duty-free treatment to products of Japan falling under the tariff items at issue in this dispute.

7.450. As to India's argument that Japan has not raised a "claim" regarding the "equivalency of or the effect of difference" between so-called "in-built" origin criteria in Article II:1 of the GATT 1994 and the origin rules applied under the CEPA, we agree that Japan has not raised a claim regarding Notification No. 69/2011. Indeed, Japan's arguments concerning Notification No. 69/2011 are merely in response to India's arguments that Notification No. 69/2011 "negates" Japan's claim.[1104] In our view, it is insufficient for India, as the respondent seeking to demonstrate that the measures at issue are not WTO-inconsistent, to merely identify the existence of a legal instrument and assert that the complainant, who based no claims on that legal instrument, has failed to demonstrate that that instrument is WTO-inconsistent. Thus, we do not consider that Japan's alleged failure to demonstrate any "distinction" between the CEPA Rules 2011 and the phrase "products of territories of other Members" in Article II:1(b) means that Japan has failed to substantiate its burden of proof under Articles II:1(a) and (b) of the GATT 1994 with respect to the challenged measures.

7.451. We recall that, pursuant to Articles II:1(a) and (b), India has the obligation to grant unconditional duty-free treatment on an MFN basis to all products covered by the tariff items at issue, including all such products of Japan, as set forth in its WTO Schedule. We have found that the origin requirements set forth in CEPA Rules 2011 constitute preferential rules of origin and are not "inbuilt" in the phrase "products of territories of other Members" in Article II:1(b), first sentence, of the GATT 1994. To the extent that the products of Japan falling under the tariff items at issue are required to comply with such origin requirements to be exempted from customs duties, those products of Japan are not accorded unconditional duty-free treatment.

7.452. Accordingly, we find that India has not established that, pursuant to Notification No. 69/2011, it is acting consistently with its WTO obligations under Articles II:1(a) and (b), because Notification No. 69/2011 does not grant unconditional duty-free treatment to all products of Japan at issue in this dispute.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude as follows:

a. In respect of India's assertions concerning its WTO tariff commitments, we find that:

   i. The ITA is not a covered agreement within the meaning of the WTO Agreement and the DSU, does not set forth India's legal obligations at issue in this dispute, and does not otherwise limit the scope of India's tariff commitments as set forth in its WTO Schedule;

   ii. The circumstances of this case do not satisfy the substantive requirements of Article 48 of the Vienna Convention, and we therefore decline to read aspects of India's WTO Schedule as invalid; and

   iii. India's request for findings that Japan acted inconsistently with the 1980 Decision is not within our terms of reference, and we consequently do not have the legal mandate to make such findings.

b. In respect of Japan's claims that India's tariff treatment of certain products is inconsistent with Articles II:1(a) and (b) of the GATT 1994, we find that:

[1104] India's second written submission, para. 125.

i. India's tariff treatment of products falling within the scope of tariff items 8517.12.11 and 8517.12.19 of India's First Schedule at the time of the Panel's establishment, and which presently fall within the scope of tariff items 8517.13.00 and 8517.14.00 of India's First Schedule, is inconsistent with Articles II:1(a) and (b) of the GATT 1994;

ii. India's tariff treatment of products falling within the scope of tariff item 8517.61.00 of India's First Schedule is inconsistent with Articles II:1(a) and (b) of the GATT 1994;

iii. India's tariff treatment of certain products falling within the scope of tariff item 8517.62.90 of India's First Schedule is inconsistent with Articles II:1(a) and (b) of the GATT 1994;

iv. India's tariff treatment of certain products falling within the scope of tariff items 8517.70.10 and 8517.70.90 of India's First Schedule at the time of the Panel's establishment, and which presently fall within the scope of tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of India's First Schedule, is inconsistent with Articles II:1(a) and (b) of the GATT 1994;

v. India's tariff treatment of products classified under tariff item 8517.12.90 of India's First Schedule at the time of the Panel's establishment, and which presently fall within the scope of tariff item 8517.14.00 is consistent with Articles II:1(a) and (b) of the GATT 1994;

vi. Japan has failed to demonstrate that, even where India accords products at issue treatment that is consistent with Article II:1(b) of the GATT 1994, the measures at issue in this dispute accord treatment less favourable than that set forth in India's WTO Schedule, inconsistent with Article II:1(a) of the GATT 1994, on the ground that India's customs notifications lack foreseeability or predictability, thus affecting conditions of competition for traders; and

vii. India has failed to establish that Notification No. 69/2011 brings India into compliance with its WTO obligations pursuant to Articles II:1(a) and (b) of the GATT 1994.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with Articles II:1(a) and (b) of the GATT 1994, they have nullified or impaired benefits accruing to Japan under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that India bring its measures into conformity with its obligations under Articles II:1(a) and (b) of the GATT 1994.