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## INDIA – TARIFF TREATMENT ON CERTAIN GOODS

### REPORT OF THE PANEL

#### *Addendum*

This *addendum* contains Annexes A to E to the Final Report of the Panel to be found in document WT/DS584/R.

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**ANNEX A**

## WORKING PROCEDURES OF THE PANEL

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## **ANNEX A-1**

### **WORKING PROCEDURES OF THE PANEL**

#### **Adopted on 4 December 2020 and revised on 27 January 2021**

#### **General**

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.  
  
(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

#### **Confidentiality**

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.  
  
(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.  
  
(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than five working days after the relevant due dates for submitting integrated executive summaries set forth in the timetable adopted by the Panel, unless a different due date is granted by the Panel upon a showing of good cause.  
  
(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

#### **Submissions**

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.  
  
(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.  
  
(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.  
  
(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

#### **Preliminary rulings**

4. (1) If India considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written

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submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

- a. India shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Japan shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
- b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
- c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
- d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel shall provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

### **Evidence**

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.  
  
(2) If any new evidence has been admitted pursuant to an additional exception granted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or portion thereof into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.  
  
(2) Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Upon a showing of good cause, objections may also be raised at later stages of the proceedings. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Japan should be numbered JPN-1, JPN-2, etc. Exhibits submitted by India should be numbered IND-1, IND-2, etc. If the last exhibit in connection with the first submission was numbered JPN-5, the first exhibit in connection with the next submission thus would be numbered JPN-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions. If there are no new exhibits attached to such submissions, oral statements, and responses to questions, there is no need to provide an updated list of exhibits.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

(5) Any publicly available WTO document that is relied on by either party need not be submitted as an exhibit, provided that the party indicates the document's official WTO document symbol. Such publicly available WTO documents shall be deemed to form part of the official record.

### **Editorial Guide**

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

### **Questions**

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

### **Substantive meetings**

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Japan to make an opening statement to present its case first. Subsequently, the Panel shall invite India to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional

written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it shall inform the Panel and the other party at least five working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Japan presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party shall also submit a final written version of any prepared provisional written closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel.

16. The Panel will advise on the conduct of the second substantive meeting in due course, after having consulted with the parties.

### **Third parties**

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose. A joint third-party session will be held for the third parties in DS582, DS584 and DS588.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

21. The third-party session shall be conducted as follows:
- a. All parties and third parties may be present during the entirety of this session.
  - b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.
  - c. Each third party should limit the duration of its statement to 15 minutes and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it shall inform the Panel and the parties at least five working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
  - d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.
  - e. The Panel may subsequently pose questions to any third party.
  - f. Following the third-party session:
    - i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
    - ii. Each party may send in writing, within the timeframe to be established by the Panel, any questions to one or more third parties to which it wishes to receive a response in writing.
    - iii. The Panel may send in writing, within the timeframe to be established by the Panel, any questions to one or more third parties to which it wishes to receive a response in writing.
    - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel.

21bis. In addition to the submissions referred to in Article 10.3 of the DSU, the European Union and Chinese Taipei shall also be granted access to the parties' written rebuttals before the second substantive meeting, the final written versions of the parties' opening and closing statements at the first and second substantive meetings, each party's responses to questions from the Panel and to any questions posed by the other party, and each party's comments on the other party's responses to those questions following the second substantive meeting.

### **Descriptive part and executive summaries**

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit two integrated executive summaries. The first integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first written submission, its first oral statement(s), and may also include a summary of its responses to questions following the first substantive meeting. The second integrated summary shall summarize its second written submission, its second oral statement(s), and may also include a summary of its responses to the second set of questions and comments thereon following the second substantive



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meeting. The timing of the submission of this integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. Each integrated executive summary shall be limited to 15 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline is not specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

### **Interim review**

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. Each party may submit written comments on the other party's written request for review. Such written comments shall be limited to the other party's written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

### **Interim and Final Report**

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

- a. Each party and third party shall submit all documents to the Panel by sending an email to the DS Registry by 5:00 p.m. (Geneva time) on the due dates established by the Panel, attaching an electronic copy of all such documents, preferably in both Microsoft Word and PDF format. The electronic version emailed to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. The email to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the exhibits to one email, the submitting party or third party shall provide the DS Registry with one electronic copy of the exhibits on a USB key, CD-ROM or DVD.<sup>1</sup>
- b. Each party and third party shall also submit one paper copy of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047) by 5.00 p.m. (Geneva time) the next working day.<sup>2</sup> The DS Registrar shall stamp the documents with the date and time of submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only (by

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<sup>1</sup> If, for any reason, the DS Registry is unavailable for the service of documents, the submitting party or third party shall file the exhibits using the DORA, at <https://dora.wto.org>.

<sup>2</sup> If, for any reason, the DS Registry office is unavailable for the service of paper copies, the "next working day" shall mean the day that the Panel determines for such filing once normal operations have resumed.

email or on a USB key, CD-ROM or DVD). In this case, the cover page of the exhibit shall indicate that the exhibit is only available in electronic format.

- c. In addition, each party and third party is invited to submit all documents through the Disputes On-Line Registry Application (DORA), at <https://dora.wto.org>, within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DORA, they are invited to contact the DS Registry at [DSRegistry@wto.org](mailto:DSRegistry@wto.org).
- d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each party shall also serve directly on the European Union and Chinese Taipei the documents referred to in paragraph 21bis. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has requested a paper copy at least five working days before their filing. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.
- e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- f. As a general rule, all communications from the Panel to the parties and third parties will be via email and uploaded in the DORA. The Panel shall provide the parties with a paper copy of the Interim Report and the Final Report in addition to transmitting such reports by email.

#### **Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected and should be made promptly following the filing of the submission in question.

## **ANNEX A-2**

### **ADDITIONAL WORKING PROCEDURES OF THE PANEL**

*Concerning meetings with remote participation for the first substantive meeting*

**Adopted on 20 September 2021**

#### **General**

1. These additional Working Procedures set out terms for holding meetings with the Panel in which participants may attend by remote means.

#### **Definitions**

2. For the purposes of these Procedures:

**"Remote participant"** means any person participating in the meeting with the Panel by remote means. This includes members of the parties' and third parties' delegations, experts appointed by the Panel, and interpreters.

**"Platform"** means the Cisco Webex software through which remote participants will participate in the meeting with the Panel.

**"Host"** means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

#### **Equipment and technical requirements**

3. Each party and third party shall ensure that remote participants of its delegation join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.
4. All technical questions, including the minimum equipment and technical requirements for the usage of the platform, will be addressed in the advance testing sessions between the host and the remote participants provided for in paragraph 7 below.

#### **Technical support**

5. (1) The host will assist remote participants in planning, testing and conducting the virtual meeting and provide remote participants with technical support pertaining to the platform and its functionality.  
  
(2) In order to guarantee the timely provision of technical support, the host will prioritize assisting those remote participants designated as main speakers on the delegations' lists.  
  
(3) In light of the limitations of remote assistance, each party and third party shall be responsible for its own technical support pertaining to its computer systems and networks.

## **Pre-meeting**

### Registration

6. Each party and third party shall provide to the Panel the list of the members of its delegation on a dedicated form provided by the Panel Secretary no later than 5:00 p.m. (Geneva time) on 22 September 2021.

### Advance testing

7. Remote participants will hold two testing sessions with the Secretariat before the meeting with the Panel, on dates to be established in due course. One of these sessions will be a joint session with all remote participants in the meeting, including the panelists joining remotely. Such sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Remote participants should make themselves available for the test sessions.

## **Confidentiality and security**

8. The meeting shall be confidential.
9. All remote participants shall follow any security and confidentiality protocols and guidelines the Panel may provide in advance of the meeting.
10. Remote participants shall connect to the virtual meeting through a secure internet connection and shall avoid the use of an open or public internet connection.
11. The parties and third parties are strictly prohibited from:
  - (1) Recording, via audio, video or screenshot, the virtual meeting or any part thereof; and
  - (2) Permitting any non-participant to record, via audio, video or screenshot, the virtual meeting or any part thereof.
12. The Panel will record the meeting and keep an official copy of it for the Panel's record. Such recording will include video and audio footage transmitted through the platform.

## **Conduct of the meeting**

### Access to the virtual meeting room

13. (1) The host will invite remote participants via email to join the virtual meeting room on the platform.
  - (2) For security reasons, access to the virtual meeting will be password-protected and limited to members of the delegations, who shall not forward or share the virtual meeting link or password.
  - (3) Each party and third party shall ensure that only members of its delegation join the virtual meeting room.

### Advance log-on

14. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.
  - (2) Remote participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

Document sharing

15. (1) Before each party or third-party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through the designated emailing list.

(2) Any participant wishing to share a document with the other participants during the meeting will do so through the designated emailing list, before first referring to such document at the meeting.

Pauses for internal coordination and consultation

16. The Panel may briefly pause a session at any time, at its own initiative or upon request by a party, to enable any necessary internal coordination and consultation within a party's delegation and/or among the panelists.

Technical issues

17. (1) Each party and third-party shall designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The host can be contacted via the platform, by sending an email to \*\*\*\*.\*\*\*@wto.org, or by calling at +4122 \*\*\* \*\*\*,

(2) Should any technical interruptions occur, the host will directly coordinate with the affected participants to resolve the issue. After consulting the parties, the Panel may pause the session until the technical issue is resolved or may continue the proceedings with those participants that continue to be connected.

**Relation with the Working Procedures**

18. These additional Working Procedures complement the Working Procedures of the Panel adopted on 4 December 2020 and revised on 27 January and 12 April 2021, and prevail over the latter to the extent of any conflict.

### **ANNEX A-3**

#### **ADDITIONAL WORKING PROCEDURES OF THE PANEL**

*Concerning meetings with remote participation for the second substantive meeting*

**Adopted on 18 March 2022**

#### **General**

1. These additional Working Procedures set out terms for holding meetings with the Panel in which participants may attend by remote means.

#### **Definitions**

2. For the purposes of these Procedures:

**"Remote participant"** means any person participating in the meeting with the Panel by remote means. This includes members of the parties' delegations, experts appointed by the Panel, and interpreters.

**"Platform"** means the Cisco Webex software through which remote participants will participate in the meeting with the Panel.

**"Host"** means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

#### **Equipment and technical requirements**

3. Each party shall ensure that remote participants of its delegation join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.
4. All technical questions, including the minimum equipment and technical requirements for the usage of the platform, will be addressed in the advance testing sessions between the host and the remote participants provided for in paragraph 7 below.

#### **Technical support**

5. (1) The host will assist remote participants in planning, testing and conducting the virtual meeting and provide remote participants with technical support pertaining to the platform and its functionality.  
  
(2) In order to guarantee the timely provision of technical support, the host will prioritize assisting those remote participants designated as main speakers on the delegations' lists.  
  
(3) In light of the limitations of remote assistance, each party shall be responsible for its own technical support pertaining to its computer systems and networks.

## **Pre-meeting**

### Registration

6. Each party shall provide to the Panel the list of the members of its delegation on a dedicated form provided by the Panel Secretary no later than 5:00 p.m. (Geneva time) on 21 March 2022.

### Advance testing

7. Remote participants will hold two testing sessions with the Secretariat before the meeting with the Panel, on dates to be established in due course. One of these sessions will be a joint session with all remote participants in the meeting, including the panelists joining remotely. Such sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Remote participants should make themselves available for the test sessions.

## **Confidentiality and security**

8. The meeting shall be confidential.
9. All remote participants shall follow any security and confidentiality protocols and guidelines the Panel may provide in advance of the meeting.
10. Remote participants shall connect to the virtual meeting through a secure internet connection and shall avoid the use of an open or public internet connection.
11. The parties are strictly prohibited from:
  - (1) Recording, via audio, video or screenshot, the virtual meeting or any part thereof; and
  - (2) Permitting any non-participant to record, via audio, video or screenshot, the virtual meeting or any part thereof.
12. The Panel will record the meeting and keep an official copy of it for the Panel's record. Such recording will include video and audio footage transmitted through the platform.

## **Conduct of the meeting**

### Access to the virtual meeting room

13. (1) The host will invite remote participants via email to join the virtual meeting room on the platform.
  - (2) For security reasons, access to the virtual meeting will be password-protected and limited to members of the delegations, who shall not forward or share the virtual meeting link or password.
  - (3) Each party and shall ensure that only members of its delegation join the virtual meeting room.

### Advance log-on

14. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.
  - (2) Remote participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

Document sharing

15. (1) Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through the designated emailing list.

(2) Any participant wishing to share a document with the other participants during the meeting will do so through the designated emailing list, before first referring to such document at the meeting.

Pauses for internal coordination and consultation

16. The Panel may briefly pause a session at any time, at its own initiative or upon request by a party, to enable any necessary internal coordination and consultation within a party's delegation and/or among the panelists.

Technical issues

17. (1) Each party shall designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The host can be contacted via the platform, by sending an email to \*\*\*\*.\*\*\*\*@wto.org, or by calling at +41 22 \*\*\* \*\*\*\*.

(2) Should any technical interruptions occur, the host will directly coordinate with the affected participants to resolve the issue. After consulting the parties, the Panel may pause the session until the technical issue is resolved or may continue the proceedings with those participants that continue to be connected.

**Relation with the Working Procedures**

18. These additional Working Procedures complement the Working Procedures of the Panel adopted on 4 December 2020 and revised on 27 January and 12 April 2021, as well as the Additional Working Procedures concerning meetings with remote participation, adopted on 20 September 2021. The current additional Working Procedures prevail over the aforementioned documents to the extent of any conflict.

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**ANNEX B**

ARGUMENTS OF THE PARTIES

*JAPAN*

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*INDIA*

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**ANNEX B-1****FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. Introduction**

1. This dispute concerns the imposition of customs duties on certain goods by India, in breach of its obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Japan submits that India is imposing customs duties in a manner inconsistent with its obligations under Articles II:1(a) and (b) of the GATT 1994 upon the products which fall under tariff items 8517 12 11, 8517 12 19, 8517 12 90, 8517 61 00, 8517 62 90, 8517 70 10, and 8517 70 90 ("Products Concerned") of the First Schedule to the Customs Tariff Act, 1975, No. 51 of 1975 of India ("First Schedule").

**II. India's Measures at Issue Are Inconsistent with Articles II:1(a) and (b) of the GATT 1994**

2. India's measures are inconsistent with Articles II:1(a) and (b) of the GATT 1994 because they subject the Products Concerned to duties in excess of those provided for in India's Schedule of Concessions and Commitments annexed to the GATT 1994 ("India's Schedule") and provide them with a treatment that is less favourable than that which is provided for in India's Schedule.

**A. India's Measures Are Inconsistent with Article II:1(b), First Sentence, of the GATT 1994****1. Introduction**

3. Article II:1(b), first sentence, of the GATT 1994 prohibits the levying of ordinary customs duties in excess of the ceiling set forth in the schedule of concessions ("Schedule") of the importing member of the World Trade Organization ("WTO" and "WTO Member") at issue. In bringing a claim based on Article II:1(b), first sentence, of the GATT 1994, Japan (i) identifies the treatment accorded in India's Schedule to the Products Concerned, and then (ii) shows that India imposes customs duties in excess of those provided for in India's Schedule.

**2. The Treatment Provided for in India's Schedule**

4. The relevant Schedule in this case is India's Schedule which came into effect on 12 August 2015. As explicitly indicated in India's Schedule, India's Schedule is based on the 2007 edition ("HS 2007") of the nomenclature established under the International Convention on the Harmonized Commodity Description and Coding System ("HS nomenclature"). India's Schedule includes tariff commitments of 0% at the 8-digit level for, inter alia, tariff lines 8517.12.00, 8517.61.00, 8517.62.00, and 8517.70.00.

**3. India Imposes Customs Duties in Excess of Those Provided for in India's Schedule**

5. The Products Concerned fall under the relevant tariff lines in India's Schedules and India imposes customs duties in excess of the applicable bound rate of 0% as follows.

*a. 8517 12 11, 8517 12 19, and 8517 12 90 Products*

6. The description of the 8-digit tariff line 8517.12.00 of India's Schedule exactly matches the description of the 6-digit subheading 8517 12 of the First Schedule. In particular, both tariff line 8517.12.00 of India's Schedule and subheading 8517 12 of the First Schedule are described as "Telephones for cellular networks or for other wireless networks". Accordingly, it is clear that the 6-digit subheading 8517 12 of the First Schedule is covered by tariff line 8517.12.00 of India's Schedule.

7. The 6-digit subheading 8517 12 of the First Schedule is further broken down into the 8-digit tariff items 8517 12 11, 8517 12 19, and 8517 12 90 of the First Schedule, which means that these 8-digit tariff items fall under tariff line 8517.12.00 of India's Schedule. Therefore, the products falling under tariff items 8517 12 11, 8517 12 19, and 8517 12 90 of the First Schedule ("8517 12 11, 8517 12 19, and 8517 12 90 Products") fall under tariff line 8517.12.00 of India's Schedule, the bound rate of which is 0%.

8. However, pursuant to various legal instruments (e.g. Customs Notification No. 56/2017, Customs Notification No. 91/2017, the Bill No. 4 of 2018 ("Finance Bill, 2018"), the Finance Act, 2018, No. 13 of 2018 ("Finance Act, 2018"), the Bill No. 55 of 2019, and the Finance (No. 2) Act, 2019, No. 23 of 2019), India has been imposing a 20% customs duty on imports of the 8517 12 11, 8517 12 19, and 8517 12 90 Products.

9. Accordingly, India's customs duty imposed on imports of the 8517 12 11, 8517 12 19, and 8517 12 90 Products manifestly exceeds the bound rate of 0% specified in India's Schedule.

*b. 8517 61 00 Products*

10. The structure of the division within the 4-digit heading 8517 of the First Schedule that is described as "Other apparatus for 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)" is the same as that of the 5-digit subgroup 8517.6 of India's Schedule. Namely, there are three subgroups in the abovementioned division in the First Schedule: (i) tariff item 8517 61 00 described as "Base stations", which corresponds to tariff line 8517.61.00 in India's Schedule, (ii) subheading 8517 62, described as "Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus", which corresponds to tariff line 8517.62.00 in India's Schedule, and (iii) subheading 8517 69, which is described as "Other" and corresponds to tariff line 8517.69.00 in India's Schedule.

11. Given this identity of the structure of the divisions of "Other apparatus for 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)", as well as the identity of the description of tariff item 8517 61 00 of the First Schedule and tariff line 8517.61.00 of India's Schedule ("Base stations", in both the First Schedule and India's Schedule), it is clear that the products falling under tariff item 8517 61 00 of the First Schedule ("8517 61 00 Products") also fall under tariff line 8517.61.00 of India's Schedule, the bound rate of which is 0%.

12. However, pursuant to various legal instruments (e.g. Customs Notification No. 56/2017 and Customs Notification No. 74/2018), India has been imposing a 20% customs duty on imports of the 8517 61 00 Products.

13. Accordingly, India's customs duty imposed on imports of the 8517 61 00 Products manifestly exceeds the bound rate of 0% specified in India's Schedule.

*c. 8517 62 90 Products*

14. The description of the 8-digit tariff line 8517.62.00 of India's Schedule, matches the description of the 6-digit subheading 8517 62 of the First Schedule. In particular, both tariff line 8517.62.00 of India's Schedule and subheading 8517 62 of the First Schedule are described as "Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus". Accordingly, it is clear that the products which fall under subheading 8517 62 of the First Schedule fall under tariff line 8517.62.00 of India's Schedule.

15. Therefore, the products included in tariff item 8517 62 90 of the First Schedule ("8517 62 90 Products"), described as "Other", which is a sub-category of subheading 8517 62 of the First Schedule, are also among the products that fall under tariff line 8517.62.00 of India's Schedule, the bound rate of which is 0%.

16. However, India has been imposing a 10% customs duty on the imports of products falling under tariff item 8517 62 90 that are covered by the exemption from the duties pursuant to Customs Notification No. 57/2017 and its succeeding notifications, and a 20% customs duty on imports of the remainder of the 8517 62 90 Products based on various legal instruments (e.g. the Bill No. 35 of

2014, the Finance (No. 2) Act, 2014, No. 25 of 2014, the Finance Bill, 2018, and the Finance Act, 2018).

17. Accordingly, India's customs duty imposed on imports of the 8517 62 90 Products manifestly exceeds the bound rate of 0% specified in India's Schedule.

d. 8517 70 10 Products

18. In India's Schedule, the 4-digit heading 8517, described as "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[s] 84.43, 85.25, 85.27 or 85.28 [of India's Schedule]", is divided into several tariff lines, including tariff line 8517.70.00 of India's Schedule, described as "Parts".

19. The structure of the 4-digit heading 8517 of the First Schedule is almost identical to that of the 4-digit heading 8517 of India's Schedule. Heading 8517 of India's Schedule is also comprised of several subgroups corresponding to the 6-digit subheadings and some of the 8-digit tariff items that comprise heading 8517 of the First Schedule, including subheading 8517 70 of the First Schedule, described as "Parts".

20. The 8-digit tariff item 8517 70 10 of the First Schedule, described as "Populated, loaded or stuffed printed circuit boards", falls under subheading 8517 70 of the First Schedule, described as "Parts". As subheading 8517 70 of the First Schedule corresponds to tariff line 8517.70.00 of India's Schedule, products falling under tariff item 8517 70 10 of the First Schedule ("8517 70 10 Products") also fall under tariff line 8517.70.00 of India's Schedule, the bound rate of which is 0%.

21. However, India has been imposing a 10% customs duty on products falling under tariff item 8517 70 10 that are covered by the partial exemption from the duties pursuant to Customs Notification No. 57/2017 and its succeeding notifications, and a 20% customs duty on importation of remainder of the 8517 70 10 Products based on various legal instruments (e.g. Customs Notification No. 36/2018, the Bill No. 26 of 2020, and the Finance Act, 2020, No. 12 of 2020).

22. Accordingly, India's customs duties imposed on imports of the 8517 70 10 Products manifestly exceed the bound rate of 0% specified in India's Schedule.

e. 8517 70 90 Products

23. Similar to the 8-digit tariff item 8517 70 10 of the First Schedule discussed above, tariff item 8517 70 90 of the First Schedule described as "Other" also falls under subheading 8517 70 of the First Schedule, described as "Parts". As subheading 8517 70 of the First Schedule corresponds to tariff line 8517.70.00 of India's Schedule, the products falling under tariff item 8517 70 90 of the First Schedule ("8517 70 90 Products") also fall under tariff line 8517.70.00 of India's Schedule, the bound rate of which is 0%.

24. However, India has been imposing a 10% customs duty on products falling under tariff item 8517 70 90 that are covered by the partial exemption from the duties pursuant to Customs Notification No. 02/2020, read in conjunction with Customs Notification No. 57/2017 and its succeeding notifications, and a 15% customs duty on importation of remainder of the 8517 70 90 Products based on various legal instruments (e.g. Customs Notification No. 56/2017, the Finance Bill, 2018, and the Finance Act, 2018).

25. Accordingly, India's customs duties imposed on the 8517 70 90 Products manifestly exceed the bound rate of 0% specified in India's Schedule.

#### 4. Conclusion

26. In conclusion, India imposes customs duties on the Products Concerned in excess of the applicable bound rates of 0%, specified in India's Schedule, which is inconsistent with its obligations under Article II:1(b), first sentence, of the GATT 1994.

27. Moreover, although some of the Products Concerned are exempted from customs duties, a subset of these exemptions require that certain conditions are met. Where the exemptions are

subject to conditions, there remains a violation of Article II:1(b), first sentence, of the GATT 1994 since such conditions are not provided for in India's Schedule.

**B. India's Measures Are Inconsistent with Article II:1(b), Second Sentence, of the GATT 1994**

28. Article II:1(b), second sentence, of the GATT 1994 prohibits the levying of all other duties or charges of any kind imposed on or in connection with importation, in excess of those imposed on the date of entry into force of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing WTO Member on that date. According to the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, such "other duties or charges" must be recorded in a WTO Member's Schedule.

29. Japan submits that the duties at issue are "ordinary customs duties". However, even if India's customs duties were considered not to be "ordinary customs duties" (which they are), they would constitute "all other duties or charges" within the meaning of Article II:1(b), second sentence, of the GATT 1994. These "other duties or charges" constitute a residual category that captures any "other" duties or charges imposed by reason of importation. Arguendo, even if India's customs duties were deemed "other duties or charges", they are inconsistent with Article II:1(b), second sentence, of the GATT 1994, since they are not recorded in India's Schedule in the column for "other duties or charges".

**C. India's Measures Are Inconsistent with Article II:1(a) of the GATT 1994**

30. The measures at issue are also inconsistent with Article II:1(a) of the GATT 1994 in that they accord treatment less favourable than that provided for in India's Schedule in several ways.

31. First, as a consequence of India imposing customs duties on the Products Concerned in excess of the bound rates specified in India's Schedule in a manner inconsistent with Article II:1(b) of the GATT 1994, it accords the Products Concerned a less favourable treatment than that which is provided for in India's Schedule in a manner inconsistent with Article II:1(a) of the GATT 1994.

32. In this regard, the Appellate Body in *Argentina – Textiles and Apparel* found that the application of customs duties in excess of those provided for in the Schedule of a WTO Member constitutes both an inconsistency with the first sentence of Article II:1(b) of the GATT 1994, as well as "less favourable" treatment under the provisions of Article II:1(a) of the GATT 1994. In other words, if a measure is found to be inconsistent with Article II:1(b) of the GATT 1994, it will always be inconsistent with Article II:1(a) of the GATT 1994.

33. Second, even where certain specific products among the Products Concerned are exempted from customs duties, and therefore customs duties are not imposed upon those products in excess of the bound rates specified in India's Schedule, India accords a less favourable treatment than that provided for in India's Schedule in a manner inconsistent with Article II:1(a) of the GATT 1994. This is because some exemptions are conditioned on (i) the satisfaction of certain requirements that are specified in the relevant customs notifications or in the preferential rules of origin set forth in the Comprehensive Economic Partnership Agreement between Japan and the Republic of India ("India–Japan CEPA"), but those conditions are not listed in India's Schedule, and (ii) the existence of the India–Japan CEPA itself.

34. Third, even where specific Products Concerned are exempted from customs duties, and therefore customs duties are not imposed upon those products in excess of the bound rates specified in India's Schedule, India accords a less favourable treatment to them than that provided for in India's Schedule in a manner inconsistent with Article II:1(a) of the GATT 1994 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. This gives rise to a lack of foreseeability for traders operating in the market place, which has serious effects on competition. This claim applies regardless of whether exemptions are subject to certain conditions, and is an additional and distinct claim from the other Article II:1(a) of the GATT 1994 claims as described above (i.e. the Article II:1(a) of the GATT 1994 claim based on the inconsistency with Article II:1(b) of the GATT 1994 and that based on the existence of conditions not specified in India's Schedule).

35. According to the panel in EC – IT Products, "if a measure adversely affects the conditions of competition for a production from that which it is entitled to enjoy under a Schedule, this would be less favourable treatment under Article II:1(a)". The same panel found that the duty suspension, whereby the duties were suspended for some products, did not eliminate the inconsistency with Article II:1(a) of the GATT 1994 "because there remains the potential of deleterious effects on competition".

36. In the present case, because (i) Section 25 of the Customs Act, 1962, Act No. 52 of 1962 authorizes India to apply, modify, or repeal tariff exemptions of any product, at any time, on a discretionary basis, (ii) the customs notifications establishing tariff exemptions do not provide any explanation or refer to any objective criteria for which those exemptions are granted, (iii) the customs notifications do not provide any information concerning the conditions under which these exemptions may be terminated and/or modified, and (iv) there is no predictability as to how long and under what conditions those exemptions will continue to apply, there is a lack of predictability which has serious effects on competition in the Indian market.

### **III. India's Tariff Concessions Are Not Limited by the ITA-1**

#### **A. The Panel Lacks Jurisdiction to Adjudicate on India's Rights and Obligations Under the ITA-1**

37. In response to Japan's claims, India asserts that the Products Concerned are not covered by the Ministerial Declaration on Trade in Information Technology Products (WT/MIN(96)/16) ("ITA-1"). India relies on paragraph 1 of the Annex to the ITA-1 and Article 3.2 of the Dispute Settlement Understanding ("DSU") to argue that the Panel should interpret "the relevant entries in Attachment A to the ITA-1" in accordance with the customary rules of interpretation under the Vienna Convention on the Law of Treaties ("Vienna Convention"). This argument is wrong because the Panel does not have jurisdiction to clarify the rights and obligations under the ITA-1.

38. The ITA-1 is not a "covered agreement" within the meaning of Article 1.1 of the DSU, as only agreements listed in Appendix 1 to the DSU are "covered agreements". In this case, India's relevant obligations arise from the tariff concessions made by India under Article II:1 of the GATT 1994 and its certified Schedule which is made an integral part of the GATT 1994, pursuant to Article II:7 of the GATT 1994, not the ITA-1.

39. The panel function under Article 11 of the DSU is limited to assisting the Dispute Settlement Body ("DSB") in discharging its responsibilities under the DSU and the covered agreements. In addition, Article 3.2 of the DSU establishes that the role of the WTO dispute settlement system is to "preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". Thus, the jurisdiction of the Panel to clarify the rights and obligations of WTO Members is limited to those arising under the "covered agreements", and this limitation is also clearly indicated in the Panel's terms of reference.

40. Accordingly, the Panel lacks jurisdiction to interpret the ITA-1 and to determine India's rights and obligations thereunder.

#### **B. The ITA-1 Is Not Relevant to the Interpretation of India's Tariff Concessions at Issue**

41. India's obligations regarding the tariff concessions on the Products Concerned arise from Article II:1 of the GATT 1994, and thus, the document to be interpreted by the Panel is India's Schedule, not the ITA-1. Japan further submits that the ITA-1 is not relevant to the Panel's interpretation of India's Schedule and cannot be taken into account either as context or even as supplementary means of interpretation.

##### **1. The ITA-1 Cannot Serve as "Context" for Interpreting India's Obligations**

42. Article 31(1) of the Vienna Convention requires that the interpretation of a treaty be made "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

43. While Japan recognizes that the panel in EC – IT Products found that the ITA-1 may serve as context within the meaning of Article 31(2)(b) of the Vienna Convention for interpreting tariff concessions in some cases, this finding was made in the specific context of that case. More specifically, in EC – IT Products, the relevant Schedule at issue was based on the same version of the HS nomenclature as the one used by the ITA-1. In contrast, in the present case, India's Schedule at issue is based on a different version of the HS nomenclature from the one which the ITA-1 was based upon. Additionally, unlike India's Schedule, the European Communities' Schedule examined in EC – IT Products explicitly referred to the ITA-1, providing an explicit basis for its examination.

44. Accordingly, Japan submits that the ITA-1 cannot serve as part of the context within the meaning of Article 31(2)(b) of the Vienna Convention for the purpose of interpreting India's Schedule.

## **2. The ITA-1 Cannot Be Used as a Supplementary Means of Interpretation in This Case**

45. Nor can the ITA-1 be examined as a "supplementary means of interpretation" within the meaning of Article 32 of the Vienna Convention. A recourse to "supplementary means of interpretation" is justified when "the interpretation according to [A]rticle 31 ... leaves the meaning ambiguous or obscure; or ... leads to a result which is manifestly absurd or unreasonable". As the meaning of the relevant part of India's Schedule which is at issue is sufficiently clear and unambiguous, the conditions for a recourse to supplementary means of interpretation are not satisfied in the present case.

### **C. The ITA-1 Covers the Products Concerned and Its Product Scope Does Not Exclude "New Products"**

46. Finally, even if the Panel were to look at the ITA-1 when interpreting India's tariff concessions, whether as context or otherwise, the consideration of the ITA-1 does not change the result of the textual analysis of the relevant tariff concessions. India asserts that the ITA-1 does not include "new products" that did not exist at the time of the ITA-1 negotiations. In support of its position, India refers to (i) paragraph 3 in the Annex to the ITA-1 whereby its participants agreed to "review the product coverage specified in the Attachments, ... in the light of technological developments, ...", (ii) certain statements of the participants of the Committee of Participants on the Expansion of Trade in Information Technology Products ("CITA") regarding the expansion of the product coverage of the ITA-1, and (iii) the fact that some of the Products Concerned are covered by Ministerial Declaration on the Expansion of Trade in Information Technology Products (WT/MIN(15)/25) ("ITA Expansion"). However, none of these arguments supports India's position.

47. First, paragraph 3 in the Annex to the ITA-1 merely acknowledges that the ITA-1 has a certain scope and that it is important to envisage the expansion of its product coverage for headings or subheadings under the HS nomenclature that are not covered by the ITA-1, but later should be covered as "information technology products". This understanding is consistent with the observations of the panel in EC – IT Products that paragraph 3 in the Annex to the ITA-1 concerns products that are not currently covered by the ITA-1, and that it provides little guidance on the scope of the products that are covered by the ITA-1.

48. Second, the statements by the CITA do not form "subsequent practice in the application of the treaty" within the meaning of Article 31(3)(b) of the Vienna Convention. It is clear that the statements by a limited number of participants to the ITA-1 and/or the ITA Expansion cited by India do not constitute a "common, consistent, discernible pattern of ... pronouncements". They also do not imply any agreement among the WTO Members regarding the interpretation of existing commitments pursuant to the ITA-1.

49. Third, the product coverage of the ITA-1 and that of the ITA Expansion are not mutually exclusive. In fact, the negotiators of the ITA Expansion were aware that some of the products being negotiated for inclusion in the ITA Expansion were already covered by the ITA-1.

50. Accordingly, even if the ITA-1 were to be taken into account for interpreting the scope of India's tariff concessions, there is no reason for the Panel to conclude that such scope is limited to the products that existed at the time the ITA-1 was negotiated. India's interpretation effectively carves out "new products" from the scope of the tariff concessions, without any textual basis in the

tariff concessions themselves for doing so. As explained by the panel in EC – IT Products, the scope of tariff concessions must be interpreted using the ordinary meaning of the actual terms of the relevant commitment, and qualifications which are not found within the text of a commitment should not be considered in its interpretation. Neither India's Schedule nor the ITA-1 contains any language limiting the scope of the concessions to products that existed at a particular point in time. The panel in EC – IT Products also stressed that "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". Thus, whether a particular product or technology existed at the time the relevant concession was made is not an element which should be taken into account for determining the scope of the relevant concession.

#### **IV. India Is Not Excused from Its Commitments Due to an Alleged "Error"**

51. In its defence, India alleges that the tariff concessions at issue in India's Schedule are invalid due to errors within the meaning of Article 48 of the Vienna Convention. In particular, India argues that it was in error as to the scope of its tariff concessions on the Products Concerned in its Schedule based on the HS 2007, at the time of its certification, as a result of the complex nature of the transposition from the 2002 edition of the HS nomenclature ("HS 2002") to the HS 2007. According to India, the transposition expanded its tariff commitments with respect to information technology products beyond the remit of India's obligations as contained in the ITA-1.

52. However, India's allegations of error and invocation of Article 48 of the Vienna Convention must be rejected, as India has failed to establish that (i) the defence set forth in Article 48 of the Vienna Convention is available in the present dispute, and that (ii) the conditions for the invocation of that defence are met.

##### **A. The Defence Under Article 48 of the Vienna Convention Is Not Available in the Present Case**

###### **1. There Is No Legal Basis to Apply Article 48 of the Vienna Convention in This Case**

53. There is no legal basis for the application of Article 48 of the Vienna Convention to this case. Although India refers to Article 3.2 of the DSU and Article 31(3)(c) of the Vienna Convention as two distinct legal bases for the applicability of Article 48 of the Vienna Convention in this case, neither argument can be sustained.

54. Article 3.2 of the DSU describes the role of the WTO dispute settlement system as being to "clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law". Moreover, Article 11 of the DSU instructs panels to make an objective assessment of the "applicability of and conformity with the relevant covered agreements". However, the Vienna Convention is not a "covered agreement" within the meaning of Article 1.1 of the DSU. In addition, Article 48 of the Vienna Convention does not constitute part of the customary rules of interpretation of public international law referred to in Article 3.2 of the DSU.

55. Likewise, Article 31(3)(c) of the Vienna Convention, which provides that "any relevant rules of international law applicable in the relations between the parties" shall be "taken into account, together with the context", only provides that such rules of international law can be taken into account in interpreting the text of a treaty pursuant to Article 31(1) of the Vienna Convention. It does not authorize the invalidation of rights or obligations under that treaty based on an interpretation pursuant to those rules of international law. Accordingly, it does not authorize a panel to invalidate a WTO Member's concessions on the basis of Article 48 of the Vienna Convention.

56. Rather, such invalidation would be contrary to the requirements of Articles 3.2 and 19.2 of the DSU, which provide that findings and recommendations of panels and the Appellate Body, and correspondingly the recommendations and rulings of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements. India's argument raises serious systemic questions about the power of panels under the DSU to invalidate provisions of a WTO Member's Schedule.



## **2. Article XXVIII of the GATT 1994 Provides the Exclusive Method by Which Tariff Concessions Can Be Modified**

57. Furthermore, even if the Panel were to find that, in principle, Article 48 of the Vienna Convention could be invoked with respect to the rights and obligations under the covered agreements, it cannot be invoked in this case. This is because Article XXVIII of the GATT 1994 is the sole provision applicable to any modification of the tariff concessions, regardless of the underlying cause or nature of the modification, including a modification of a tariff concession which a WTO Member made "in error". Article XXVIII of the GATT 1994 thereby precludes the applicability of Article 48 of the Vienna Convention.

58. In Korea – Procurement, the panel found that customary international law "applies to the extent that the WTO treaty agreements do not 'contract out' from it". Article 5 of the Vienna Convention also explicitly recognizes that the rules of the Vienna Convention apply to treaties adopted within an international organization "without prejudice to any relevant rules of the organization". Accordingly, when an international organization has separate and different rules on a particular subject of the law of treaties, those specific rules supersede those of the Vienna Convention.

59. The provisions of Article XXVIII of the GATT 1994 constitute "an expression in a covered agreement that implies differently", which, according to the panel in Korea – Procurement, precludes the application of the customary rules of international law, taking into account the very detailed rules and procedures set out therein and the particular legal nature of tariff concessions. Article XXVIII of the GATT 1994 thus offers the relevant path for any modifications of the tariff concessions, including modifications due to an error in granting or transposing tariff concessions.

60. In that regard, it is important to recall that all tariff concessions are made by WTO Members as part of the reciprocal exchange of tariff concessions among and between all WTO Members, and they do so on the basis of the other tariff concessions existing to date.

61. This is confirmed by Article XXVIII bis of the GATT 1994, which states that "[tariff] negotiations on a reciprocal and mutually advantageous basis ... are of great importance to the expansion of international trade". This language underlines that the tariff concessions of one WTO Member are an important factor for all other WTO Members when making their own tariff concessions, and such reciprocal and mutually advantageous concessions are an important basis for subsequent tariff negotiations. The reciprocal and mutually advantageous nature of the tariff concessions requires that any modification of a tariff concession by a WTO Member provide all other WTO Members the opportunity to make appropriate adjustments in their own tariff concessions if they so request. However, nullification of a WTO Member's tariff concessions pursuant to Article 48 of the Vienna Convention offers no such opportunity and therefore would simply allow one WTO Member to escape its obligations while leaving all other WTO Members bound by their own. In light of the foregoing, it is manifestly unreasonable to allow a WTO Member to unilaterally invalidate or modify a tariff concession to the detriment of other WTO Members. Thus, the application of Article 48 of the Vienna Convention to such modification on the basis of an alleged error would upset the rights and obligations of the WTO Members.

62. Article XXVIII of the GATT 1994 sets forth the substantive rules and procedures for withdrawing or modifying tariff concessions set out in a WTO Member's Schedule. These procedures are specifically tailored to meet the needs of such multi-party negotiations, and therefore constitute the exclusive method by which to enact any modifications of the tariff concessions by a WTO Member, irrespective of the underlying cause or nature of the modification.

63. The procedures for the introduction of HS 2007, which state 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", provide further support for the proposition that any alteration to tariff concessions, including in the context of the transposition of editions of the HS nomenclature, must follow the procedures set forth by the GATT 1994.

64. Although India argues that the alleged "error" in India's Schedule is a technical error, and thus Article XXVIII of the GATT 1994 does not apply to rectification of such error, there is no such textual limitation in Article XXVIII of the GATT 1994 as to the reasons or nature of the modification to which

it applies. There is no rationale to artificially limit the scope of Article XXVIII of the GATT 1994 as suggested by India.

**B. The Conditions for the Invocation of Article 48(1) of the Vienna Convention Are Not Met**

65. Article 48(1) of the Vienna Convention contains several conditions for its application, namely, (i) that an "error" occurred and (ii) that such error "relates to a fact or situation which was assumed ... to exist at the time when the treaty was concluded". However, India has not established that such conditions are met in the present case.

66. In addition, Article 48(2) of the Vienna Convention provides that Article 48(1) of the Vienna Convention does not apply if the state alleging its error contributed to the error or was put on notice of a possible error. In this case, these circumstances existed and thus, for that additional reason, Article 48(1) of the Vienna Convention does not apply.

**1. There Is No Error Because the Transposition Did Not Change the Material Scope of India's Obligations**

67. First, there is no "error" in relation to the material scope of the commitments under the contested subheadings as alleged by India because the transposition to the HS 2007 constituted a mere process of transposition from the previous version of the HS nomenclature which was certified and agreed as it did not change the scope of the pre-existing concessions of India.

68. India's tariff concessions as included in its Schedule which was certified in 1997, after the conclusion of the ITA-1, already covered the Products Concerned. This is demonstrated by the correlation tables between the HS 2002/the 1996 edition of the HS nomenclature and the HS 2007 which were prepared by the secretariat of the WTO ("WTO Secretariat") and circulated to the WTO Members.

**2. The Alleged Error Does Not Relate to a "Fact or Situation Which Was Assumed ... to Exist at the Time When the Treaty Was Concluded"**

69. Second, Article 48 of the Vienna Convention does not apply in this case because the "error" alleged by India is not one which "relates to a fact or situation which was assumed ... to exist at the time when the treaty was concluded". India claims that it "was in error as to the scope of the contested sub-heading commitments in" its Schedule based on the HS 2007. Such alleged "error" regarding the scope of India's tariff commitments is an error of law, not one of fact or regarding a situation, and therefore falls outside the scope of Article 48 of the Vienna Convention.

**3. India Contributed to the Alleged "Error" and the Circumstances Were such That India Was on Notice of a Possible Error**

70. Finally, India cannot rely on Article 48 of the Vienna Convention because India contributed to the alleged "error" and the circumstances were such that it was on notice of a possible "error", as India had ample opportunity to examine its transposed Schedule and correct any error, if such an error existed. In fact, during the negotiations leading to the certification of India's Schedule based on the HS 2007, India's representatives repeatedly examined and had ample opportunities to avoid the alleged error and correct it before the certification. In these proceedings, India confirmed that it had reviewed the HS 2007 transposition file prepared by the WTO Secretariat and had been able to provide comments thereon, meaning that the contents of the tariff lines subject to this dispute were sufficiently clear to India. Accordingly, an excusable error under Article 48(2) of the Vienna Convention could not have occurred in the process of the HS 2007 transposition of India's Schedule.

71. In this regard, India asserts that the party denying the application of Article 48(1) of the Vienna Convention by virtue of Article 48(2) of the Vienna Convention bears the burden of proving that the circumstances prescribed in Article 48(2) of the Vienna Convention existed. Japan emphasizes that, regardless of which party bears the burden of proof with regard to Article 48(2) of the Vienna Convention, it is relevant for the Panel to take into account that it is 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.

**C. Conclusion Regarding Article 48 of the Vienna Convention**

72. To conclude, Article 48 of the Vienna Convention is not applicable in the present case and, even assuming that it is applicable, the conditions for invoking Article 48(1) of the Vienna Convention are not met. Furthermore, and in any case, even if an error were found to exist, India contributed to its own alleged error and the circumstances were such as to put India on notice of a possible error within the meaning of Article 48(2) of the Vienna Convention. Thus, Article 48 of the Vienna Convention does not invalidate India's tariff concessions regarding the Products Concerned.

**V. India's Commitments Are Not Fulfilled by the India-Japan CEPA**

73. India also argues that it is not acting inconsistently with Article II:1 of the GATT 1994 because products which qualify as "products of Japan" under the rules of origin set forth in the India-Japan CEPA are not subject to any customs duties.

74. This argument is inapposite and must be rejected by the Panel for the following reasons.

75. First, Article II:1(b) of the GATT 1994 requires WTO Members not to impose import duties in excess of the bound rate prescribed in their Schedules, on "the products of territories of other Members". Article II:1(a) of the GATT 1994 requires WTO Members to accord no less favourable treatment than that provided for in their Schedules to "the commerce of the other Members". Therefore, those obligations apply with respect to imports from all other WTO Members. These provisions thus clearly indicate that a WTO Member legally commits, with respect to a product at issue, to a single tariff concession with respect to imports from all other WTO Members, and not multiple concessions separately with respect to imports from distinct WTO Members.

76. Therefore, India's obligation to eliminate customs duties for the Products Concerned applies to all imports from all other WTO Members. However, under India's measures, while the Products Concerned which qualify as products of Japanese origin under the rules of origin set forth in the India-Japan CEPA could benefit from duty-free treatment, all Products Concerned which do not qualify as products of Japanese origin under the rules of origin set forth in the India-Japan CEPA are still subject to a customs duty that exceeds the 0% bound rate set forth in India's Schedule. Duties greater than 0% applied by India on such products are clearly "in excess of" the bound rates (i.e. 0%) in India's relevant tariff concessions and thus give rise to a treatment "less favourable" than the treatment provided for in India's Schedule. Therefore, India's measures are clearly inconsistent with India's obligations under Articles II:1(a) and (b) of the GATT 1994.

77. Second, even with respect to the Products Concerned which qualify as being of Japanese origin under the rules of origin of the India-Japan CEPA, India's measures at issue are inconsistent with Article II:1(a) of the GATT 1994, as described in Section II.C above. In addition, the tariff exemptions granted to that limited scope of the Products Concerned do not prevent the Panel from finding an inconsistency of the measures at issue with Article II:1(b), first sentence, of the GATT 1994, because these exemptions are conditional contrary to India's Schedule.

**ANNEX B-2****SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. INTRODUCTION**

1. Throughout these panel proceedings, Japan has demonstrated that India's measures at issue, which are applicable to products falling under tariff items 8517 12 11, 8517 12 19, 8517 12 90, 8517 61 00, 8517 62 90, 8517 70 10, and 8517 70 90 ("Products Concerned") of the First Schedule to the Customs Tariff Act, 1975, No. 51 of 1975 of India ("First Schedule"), are inconsistent with India's obligations under Articles II:1(a) and II:1(b) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

**II. INDIA CANNOT INVALIDATE ITS CONSENT TO BE BOUND BY ITS OBLIGATIONS WITH RESPECT TO THE CONTESTED TARIFF CONCESSIONS**

2. In response to Japan's claims under Articles II:1(a) and II:1(b) of the GATT 1994, India invokes Article 48 of the Vienna Convention on the Law of Treaties ("Vienna Convention") and argues that the concessions for the contested subheadings in India's Schedule of Concessions and Commitments annexed to the GATT 1994 ("India's Schedule") based on the 2007 edition ("HS 2007") of the nomenclature ("HS nomenclature") are invalid. Japan submits that India's arguments regarding Article 48 of the Vienna Convention must be rejected because: (i) Article 48 of the Vienna Convention is not applicable as a defence in this dispute, (ii) India failed to establish that the requirements of Articles 48(1) and 48(2) of the Vienna Convention are met, (iii) India also failed to establish that the requirements for partial invalidation of a treaty under Article 44 of the Vienna Convention are met, and, in any event, (iv) India has acquiesced in the validity of its Schedule, within the meaning of Article 45 of the Vienna Convention and thus lost its right to invoke Article 48 of the Vienna Convention.

**A. Article 48 of the Vienna Convention Is Not Applicable to This Dispute****1. There Is No Legal Basis for the Panel to Apply Article 48 of the Vienna Convention**

3. Article 48 of the Vienna Convention cannot be applied in this dispute for the following reasons.

4. First, the Vienna Convention is not a covered agreement within the meaning of Article 1.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). Article 48 of the Vienna Convention thus does not fall within the Panel's terms of reference.

5. Second, Article 48 of the Vienna Convention is not part of the "customary rules of interpretation of public international law" referred to in Article 3.2 of the DSU, because it does not relate to the interpretation of the existing provisions of the covered agreements.

6. Third, Article 48 of the Vienna Convention is not a "relevant rule of international law" within the meaning of Article 31(3)(c) of the Vienna Convention. This is because (i) Article 48 of the Vienna Convention, which sets out the conditions to invalidate consent to be bound by a treaty on the basis of an error, does not relate to the interpretation of India's Schedule, but is used by India to invalidate its schedule of concessions ("Schedule"), (ii) Article 48 of the Vienna Convention is not "relevant" within the meaning of Article 31(3) of the Vienna Convention for the purpose of interpreting the Schedule of a Member of the World Trade Organization ("WTO" and "WTO Member", as appropriate) as well as Article II:1 of the GATT 1994, since the specific subject matter of Article 48 of the Vienna Convention is different from that of India's Schedule describing the scope of India's tariff commitment. If India wishes to modify its Schedule, Article XXVIII of the GATT 1994 is the sole provision that contains the procedures applicable to any and all modifications of tariff concessions.

7. Finally, the Panel cannot add to or diminish the rights and obligations set forth in the covered agreements in accordance with Article 3.2 of the DSU. It is impossible to reconcile the Panel's duty under Article 3.2 of the DSU with India's position that the state of its tariff concessions for the

Products Concerned would be "unbound". Moreover, India's argument ignores the nature of tariff concessions under the GATT 1994. If India's argument were accepted, and the Panel were to find that the contested concessions are not valid because they were made in error, the Panel's finding would diminish the obligations of India, and thus the rights of other WTO Members, related to those particular tariff concessions, and would cause significant harm to the carefully crafted balance of the multilateral mechanism of tariff concessions.

## **2. The Specific Procedures in Article XXVIII of the GATT 1994 Apply to Any and All Modifications of Tariff Concessions**

8. Furthermore, India cannot rely upon Article 48 of the Vienna Convention to depart from its obligations under Articles II:1(a) and II:1(b) of the GATT 1994 because Article XXVIII of the GATT 1994 provides for special, and in fact the only, applicable procedure within the WTO framework for any modification of tariff concessions.

9. Article 5 of the Vienna Convention expressly recognizes that the rules of the Vienna Convention apply to treaties adopted within an international organization "without prejudice to any relevant rules of the organization". This means that when an international organization has separate and different rules on a particular subject concerning the law of treaties, these have priority over the Vienna Convention. In the present case, separate and different rules are set forth in Article XXVIII of the GATT 1994. The foregoing understanding is consistent with the Appellate Body's findings in Peru – Agricultural Products.

10. Likewise, in Korea – Procurement, the panel emphasized that customary international law applies to the extent that the WTO treaty agreements do not "contract out" from it. Japan submits that the provisions of Article XXVIII of the GATT 1994 "contract out" from the application of Article 48 of the Vienna Convention, taking into account the very detailed rules and procedures set out therein and the particular legal nature of the tariff concessions.

11. Most importantly, tariff concessions are made as part of the reciprocal exchange of tariff concessions among and between multiple WTO Members, and on the basis of the other tariff concessions existing to date. This reciprocal and mutually advantageous nature of tariff concessions requires that any modification of a tariff concession by a WTO Member be accompanied by appropriate adjustments in the tariff concessions made by any other WTO Member or Members, if they so request. The application of Article 48 of the Vienna Convention to the modification of tariff concessions, including with regard to concessions based on alleged errors, would render this balance of rights and obligations under the GATT 1994, and the relevant procedural arrangements, meaningless.

### **B. The Requirements of Article 48 of the Vienna Convention Are Not Met**

12. Even if the Panel were to find that Article 48 of the Vienna Convention is applicable in this case, *quod non*, India has failed to prove that the requirements for application of Article 48 of the Vienna Convention are met.

#### **1. Allocation of the Burden of Proof**

13. India does not dispute that it bears the burden of proving that the conditions of Article 48(1) of the Vienna Convention have been satisfied, but argues that the burden of proof under Article 48(2) of the Vienna Convention lies on Japan.

14. However, since India is invoking Article 48 of the Vienna Convention as a defence, India bears the burden of proving that all of the conditions to invoke Article 48 of the Vienna Convention have been fulfilled. This applies not only to the conditions established in Article 48(1) of the Vienna Convention, but also to the conditions set forth in Article 48(2) of the Vienna Convention, which complement those established in Article 48(1) of the Vienna Convention. When Article 48 of the Vienna Convention is interpreted as a whole, it follows that a number of conditions must be fulfilled, including those of paragraph 1 and of paragraph 2.

15. Japan also submits that it is extremely important that the Panel take into account the fact that India is in possession of most of the relevant information and evidence required to prove that the conditions of Article 48(2) of the Vienna Convention are met, and that it is difficult for Japan to

access that information and evidence to prove otherwise. Moreover, Japan does not believe that requesting India to meet the burden of proof under Article 48(2) of the Vienna Convention would constitute an unfair requirement to "prove a negative".

16. Even if the Panel were to find that the burden of proof under Article 48(2) of the Vienna Convention rests on Japan, assuming *arguendo* that an error within the meaning of Article 48(1) of the Vienna Convention exists, India, as will be explained below, contributed to its own alleged error and that the circumstances were such as to put India on notice of a possible error, within the meaning of Article 48(2) of the Vienna Convention.

**2. The Conditions Established in Article 48(1) of the Vienna Convention Are Not Met**

*a. India failed to demonstrate the existence of an "error relat[ing] to a fact or situation"*

17. India argues that its alleged error emanated from the "mistaken belief that [the certification of its Schedule based on the HS 2007 transposition] did not expand upon India's ITA-1 obligations", essentially asserting that its alleged error stemmed from a mistaken understanding of the legal implications of the certification of India's Schedule based on the HS 2007 on India's substantive obligations. This argument must be rejected for the following reasons.

18. First, Japan submits that the transposition of the Schedule of India from the 2002 edition of the HS nomenclature ("HS 2002") established under the International Convention on the Harmonized Commodity Description and Coding System ("HS Convention") to the HS 2007 did not change the scope of concessions, and notes that India's Schedule, based on the HS 2007, was certified without any objection from any WTO Member. The draft of the Schedule's transposition to the HS 2007 ("HS 2007 file") was examined by India and then released for multilateral review, after which it was approved. The lack of objections during this process indicates that there was an understanding shared by all WTO Members, including India, that no alteration in the scope of the relevant concessions occurred. Therefore, the transposition could not have been the source of any error as to the scope of concessions in India's Schedule based on the HS 2007.

19. Second, assuming that errors could have occurred during the transposition, what is relevant is a comparison between the Schedule of India that was based on the HS 2002 and the currently certified Schedule based on the HS 2007. Since there has been no change with regard to the subheadings that cover the Products Concerned when the 1996 edition of the HS nomenclature ("HS 1996") was transformed to the HS 2002, what is relevant is a comparison between the scope of the concessions contained in India's Schedule based on the HS 2007 and the scope of the concessions in India's previous Schedule based on HS 1996, which includes concessions made by India pursuant to the Ministerial Declaration on Trade in Information Technology Products (WT/MIN(96)/16) ("ITA-1").

20. When such a comparison is made, it reveals that the transposition from the previous versions of the HS nomenclature to the HS 2007 did not change the scope of India's pre-existing concessions for the Products Concerned. In other words, the Products Concerned were already covered by the duty-free concessions in the certified India's Schedule based on the HS 1996 and HS 2002, as shown below:

- a. Telephones for cellular networks or for other wireless networks (tariff items 8517 12 11, 8517 12 19, and 8517 12 90 of the First Schedule) were covered by subheading 8525.20 in the HS 1996 (and thus the HS 2002) which were subject to duty-free concession;
- b. Base stations (tariff item 8517 61 00 of the First Schedule) were covered by subheadings 8517.70, ex8525.10, and 8525.20 in the HS 1996 (and thus the HS 2002) which were subject to duty-free concessions;
- c. Machines for the reception, conversion and transmission or regeneration of voice, images or other data including switching and routing apparatus, (in subheading 8517 62 of the First Schedule) were covered by subheadings ex8471.80, ex8517.22, 8517.30, ex8517.50, ex8517.80, ex8525.10, and ex8525.20 in the HS 1996 and the HS 2002 which were subject to duty-free concessions. Given that tariff item 8517 62 90 is a residual item

that covers the remainder of the products falling within subheading 8517 62 after the products that are specifically classified under tariff items 8517 62 10 through 8517 62 70 are deducted, the products that currently fall within tariff item 8517 62 90 of the First Schedule were logically covered by these subheadings in the HS 1996 and the HS 2002; and

d. Products falling within subheading 8517 70 of the First Schedule (the description of which is "Parts") fell within subheadings ex8473.30, ex8517.90, and 8529.90 in the HS 1996 and HS 2002, which were subject to duty-free concessions. As tariff items 8517 70 10 and 8517 70 90 of the First Schedule make up the whole of subheading 8517 70 of the First Schedule, products that fall within tariff items 8517 70 10 and 8517 70 90 of the First Schedule were classified in any of ex8473.30, ex8517.90, and 8529.90 in the HS 1996 and the HS 2002.

21. India's arguments essentially rely on its assertion that the Products Concerned were not covered by the ITA-1, but India is silent on the level of tariff concessions that would have been afforded to the Products Concerned in its Schedule based on the HS 2002 at the time India intended to transpose its Schedule to the HS 2007. India has not provided any explanation to show that the scope of the tariff concessions regarding the Products Concerned changed when its Schedule was transposed from the HS 2002 to the HS 2007. It follows that the transposition of the Schedule of India to the HS 2007 cannot have been the source of any "error" by India as to the scope of the commitments made when India certified the Schedule based on the HS 2007, because there has been no change in the scope of the relevant concessions.

22. Third, even assuming arguendo that there was an error, India's alleged error does not relate to a "fact or situation". In particular, India insists that its alleged error relates to the "material scope of the [contested] commitments", which qualifies as an error concerning a "situation"—that is, an "overall condition or circumstance prevailing at a particular time". India further stresses that it would "not always be easy to" distinguish errors of fact and of law, and that Article 48 of the Vienna Convention would "not exclude mixed questions of fact and law". India then concludes that "the fact that an error might have legal consequences [as in the case of India's contested commitments] does not make the error a legal error".

23. In the present case, however, India's alleged error clearly constitutes an error of law. Contrary to India's assertion, it is not (merely) an error of fact or situation that, incidentally, "might have legal consequences". As per India's own admission, India's purported error relates to the "material scope" of the contested concessions in its Schedule based on the HS 2007. As 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. Accordingly, to the extent that there is any "error", India's alleged error constitutes an error of law and cannot be used by India to invoke Article 48 of the Vienna Convention.

*b. India failed to establish that the alleged error represented an "essential basis of its consent"*

24. Likewise, India has not proven that the alleged error "formed an essential basis of its consent to be bound by the treaty", as required by Article 48(1) of the Vienna Convention, as only an error that touches on the reality or essence of a state's consent may justify its invalidation to the detriment of treaty stability.

25. In addition, in order for an error to constitute an essential basis of a state's consent to be bound by a treaty, the error must pertain to a fact substantially affecting the treaty as a whole. Thus, an error is essential if the state concerned would not have given its consent to be bound by the treaty as a whole, had the real fact or situation been known to that state. The text of Article 48(1) of the Vienna Convention reflects this interpretation, as it requires that an error be "an essential basis of [the state's] consent to be bound by the treaty". This is further reflected in the mechanism for invalidation of a treaty based on an error under the Vienna Convention, as, in principle, a treaty is to be invalidated in its entirety, pursuant to Article 44(2) of the Vienna Convention.

26. As the foregoing shows, India has failed to demonstrate that its error pertained to a fact substantially affecting the treaty as a whole. Under the circumstances of this case, at the time India allegedly was in error, while the Schedule of India was transposed from the HS 2002 to the HS 2007,

India already was bound by the GATT 1994 itself. Thus, 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 HS 2007. However, India has never argued that it would not have agreed to the transposition of its Schedule based on the HS 2007 "as a whole" had it been aware of the alleged mistaken understanding.

27. Hence, India has not established that the requirements for the application of Article 48 of the Vienna Convention are met.

**3. India Has Failed to Establish that the Conditions of Article 48(2) of the Vienna Convention Are Met**

28. In the unlikely event that the Panel concludes that Article 48 of the Vienna Convention is applicable in the present case and that the requirements of Article 48(1) of the Vienna Convention are met, Japan submits that India is precluded from relying on its error, by virtue of Article 48(2) of the Vienna Convention, as India contributed to the relevant error by its own conduct or, at the very least, was put on notice of the alleged error.

*a. India Contributed to Its Error Within the Meaning of Article 48(2) of the Vienna Convention by Having Its Schedule Certified*

29. First, the transposition process was agreed upon by the WTO Members through the General Council Decision of 15 December 2006, titled "A Procedure for the Introduction of Harmonized System 2007: Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database" (WT/L/673) ("Procedure for the Introduction of HS 2007"). The Procedure for the Introduction of HS 2007 provides that "[d]eveloped country Members shall prepare their own transposition", while "[t]he Secretariat shall transpose the schedules of developing country Members, except for those who undertake to prepare their own transposition". Accordingly, the fact that the secretariat of the WTO ("WTO Secretariat") prepared a draft HS 2007 file for India indicates that India did not undertake the preparation of its own HS 2007 file, and thus chose to seek assistance from the WTO Secretariat.

30. Second, the responsibility of WTO Members to verify the draft HS 2007 files is expressly included in the Procedure for the Introduction of the HS 2007. Indeed, even where the WTO Secretariat prepared a draft HS 2007 file, the WTO Members retained full control over the transposition process, and were required to examine the HS 2007 file and either approve it or provide comments.

31. India did not make any objections to the transposition. In fact, India acknowledged during the proceedings that, after receiving the HS 2007 file from the WTO Secretariat on 8 November 2013, it "provided certain comments on the draft files for the HS2007 transposition of India's Schedule of Concessions in the first instance", but "did not seek clarification from the Secretariat regarding the transposition of the tariff lines at issue". India also admitted that the WTO Secretariat reviewed India's comments, and requested that India approve the revised file, which India "certified" without making further inquiries as to the scope of its concessions. Thus, by India's own admission, India failed to make any inquiries about or objections to the tariff lines at issue, when requested to review the revised file containing those tariff lines.

32. Given this background, India undoubtedly was given enough time and opportunity to review and correct its allegedly incorrect tariff commitments, and also retained control over the transposition process. India had access to all relevant documentation outlining the scope of the transpositions, by way of the concordance tables made available in 2007. Despite being aware of the legal implications of certifying its updated Schedule, India did not exercise the required due diligence. Rather, by its own negligent behavior and failure to properly verify its tariff commitments, India contributed to (if not caused) the alleged error. India is therefore precluded from invoking Article 48(1) of the Vienna Convention.

*b. India Was Put on Notice of Its Error Within the Meaning of Article 48(2) of the Vienna Convention*

33. At the very least, Japan submits that even if the Panel were to find that India did not cause or contribute to its alleged error, it is clear that the circumstances were such as to put India on



notice of its alleged error, within the meaning of Article 48(2) of the Vienna Convention. In fact, India was on notice of what would allegedly constitute its error.

34. The transposition process was conducted carefully, over a period of more than eight years, with numerous meetings and consultations between the WTO Members assisted by the WTO Secretariat. India was informed of how the transposition process would proceed pursuant to the Procedure for the Introduction of HS 2007, and received relevant documentation, including the HS 2007 file and concordance tables, several years prior to the certification of its Schedule based on the HS 2007. It follows that India had sufficient time and materials to study the proposed transposition file, including all changes in India's concessions which would occur as a result of the transposition, if any, carefully and in detail, and that India was aware of what it must do if it did not agree to have its updated Schedule certified. This is clearly a situation where, in light of the specific circumstances, no interested party could have failed to notice the error. Accordingly, India was put on notice of the alleged error.

35. Notwithstanding the foregoing evidence showing that India was put on notice of its alleged error, India attempts to shift the blame to the WTO Secretariat. However, it is the WTO Members that have the responsibility and the authority to determine whether a proposed transposition altered the scope of existing concessions. The WTO Secretariat is neither expected, nor mandated, to do so. The role of the WTO Secretariat in the transposition process is to assist WTO Members in understanding and confirming that the transposition was made in accordance with the relevant version of the HS nomenclature and involves only modifications that were accepted by all WTO Members.

36. India's assertion that the WTO Secretariat did not appropriately "flag" the contested subheadings pursuant to paragraph 4 of the Procedure for the Introduction of the HS 2007 assumes that there was a change in the scope of the concessions for the contested subheadings. However, there has been no change in the scope of India's concessions and India, as the party asserting this, has not demonstrated otherwise. In any event, the WTO Secretariat clearly informed India that the transposition regarding the contested subheadings involved "complex changes", meaning that they involved "both splitting and merging of the whole or part of different subheadings". India thus knew about the nature of the changes. In any event, the fact that a change is "complex" does not imply that it involves a change in the scope of the concessions and the guiding principle remains that "the scope of the concessions by Members should remain the same in the two nomenclatures".

#### **4. India Intends to Invalidate Only Part of Its Schedule, but Has Failed to Establish That the Requirements of Article 44 of the Vienna Convention Have Been Met**

37. Assuming *arguendo* that Article 48 of the Vienna Convention is applicable in the present case and that its conditions are satisfied, in order for India's assertion that the relevant tariff concessions are invalid to be accepted, the requirements of Article 44 of the Vienna Convention must be met. However, those requirements are not fulfilled in the present case.

38. The general rule is that an error may only be invoked with respect to the whole treaty pursuant to Article 48 of the Vienna Convention in conjunction with Article 44(2) of the Vienna Convention, unless a state has shown that such error can relate to a particular treaty clause, on an exceptional basis, as provided in Article 44(3) of the Vienna Convention. However, India fails to provide any sufficient substantiation regarding how the requirements of Article 44(3) of the Vienna Convention are fulfilled. In any event, Japan submits that none of these requirements are satisfied. Treating the contested commitments separately and allowing India to invalidate them severally while maintaining all of the other WTO Members' Schedules intact deprives those other WTO Members of their opportunities for making adjustments to their Schedules and is unjust. In sum, even if India were to establish that Article 48(1) of the Vienna Convention is applicable and its conditions are satisfied, India cannot invalidate only the contested commitments.

#### **5. India Lost Its Right to Invalidate Its Concessions Under Article 48 of the Vienna Convention, Since It Acquiesced in the Validity of Its Schedule Within the Meaning of Article 45 of the Vienna Convention**

39. India is also prohibited from invoking Article 48 of the Vienna Convention by reason of its acquiescence to the "error", as set forth in Article 45 of the Vienna Convention. In particular, India

was made aware of the full extent of its tariff commitments under the HS 2007, including its alleged error regarding the scope of the contested tariff concessions, on several occasions, long before the certification of its Schedule based on the HS 2007. However, India failed to raise the existence of its purported error until September 2018, when it submitted the Rectifications and Modifications of Schedules: Schedule XII – India (G/MA/TAR/RS/572) ("Draft Rectification") under the Procedures for Modification and Rectification of Schedules of Tariff Concessions ("1980 Procedures"). This was three years after India's Schedule was certified, effective 12 August 2015. Thus, India acquiesced in the validity of its Schedule based on the HS 2007 before it submitted the Draft Rectification, as it gave the impression that it had validated the relevant treaty by refraining from mentioning any "error" or "mistake" when it replied to the inquiries from the European Union, the United States, and Japan in November 2016 and by remaining silent for another two years thereafter.

40. Even assuming that India did not lose its right to invoke Article 48 of the Vienna Convention until it submitted the Draft Rectification, it lost that right thereafter. It is generally understood that a state can be deemed to have acquiesced in the validity of a treaty if it accepts benefits under the treaty in question. Since the certification of its Schedule based on the HS 2007, and to this day, India has continued to benefit from all of the other WTO Members' tariff concessions, which it received as consideration for, and in exchange for, its own concessions, which it is now attempting to unilaterally invalidate. This type of behaviour amounts to acquiescence and is precisely what Article 45(b) of the Vienna Convention intends to prevent.

**C. India's Argument Relating to Japan's Objection to the Draft Rectification Has No Basis and Must Be Rejected**

41. India also asserts that Japan's objections to certification of the Draft Rectification were "unfounded" in light of the 1980 Procedures and that the Panel should "recognize and declare that the Draft Rectification was of a purely formal character and Japan's objections on the same were unfounded". However, India's request has no basis and must be rejected for the following reasons.

42. There is no legal basis 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" under the DSU or any other covered agreement. Under Article 3.2 of the DSU, the Panel's authority is limited to the "preserv[ation] [of] the rights and obligations of Members under the covered agreements" and the "clarif[ication] [of] the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law". Further, under Article 11 of the DSU, a panel should "make an objective assessment of the matter before it ... and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". However, neither the Draft Rectification nor the 1980 Procedures is a covered agreement within the meaning of Article 1.1 of the DSU and therefore are not within the Panel's terms of reference.

43. Accordingly, making a finding as to whether the Draft Rectification submitted by India was of a "purely formal character", and whether the objection made by Japan was unfounded, clearly goes beyond the Panel's mandate.

44. India argues that the 1980 Procedures are a "covered agreement" within the meaning of Article 3.2 of the DSU, and states that Articles 3.2 and 11 of the DSU and the observations presented by the panel in *Russia – Traffic in Transit* constitute the legal grounds for the Panel to find that Japan's objections under the 1980 Procedures were unfounded. However, India's argument mischaracterizes the nature of the 1980 Procedures, as it assumes that the 1980 Procedures impose specific obligations on WTO Members raising objections to a proposed rectification. As clearly stated in the title and the preamble of the document, the 1980 Procedures establish only the procedures for modification and rectification of Schedules.

45. Even if the Panel finds that Japan's objection was "unfounded", a ruling to that effect made by the Panel, and ultimately by the DSB, would not achieve a satisfactory settlement of the matter within the meaning of Article 3.4 of the DSU, because such a finding would not address Japan's claims under Articles II:1(a) and II:1(b) of the GATT 1994. Even if the Panel finds that Japan's objection was "unfounded", this does not mean that the Draft Rectification submitted by India in 2018 would become certified or deemed to be effective. India's Schedule would not be altered until the Draft Rectification becomes effective through certification pursuant to the 1980 Procedures. Moreover, several WTO Members other than Japan also objected to the Draft Rectification submitted

by India. The Panel's finding would not affect the validity of the objections by those other WTO Members, which are not parties to this dispute. Therefore, valid objections to the Draft Rectification would remain.

46. In view of the foregoing, India's claim that Japan's objection to the proposed rectification is unfounded must be rejected.

### **III. THE PRODUCTS CONCERNED FALL WITHIN TARIFF LINES IN INDIA'S SCHEDULE ENTITLED TO DUTY-FREE TREATMENT, AND THUS INDIA'S IMPOSITIONS OF CUSTOMS DUTIES IN EXCESS OF THOSE PROVIDED IN INDIA'S SCHEDULE ARE INCONSISTENT WITH INDIA'S OBLIGATIONS UNDER ARTICLE II:1 OF THE GATT 1994**

#### **A. India's Schedule Determines the Scope of India's Tariff Concessions**

47. The assessment of Japan's claims under Articles II:1(a) and II:1(b) of the GATT 1994 must be made by reference to India's tariff concessions as included in its Schedule based on the HS 2007, not by reference to extraneous documents, such as the ITA-1 or the Ministerial Declaration on the Expansion of Trade in Information Technology Products (WT/MIN(15)/25) ("ITA Expansion"). The Panel's analysis must focus on the text of India's Schedule.

48. India refers to the ITA-1 and the obligations thereunder as items that should be interpreted for purposes of this dispute. However, any rights and obligations that may be established by the ITA-1 are outside of the scope of the Panel's jurisdiction because the ITA-1 is not a "covered agreement" and because the ITA-1 is not cited in Japan's request for the establishment of a panel.

49. India argues that the ITA-1 can serve as "context", within the meaning of Article 31(2)(b) of the Vienna Convention, in the interpretation of India's Schedule. India likewise seems to argue that the ITA Expansion is relevant to the interpretation of India's Schedule. However, neither the ITA-1 nor the ITA Expansion can serve as relevant "context" for purposes of interpretation of India's Schedule in this dispute. The HS 2007 which India's Schedule is based on is significantly different in its structure from the HS 1996 which the ITA-1 is based upon, and does not explicitly refer to the ITA-1. Turning to the ITA Expansion, it is not an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" within the meaning of Article 31(2)(b) of the Vienna Convention. Further, neither the ITA-1 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. Accordingly, the Panel cannot consider the ITA-1 or the ITA Expansion as part of its interpretation of the tariff concessions set out in India's Schedule.

50. Even accepting, *arguendo*, India's argument that the relevant treaty is the ITA-1 and not India's Schedule, Japan's claims still must be upheld because the Products Concerned are covered by the ITA-1. In particular, India argues that the ITA-1 does not cover the Products Concerned, because the ITA-1 is "limited to the products originally agreed upon and classified under Attachment A of the ITA-1 and that technological advancements leading to 'new products' have not affected the product scope of the ITA-1". However, these arguments cannot be sustained. First, while India relies on Paragraph 3 of the Annex to the ITA-1, which provides for a mechanism to update the scope of the ITA-1, that paragraph provides little guidance on the scope of the products covered by the ITA-1 and, thus, does not indicate that the Products Concerned are not covered by the ITA-1. Second, while India argues that "the various official statements issued by the [p]articipants [to the ITA-1 and the ITA Expansion] regarding the limited product scope of the ITA-1" constitute subsequent practice to the ITA-1 under Article 31(3)(b) of the Vienna Convention, the statements cited by India do not fulfil any of the conditions to constitute "subsequent practice in the application of the treaty" within the meaning of Article 31(3)(b) of the Vienna Convention. Third, the ITA Expansion also does not constitute "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention for the purposes of interpreting the ITA-1 because it does not fulfil any of the relevant conditions. Finally, and in any case, even assuming that the concessions undertaken by India pursuant to the ITA-1 as included in its Schedule based on the HS 1996 were relevant in interpreting India's Schedule, *quod non*, those duty-free concessions cover the Products Concerned.

**B. Japan's Claims Regarding Article II:1(b) of the GATT 1994****1. The Products Concerned Fall Within Tariff Lines in India's Schedule Entitled to Duty-Free Treatment**

51. The Products Concerned on which customs duties are imposed fall within the tariff lines in India's Schedule that are entitled to duty-free treatment, and thus India is acting inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994. This fact does not change even after the First Schedule was amended to reflect the introduction of the 2022 edition of the HS nomenclature ("HS 2022").

52. In particular, while India argues that "the measure pertaining to sub-heading 8517.12" "ceased to exist" due to the introduction of the HS 2002, that argument cannot be sustained. The entry into force of the HS 2022 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. In other words, the 20% customs duty continues to be applied to "telephones for cellular networks and other wireless networks" which previously fell under subheading 8517 12 of the First Schedule, even though those telephones now fall under two different subheadings, the descriptions of which are "smartphones" and "other telephones for cellular networks or for other wireless networks".

53. India also argues that Japan's claims in relation to subheading 8517.12 of India's Schedule do not cover "smartphones", which fall under subheading 8517 13 of the First Schedule as amended by the introduction of the HS 2022. However, the description and the structure of India's Schedule make clear that the products that are covered by subheading 8517.12 of India's Schedule based on the HS 2007 are "[t]elephones for cellular networks or for other wireless networks". As "smartphones" constitute a type of "telephones for cellular networks", the description and structure of the amended First Schedule, together with the notes included in the amended First Schedule, confirm that "smartphones" are covered by subheading 8517.12 of India's Schedule based on the HS 2007.

54. In addition, the entry into force of the HS 2022 also reshaped the structure of subheading 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 of the First Schedule). In other words, "Parts" of products falling under heading 8517 of the First Schedule are still subject to a 20% or 15% customs duty regardless of changes in subheadings that were made due to the introduction of the HS 2022. India agrees that there are no changes to the situation concerning tariff impositions for those subheadings.

55. In this regard, Japan submits that, in the present dispute, the Panel should make findings regarding the inconsistency with Articles II:1(a) and II:1(b) of the GATT 1994 with respect to the measures at issue, both as they existed on the date of the Panel's establishment and as they were amended thereafter, including the amended First Schedule as applied since 1 January 2022. The latter should be covered by the Panel's findings because (i) the Panel's terms of reference are broad enough to include subsequent amendments to the First Schedule, (ii) such amendments do not change the essence of the original measures identified in Japan's request for the establishment of a panel, and (iii) the inclusion of these amendments within the Panel's terms of reference is necessary to secure a positive solution to the dispute.

**2. Tariff Exemptions Do Not Eliminate the Inconsistency with Article II:1(b) of the GATT 1994**

56. Moreover, although some of the Products Concerned are currently exempt from customs duties in India, this does not eliminate the inconsistency of the measures at issue with Article II:1(b) of the GATT 1994.

57. First, in order to establish a prima facie case, it is sufficient for the complainant to demonstrate that some of the products falling within the scope of duty-free tariff concessions at issue bear certain import duties. If India wishes to rebut the prima facie case by arguing that, although a basic customs duty is applicable, the duty ultimately is exempted, it is India that bears the burden to prove the fact of such exemption.

58. Second, a subset of these exemptions require that certain conditions be met. For 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 to benefit from duty-free treatment are provided for in India's Schedule. Japan submits that the phrase "subject to the terms, conditions or qualifications" in Article II:1(b), first sentence, of the GATT 1994 should be understood as meaning the imposition of qualifying restrictions or conditions on the substantive content of the concessions, and that this phrase thus covers conditions imposed to benefit from a tariff treatment set forth in the Schedule, such as an exemption. While India identifies specific conditions for exemption at issue and argues that they do not constitute "the terms, conditions or qualifications" within the meaning of Article II:1(b), first sentence, of the GATT 1994 that argument should be rejected because, according to the applicable customs notifications, the conditions mentioned by India are specific requirements that must be met to receive the relevant tariff treatment and, therefore, must be set forth in the Schedule.

### **C. Japan's Claims Regarding Article II:1(a) of the GATT 1994**

59. Japan also claims that India is acting contrary to its obligations under Article II:1(a) of the GATT 1994, because India accords the Products Concerned treatment less favourable than that provided for in India's Schedule in several ways.

60. First, since India's measures are inconsistent with Article II:1(b), first sentence, of the GATT 1994, they also are necessarily inconsistent with Article II:1(a) of the GATT 1994.

61. Second, even where specific Products Concerned are exempt from customs duties, India accords those products less favourable treatment than that provided for in India's Schedule, because the relevant exemptions are subject to the possibility of repeal at any time and, therefore, there is uncertainty and unpredictability regarding the customs duties that will apply to the Products Concerned.

62. The measures at issue, which are challenged pursuant to this claim, refer to the tariff treatment applied, through the relevant acts and notifications, to imports of the Products Concerned, including the customs duties applicable and the exemptions from those duties when relevant. Those exemptions that apply to the basic customs duty rates exceeding 0% for the Products Concerned as set forth in the First Schedule, together with those customs duties, generate "deleterious effects on competition", because such exemptions can be modified or revoked at any time and by a simple act of the Government of India, in contrast to the basic duty rate exceeding 0%, which can be changed only through an act of Parliament. This makes it difficult for the exporters and importers of the Products Concerned to foresee the level of the customs duties that will be applied to those products at the time of their importation into India. Accordingly, Japan argues that the exemptions granted to some of the Products Concerned do not eliminate the inconsistency with Article II:1(a) of the GATT 1994 arising from the imposition of customs duties on the Products Concerned that are above the bound rate set forth in India's Schedule.

63. Third, where the specific Products Concerned are exempt from customs duties, and those exemptions are subject to conditions, India accords treatment less favourable than that provided for in India's Schedule, in a manner inconsistent with Article II:1(a) of the GATT 1994, since the exemptions are conditioned on the satisfaction of certain requirements that are specified in the relevant customs notifications, but not set forth in India's Schedule.

64. This third claim under Article II:1(a) of the GATT 1994 is different from the first claim under the same provision because the first claim is purely consequential. The first claim submits that the inconsistency with Article II:1(b), first sentence, of the GATT 1994 necessarily means that India accords less favourable treatment than that provided for in India's Schedule, in violation of Article II:1(a) of the GATT 1994. By contrast, the third claim focuses on whether the applied conditions are specified in India's Schedule even if India did not act inconsistently with Article II:1(b), first sentence, of the GATT 1994. Thus, even if the Panel were to conclude that India is not acting inconsistently with Article II:1(b) of the GATT 1994 with regard to those products that are exempt from customs duties under conditional exemptions, it should find that India still is acting inconsistently with Article II:1(a) of the GATT 1994 because the exemptions are subject to conditions that are not provided for in India's Schedule.

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**IV. THE INDIA–JAPAN CEPA DOES NOT ELIMINATE THE INCONSISTENCY OF INDIA'S MEASURES WITH ARTICLE II:1 OF THE GATT 1994**

65. India argues that because the Comprehensive Economic Partnership Agreement between Japan and the Republic of India ("India–Japan CEPA") "provides for NIL rate of duty to 'products of Japan'", "the measures at issue identified by Japan are not inconsistent with Article II:1(a) and (b) of the GATT 1994 in as much as they do not accord less favourable treatment to products of Japan than that provided for in India's 2007 Schedule". India's argument cannot stand, and must be rejected, for the following reasons.

66. First, the India–Japan CEPA only covers products that 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.

67. Second, even with regard to the Products Concerned that 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. These exemptions require that certain conditions be met, including the satisfaction of the rules of origin under the India–Japan CEPA, and these conditions are not provided for in India's Schedule. As such, there remains an inconsistency with Article II:1(b), first sentence, of the GATT 1994. This applies equally to Japan's claims under Article II:1(a) of the GATT 1994, because subjecting the tariff exemptions to the requirement of satisfying certain conditions not specified in India's Schedule, such as the preferential rules of origin set forth in the India–Japan CEPA, constitutes treatment "less favourable" than that provided for in India's Schedule. In addition, the existence of conditions to benefit from the duty-free treatment not listed in India's Schedule creates a lack of predictability and certainty for traders, and this also constitutes "less favourable" treatment accorded to the commerce of Japan and other WTO Members contrary to Article II:1(a) of the GATT 1994.

68. Third, such duty-free treatment is conditioned upon the existence of the India–Japan CEPA itself. The tariff exemptions under the India–Japan CEPA would not even exist without the India–Japan CEPA, but India's Schedule does not refer to the existence of the India–Japan CEPA at all, as a condition for India's tariff concessions.

**V. CONCLUSION**

69. Japan respectfully requests that the Panel find that India's measures at issue, as set out in Japan's request for the establishment of a panel and as amended thereafter, are inconsistent with India's obligations under Articles II:1(a) and II:1(b) of the GATT 1994. Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with the GATT 1994.

## ANNEX B-3

### FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

#### A. Introduction

1. Japan has alleged that by imposing duties on the products at issue, India is in violation of Article II:1(a) and II:1(b) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). On the other hand, India argues that the alleged commitments on contested tariff lines were provided in error, and that India has never intended on expanding its commitments relating to certain information and communication technology products ("ICT products") beyond the Ministerial Declaration on Trade in Information Technology Products ("ITA-1") entered by it in 1996. In this regard, India has pleaded treaty invalidity under Article 48 of the Vienna Convention on the Law of Treaties ("VCLT").

#### B. Article 48 of the VCLT is applicable in the present dispute

2. Article 3.2 of the Understanding on rules and procedures governing the settlement of disputes ("DSU") prescribes that Panels apply 'customary rules of interpretation of public international law'.<sup>1</sup> The text of the DSU obliges the Panel to clarify the content of the covered agreements in 'accordance with customary rules of interpretation of public international law' which requires the application of Articles 31-33 of the VCLT (reflecting principles of customary international law for the purposes of treaty interpretation).<sup>2</sup> More specifically, Article 31(3)(c) of the VCLT provides for taking into account "[a]ny relevant rules of international law applicable in the relations between the parties".<sup>3</sup> Article 48 of the VCLT codifies the customary international law principle of error (detailed in India's first written submission),<sup>4</sup> and therefore is applicable in the present context. That approach, in the context of applying Article 48 of the VCLT, has also been confirmed by the Panel in *Korea—Procurement*.<sup>5</sup>

3. In addition, India highlights that while World Trade Organization ("WTO") rules are *lex specialis* in many respects, they do not exist in 'clinical isolation' from public international law and principles of international law therefore continue to apply to the present dispute unless otherwise excluded.<sup>6</sup>

<sup>1</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (entered into force 1 January 1995), 1869 U.N.T.S. 401 Article 3.2

<sup>2</sup> Appellate Body Report, *US — Gasoline*, Page 17 ("[Article 31 VCLT] ... [t]hat general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."); Panel Report, *EC — Biotech*, Paras. 7.67 - 7.70 ("Article 31(3)(c) directly speaks to the issue of the relevance of other rules of international law to the interpretation of a treaty. In considering the provisions of Article 31(3)(c), we note, initially, that it refers to "rules of international law". Textually, this reference seems sufficiently broad to encompass all generally accepted sources of public international law, that is to say, (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognized general principles of law. In our view, there can be no doubt that treaties and customary rules of international law are "rules of international law" within the meaning of Article 31(3)(c) ... [i]t is important to note that Article 31(3)(c) mandates a treaty interpreter to take into account other rules of international law ("[t]here shall be taken into account"); it does not merely give a treaty interpreter the option of doing so.")

<sup>3</sup> Dörr, 'Article 31' in Oliver Dörr, Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn., Springer, 2018) Pages. 606-607 (Exhibit IND-45)

<sup>4</sup> WTO, India - Tariff Treatment on Certain Goods - First Written Submission of India (8 April 2021) WT/DS582 ("India's First Written Submission"), Para. 55-91

<sup>5</sup> Panel Report, *Korea — Procurement*, Para. 7.96

<sup>6</sup> Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can we Go', (2001) 95 Am. J. Int'l L. 535 543 ("[h]owever, besides international law rules on treaty interpretation, many other rules of general international law not explicitly confirmed in the WTO treaty must be applied with respect to the treaty; that is, as long as it does not contract out of these rules. In terms of the law of treaties, certain rules on the conclusion, invalidity, application, modification, suspension, or termination of treaties comes to mind, but also rules on state responsibility, on judicial settlement of disputes, and on how to solve conflicts between norms must apply.") (Exhibit IND-45)

4. Separately, India clarifies that Article XXVIII of the GATT 1994 does not apply in the present dispute. Article XXVIII provides for renegotiation and modification of Schedule of Concessions. This is different from Article 48 of the VCLT, which provides for error as a circumstance that invalidates consent to a treaty.<sup>7</sup> India confirms that it has not invoked Article 79 of the VCLT.

**C. The commitments under the contested sub-headings in the 2007 Schedule are invalid due to errors.**

5. Article 48(1) of the VCLT comprises the following threshold elements: (i) that the existence of an error must relate to a fact or situation assumed by the State to exist at the time when the treaty was concluded, and (ii) that such an error must form an essential basis of the state's consent to be bound by the treaty. Separately, these threshold conditions are qualified by Article 48(2) which provides: (i) that the State must not have contributed to the error by its own conduct, and (ii) that the State must not have been on notice of such error.

6. In relation to the first threshold element of Article 48(1), India was in error in relation to the material scope of the commitments under the contested sub-headings at the time the 2007 Schedule was certified. At no point did India intend to expand the scope of concessions for certain products beyond the ITA-1. India's error is further highlighted by the fact that at the time the contested sub-headings were certified in August 2015, *a)* India had already made its intention clear of not expanding its obligations under the ITA-1 via the HS2007 transposition or otherwise,<sup>8</sup> and *b)* as noted by Japan, India was already levying duties in 2014 on certain ICT products which clearly conflicted with the commitments it was ostensibly undertaking at the same time via the HS2007 transposition.<sup>9</sup>

7. By inadvertently certifying concessions contrary to its unequivocal objections, India committed a factual/situational error within the meaning of the first Paragraph of Article 48 of the VCLT in the context of admittedly complex technical transpositions. India highlights the deliberate use of the word 'situation' in addition to the word 'facts' in the phraseology of Article 48 - which covers the overall condition or circumstance prevailing at a particular time.<sup>10</sup> Indeed, similar errors relating to technical entries have been previously considered as a potential ground for invalidity in international law.<sup>11</sup>

8. The above position is also confirmed via commentary on Article 48 of the VCLT, which notes that "no consistent meaning can be drawn from international jurisprudence with respect to the distinction between errors of fact and of law".<sup>12</sup> Further, "Article 48 does not exclude mixed questions of fact and law and the line between one and the other may not always be easy to draw".<sup>13</sup> Clearly, the difficulty in articulating a workable distinction between errors of law and errors of fact

<sup>7</sup> See Paras. 64-69 of WTO, India - Tariff Treatment on Certain Goods - India's Response to the Questions by the Panel dated July 20, 2021 (20 September 2021) WT/DS584 ("India's response to the Panel's Questions")

<sup>8</sup> India maintains that it never intended on joining the ITA-2 since India's manufacturing had dipped profusely due to the ITA-1. It has made several pronouncements regarding the same. WTO, Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting of 1 November 2012 (14 March 2013) G/IT/M/56 ("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.")

<sup>9</sup> WTO, India - Tariff Treatment on Certain Goods - First Written Submission of Japan (28 January 2021) WT/DS584 ("Japan's First Written Submission"), Paras. 2, 49

<sup>10</sup> According to the Cambridge Dictionary, a "situation" is "the set of things that are happening and the conditions that exist at a particular time and place."; *Cambridge Advanced Learner's Dictionary* (Cambridge University Press, 2005), Page 606 (Exhibit IND-57)

<sup>11</sup> India's First Written Submission, Paras. 44, 54, 56, 57, 62

<sup>12</sup> Wyler and Samson, *Invalidity, Termination and Suspension of Treaties*, in Corten and Klein, 'The Vienna Convention on the Law of Treaties' (OUP, 2011) Page 1127 (Exhibit IND-18)

<sup>13</sup> M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), Page 608 (Exhibit IND-13)



has been evident from as early as the drafting of the VCLT. India reasserts that the fact that an error might have legal consequences (as indeed all contested errors would) does not make the error a legal error.<sup>14</sup>

9. In relation to the second threshold element of Article 48(1), it is clear that India would not have agreed to the certification if it were aware that it would effectively expand India's commitments beyond those contained in ITA-1. India's error in relation to the material scope of the contested sub-headings formed an essential condition for India's consent to certification of the contested sub-headings.

10. While India thus satisfies the threshold elements of Article 48(1), it also takes this opportunity to clarify its stand on Article 48(2). It is an acknowledged position that the party denying the vitiating effect of the error under Article 48(1) due to the exceptions under Article 48(2) has the burden of proving those exceptions.<sup>15</sup> Accordingly, such burden of proof lies on Japan and not on India.

11. Nevertheless, India has made submissions in relation to Article 48(2) of the VCLT, and has clarified that its error related to admittedly complex and technical transpositions - and which were not an unlikely circumstance for such error.<sup>16</sup> Also, in the one previous and perhaps the only instance of Article 48 of the VCLT being applied in a WTO dispute, the Panel had observed that there exists a duty for all negotiating parties to verify the schedule.<sup>17</sup> That observation rings particularly true in the present instance for any party interested in the treatment of ICT products by India would have known that India's explicit stance was that it did not intend to commit to obligations beyond those in the ITA-1.

#### **D. The ITA-1 is the comparative benchmark for assessing the 'error' under Article 48(1), VCLT**

12. From the above, it is clear that in order to examine India's claims under Article 48 of the VCLT, the Panel is required to assess India's commitments under the ITA-1. The error that India committed at the time of certifying the 2007 Schedule was that it believed that the certification of the Schedule would not alter its commitments under the ITA-1. Unfortunately, the certification of the Schedule is being claimed as having materially altered its concessions for certain ICT products *compared* to its commitments under the ITA-1 or the subsequently certified Schedule, WT/LET/181 ("WT/LET/181").

13. Further, Japan has claimed that "transposition of tariff concessions from one version of the HS nomenclature to another does not modify the scope of tariff concessions, unless modified through the procedures under Article XXVIII of the GATT 1994."<sup>18</sup> However, Japan has not offered a shred of evidence to establish that the transposition did not alter the scope of India's concessions. Since the ITA-1 was the last instrument to substantively modify India's commitments concerning the ICT products, Japan should, at the very least, compare the scope of concessions under the ITA-1 and the scope of concessions under Certification of Modifications And Rectifications To Schedule XII –

<sup>14</sup> UN Conference on the Law of Treaties, Draft Articles on the Law of Treaties with Commentaries, Page 244 ("The Commission appreciated that an error in a treaty may sometimes involve mixed questions of fact and of law and that the line between an error of fact and of law may not always be an easy one to draw.") (Exhibit IND-59)

<sup>15</sup> Rensmann, 'Article 48' in Oliver Dörr, Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn., Springer, 2018) Page. 893, n. 144 ("The final version of Art 48 para 2 is in marked contrast to *Fitzmaurice* III 25 (Art 12 para 2 lit c), which required positively that the error must be excusable (Exhibit IND-14); See also *Bartoš* [1963-I] YbILC 42 criticizing the negative wording of the ILC draft for not placing the burden of proof on the party relying on the error. As to the burden of proof with regard to para 1 see *Villiger* (2009), Art. 48 MN4")

<sup>16</sup> As Canada notes, the transpositions were not sufficiently highlighted or flagged by the WTO Secretariat as being those which possibly changed the scope of the concessions. WTO, India - Tariff Treatment on Certain Goods in the Information and Communication Technology Sector- Third Party Written Submission of Canada (22 April 2021) WT/DS584 ("Canada's Third Party's Submissions") Para. 15

<sup>17</sup> Panel Report, *Korea - Procurement*, Para. 7.125

<sup>18</sup> WTO, India - Tariff Treatment on Certain Goods - Responses by Japan to Questions from the Panel to the Parties (20 September 2021) WT/DS584 ("Replies by Japan to Questions from the Panel"), Para. 18

India, WT/LET/1072 ("2007 Schedule" or "WT/LET/1072")<sup>19</sup> to establish that there has been no change in concessions concerning the products at issue.<sup>20</sup>

14. The ITA-1 and its scope of coverage are instrumental as the comparative benchmark in establishing whether the transposition resulted in an expansion in the scope of India's tariff concessions, and therefore, in determining India's plea of error.

15. In order to determine whether there is a difference in the scope of concessions under the WT/LET/181 and WT/LET/1072, normally, the Panel could compare the scope of commitments of the two documents, and it could be easily ascertained that the scope of commitments for ICT products is much wider under WT/LET/1072 than it was under WT/LET/181. A comparison the two documents (the said schedules) could be performed in two potential ways: (i) by preparing a positive list of products covered by the relevant tariff lines in each of the documents, or (ii) by ascertaining the negative list of products not covered by the relevant tariff lines in each of the documents.

16. As an example of the latter, it may be noted that India made a commitment to grant concessions to "Transmission apparatus incorporating reception apparatus" covered by sub-heading 8525.20 under the ITA-1, and consequently under WT/LET/181. The Explanatory Notes to HS1996 limit the definition of 'Transmission Apparatus of Radio Telephony or Radio Telegraphy' to apparatus which allowed the transmission of signals representing (1) speech, (2) messages, or (3) still pictures.<sup>21</sup> Therefore, 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. Subsequently, during the transposition of India's schedule from HS2002 to HS2007, sub-heading 8525.20 was split into four sub-headings in the 2007 Schedule, the relevant one being sub-heading 8517.12. In the 2007 Schedule, sub-heading 8517.12, which is a contested tariff line in the present dispute, covers telephones for cellular networks. Telephones for cellular networks can transmit signals representing data other than speech, messages or still pictures. Accordingly, such phones cannot be covered under the HS1996 sub-heading 8525.20. Upon a comparison of the relevant tariff lines under the two documents, it can be ascertained that while telephones for cellular networks could not have been covered under the ITA-1 (and no commitment was made for it under WT/LET/181), India's scope of concessions has erroneously expanded to cover telephones for cellular networks in the 2007 Schedule.

17. Therefore, the core question before the Panel is a limited one: whether the products at issue are eligible to receive concessions under India's commitment under the ITA-1.<sup>22</sup> The exercise is limited to finding whether the products at issue were covered by the ITA-1.

18. Japan has not provided any evidence to establish that the products at issue were covered by the ITA-1. Rather than have the Panel make an objective assessment, as is mandated by Article 11 of the DSU,<sup>23</sup> Japan would instead have the Panel rely on Japan's empty assertions.

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<sup>19</sup> Certification of Modifications and Rectifications to Schedule XII - India (12 August 2015) WT/Let/1072

<sup>20</sup> A comparison between the ITA-1 and the 2007 Schedule is required to assess India's claim under Article 48. See Paras. 15-16 of this Response; WTO, India – Tariff Treatment on Certain Goods – India's Opening Statements (October 5, 2021) WT/DS584 ("India's Opening Statements"), Para. 37

<sup>21</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (2nd edn., World Customs Organization 1996) Heading 8525 (Exhibit IND-6)

<sup>22</sup> Japan has been unable to satisfy threshold requirements of specificity under Article 6.2 of the DSU. It has been unable to classify products under the contested sub-headings. This is particularly true for tariff items 8517.62.90, 8517.70.90 and USB cables. See India's First Written Submission, Paras. 21-30

<sup>23</sup> Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, Para. 1128: "However, in its analysis, the Panel deferred to the United States' subsidized product allegations rather than making its own independent assessment of whether all Airbus LCA should be treated as a single subsidized product. In so doing, the Panel failed to make an objective assessment of the matter, including the 'applicability of and conformity with the relevant covered agreements', as required under Article 11 of the DSU."

### **E. The products at issue are not covered by the ITA-1**

19. The parties initially agreed that the ITA-1 is relevant to the present dispute,<sup>24</sup> although it seems that Japan has had a change of heart on this issue<sup>25</sup> when confronted with the explanatory notes attached to Harmonized System ("HS") 1996. If Japan reverts to its original position, then it is required to offer a prima facie proof that the products at issue were covered by the ITA-1. Even though the burden of proof rests on Japan to establish that products at issue were covered by the ITA-1, India has made extensive submissions concerning the same.

20. Firstly, India submits that the scope of Attachment A to the ITA-1 is limited to the sub-headings mentioned therein read with the HS1996 (including the Explanatory Notes). Most of the products at issue are covered by the ITA Expansion<sup>26</sup>, to which India is not a party. The products at issue are advanced ICT products, which evolved and developed over time. India considers that such products could not be covered under ITA-1.<sup>27</sup> However, for the purposes of the present dispute, India does not wish to enter into a fact-finding exercise concerning how many products at issue actually existed when ITA-1 was signed. The term "new product" used by India in this dispute is limited to the products which fall outside the product scope of the ITA-1 and HS1996 Explanatory Notes.<sup>28</sup>

21. As per Paragraph 2 of the ITA-1, the product coverage of the ITA-1 is delimited in Attachment A and Attachment B of the ITA-1. Attachment A consists of two lists of categories of products defined by their HS1996 codes<sup>29</sup> and Attachment B is a list of product descriptions without reference to their HS codes. Under Attachment B, customs duties and other duties and charges of any kind were to be eliminated on these products "wherever they are classified."<sup>30</sup> There is no language 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-1. The language simply provides for two lists of products which are included in the product scope of the ITA-1.

22. The Annex to ITA-1 also shows that the Participants were well aware of the rapidly advancing nature of the IT industry.<sup>31</sup> The ITA-1's language was not expected to cover every new product that may come along in the rapidly developing and converging IT sector. The ITA-1, therefore, also provided a mechanism for updating the product scope of the ITA-1 and the framework for resolving the ambiguities that convergence and rapid development were expected to bring to customs classification of such products in this sector. However, this mechanism was not 'automatic' in nature. It required the Participants to 'meet periodically' and modify the Attachments in light of technological developments.<sup>32</sup> The mechanism envisioned by the negotiators for updating the product coverage of the ITA-1 in the light of, inter alia, technological development is set forth in Paragraph 3 to the Annex to the ITA-1.

23. Further, in the course of negotiating the Ministerial Declaration on the Expansion of Trade in Information Technology Products ("ITA-2"), various Participants to both the ITA-1 and the ITA-2 made several pronouncements regarding the product scope of the ITA-1. India submits that the various official statements issued by the Participants regarding the limited product scope of the ITA-1 would be relevant to the interpretation of ITA-1, including by means of subsequent practice to the

<sup>24</sup> WTO, India - Tariff Treatment on Certain Goods - First Written Submission of Japan (January 28, 2021) WT/DS584 ("Japan's First Written Submission"), Paras. 14-18, Section III.B; WTO, India - Tariff Treatment on Certain Goods in the Information and Communication Technology Sector - First Written Submission of India (April 8, 2021) WT/DS584 ("India's First Written Submission"), Para. 75

<sup>25</sup> WTO, India - Tariff Treatment on Certain Goods - Responses by Japan to Questions from the Panel to the Parties (September 20, 2021) WT/DS584 ("Japan's Responses to the Panel's Questions"), Paras. 8-16

<sup>26</sup> India's First Written Submission, Para. 124

<sup>27</sup> India maintains that it never intended on joining the ITA-Expansion. India has made several pronouncements regarding the same. WTO, Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting of 1 November 2012 (14 March 2013) G/IT/M/56

<sup>28</sup> India's Opening Statement, Para. 41

<sup>29</sup> Ministerial Declaration on Trade in Information Technology Products (13 December 1996) WT/MIN (96)/16 Para. 2(a)

<sup>30</sup> Ministerial Declaration on Trade in Information Technology Products (13 December 1996) WT/MIN (96)/16 Para. 2(b)

<sup>31</sup> Ministerial Declaration on Trade in Information Technology Products (13 December 1996) WT/MIN (96)/16 Para. 3

<sup>32</sup> Ministerial Declaration on Trade in Information Technology Products (13 December 1996) WT/MIN (96)/16 Para. 3

ITA-1 under Article 31(3)(b) of the VCLT. Article 31(3)(b) of the VCLT states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is instrumental in interpreting a treaty.<sup>33</sup>

24. India submits that by the admission of over 51 Participants (with each EU Member, not including Croatia who joined EU in 2013, being counted as one) of the ITA-1, the scope of the ITA-1 continues to be limited to the products classified in Attachment A and listed in Attachment B of the ITA-1.<sup>34</sup> It is clear that the Participants agree that technological advancements have not affected the product scope of the ITA-1.

25. Secondly, Attachment A contains a list of products "*classified (or classifiable) with Harmonized System (1996) headings.*" Therefore, in order to determine the product scope of the ITA-1 under Attachment A, it is important to interpret the HS headings in accordance with the International Convention on the Harmonized Commodity Description and Coding System ("HS Convention") and the Explanatory Notes issued by the World Customs Organization which serve as an official interpretation to the HS Nomenclature.

26. Article 31(4) of the VCLT states that "[a] special meaning shall be given to a term if it is established that the parties so intended." In the present instance, the parties intended to limit the scope of Attachment A to the HS1996 Nomenclature.<sup>35</sup> Therefore, the ordinary meaning of products listed under Attachment A can only be determined in accordance with the meaning assigned to the products by the HS1996 Nomenclature. Other dictionary meanings and interpretations can only be relied upon if Japan provides a decisive reason to rely on another interpretation.<sup>36</sup> However, no such reasoning has been provided by Japan.

27. Thirdly, India submits that the products at issue are not covered by the ITA-1. This has been demonstrated in Section IV.B of India's First Written Submission. This is also confirmed by the fact that several Participants of the ITA-1, who are also now participants to the Ministerial Declaration on the Expansion of Trade in Information Technology Products ("ITA Expansion"), did not grant any

<sup>33</sup> Vienna Convention of the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331 (1969) Article 31(3)(b) (Exhibit IND-10); India's First Written Submission, Paras. 88-91

<sup>34</sup> WTO, Committee of Participants on the Expansion of Trade in Information Technology Products, Concept Paper for the Expansion of the ITA (2 May 2012) G/IT/W/36; Directorate General for Trade of the European Commission, The Expansion of the Information Technology Agreement: An Economic Assessment (Publications Office of the European Union, 2016) <[https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154430.pdf](https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154430.pdf)> last accessed 26 March 2021 (Exhibit IND-25); WTO, Committee of Participants on the Expansion of Trade in Information Technology Products, 'Updating the List of Products covered under the Information Technology Agreement (ITA): Communication from Japan' (24 November 2006) G/IT/W/25; Ministry of Economy, Trade and Industry, 'Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA' (2013), <[https://www.meti.go.jp/english/report/downloadfiles/2013WTO/02\\_04.pdf](https://www.meti.go.jp/english/report/downloadfiles/2013WTO/02_04.pdf)> last accessed 6 April 2021 (Exhibit IND-26); Ministry of Economy, Trade and Industry, 'Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA' (2014), <[https://www.meti.go.jp/english/report/downloadfiles/2014WTO/02\\_05.pdf](https://www.meti.go.jp/english/report/downloadfiles/2014WTO/02_05.pdf)> last accessed 6 April 2021 (Exhibit IND-27); Ministry of Economy, Trade and Industry, 'Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA' (2015), <[https://www.meti.go.jp/english/report/data/2015WTO/02\\_05.pdf](https://www.meti.go.jp/english/report/data/2015WTO/02_05.pdf)> last accessed 6 April 2021 (Exhibit IND-28); Ministry of Economy, Trade and Industry, 'Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA' (2016), <[https://www.meti.go.jp/english/report/data/2016WTO/pdf/02\\_07.pdf](https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_07.pdf)> last accessed 6 April 2021 (Exhibit IND-29); Ministry of Economy, Trade and Industry, 'Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA' (2017) (Exhibit IND-30); Ministry of Economy, Trade and Industry, 'Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA' (2018), last accessed 6 April 2021 (Exhibit IND-31); Ministry of Economy, Trade and Industry, 'Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA' (2019), <[https://www.meti.go.jp/english/report/data/2019WTO/pdf/02\\_05.pdf](https://www.meti.go.jp/english/report/data/2019WTO/pdf/02_05.pdf)> last accessed 6 April 2021 (Exhibit IND-32); Asia-Pacific Economic Cooperation, Compilation of APEC and Industry Statements of Support for Expansion of the Information Technology Agreement (29 March 2012) 2012/CTI2/MAG/DIA/002 <[http://mddb.apec.org/documents/2012/MAG/DIA1/12\\_mag\\_dia1\\_002.pdf](http://mddb.apec.org/documents/2012/MAG/DIA1/12_mag_dia1_002.pdf)> accessed 25 March 2021 (Exhibit IND-33); WTO, Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the Meeting (8 May 2015) G/IT/M/62 Para 2.2 and 2.7

<sup>35</sup> Ministerial Declaration on Trade in Information Technology Products (13 December 1996) WT/MIN(96)/16, Para. 2(a)

<sup>36</sup> *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, I.C.J. Reports 1948, 57, 63 (Exhibit IND-56)

concessions to certain products at issue until they modified their schedules of concessions in pursuance of the ITA Expansion.

28. For example, the European Union had a bound rate of 3.6-5% for certain products covered under 8517.70 until it entered the ITA Expansion.<sup>37</sup> The very fact that the European Union, along with several other ITA-1 Participants, continued to impose duties on certain products at issue is of significant interpretative value, including as subsequent practice in the application of the ITA-1 and establishes the ITA's limited and static product scope. If the ITA-1 covered the products at issue, there would be no reason for at least 36 ITA-1 Participants to impose duties on such products. Interestingly, these 36 ITA-1 Participants only modified their schedules with regard to these products to implement the ITA Expansion.

29. The continued imposition of duty on the products at issue for years after their entry into the ITA-1 constitutes subsequent practice under Article 31(3)(b) of the VCLT since it establishes the agreement of the parties regarding the application of the ITA-1. From this practice, it is clear that the product scope of the ITA-1 did not include the products at issue.

30. The claims made by Japan are under the sub-headings 8517.12, 8517.61, 8517.62, 8517.70. The claims and products at issue could be divided into two categories, namely, "independent claims" and "dependent claims."

31. Telephones for cellular networks (8517.12), base stations (8517.61), Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus (8517.62)<sup>38</sup> are independent claims. With regard to static converter (8504.40), printed circuit boards (8517.70), and parts of telephone sets other than PCBs (8517.70),<sup>39</sup> it is submitted that the commitments under these sub-headings are dependent on the other principal commitments made under the ITA-1 for products such as telephones for cellular networks.<sup>40</sup> Since the ITA-1 did not cover telephones for cellular networks, base stations and LTE Equipment, their parts and apparatus can also not be covered by the ITA-1.

32. India summarizes its position concerning the independent claims made by Japan below:

**i) Sub-Heading 8517.12 – 'Telephones for Cellular Networks or for Other Wireless Networks' were not covered under the ITA-1**

33. Japan alleges that India imposes a 20% duty on telephones for cellular networks, which are covered under tariff items 8517.12.11, 8517.12.19, and 8517.12.90.<sup>41</sup>

34. The issue before the Panel is whether sub-heading 8525.20 – "Transmission apparatus incorporating reception apparatus" could cover telephones for cellular networks. The tariff heading 8525 covered, among others, 'Transmission Apparatus for Radio-Telephony or Radio Telegraphy'.<sup>42</sup> The definition of the Transmission Apparatus of Radio Telephony or Radio Telegraphy is limited to the transmission of signals representing (1) speech, (2) messages, or (3) still pictures.<sup>43</sup> This list is cumulative and exhaustive in nature. Therefore, no apparatus which can transmit signals representing videos or any other media other than the three listed above can be included in the scope of heading 8525.

35. Further, a comparison of the HS1996 Explanatory Note to Heading 8525 and HS2007 Explanatory Notes to Heading 8517 demonstrates that telephones for cellular networks are not

<sup>37</sup> Certification of Modifications and Rectifications to Schedule CLXXIII– European Union (June 8, 2017) WT/Let/1265

<sup>38</sup> Japan has been unable to satisfy threshold requirements of specificity under Article 6.2 of the DSU. It has been unable to classify products under the contested sub-headings. This is particularly true for tariff item 8517.62.90. See India's First Written Submission, Paras. 21-30

<sup>39</sup> Japan has been unable to satisfy threshold requirements of specificity under Article 6.2 of the DSU. It has been unable to classify products under the contested sub-headings. This is particularly true for tariff items 8517.70.90. See India's First Written Submission, Paras. 21-30

<sup>40</sup> India's First Written Submission, Paras. 156, 185, 191

<sup>41</sup> Japan's First Written Submission, Para. 40

<sup>42</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (2nd edn., World Customs Organization 1996) Heading 8525 Marginal Note (Exhibit IND-6)

<sup>43</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (2nd edn., World Customs Organization 1996) Heading 8525 Marginal Note (Exhibit IND-6)

categorized in the general group of "*transmitting and receiving apparatus for radio-telephony and radio-telegraphy*" even under HS2007.<sup>44</sup> The description of radio telephony apparatus of the kind covered under heading 8517 under HS2007 has remained unchanged from those covered under Heading 8525 in HS1996 viz. radio-telephony apparatus for motor vehicles, ships, aircraft, trains, etc. Therefore, it would be fallacious to argue that telephones for cellular networks which are not even covered within the general description of "*transmitting and receiving apparatus for radio-telephony and radio-telegraphy*" in the year 2007, were covered within the general description of transmission apparatus for radio-telephony or radio-telegraphy under HS1996.

36. Alternatively, India submits that the list appended to the HS1996 Explanatory Notes to Heading 8525 could be regarded as illustrative in nature with regard to various sub-groups. However, with respect to the sub-group of radio-telephony, the description is exhaustive.<sup>45</sup> Accordingly, India submits that 8525.20 – "*Transmission apparatus incorporating reception apparatus*" did not and could not cover telephones for cellular networks.

**ii) Sub-Heading 8517.61: 'Base Stations' were not covered under the ITA-1.**

37. Japan alleges that India imposes 20% duty on "Base Stations," which are covered under tariff items 8517.61.00 of the Customs Tariff Act.<sup>46</sup>

38. It is India's understanding that Japan does not argue that the base stations were somehow covered under sub-headings 8517.30 or 8517.50 because the apparatus covered under these sub-headings would be limited to those matching the description of heading 8517, i.e., apparatus for line telephony or line telegraphy. Base stations at issue are not used as apparatus in line telephony or line telegraphy. Therefore, base stations could not have been covered under sub-heading 8517.50 of HS1996.

39. Unlike base station, switching apparatus of the kind covered in HS1996 Explanatory Notes does not receive or transmit radio waves. They receive and transmit "coded" electrical signals and establish a connection for the purposes of line telephony. Therefore, base stations, for which radio transmission is essential, cannot be covered under this heading.

40. Accordingly, the issue before the Panel is whether sub-heading 8525.10 – "*Transmission apparatus other than apparatus for radiobroadcasting or television*" or 8525.20 – "*Transmission apparatus incorporating reception apparatus*" could cover base stations.

41. As stated above, heading 8525 (HS1996) covered "[t]ransmission apparatus for radio-telephony, radio-telegraphy, ..., whether or not incorporating reception apparatus or sound recording or reproducing apparatus."<sup>47</sup> The transmission apparatus covered under such heading were limited to radio-telephony apparatus of the kind described in HS1996 Explanatory Notes. It has already been established above that telephones for cellular networks were not covered under the ITA-1. Accordingly, base stations were also not covered under the ITA-1. Accordingly, India submits that sub-headings 8525.10 or 8525.20 did not and could not cover base stations.

**iii) Sub-Heading 8517 62: Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus other than PLCC Equipment, Voice Frequency Telegraphy, Modems, High Bit Rate Digital Subscriber Line System, Digital Loop Carrier System, Synchronous Digital Hierarchy System and Multiplexers were not covered under the ITA-1.**

42. At the outset, Japan has alleged<sup>48</sup> that Customs Notification No. 57/2017 dated 30 June 2017 and its succeeding 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 for wrist wearable devices,

<sup>44</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (4th edn., World Customs Organization 2007), Heading 8517 (Exhibit IND-8)

<sup>45</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (2nd edn., World Customs Organization 1996) Heading 8525 (Exhibit IND-6)

<sup>46</sup> Japan's First Written Submission, Para. 47

<sup>47</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (2nd edn., World Customs Organization 1996) Heading 8525 (Exhibit IND-6)

<sup>48</sup> Japan's First Written Submission, Para. 54

optical transport equipment, combination of one or more of packet optical transport product or switch, optical transport network, IP Radios, Soft switches and Voice over Internet Protocol equipment, carrier ethernet switch, packet transport node products, multiprotocol label switching transport profile products, and MIMO and LTE products. However, Japan has not provided a shred of evidence regarding the said products being classified under tariff item 8517.62.90. Serial No. 20 of Notification No. 57/2017 dated June 30, 2017 provides exemption with certain exceptions.<sup>49</sup> The column concerning classification of the said goods indicate that such goods could be classified under 8517.62.90 or 8517.69.90.

43. Therefore, the products at issue may not be classified under tariff item 8517.62.90. Japan's claims are limited to sub-heading 8517.62. Therefore, to the extent that the products described above are appropriately classified under sub-heading 8517.69, such products are not only outside the scope of the present Panel request but there cannot be any dispute over such products.

44. It is India's understanding that Japan does not argue that the products or apparatus which are currently covered under tariff item 8517.62.90 were somehow covered under sub-headings 8517.22, 8517.30, 8517.50 or 8517.80 because the apparatus covered under these sub-headings would be limited to those matching the description of heading 8517, i.e., apparatus for line telephony or line telegraphy.

45. India invites the Panel's attention to HS1996 Explanatory Notes for heading 8517. The Explanatory Notes define electrical apparatus for line telephony and line telegraphy as under<sup>50</sup>:

The term "electrical apparatus for line telephony or line telegraphy" means apparatus for the transmission between two points of speech or other sounds (or of symbols representing, written messages, images or other data), by variation of an electric current or of an optical wave flowing in a metallic or dielectric (copper, optical fibres, combination cable, etc.) circuit connecting the transmitting station to the receiving station.

The heading covers all such electrical apparatus designed for this purpose, including the special apparatus used for carrier-current line systems.

46. Under the ITA-1, India made a commitment under sub-heading 8517.50, i.e., 'other apparatus for carrier-current line systems or for digital line systems.' HS1996 Explanatory Notes states as follows with regard to sub-heading 8517 50<sup>51</sup>:

"These systems are based on the modulation of an electrical carrier-current or of a light beam by analogue or digital signals. Use is made of the carrier-current modulation technique and pulse code modulation (PCM) or some other digital system. These systems are used for the transmission of all kinds of information (words, data, images, etc.)

These systems include all categories of multiplexers and related line equipment for metal or optical fibre cables. "Line equipment" includes transmitters and receivers or electro-optical converters. Combined modulators-demodulators (modems) are also classified here.

Similar apparatus used for radio transmission systems is excluded (heading 85.25 or 85.27)."<sup>52</sup>

[Emphasis Supplied]

47. From the above, it becomes evident that apparatus used for 'radio transmission' systems were excluded from the ambit of sub-heading 8517.50, and consequently, there exists no obligation upon

<sup>49</sup> Notification No. 57/2017 dated 30 June 2017, G.S.R. 798(E) (Exhibit JPN-27)

<sup>50</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (2nd edn., World Customs Organization 1996), Heading 8517 (Exhibit IND-7)

<sup>51</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (2nd edn., World Customs Organization 1996) Heading 8517 (Exhibit IND-7)

<sup>52</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (2nd edn., World Customs Organization 1996) Heading 8517 (Exhibit IND-7)

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India under the ITA-1 to provide Nil duty to apparatus used for radio transmission under sub-heading 8517.50.

48. There is no doubt that the apparatus for carrier line systems and digital line systems have been granted a Nil duty by India.<sup>53</sup> India made no commitment for "*machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus*".

49. The HS1996 Explanatory Notes to sub-heading 8525.10 states as under:

The apparatus for radio-broadcasting falling in this group must be for the transmission of signals by means of electro-magnetic waves transmitted through the ether without any line connection. On the other hand television apparatus falls here whether the transmission is by electro- magnetic waves or by line.

This group includes:

- (1) Transmitters of all kinds.
- (2) Relay apparatus used to pick up a broadcast and retransmit it and so increase the range (including television relay apparatus for mounting in aircraft).
- (3) Relay television transmitters for transmission, by means of an aerial and parabolic reflector, from the studio or site of an outside broadcast to the main transmitter.
- (4) Television transmitters for industrial use (e.g., for reading instruments at a distance, or for observation in dangerous localities). With this apparatus the transmission is often by line.

50. On the other hand, as per HS2007 Explanatory Notes, "*other communication apparatus*" is apparatus which allows for connection to a wired or wireless communication network or the transmission or reception of speech/sounds/images/data within such a network. This could include network interface cards, modems, routers, bridges, hubs, codecs, multiplexers, pulse to tone converters.<sup>54</sup> HS2007 Explanatory Notes explain 'other communication apparatus' to be:

This group includes apparatus which allows for the connection to a wired or a wireless communication network or the transmission or reception of speech or other sounds, images or other data within such a network.

Communication networks include, inter alia, carrier current line systems, digital line systems and combinations thereof. They may be configured, for example, as public switched telephone networks, Local Area Networks (LAN), Metropolitan Area Networks (MAN) and Wide Area Networks (WAN), whether proprietary or open architecture. This group includes:

- (1) Network Interface Cards
- (2) Modems
- (3) Routers, bridges, hubs, repeaters and channel to channel adaptors
- (4) Multiplexers and related line equipment (e.g., transmitters, receivers or electro-optical converters)
- (5) Codecs (data compressors/decompressors) which have the capability of transmission and reception of digital information

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<sup>53</sup> The Customs Tariff Act 1975, No. 51 of 1975, First Schedule

<sup>54</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (4th edn., World Customs Organization 2007) Heading 8517 (Exhibit IND-8)



(6) Pulse to tone converters which convert pulse dialed signals to tone signals"<sup>55</sup>

[Emphasis Supplied]

51. A comparison of the HS1996 Explanatory Notes to heading 8525 with HS2007 Explanatory Notes to heading 8517 makes it clear that the latter is much wider. Japan cannot succeed in its claim unless it demonstrates that the products listed in Paragraph 186 of India's first written submissions are appropriately classified under tariff item 8517.62.90 and fall within the ambit of sub-headings 8525.10 (HS1996), as explained by HS1996 Explanatory Notes.

**F. India's Rectification Request was valid and the objections made by Japan were unfounded**

52. The 1980 Procedures provide that Members may only object to a rectification if the Rectification and Modification of Schedules, Schedule XII - India, Communication to the Secretariat, (25 September 2018) G/MA/TAR/RS/572 ("Draft Rectification"), (a) alters the scope of concessions, or (b) is not in terms of the procedural requirements as listed in Paragraph 2 of the 1980 Procedures. In that context (and as India has argued previously),<sup>56</sup> the objections made by Japan to India's rectification request were unfounded. Accordingly, India maintains that: (i) Japan acted beyond the prescriptions of Paragraph 3 of the 1980 Procedures by raising an objection unfounded in law, and (ii) Japan's objections were an impediment to India's rights to make a formal rectification to its Schedule of Concessions under the 1980 Procedures.

53. Paragraph 1(b)(iv) of the GATT 1994 states that the GATT 1994 consists of "other decisions of the Contracting Parties to GATT 1947." The Panel in *US — FSC* had interpreted "other decisions of the Contracting Parties to GATT 1947" to include 'a formal legal text which represented a legally binding determination in respect of the rights and/or obligations generally applicable to all contracting parties to GATT 1947.'<sup>57</sup> Thus, it is clear that the 1980 Procedures form part of the GATT 1994, by virtue of being a decision by Contracting Parties to the GATT 1947, and thereby are a "covered agreement" within the meaning of the DSU.

54. Since the 1980 Procedures are a covered agreement, under Article 3.2 of the DSU, the Panel has the authority to interpret the Draft Rectification and clarify the rights and obligations of the Members under it. Further, Article 11 of the DSU also imposes an obligation on the Panel to objectively assess the facts of the dispute and examine the conformity of Members' actions with covered agreements. Therefore, in the present dispute, 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.

55. India requests the Panel to assess the objection raised by Japan. If the Panel were to find that the ITA-1 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 Procedures. Further, such a determination shall also establish that Japan's action impeded India's right to rectify its Schedule under the 1980 Procedures. This would also lead to the conclusion that the alleged concessions on the products at issue were clearly in error and that such concessions were capable of rectification via the 1980 Procedures.

**G. Applied Rate of Ordinary Customs Duty on Products of Japan are not in Excess of India's Bound Rates**

56. Without prejudice to India's position, the Panel must note that the applied rates of ordinary customs duty on products of Japan are not in excess of that provided in India's Schedule of Concessions.

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<sup>55</sup> Customs Co-operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (4th edn., World Customs Organization 2007) Heading 8517 (Exhibit IND-8)

<sup>56</sup> Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions, GATT Doc. BISD S27/25-26, 26 March 1980

<sup>57</sup> Panel Report, *US — FSC*, Para. 7.63

57. Notification No.69/2011-Customs issued by the Government of India on 29 July 2011 pursuant to the Comprehensive Economic Partnership Agreement between Japan and the Republic of India provides for NIL rate of duty to "products of Japan".<sup>58</sup>

58. India submits that the measures at issue identified by Japan as imposing ordinary customs duties in excess of those set forth in India's Schedule of Concessions have no relevance and do not affect the validity and operation of Notification No.69/2011-Customs through which India applies ordinary customs duty to the products of Japan.

59. Consequentially, the measures at issue identified by Japan are not inconsistent with Article II:1(a) and (b) of the GATT 1994 since they do not accord less favourable treatment to products of Japan than that provided for in India's Schedule of Concessions.

## **H. Conclusion**

60. In the light of the foregoing considerations, India respectfully requests the Panel to find that:

- a. All products except the ones explicitly classified by Japan under the contested sub-headings, especially tariff items 8517.62.90 and 8517.70.90 are beyond the scope of the present dispute.
- b. The products at issue are not covered under the ITA-1.
- c. Since the products at issue are not covered under the ITA-1, the Draft Rectification circulated by India is of a purely formal character.
- d. The commitments under the contested sub-headings are invalid due to error. Accordingly, India has not violated Articles II:1(a) and II:1(b) of the GATT 1994.
- e. The applied rate of ordinary customs duty on products of Japan are not in excess of India's bound rates, and that there is no violation of Articles II:1(a) and II:1(b) of the GATT

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<sup>58</sup> Notification No. 69/2011, G.S.R. 593 (E), 29th July 2011 (Exhibit IND-41)

**ANNEX B-4****SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA****Introduction**

Japan has alleged that by imposing duties on certain information and communication technology products ("ICT products"), India is in violation of Article II:1(a) and II:1(b) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). On the other hand, India argues that the alleged commitments on contested tariff lines were provided in error, and that as a consequence India inadvertently expanded its commitments relating to products at issue beyond its obligations under the Information Technology Agreement 1996 ("ITA-1").

**Article 48 of the VCLT is applicable in the present dispute**

Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") prescribes the application of 'customary rules of interpretation of public international law' by Panels. The text of the DSU thus obliges the Panel to clarify the content of the covered agreements in 'accordance with customary rules of interpretation of public international law' which therefore requires the application of Articles 31-33 of the Vienna Convention on the Law of Treaties 1969 ("VCLT") (reflecting principles of customary international law for the purposes of treaty interpretation). More specifically, Article 31(3)(c) of the VCLT provides for taking into account "[a]ny relevant rules of international law applicable in the relations between the parties." Article 48 of the VCLT codifies the customary international law principle of error (detailed in India's written submissions), which is applicable in the present context. That approach, in the context of applying Article 48 of the VCLT, has been previously confirmed by the Panel in *Korea — Procurement*.

In addition, India highlights that while World Trade Organization ("WTO") rules are *lex specialis* in many respects, they do not exist in 'clinical isolation' from public international law and principles of international law therefore continue to apply to the present dispute unless otherwise excluded. India notes that its position with respect to the applicability of Article 48 of the VCLT has been confirmed by certain other parties to this dispute, including the European Union (in a parallel dispute DS582).

Separately, India also clarifies that Article XXVIII of the GATT 1994 does not apply in the present dispute. Article XXVIII provides for renegotiation and modification of a Schedule of Concessions. This is different from Article 48 of the VCLT, which provides for error as a circumstance that invalidates consent to a treaty (in this case, some parts of India's Schedule of Concessions). India further confirms that it has not invoked Article 79 of the VCLT.

**The commitments under the contested sub-headings in the 2007 Schedule are invalid due to errors**

Article 48(1) of the VCLT comprises the following threshold elements: (i) that the existence of an error must relate to a fact or situation assumed by the State to exist at the time when the treaty was concluded, and (ii) that such an error must form an essential basis of the state's consent to be bound by the treaty. These threshold conditions are qualified by Article 48(2) which provides: (i) that the State must not have contributed to the error by its own conduct, and (ii) that the State must not have been on notice of such error.

In relation to the first threshold element of Article 48(1), India was in error in relation to the material scope of the commitments under the contested sub-headings at the time the 2007 Schedule was certified. At no point did India look to expand the scope of concessions on ICT products beyond the ITA-1. India's error is highlighted by the fact that at the time the contested sub-headings were certified in August 2015, *a*) India had already made its intention clear of not expanding its obligations under the ITA-1 via the HS2007 transposition or otherwise, and *b*) as noted by Japan, India was already levying duties in 2014 on certain ICT products which clearly conflicted with the commitments it was ostensibly undertaking (in error) at the same time via the HS2007 transposition.

By inadvertently certifying concessions contrary to its unequivocal stand on the issue, India committed a factual/situational error within the meaning of the first Paragraph of Article 48 of the VCLT in the context of admittedly complex technical transpositions which were not flagged. In this context, India highlights the deliberate use of the word 'situation' in addition to the word 'facts' in the phraseology of Article 48 which covers the overall condition or circumstance prevailing at a particular time. Indeed, similar errors relating to technical entries have been previously considered as a potential ground for invalidity in international law. Additionally, India notes that Canada (as a third party to this dispute) is in agreement with India's position in relation to the character of India's error.

That position is also confirmed via commentary on Article 48 of the VCLT, which notes that "no consistent meaning can be drawn from international jurisprudence with respect to the distinction between errors of fact and of law". Further, "Article 48 does not exclude mixed questions of fact and law and the line between one and the other may not always be easy to draw". Clearly, 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. India reiterates that the fact that an error might have legal consequences (as indeed all contested errors would) does not make the error a legal error.

In relation to the second threshold element of Article 48(1), it is clear that India would not have agreed to the certification if it were aware that it would effectively expand India's commitments beyond those contained in ITA-1. India's error in relation to the material scope of the contested sub-headings formed an essential condition for India's consent to certification of the contested sub-headings.

In relation to Article 48(2), India asserts that it is an acknowledged doctrinal position that the party denying the vitiating effect of the error under Article 48(1) due to the exceptions under Article 48(2) has the burden of proving those exceptions. Accordingly, such burden of proof lies on Japan and not on India. Chinese Taipei (in a parallel dispute DS588) and Canada agree with India's position. Notwithstanding India's position on burden of proof, India highlights that the qualifying condition under Article 48(2) is "to have employed all reasonable (rather than possible) means of establishing the facts when concluding the treaty and of having taken precautions to avoid any error". India's error is framed by a transposition exercise in relation to admittedly complex technical sub-headings which were not "clearly flagged", as was required under the Procedure for the Introduction of HS2007 (a fact that has also been noted by the European Union and Canada separately). India's error was not unlikely in these circumstances. India further highlights that WTO law imposes a duty of diligence on all parties. 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-1.

In the one previous instance of Article 48 of the VCLT being applied in a WTO dispute, the Panel had observed that there exists a duty for all negotiating parties to verify the concessions being offered. That observation rings particularly true in the present instance for any party interested in the treatment of ICT products by India would have known that India's explicit stance was that it did not intend to commit to obligations beyond those in the ITA-1.

In relation to Article 44 of the VCLT, India highlights that error is a relative ground of invalidity, which may affect only some provisions of the treaty. Articles 44(3)(a)-3(c) of the VCLT prescribe the conditions for separability of some provisions of the treaty. India has previously sought to establish that the contested sub-headings are clearly separable for, a) the error relates only to the contested sub-headings, b) the contested sub-headings are separable from the remainder of 2007 Schedule, c) the certification of the contested sub-headings was not an essential condition for the consent of other Members to 2007 Schedule, and d) the continued performance of obligations undertaken via other sub-headings in 2007 Schedule would not be unjust (as is also a continuing fact).

In relation to Article 45 of the VCLT, India reiterates that it has not acquiesced to the validity of contested tariff lines. First, at no point did India provide concessions on the contested sub-headings which would be conduct capable of evidencing acquiescence to begin with. Second, as India has previously described, India made its position clear with respect to the scope of its commitments within a year of certifying its schedule (in response to objections by various WTO members).

Ultimately, India has sought to establish that the legal consequence of the invalidity of the contested sub-headings is that the tariff sub-headings would be rendered unbound. Japan argues that Panel's duty not to diminish India's obligations cannot be reconciled with India's argument on error. However, as India has stated above, the Panel must apply error as a rule of customary international law. India argues that if the application of a customary international law principle (error) is in accordance with the DSU, it cannot be that a finding on its legal consequence (invalidity) would be in derogation to the DSU.

India also highlights that in relation to Article 48 it has provided a comprehensive expert opinion on the issue of error by Prof. Waibel with its second written submissions. That expert report is admissible in the present proceedings and confirms various aspects of India's analysis on error in the context of the present dispute.

### **The ITA-1 is the comparative benchmark for assessing the 'error' under Article 8(1), VCLT**

The ITA-1 and its scope of coverage are instrumental as the comparative benchmark in establishing whether the transposition resulted in an expansion in the scope of India's tariff concessions, and therefore, in determining India's plea of error.

In order to determine whether there is a difference in the scope of concessions under the WT/LET/181 and WT/LET/1072, normally, the Panel could compare the scope of commitments of the two documents, and it could be easily ascertained that the scope of commitments for ICT products is much wider under WT/LET/1072 than it was under WT/LET/181. A comparison of the two documents (the said schedules) could be performed in two potential ways: (i) by preparing a positive list of products covered by the relevant tariff lines in each of the documents, or (ii) by ascertaining the negative list of products not covered by the relevant tariff lines in each of the documents.

India highlights that since the HS1996 Schedule (WT/LET/181) represents the immediate incorporation of India's commitments under the ITA-1, it should be used as the comparative benchmark. This is also evidenced by the fact that the Japan has used ITA-1 as the basis of its claim or as context for India's concessions on ICT Products. In any case, there is no material difference between India's concessions under WT/LET/181 and its HS2002 Schedule, i.e., WT/LET/886. The transposition of India's schedule from HS1996 to HS2002 did not result in any changes to headings 8517 or 8525.

India reiterates that the ITA-1 continues to stand as a special sui-generis agreement relevant to the subject matter of the present dispute and it must therefore be used as a base-line comparator as opposed to other instruments (or concession schedules) that may have expired or been superseded.

### **The Products at Issue Were Not Covered By The ITA-1**

Japan has argued that the ITA-1 must not be interpreted in accordance with the VCLT since the ITA-1 is not a covered agreement. India submits that the ITA-1 need not be a covered agreement for the Panel to interpret it for the purposes of India's claim under Article 48 of the VCLT. It may be observed that India's defence need not be limited to covered agreements. The language of Article 1.1 of the DSU states that the rules and procedures of the DSU shall apply to "disputes brought pursuant to the consultation and dispute settlement provisions" of the covered agreements. The language clearly suggests that covered agreements are relevant only for the purposes of claims raised in a dispute. India further submits that since the ITA-1 constitutes a "treaty" within the meaning of Article 2(1)(a) of the VCLT, it must be interpreted as such. The ITA-1 can only be interpreted under Articles 31 and 32 of the VCLT.

India submits that the HS Explanatory Notes, the subsequent practice to the ITA-1, and the product scope of the ITA-Expansion (read together) constitute relevant practice and demonstrate that the products at issue were not covered by the ITA-1.

### ***HS Explanatory Notes***

Japan relies on the correlation table to state that all the products at issue are covered by the ITA-1. Correlation tables act as guidelines in order to facilitate implementation of the new editions of the HS nomenclature, but are not legally binding. Article 31(4) of the VCLT provides that "[a] special

meaning shall be given to a term if it is established that the parties so intended." The Participants to the ITA-1 intended to limit the scope of Attachment A to the Harmonized System ("HS") 1996 Nomenclature and its Explanatory Notes. Therefore, the product scope of Attachment A to the ITA-1 is delineated by the HS1996 Nomenclature and Explanatory Notes, and only such product scope has any legal standing.

Japan has also argued that India has failed to provide any alternate classification for the products at issue. In this regard, India notes that the burden of proof is on Japan to establish that cellular telephones were covered by the ITA-1 and that Japan has failed to discharge such burden of proof. Without prejudice to the same, India submits that cellular telephones, base stations and LTE Equipment, as they exist in the present-day, would have been classified under HS1996 heading 8543, i.e., "Electrical Machines and Apparatus, Having Individual Functions, Not Specified or Included Elsewhere in this Chapter." More specifically, they would have been classified under sub-heading 8543.89, i.e., "Other." As demonstrated in India's first written submission, the products at issue could not have been classified under HS1996 headings 8525 and 8517. India highlights that it made no commitments under the ITA-1 on products classified under sub-heading 8543.89.

The claims made by the Japan are under the sub-headings 8517.12, 8517.61, 8517.62, and 8517.70. The claims and products at issue could be divided into two categories, namely, "independent claims" and "dependent claims." Telephones for cellular networks (8517.12), base stations (8517.61), Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus (8517.62) are independent claims. With regard to static converter (8504.40), printed circuit boards (8517.70), and parts of telephone sets other than PCBs (8517.70), it is submitted that the commitments under these sub-headings are dependent on the other principal commitments made under the ITA-1 for products such as telephones for cellular networks. Since the ITA-1 did not cover telephones for cellular networks, base stations and LTE Equipment, their parts and apparatus can also not be covered by the ITA-1.

India summarizes its position concerning the independent claims made by Japan below:

**Sub-Heading 8517.12 – 'Telephones for Cellular Networks or for Other Wireless Networks' were not covered under the ITA-1**

Japan alleges that India imposes a 20% duty on telephones for cellular networks, which are covered under tariff items 8517.12.11, 8517.12.19, and 8517.12.90. India maintains that the issue before the Panel is whether sub-heading 8525.20 – "Transmission apparatus incorporating reception apparatus" could cover telephones for cellular networks. The tariff heading 8525 covered, among others, 'Transmission Apparatus for Radio-Telephony or Radio Telegraphy.' The definition of the Transmission Apparatus of Radio Telephony or Radio Telegraphy is limited to the transmission of signals representing (1) speech, (2) messages, or (3) still pictures. This list is cumulative and exhaustive in nature. Therefore, no apparatus which can transmit signals representing videos or any other media other than the three listed above can be included in the scope of heading 8525.

Japan has relied on the amendment made to the HS1996 Explanatory Notes in March 1998 to argue that mobile phones could be classified under HS1996 heading 8525. India highlights that, *first*, the list in Part (A) of the Explanatory Notes of heading 8525 is subject to the main definition of Transmission Apparatus for Radio Telephony or Radio Telegraphy. As explained above, the transmission apparatus under HS1996 heading 8525 only consists of apparatus which can transmit signals representing (1) speech, (2) messages, or (3) still pictures. *Second*, the amendment to the HS1996 Explanatory Notes was only adopted in 1998. WT/LET/181 was certified on October 2, 1997. Therefore, the product scope agreed upon by India was the product scope as delineated by the Explanatory Notes as on October 2, 1997. The amendment cited by Japan is not applicable in the present dispute.

India also highlights that the contested sub-heading 8517.12 has ceased to exist. Smartphones and Telephones for cellular networks are now classified under sub-headings 8517.13 and 8517.14, respectively. In this regard, it must be noted that if a product is to be classified under a tariff entry, then the heading and description both would have to be seen together to determine the commitments prescribed in the schedule. The description of sub-headings 8517.13 and 8517.14 is different from the description of the erstwhile sub-heading 8517.12. Specifically, the term

'smartphones' does not appear in the ITA-1 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.

Separately, India submits that 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. However, tariff item 8517.13.00 is based on functionality of the phone and the type of network. Based on Chapter Note 5 to Chapter 85, India considers that smartphones are multifunctional devices, and the principal function of these devices is not that of telephones. In other words, such devices could have various other functions such as gaming, photography and videography, video production and editing, consuming various forms of content, wirelessly charging other devices, etc. and the principal function no longer appears to be that of a telephone. India 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. The burden of proof is on the complainant to identify the sub-heading under which smartphones were classified under HS2007, and whether India has violated its commitments viz-a-viz such sub-headings.

**Sub-Heading 8517.61: 'Base Stations' were not covered under the ITA-1.**

Japan alleges that India imposes 20% duty on "Base Stations," which are covered under tariff items 8517.61.00 of the Customs Tariff Act, 1975. Unlike base station, switching apparatus of the kind covered in HS1996 Explanatory Notes does not receive or transmit radio waves. They receive and transmit "coded" electrical signals and establish a connection for the purposes of line telephony. Therefore, base stations, for which radio transmission is essential, cannot be covered under this heading. Accordingly, the issue before the Panel is whether sub-heading 8525.10 - "Transmission apparatus other than apparatus for radiobroadcasting or television" or 8525.20 - "Transmission apparatus incorporating reception apparatus" could cover base stations.

India reiterates that heading 8525 (HS1996) covered "[t]ransmission apparatus for radio-telephony, radio-telegraphy, ...., whether or not incorporating reception apparatus or sound recording or reproducing apparatus." The transmission apparatus covered under such heading were limited to radio-telephony apparatus of the kind described in HS1996 Explanatory Notes. It has already been established above that telephones for cellular networks were not covered under the ITA-1. Even if the Panel were to find that mobile phones were covered under sub-heading 8525 of HS1996 on the basis of the later WCO amendment, Japan's claims regarding base stations and LTE equipment being covered by the ITA-1 would still fail - since they were still not included within the exhaustive description of sub-group of radio-telephony. Accordingly, base stations were also not covered under the ITA-1. Accordingly, India submits that sub-headings 8525.10 or 8525.20 did not and could not cover base stations.

**Sub-Heading 8517 62: Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus other than PLCC Equipment, Voice Frequency Telegraphy, Modems, High Bit Rate Digital Subscriber Line System, Digital Loop Carrier System, Synchronous Digital Hierarchy System and Multiplexers were not covered under the ITA-1.**

Japan has alleged that Customs Notification No. 57/2017 dated 30 June 2017 and its succeeding notifications exempts products falling under the tariff item 8517.62.90 of the First Schedule from the portion of customs duty exceeding 10%, except for wrist wearable devices, optical transport equipment, combination of one or more of packet optical transport product or switch, optical transport network, IP Radios, Soft switches and Voice over Internet Protocol equipment, carrier ethernet switch, packet transport node products, multiprotocol label switching transport profile products, and MIMO and LTE products.

Indeed, Serial No. 20 of Notification No. 57/2017 dated June 30, 2017 provides exemptions with certain exceptions, and the column concerning classification of the said goods indicates that such goods could be classified under tariff item 8517.62.90 or 8517.69.90. There is thus a possibility that the products at issue might not be classified under tariff item 8517.62.90 to the extent they are appropriately classified under sub-heading 8517.69.

Japan has argued that since Wrist Wearable devices, optical transport equipment, POTP or POTS, OTN products and IP Radios were classified under tariff item 8517.62.90 under Notification No. 75/2018, at least these products should fall under tariff item 8517.62.90. Further, it has stated that all the products in the list are covered by Japan's claims, as well as the rest of the products fall under tariff item 8517.62.90, which are subject to 10% duty. However, Japan has provided no evidence for its claim concerning the classification of the products under sub-heading 8517.62.90.

### **Relevance of Paragraph 3 of the Annex to the ITA-1**

Japan has argued that India refers to paragraph 3 in the Annex to the ITA-1, as evidence to show that the ITA-1 does not cover 'new products.' Japan has argued that Paragraph 3 of the Annex to the ITA-1 merely acknowledges that the ITA-1 has a certain scope, which must be expanded from time to time, and its understanding is consistent with observation of the Panel in *EC – IT Products*.

First, India clarifies that the analysis of the product scope of the ITA-1, as proposed by India, is consistent with the position taken by the Panel in *EC – IT Products*. New product" used by India in this dispute is limited to the products which fall outside the product scope of the ITA-1 read with HS1996 Explanatory Notes. Second, *EC - IT Products* was concerned with Attachment B of the ITA-1, an attachment which relies on description of products rather than associated tariff headings or sub-headings. On the other hand, the scope and coverage of Attachment A to the ITA-1 would be circumscribed by the related HSN Explanatory Notes. The scope of India's commitments for the products at issue under the ITA-1 are delineated by the HS1996 Nomenclature read with its Explanatory Notes.

### **Subsequent Practice to the ITA-1**

India highlights that statements may qualify as subsequent practice within the meaning of Article 31(3)(b) of the VCLT, if such statements are concerned with the treaty's meanings and interpretation. Japan has argued that the statements referred to by India do not constitute subsequent practice in the application of the treaty under Article 31(3)(b) since (i) the pronouncements do not reflect a common, consistent, discernible pattern and (ii) the pronouncements do not imply agreement on the interpretation of a provision.

India notes that it is evident from Appellate Body Report in *EC – Chicken Cuts*, (i) not each and every party must be engaged in a particular practice for it qualify as a 'common' and 'concordant' practice, however, (ii) it would be difficult to establish such a practice on the basis of the pronouncements of *one or very few parties*. In addition, the Appellate Body has acknowledged that in the event that very few parties have traded or classified products under a given heading (in context of a multilateral treaty), there may not be as many acts and pronouncements available for the examination of the subsequent practice to a treaty. The statements relied upon by India reflect the countries' agreement concerning the static nature of the product scope of the ITA-1 and the need to expand the product scope in order to include 'new products,' i.e., products not already covered by the ITA-1.

India in its First Written Submission demonstrated how several Participants of the ITA-1, who are also now participants to the Ministerial Declaration on the Expansion of Trade in Information Technology Products ("ITA Expansion"), did not grant any concessions to certain products at issue until they modified their schedules of concessions in pursuance of the ITA Expansion. Separately too, and in what affirms the complex nature of the transposition itself, India has demonstrated that (i) 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, (ii) some ITA-1 Participants have not committed to a NIL duty for certain contested tariff lines, and last, (iii) certain ITA-1 participants who are not participants to the ITA Expansion continue to impose duties on products covered under certain contested tariff lines.

For instance, Vietnam and Ukraine have committed Nil duty on certain tariff lines but continue to impose duties ranging from 0-10% on certain products classifiable under such tariff lines. Indeed, countries such as the Dominican Republic, Indonesia, Morocco, Tajikistan, Turkey, Ukraine, Vietnam, Oman, Moldova, Jordan and Egypt continued to impose duties on certain products at issue for a considerable period after entering into the ITA-1.



It was found that while Viet Nam's bound rate for sub-heading 8517.62 is Nil, Viet Nam continued to apply duties ranging from 0-10% till 2020 on certain products classifiable under sub-heading 8517.62. Further, Viet Nam's bound rate for contested sub-heading 8517.70 is not Nil. This implies that Viet Nam does not consider the contested sub-heading to be a part of its ITA-1 commitments. Similarly, Ukraine's bound rate for sub-heading 8517.70 is Nil, Ukraine continued to apply duties ranging from 0-10% on certain products classifiable under sub-heading 8517.70 till at least 2021.

### **Product Scope of the ITA Expansion**

India also highlights that 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-1 read with the relevant sub-headings of HS1996 and the applicable Explanatory Notes. The fact that the ITA Expansion covers almost all products at issue in the present case - explicitly those under sub-headings 8504.40, 8517.61, 8517.62, 8517.70, 8518.30 - is a clear affirmation that those products are in addition to and were beyond the scope of the ITA-1.

Japan and certain third parties have claimed that there exists an overlap between ITA-1 and ITA Expansion. Japan has relied on G/IT/SPEC/15 to substantiate the claim. India highlights that G/IT/SPEC/15 does not form a part of negotiating history of the ITA Expansion, and therefore cannot be relied upon. Further, India notes that G/IT/SPEC/15 contains notations against products which are already included in the ITA-1. However, India notes that none of the products at issue have been identified in G/IT/SPEC/15 with such notations which denote that the products at issue were part of the ITA-1.

Japan has also relied on another document entitled "HS2007 Amendments in Relation to ITA Products and a Model List in HS2007" ("Model List"). However, the document relied on correlation tables published by the WCO, and makes these tables the basis for such guidelines. India highlights that the document advises caution with the following note: "It should be noted that, although these correlation tables have been published by the WCO Secretariat as guidelines in order to facilitate implementation of the new editions of the HS nomenclatures, *they do not hold any legal status.*" Thus, reliance on this document does not substantiate Japan's arguments in any manner.

### **Draft Rectification**

India's position with regard to the Draft Rectification is not a counter-claim in the present dispute. India submits that if it is found that the proposed Draft Rectification is of a purely formal character, it would lead to the conclusion that the objection raised by Japan to the Draft Rectification was unfounded. Consequently, the Panel could determine 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 Procedures. Therefore, there can be no violation of Article II:1(a) and Article II:1(b) of the GATT 1994 if the contested tariff lines of India's Schedule of concessions are void. India does not seek for the certification of the Draft Rectification through the dispute settlement mechanism.

Paragraph 1(b)(iv) of the GATT 1994 states that the GATT 1994 consists of "other decisions of the Contracting Parties to GATT 1947." The Panel in *US — FSC* had interpreted "other decisions of the Contracting Parties to GATT 1947" to include "a formal legal text which represented a legally binding determination in respect of the rights and/or obligations generally applicable to all contracting parties to GATT 1947." India notes that the 1980 Procedures constitute a 'covered agreement', as it is a decision by the Contracting Parties to the General Agreement on Tariffs and Trade 1947 ("GATT 1947"), and it is a legally binding determination in respect of the rights and obligations generally applicable to all the Contracting Parties to the GATT 1947. Since the 1980 Procedures is a covered agreement, under Article 3.2 of the DSU, the Panel can interpret the Draft Rectification and clarify the rights and obligations of the Members under it.

In any case, the Panel is obligated under Article 11 of the DSU to make an "objective assessment of the matter before it, including an objective assessment of the facts of the case." From this, it is evident that under Article 11 of the DSU, the Panel is obligated to consider defences raised by the respondent during the course of a dispute. This stands true even if such defence pertains to Agreements which are not covered agreements. Therefore, the Panel is obligated to assess the complaint in light of the 1980 Procedures. Any position to the contrary would result in the respondents not being able to raise any defence in proceedings before the Panel. India considers the

assessment of Japan's objections to the Draft Rectification essential for an objective assessment of the facts of the case under Article 11 of the DSU.

### **Conditions**

The Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017, which requires the intimation of intent to avail concessional rates of duties and registration of bills of entry. These processes have been automated, where all details can be uploaded on a common portal. With regard to the licensing requirements for wireless products, the Indian Wireless Telegraphy Act 1933 provides that the possession of wireless telegraphy apparatus, i.e., 'any apparatus, appliance, instrument or material used or capable of use in wireless communication' without a license is prohibited, except any relaxation provided under any rules framed thereunder. Further, Notification No. 71 dated September 25, 1953, as amended, allows the importation of wireless equipment only by persons who have been licensed to import such equipment by the Department of Telecommunications. The licensing requirement is applicable for the possession of the specified wireless apparatus in the country.

India submits that there is no requirement to record such procedural and documentary formalities for the importation of goods in the schedule of concessions. There is no restriction on maintaining such formalities pertaining to importation of goods, as long as such formalities do not act as a limitation to trade.

### **Applied Rate of Ordinary Customs Duty on Products of Japan are not in Excess of India's Bound Rates**

Without prejudice to India's position, the Panel must note that the applied rates of ordinary customs duty on products of Japan are not in excess of that provided in India's Schedule of Concessions.

India highlights that that the burden to identify the measure at issue is upon Japan, and not upon India. Japan has not identified Notification No. 69/2011 as the relevant measure at issue in the present dispute.

India submits that the measures at issue identified by Japan as imposing ordinary customs duties in excess of those set forth in India's Schedule of Concessions have no relevance and do not affect the validity and operation of Notification No.69/2011-Customs through which India applies ordinary customs duty to the products of Japan.

Consequentially, the measures at issue identified by Japan are not inconsistent with Article II:1(a) and (b) of the GATT 1994 since they do not accord less favourable treatment to products of Japan than that provided for in India's Schedule of Concessions.

### **India's Exemption Notifications are consistent with Article II:1(a) of GATT**

Japan argues that the exemptions granted by Section 25 of the Customs Act do not eliminate the inconsistency with Article II:1(a). It has argued that the nature of exemption notifications issued by India leads to a lack of foreseeability for traders operating in the marketplace. For this submission, Japan has relied on the legal test laid down in *EC – IT Products*.

India highlights that none of the factual aspects identified by Japan resemble the factual features identified in *EC – IT Products*. Particularly, Japan has been unable to highlight even a single instance of a "gap period" which was addressed by the retrospective application of an exemption notification. Further, India's exemption notification remain in place until there has been a modification by the Government of India. The tariff treatment under the exemption notifications is not contingent on any retrospective renewal or extension. Thus, for these reasons the Panel must reject Japan's claim under Article II:1(a) GATT 1994.

## **Conclusion**

For the reasons set forth in this submission, India respectfully requests the Panel to find that:

- The commitments under the contested sub-headings are invalid due to 'error' within the meaning of Article 48 of the VCLT
  - The products at issue are not covered under the ITA-1 and the 2007 Schedule, certified in error, included products not originally covered by the ITA-1
  - Since the products at issue are not covered under the ITA-1, the Draft Rectification circulated by India is of a purely formal character
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**ANNEX C****ARGUMENTS OF THE THIRD PARTIES**

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**ANNEX C-1****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL****INTRODUCTION**

1. Brazil provides the following executive summary of its participation during the panel proceedings in this dispute.

**I. ARGUMENTS****A. *Articles 8.6 and 8.7 of the DSU regarding the composition of a panel.***

2. Brazil does not see a hierarchy of procedures between Article 8.6 and Article 8.7. Article 8.6 establishes an obligation for the Secretariat to circulate names for the parties to agree upon as panelists, but Parties may decline such indications or agree on other panelists not previously suggested by the Secretariat. Article 8.7, on its turn, defines that the Director-General shall determine the composition of the panel if there is no agreement on the panelists within 20 days after the date of the establishment of a panel. The text of that provision does not condition the request to the Director-General on the previous circulation of a slate of names; rather, it only defines a minimum amount of time for the parties to try to negotiate. Such negotiations, in Brazil's view, are not a mandatory condition for the formation of a panel by the Director-General.

**B. *The interpretation and modification of the Schedules of Concessions, in light of the object and purpose of the GATT 1994.***

3. Brazil understands that, in the present dispute, the Panel is required to clarify the proper bound tariff set by India in its Schedules for certain tariff lines. Pursuant to Article 3.2 of the DSU, the Panel should apply customary rules of interpretation of public international law, in particular Articles 31 and 32 of the VCLT, to accomplish this objective.
4. Regarding the nature and usefulness of the ITA-1 in the present dispute, Brazil understands that the ITA-1 constitutes a commitment on the part of its participants to eliminate and bind duties at zero for the products specified therein on an MFN basis. Once the concessions are included in a participant's Schedule of Concessions, those rates become part of that Member's obligations under the covered agreements.
5. In Brazil's view, the ITA-1 is not a "covered agreement" within the meaning of Article 1.1 of the DSU, and, therefore, the Panel has no authority to interpret it. The panel may need to inquire, however, whether the ITA-1 qualifies as context, within the meaning of Article 31(2)(b) of the VCLT, for the interpretation of the commitments in India's Schedule. Brazil does not take a position on that matter.
6. More importantly, Brazil considers that the present dispute concerns the interpretation of the Schedules 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. In this sense, Brazil reiterates that the ITA is not material to a determination on the objective and purpose of the WTO Agreement, just as previously analyzed by the panel in *EC – IT Products*.<sup>1</sup>
7. Brazil also notes that the ITA-1 covers a set of fast evolving products - computers, telecommunication gadgets, semi-conductors, and manufacturing equipment, amongst others – which are constantly subject to new functionalities and innovations. This invites the panel to analyze the extent to which technological innovations may change the commitments inscribed in a Member's Schedule. In Brazil's view, technological evolution cannot lead to unilateral

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<sup>1</sup> Panel Report, *EC – IT Products*, para. 7.548.

reclassifications by importing Members in ways that may circumvent the tariff commitments they negotiated and registered in their WTO Schedules.

**C. *The application of Article 48 of the Vienna Convention on the Law of Treaties.***

8. Brazil understands that nothing in the WTO agreements precludes a Member from invoking Article 48 of the VCLT. Notwithstanding this, Brazil notes that current international jurisprudence sets a very high threshold for demonstrating that a party consented to a treaty in error.
9. Brazil recalls that in order for Article 48 to apply, it must be established that: (i) the error in question, if it existed, formed an "essential basis" of a Party's consent to be bound by the treaty; (ii) that Party did not contribute by its own conduct to the error; and (iii) the circumstances were not such as to put that Party on notice of a possible error.
10. Whilst Brazil does not take a position on the application of Article 48 of the VCLT in this dispute, it believes that precedence should be given to provisions in the WTO covered agreements over other legal documents, such as the VCLT. For example, Brazil understands that provisions contained in the "Procedures for Modification and Rectification of Schedules of Tariff Concessions" ("1980 Procedures") regarding the rectification of Schedules should prevail over the analogous rules in Article 79 of the VCLT regarding changes of a purely formal character

**ANNEX C-2****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA****I. INTRODUCTION**

1. The following submission sets out the main arguments of Canada as a third party in this dispute. Specifically, Canada's views with respect to the issue of technological advancements and product coverage, the ITA-1 and the ITA Expansion, Article 48 of the VCLT, and India's bilateral trade agreement with Japan.

**II. NEW PRODUCTS ARE NOT EXCLUDED FROM EXISTING COVERAGE SIMPLY BECAUSE THEY INCORPORATE TECHNOLOGICAL ADVANCEMENTS**

2. Canada's view is that tariff concessions under the Uruguay Round and ITA-1 are not static and do not encompass only those products in existence at the time they were concluded. The 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.

3. The panel in *EC – IT Products* observed that Members, when making commitments pursuant to Article II of the GATT 1994 "may choose precise, even exclusive, terms and conditions to qualify or limit the scope of coverage. These include terms and conditions that would limit coverage to a particular product based on its physical attributes, dimensions, technical characteristics or features. A Member may also refer to a particular classification or tariff heading to define or limit the scope of a concession. The determination of the scope of coverage comes from the meaning of the terms of that commitment."<sup>1</sup> New products are not automatically excluded from existing coverage simply because they incorporate technological advancements. Rather, the scope of coverage is determined by an examination of the meaning of the terms contained in the commitment set out in a Member's Schedule.

4. With regards to the specific issue of technological developments with respect to IT products, the panel in *EC – IT Products* found that in assessing the scope of the proposed concessions at issue in that case there was no need to consider the particular status of technology at the time of negotiating the concession.<sup>2</sup> Rather, in determining the scope of the commitments made with respect to the specific products, the Panel applied the customary rules of interpretation set out in Article 31 of the Vienna Convention, including the ordinary meaning of the terms of the commitment, the context provided by the ITA-1, other relevant parts of the Schedule at issue and the Schedules of other WTO Members.<sup>3</sup>

5. As such, it is not necessary in the case at hand to examine the status of the technology in existence at the time the ITA-1 was concluded. Rather, the Panel's primary task in this case is to determine whether, in its tariff schedule, 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.

6. Canada's position in this regard is the same with respect to all products - whether products in general, products falling within the scope of the ITA-1, or products falling within the scope of the ITA Expansion. An interpretation that finds that such 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 new technology or has otherwise evolved technologically.

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<sup>1</sup> Panel Reports, *EC – IT Products*, para. 7.505 (emphasis added).

<sup>2</sup> *Ibid*, paras. 7.596, 7.600, 7.952.

<sup>3</sup> *Ibid*, para. 7.952 for instance.

### **III. THE RELEVANCE OF THE ITA-1 AND THE ITA EXPANSION AND THE INTERPLAY BETWEEN THE TWO AGREEMENTS**

7. In Canada's view, it is not necessary in the case at hand to interpret the ITA-1 itself. Rather, the Panel's task is to interpret India's tariff commitments set forth in its Schedule of Concessions annexed to the GATT 1994. The ITA-1, however, 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.

8. India is not a party to the ITA Expansion and therefore did not agree to any tariff concessions nor implement the commitments agreed upon by the parties to the ITA Expansion. The ITA Expansion would therefore qualify to serve as context for changes to other Member's schedules that were made following that Agreement and which implemented the commitments contained therein – but this is not the case for India.

9. Further, the inclusion of a product in the ITA Expansion does not necessarily mean that it falls outside the scope of the ITA-1; overlap in product coverage may occur between the two lists. When defining the product scope of the ITA Expansion, it is Canada's understanding that negotiators did not purposefully seek to avoid overlap with certain products falling within the scope of ITA-1. Rather, Canada understands that negotiators were aware that there would be overlap, and that overlap would be difficult to avoid, in part due to the differences in HS versions that were used as a basis for the two agreements (i.e. the HS2007 for the ITA Expansion and HS1996 for ITA-1).

### **IV. ARTICLE 48 OF THE VCLT**

10. As a preliminary matter, any analysis under Article 48 must first be preceded by an analysis and findings as to whether the products at issue are captured by the tariff concessions at issue. It would then require a determination that all of the requisite elements of Article 48 have been met. In other words, it must be shown that: 1) there is an error in the treaty, 2) related to a fact or situation assumed by the State to exist at the time the treaty was concluded, 3) which formed an essential basis of its consent to be bound by the treaty, and 4) that the State did not contribute by its own conduct to the error nor the circumstances were such as to put that State on notice of a possible error.

11. Canada 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. This element of Article 48 examines whether a State would have refrained from giving its consent to the entire treaty had it known the real fact or situation. It was included in Article 48 to guard against abuse of Article 48 by preventing States from reneging on their commitments and to protect the stability of treaties, as well as the good faith of the other parties by clearly defining the conditions under which an error is capable of invalidating consent.<sup>4</sup> In Canada's view, given this requirement regarding the "essential" character of the error, it seems unlikely that technical amendments that do not alter the scope of a State's obligations could satisfy such a high threshold of forming the "essential" basis of a State's consent to be bound by a treaty.

12. The criteria in Article 48(2) are also of particular importance to the Panel's analysis on whether Article 48 can be successfully invoked. The first requirement in Article 48(2) is that the State in question did not, by its own conduct, contribute to the error. The second element in Article 48(2) is that a claim of error cannot be invoked where "the circumstances were such as to put that State on notice of a possible error."

13. While the jurisprudence on Article 48 is limited, the jurisprudence 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. In Canada's view, it is the WTO Member's responsibility to adequately review and ensure its Schedules are correct before they are certified. Canada considers that India had the opportunity to review the proposed transposition prepared by the WTO Secretariat and to propose any changes prior to certifying the document. Canada further notes that concordance documentation was available in 2007 that indicated exactly

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<sup>4</sup> O. Dorr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary, Second Edition* (Berlin: Springer-Verlag GmbH Germany, 2018), Exhibit CAN-1, p. 897.



how the Secretariat viewed the transposition of ITA products from HS1996 to HS2007. The availability of such 2007 concordance documentation may further suggest that the circumstances were such as to put India on notice as to a possible error in its understanding regarding the scope of the concessions. Upon review of the draft HS07 file, despite all of the available information, India did not inquire further as to the scope of the concessions and thus, by its own conduct, may have contributed to the alleged error regarding the scope of such concessions.

14. With regards to the burden of proof when invoking Article 48, the party seeking to invoke Article 48 bears the burden of proof of demonstrating that it meets the requirements of Article 48. However, Canada considers that the exclusionary clause in Article 48(2) requires the party denying the vitiating effect of an error – in this case the complainant – to prove the elements of Article 48(2) are met.

**V. THE PANEL'S ABILITY TO ASSESS THE VALIDITY OF INDIA'S DRAFT RECTIFICATION**

15. Canada is of the view that the determination of whether India's 2018 draft rectification was of a purely formal character is not within the purview of a dispute settlement panel to assess.

**VI. INDIA'S BILATERAL TRADE AGREEMENT WITH JAPAN DOES NOT SAVE IT FROM A FINDING OF A VIOLATION OF ARTICLES II:1(A) AND (B)**

16. The implementation of a bilateral free trade agreement does not preclude a finding of a violation of Article II and is irrelevant to the Panel's analysis in the case at hand. The obligations in Article II of the GATT exist independent of any bilateral free trade agreement that sets out preferential tariff concessions for goods that qualify under the bilateral free trade agreement. The concessions set out in the Schedules of WTO Members establish the maximum most-favoured nation ("MFN") duties that will apply to WTO Members, including goods from free trade agreement partners that do not claim or qualify for preferential tariff treatment under the free trade agreement. These bound MFN rates are unaffected by bilateral trade agreements.

**ANNEX C-3****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION\***

Dear Mr Chairman and Members of the Panel,

1. On behalf of the European Union, I would like to thank the Panel for this opportunity to submit orally the views of the European Union as a third party in the disputes DS 584 and DS 588.
2. Those two disputes raise essentially the same issues as the dispute DS 582 brought by the European Union. The Panel is already familiar with the arguments submitted by the European Union in the dispute DS 582. For that reason, our statement today will be very brief.
3. Like the European Union, both Japan and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu claim, in essence, that India acts inconsistently with Article II:1 a) and b) of the GATT 1994 by applying import duties on certain products in the information and communications technology (ICT) sector in excess of the tariff bindings included in India's GATT Schedule.
4. India does not contest that the tariff bindings invoked by Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu are part of India's GATT Schedule. Nor does India contest that India's applied duties are in excess of those tariff bindings.
5. By way of defence, India limits itself to argue that the transposition to the 2007 version of the Harmonised System (HS) is in error because India had made the erroneous assumption that that transposition could not expand India's commitments under the Information Technology Agreement (ITA-1). As a result, according to India, the tariff concessions at issue are invalid by virtue of Article 48 of the Vienna Convention on the Law of the Treaties (VCLT).
6. India has not proven that it made the error which it alleges now. The transposition to HS 2007 was not meant to "expand", and did not "expand", India's pre-existing tariff concessions. India was not wrong to assume that the transposition to HS 2007 could not "expand" the scope of its pre-existing concessions. Rather, India is wrong to assume that its pre-existing concessions were limited to products which already existed in 1997.
7. The burden of proving that India made the alleged error is on India. Accordingly, it is for India, and not for the complaining parties, to show that the transposition to HS 2007 "expanded" India's commitments under the ITA-1. India has failed to do so. In any event, the Panel need not reach this issue because it is evident that the strict requirements of Article 48 of the VCLT for invalidating a treaty would not be met.
8. First, the error alleged by India does not relate to a fact or situation, as required by Article 48.1 of the VCLT. India argues that it made an error with regard to the scope of the tariff concessions at issue. The scope of those concessions is defined by the terms of India's GATT Schedule, which is an integral part of the WTO Agreement. The alleged error, therefore, involves a misinterpretation by India of the terms of the treaty on which the complaining parties base their claims. Such an error is an unmixing error of law and falls squarely outside the scope of Article 48.1 of the VCLT.
9. Second, in any event, the alleged error would be clearly inexcusable according to Article 48.2 of the VCLT.
10. India had ample opportunity to review the drafts, to request clarifications and provide comments and, if necessary, to object to the transposition to HS 2007 prepared by the WTO Secretariat. Nevertheless, India did not do so with regard to any of the tariff subheadings in

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\* The European Union has requested that its oral statement serves as its executive summary.

dispute at any stage of the process. Thus, India contributed by its own conduct to the alleged error.

11. Moreover, there were circumstances that put India on notice of the alleged error. It 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-1 was negotiated. In addition, 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-1 did not cover "new products" could be in error.
12. For all these reasons, the Panel should reject India's plea of error and find that India acts inconsistently with Article II:1 a) and b) of the GATT 1994.

This concludes our statement – Thank you for your time and attention.

**ANNEX C-4****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA****I. Introduction**

1. Korea respectfully submits the executive summary of its third party written submission of 22 April 2021 and oral statement of 13 October 2021.

2. In its previous written submission and oral statement, Korea had addressed the following: (i) a request to the Panel to examine as a preliminary question, whether and how India's invocation of error pursuant to Article 48 of the Vienna Convention on the Law of Treaties ("Vienna Convention") falls under the Panel's terms of reference as defined by the DSU; (ii) the relevant principles to be taken into consideration while interpreting India's Schedule of Concessions; (iii) Korea's observations on India's defense of error and the relevance of Article 48 of the Vienna Convention; and (iv) Korea's observations on Japan's argument on the interpretation of Article II:1(a) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

**II. Preliminary Question: the Panel's Terms of Reference in Regards to Article 48 of the Vienna Convention**

3. Korea understands that there is no basis in the DSU or elsewhere in the WTO agreements on which the Panel would be authorized to apply Article 48 of the Vienna Convention in this dispute. Korea notes that Article 48 of the Vienna Convention is not a provision of any "covered agreement" under Article 7.2 of the DSU which provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."<sup>1</sup> Korea also wishes to highlight that Article 48 of the Vienna Convention addresses the issue of *invalidation* of treaties, while Article 3.2 of the DSU states that the dispute settlement system serves to "*clarify* the existing provisions of those [covered] agreements in accordance with customary rules of interpretation of public international law."<sup>2</sup>

4. In light of such, Korea requests the Panel to examine as a preliminary question, whether and how India's claim of error pursuant to Article 48 of the Vienna Convention falls under the Panel's terms of reference as defined by the DSU.

**III. Relevant Principles for the Interpretation of the Schedule of Concessions**

5. To Korea's understanding, India's argument is that its intention was to extend the scope of its tariff commitments only to those that it made through the ITA-1 to which it is a party, while the sub-headings referred to by the Complainants are only subject to the ITA-2 to which it is not a party, and that the transposition of its Schedule of Concessions to HS2007 which effectively extended the scope of its concessions to include such sub-headings was made in error contrary to its actual intention.<sup>3</sup> During the course of making such an argument, India assumes that the scope of Attachment A to the ITA-1 is limited to the sub-headings under HS1996 and does not reflect changes in product scope following technological advancements.<sup>4</sup>

6. With regards to such arguments made by India, Korea points out that the agreement at issue in this dispute is the GATT 1994, not the ITA-1. This is because the key issue in this dispute involves the interpretation of India's Schedule of Concessions annexed to the GATT 1994. And it is Korea's belief that the interpretation of the GATT 1994 must be done on the basis of the common intention of the Members and the customary rules of treaty interpretation under Article 31 of the Vienna Convention.

7. As made clear by the Appellate Body in *EC – Computer Equipment*, only the *common* intention of the contracting parties is relevant under the customary rules of treaty interpretation, while the expectations of one of the parties are not.<sup>5</sup> Also, a Member's Schedule of Concessions must be

<sup>1</sup> DSU, Article 7.2.

<sup>2</sup> DSU, Article 3.2. (*emphasis added*)

<sup>3</sup> See generally, India's First Written Submission, WT/DS584, paras. 76-194.

<sup>4</sup> See e.g., India's First Written Submission, WT/DS584, paras. 107-194.

<sup>5</sup> Appellate Body Report, *EC – Computer Equipment*, para. 84. ("The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These common

interpreted in light of its ordinary textual meaning, and the Harmonized System may constitute a "context" that can be taken into account according to Article 31 of the Vienna Convention as held by the Appellate Body in *EC – Chicken Cuts*.<sup>6</sup>

#### **IV. Korea's Observation on India's Arguments: the Rectification of GATT 1994 Schedules and the Relevance of Article 48 of the Vienna Convention**

8. To elaborate on India's position, India's argument is that it made "technical errors" in transposition of its Schedule of Concessions to HS2007 due to the complex technical nature involved in the process, which it attempted to rectify by recourse to the Procedures for Modification and Rectification of Schedules of Tariff Concessions ("1980 Procedures").<sup>7</sup> India argues that since this attempt for rectification was not certified owing to objections from other Members, India was "constrained to invoke the plea of treaty invalidity" which is the plea of error under Article 48 of the Vienna Convention.<sup>8</sup> Korea makes several observations in this regard.

9. First, the Panel need not consider Article 48 of the Vienna Convention, given that the 1980 Procedures which provide a mechanism to rectify a Member's Schedule indicate that a Member's Schedule remains in effect until a valid rectification is made.

10. The 1980 Procedures allow rectifications to a Member's Schedule of a purely formal character "which do not alter the scope of a concession." This is in line with Article XXVIII of the GATT 1994 which envisages a framework for Members to modify or withdraw concessions "by negotiation and agreement." At the same time, the 1980 Procedures require the communication of the proposed change to all WTO Members, who have the right to object to the proposed change. Thus, the 1980 Procedures expressly contemplate that the rectification will not go into effect if other Members object. The logical implication stemming from this is that the unmodified Schedule remains valid despite any allegation of error.

11. Second, even if the Panel finds that there is a basis for the Panel to have recourse to Article 48 of the Vienna Convention, Article XXVIII of the GATT 1994 and the 1980 Procedures should be understood as *lex specialis* which would pre-empt the application of Article 48 in this dispute. Korea believes that the present case is similar to the situation in *Peru – Agricultural Products*, where the Appellate Body found that "the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41."<sup>9</sup>

12. Third, and in any event, Korea has doubts that the strict conditions set out in Article 48 of the Vienna Convention are satisfied in this case.

13. A plea of error under Article 48 of the Vienna Convention must involve an error relating to a "fact or situation." However, it is evident from India's statement that its alleged error was "in relation to the material scope of the commitments under the contested sub-headings" at the time the 2007 Schedule was certified,<sup>10</sup> implying that the error, which concerns the legal consequences and the scope of its obligations stemming from the adoption of its 2007 Schedule, is of a legal nature.

14. Furthermore, India appears to have contributed to the alleged error and been duly put on notice about it. As acknowledged by India, its updated schedule was prepared by the WTO Secretariat, which followed the prescribed procedure of transposition as agreed by the decision of 15 December 2006 ("Procedure for HS2007").<sup>11</sup> The Procedure for HS2007 provides for extensive processes to be completed for the certification of an updated schedule, which provided India with ample opportunity to avoid the alleged error and to fix it.<sup>12</sup>

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intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of one of the parties to a treaty.")

<sup>6</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 199. ("As such, this agreement is 'context' under Article 31(2)(a) for the purpose of interpreting the WTO agreements, of which the [Schedule of Concessions] is an integral part.")

<sup>7</sup> India's First Written Submission, WT/DS584, para. 31.

<sup>8</sup> India's First Written Submission, WT/DS584, paras. 35, 37.

<sup>9</sup> Appellate Body Report, *Peru – Agricultural Products*, para. 5.112. (footnote omitted)

<sup>10</sup> India's First Written Submission, WT/DS582, para. 57.

<sup>11</sup> A Procedure for the Introduction of Harmonized System 2007 ("Procedure for HS2007"), WTO Document WT/L/673 (18 December 2006).

<sup>12</sup> For instance, Procedure for HS2007, para. 4. ("[i]n preparing the HS2007 transposition, to the extent possible, the scope of the concessions and other commitments shall remain unchanged. Any tariff line for which a change in the scope of a concession may have occurred due to the complex technical nature of the

15. The Procedure for HS2007 also mandates the Members to "examine" the HS07 file prepared by the Secretariat and either approve the file or provide specific comments.<sup>13</sup> Additionally, the Procedure for HS2007 also provided for a multilateral review process during which modifications could be made to the updated schedules.<sup>14</sup> Specifically, where transposition might have changed the scope of concessions of a Member, the Procedure mandated consultations and renegotiations pursuant to Article XXVIII of GATT.<sup>15</sup> The updated schedule would only be certified after all these steps were completed and there were no outstanding comments by Member States.<sup>16</sup>

16. Korea also notes that despite the fact that India's request for rectification was made in September 2018,<sup>17</sup> India had been aware of the alleged error at least since April 2016 when the EU, Japan, and the U.S. submitted questions to India on its inconsistent tariffs.<sup>18</sup> Of particular note, in Korea's opinion, is the fact that there was no mention of the defense of error in India's response communication of November 2016.<sup>19</sup>

17. Finally, Korea expresses its concern that accepting the defense of error would provide possible leeway for Members to avoid their WTO commitments. This would create great unpredictability and instability in the application of the GATT regime, which would be contrary to the object and purpose of the GATT 1994. Korea urges the Panel to exercise caution before allowing recourse to Article 48 of the Vienna Convention.

**V. Korea's Observation on Japan's Arguments: whether *ex post facto* Exemption Corrects Inconsistency under Article II:1 of GATT 1994**

18. Japan 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). Japan refers to *EC – IT Products* and argues that "less favourable treatment" should be understood in reference to "conditions of competition."<sup>20</sup> In this context, Japan argues that India's customs laws allow India to repeal or modify the exemptions at any time and that this creates a "lack of foreseeability for traders operating in the marketplace" as established in *Russia – Tariff Treatment*.<sup>21</sup> Japan concludes that this lack of predictability has a serious effect on competition and hence is inconsistent with Article II:1(a).<sup>22</sup>

19. Korea agrees that an inconsistency with Article II:1(a) of the GATT 1994 is not exclusively conditional on showing an inconsistency with Article II:1(b).<sup>23</sup> Korea also agrees with Japan's interpretation that "less favourable treatment" should be understood by reference to "conditions of competition" as held in *Argentina – Textiles and Apparel*, and that any uncertainty or unpredictability in negotiated tariff concessions could have "potential of deleterious effects on competition."<sup>24</sup>

20. Korea believes that it is the fundamental object and purpose of the WTO Agreement and the GATT 1994 that the security and predictability of reciprocal and mutually advantageous arrangements must be preserved, as acknowledged by the Appellate Body in *EC – Computer Equipment*.<sup>25</sup>

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transposition shall be clearly flagged. Paragraph 5 of Annex 2 and paragraph 15 below describe how these situations shall be addressed.")

<sup>13</sup> Procedure for HS2007, para. 8.

<sup>14</sup> Procedure for HS2007, paras. 13-14.

<sup>15</sup> Procedure for HS2007, para. 15.

<sup>16</sup> Procedure for HS2007, paras. 16-17.

<sup>17</sup> India's First Written Submission, WT/DS584, para. 31. (fn. 51)

<sup>18</sup> Questions from the European Union, Japan and the United States to India Regarding Indian Customs Notification No 11/2014, WTO Document G/MA/W/120 (4 April 2016).

<sup>19</sup> Replies of India to Questions Raised by EU, US and Japan in G/MA/W/120 and G/IT/W/42, WTO Document G/MA/W/128 (17 November 2016).

<sup>20</sup> Japan's First Written Submission, WT/DS584, para. 130.

<sup>21</sup> Japan's First Written Submission, WT/DS584, para. 137.

<sup>22</sup> Japan's First Written Submission, WT/DS584, para. 137.

<sup>23</sup> Japan's First Written Submission, WT/DS584, para. 130.

<sup>24</sup> Japan's First Written Submission, WT/DS584, para. 130.

<sup>25</sup> Appellate Body Report, *EC – Computer Equipment*, para. 84. ("the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994.")

## ANNEX C-5

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY\*

Mr Chair, Members of the Panels,

1. Norway welcomes the opportunity to present its views as a third party in this dispute. In this oral statement, Norway briefly sets out its views on the legal status of the 1996 Ministerial Declaration on Trade in Information Technology Products ("ITA-1"), as well as offer some remarks on the relevant commitments under a Member's schedule of concessions.
2. Norway agrees with other third parties in this dispute that the ITA-1 is not a "covered agreement" within the meaning of Article 1.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") as the ITA-1 is not listed in Appendix 1 of the DSU. The Panels' main task in this dispute is to interpret India's commitments made in the schedule of concessions annexed to the GATT 1994, hence the relevant legal provision in the WTO Agreement is the GATT 1994 Article II:1. This, however, does not in principle preclude the ITA-1 from serving as relevant context within the meaning of Article 31(2)(b) of the Vienna Convention on the Law of Treaties for the interpretation of India's tariff concessions.
3. As mentioned in Norway's written third party submission, one must separate between technological advancements leading to "new products" not captured by the tariff lines at six-digit level as listed in Attachment A (following transposition) to the ITA-1 Annex and included in Members' schedules on the one hand, and technological advancements which are developments of a product that falls within existing commitments on the other. Norway is not of the view that the development of new technologies and new products as such modifies the scope of tariff concessions in a Member's WTO Schedules.<sup>1</sup> Rather, Norway agrees with Canada that "tariff concessions under the Uruguay Round and the ITA-1 are not static and do not encompass only those products in existence at that time".<sup>2</sup> Members' obligations under the GATT 1994 Article II:1 include all products covered by the tariff lines in that Members' schedule of concessions.
4. Norway respectfully requests the Panels to take account of the considerations set out above when evaluating the claims set forth in this dispute.
5. Thank you for your time and attention.

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\* Norway requested that its oral statement serves as its executive summary.

<sup>1</sup> See the Panels' Question 6 to the third parties before the first substantive meeting.

<sup>2</sup> Canada's Response to the Panels' Question 10. See also Canada's written third-party submission, paras. 5-9.

## ANNEX C-6

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE\*

Mr. Chairperson, Members of the Panel,

1. Good afternoon, and thank you for the opportunity to present Singapore's views on the issues raised in these proceedings.
2. At the outset, we would like to emphasise that Singapore is not commenting on the merits of the claims and defences raised by the parties to the current disputes. Singapore's participation is strictly limited to setting out its views, from a legal perspective, on whether:
  - (a) the scope of coverage of products subject to tariff elimination commitments under a Member's schedule evolve with technological advancements; and
  - (b) the coverage of ITA-1 and ITA-2 are mutually exclusive.
- A. *Whether the scope of coverage of products subject to tariff elimination commitments under a Member's schedule evolve with technological advancements***
3. We note that the respondent to the current disputes, as well as some third parties, have raised the issue of whether "new products" arising out of technological advancements are captured by the tariff concessions under a Member's schedule pursuant to the agreement under ITA-1<sup>1</sup>.
4. Singapore's position is that the scope of coverage of tariff concessions under a Member's schedule is not limited to products in existence at the time that the concessions were made, but that they can cover new products arising from technological advancements, as long as these products fall within the terms or description of the tariff concession. This applies to tariff concessions on ICT products under a Member's schedule pursuant to ITA-1 (within the tariff lines and descriptions listed in Attachment A and Attachment B to the Annex of ITA-1) as well. New ICT products are not excluded from the concessions under a Member's schedule simply because they incorporate technological advancements or because they were not in existence at the time the ITA-1 was concluded (or when the tariff concession was made).
5. This is evident from the Panel's findings in *EC – IT Products*. The Panel, in assessing the scope of the concessions at issue in the dispute, took the view that it was neither desirable nor possible to consider the relevance of the state of technology that existed at the time of negotiations of ITA-1, or technological development in the abstract, without reference to the relevant terms of the concessions. The relevant terms of the concession had to be interpreted in accordance with the customary rules of interpretation set out in Article 31 of the VCLT, which included the ordinary meaning of the terms of the commitment, the context provided by ITA-1, other relevant parts of the schedule at issue, and the schedules of other WTO Members<sup>2</sup>.
6. This must be correct. If the mere incorporation of new technology into a product that will otherwise be covered by a Member's tariff schedule takes the product out of the Member's tariff schedule, it is not difficult to imagine the chilling effect this will have on the development of technology. It would undermine tariff concessions under GATT 1994 and be contrary to the intent of the participants of ITA-1, as expressed in the preamble of ITA-1, which highlights the participants' desire to "*achieve maximum freedom of world trade in information technology products*". It should also be borne in mind that paragraph 1 of ITA-

\* Singapore requested that its oral statement serves as its executive summary.

<sup>1</sup> India's First Written Submission (DS582), paras 109-123; Third Party Submission of the United States of America (DS582, DS 584 and DS 588), paras. 25-28; Third Party Submission of the Canada (DS582), paras. 5-9; Third Party Submission by Norway (DS582, DS 584 and DS 588), paras. 7-9; Third Party Submission by Turkey (DS582, DS 584 and DS 588), paras. 22-29

<sup>2</sup> Panel Reports, *EC – IT Products*, paras. 7.596, 7.600, 7.602, and 7.952



1 exhorts that "[e]ach party's trade regime **should evolve in a manner that enhances market access opportunities for information technology products.**"

7. We acknowledge that the classification of certain ICT products is challenging due to the continuing advances in technology, and this in turn led to many disputes in connection with the coverage of tariff concessions for such products under a Member's ITA-1 schedule. The correct response, however, is not for such products to be *ipso facto* excluded from the scope of commitments under a Member's schedule simply because they are "new". The correct response is to enquire whether these "new" products fall within a Member's schedule of tariff concession commitments, interpreted in accordance with the applicable rules of interpretation.

**B. Whether the coverage of ITA-1 and ITA-2 are mutually exclusive**

8. The question has also arisen in the current disputes as to whether products which are part of the ITA expansion under ITA-2 are necessarily outside the scope of ICT products subject to tariff concessions under a Member's tariff schedule pursuant to the agreement under ITA-1<sup>3</sup>.
9. Singapore's position is that the mere inclusion of a product in the ITA expansion under ITA-2 does not mean that it falls outside the coverage of ICT products subject to tariff concessions under a Member's tariff schedule, that was made pursuant to the agreement under ITA-1. There is nothing expressly provided in ITA-2 that the coverage of ITA-1 and ITA-2 are mutually exclusive, or that ITA-2 supersedes ITA-1. Tariff concessions to be made to a Member's schedule pursuant to ITA-1 and ITA-2 are identified based on different HS Codes. There can be overlaps between the products covered by ITA-1 (defined based on HS1996 nomenclature) and ITA-2 (defined based on HS2007 nomenclature). In fact, it was noted by the Panel in *EC – IT Products* that a proposal to include an item in ITA-2 during its negotiations does not conclusively establish whether or not the product was covered within ITA-1, or whether such a product existed at the time of the ITA-1 negotiations<sup>4</sup>.
10. As already indicated by the United States in its written submissions and answers to the Panel's questions<sup>5</sup>, and other third parties in their answers to the Panel's questions<sup>6</sup>, ITA-2 negotiators have also considered the possibility that several products proposed for inclusion in ITA-2 may in fact already be part of the ITA-1<sup>7</sup>.

**C. Conclusion**

11. In conclusion, we submit that the Panel should resolve the dispute in the spirit of what ITA-1 was intended to achieve, especially taking into account its objective to "*achieve maximum freedom of world trade in information technology products*". We thank the Panel for giving due consideration to Singapore's views on the issues raised in these disputes.

<sup>3</sup> India's First Written Submission (DS582), paras 140-148; Third Party Submission of the United States of America (DS582, DS 584 and DS 588), paras. 30-31

<sup>4</sup> Panel Reports, *EC – IT Products*, paras. 7.587, 7.588

<sup>5</sup> Responses of the United States to the Panel's Advance Questions to the Third Parties, para 21

<sup>6</sup> Korea's Response to the Panel's Questions to the Third Parties, page 3 5<sup>th</sup> paragraph from the top; Responses of Canada to Questions to the Third-Parties from the Panel before the First Substantive Meeting, para 19

<sup>7</sup> Third Party Submission of the United States of America (DS582, DS 584 and DS 588), paras. 30-31; See Proposed Additions to Product Coverage: Compilation of Participants' Submissions: Note by the Secretariat, G/IT/SPEC/15 (February 24, 1998) (indicating notation that certain products are "already covered by the ITA"); Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the Meeting on 14 March 2013 (G/IT/56),

**ANNEX C-7****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINESE TAIPEI\***

Mr. Chairman, members of the Panel,

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu would like to thank the Panel for the opportunity to make a statement at this third party session. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu delivers this statement as a third party in DS582 and DS584.

2. We will first talk about the main issue in this dispute, and after that, the importance of tariff concessions and transposition procedures. And then we will briefly address the main arguments in India's submissions: first, India's claim of error under Article 48 of the Vienna Convention; and then, the idea that the ITA-1 is somehow the agreement at issue in this dispute.

**1 THE ISSUE IN THIS DISPUTE IS WHETHER INDIA IMPOSES CUSTOMS DUTIES ON PRODUCTS IN EXCESS OF THE BOUND RATES IN ITS SCHEDULE OF CONCESSIONS INCONSISTENT WITH ARTICLE II:1(a) AND (b)**

3. In our view, these are straightforward disputes. The question before the Panel is whether India imposes customs duties on certain ICT products in excess of the bound rates in its currently certified Schedule inconsistent with Article II:1(a) and (b) of the GATT 1994. If the Panel finds that India imposes customs duties on products in excess of the bound rates, then the Panel must find that India is acting inconsistently with Article II:1(a) and (b) of the GATT 1994.

**2 INDIA'S ARGUMENTS DISREGARD TRANSPOSITION PROCEDURES AND THE EXISTENCE OF INDIA'S TARIFF CONCESSIONS THAT HAVE BEEN TRANSPOSED INTO THE HS2007**

4. Schedules are the backbone of the WTO. They ensure transparency, stability, and predictability of world trade. The commitments in Schedules, like tariff concessions, are the result of successive rounds of negotiations, and represent a balance of mutually advantageous concessions.

5. In order to keep up with technological advancements, WTO Members have agreed that tariff concessions should be transposed to update tariff lines. Transposition of tariff concessions are so important that WTO Members have agreed on detailed procedures on how to do it, and have requested the Secretariat for its assistance in carrying out transpositions.<sup>1</sup>

6. India argues in its submissions that tariff concessions are static, and are limited to only those products in existence at the time of undertaking concessions. India's arguments, however, completely disregard the existence of transposition procedures, as well as India's own tariff concessions that have been transposed into the HS2007.

7. Under India's approach, tariff transpositions simply would not exist. However, without transpositions, tariff concessions would become meaningless, as over time products covered may no longer exist or become obsolete due to technological advancements. Members would be forced into a state of constant renegotiation for concessions on "new" products.

8. India's approach also ignores the fact that India itself has transposed its own schedules twice. India cannot seek to undo transpositions when its tariff concessions become subject to WTO panel proceedings. If India wishes to modify its tariff concessions, it must resort to the WTO procedures for their modification provided under Article XXVIII of the GATT 1994.

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\* Chinese Taipei requested that its oral statement serves as its executive summary.

<sup>1</sup> See e.g. Concessions under the Harmonized Commodity Description and Coding System – A Procedure for Introduction of Harmonized System 2002 Changes To Schedules of Concessions, 18 July 2001, WT/L/407; and A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database, 15 December 2006, WT/L/673.

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**3 ARTICLE 48 OF THE VIENNA CONVENTION IS INAPPLICABLE IN THIS DISPUTE BECAUSE IT IS NOT A CUSTOMARY RULE OF INTERPRETATION WITHIN THE MEANING OF ARTICLE 3.2 OF THE DSU**

9. We next address India's arguments.

10. India's main defence in this dispute is that the tariff concessions at issue are "in error" within the meaning of Article 48(1) of the Vienna Convention.<sup>2</sup>

11. But Article 48 of the Vienna Convention cannot apply, and cannot be used as a defence, in this dispute. As is well known, Article 3.2 of the DSU provides that "Members recognize that the [WTO dispute settlement system] serves to preserve the rights and obligations of Members and to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law". Thus, by the express provision of Article 3.2 of the DSU, it is therefore only the rules of interpretation in Articles 31 and 32 that can be used to interpret the WTO agreements, and not principles of public international law in general. Articles 31 and 32 are found in the part of Vienna Convention governing the "Observance, Application and Interpretation of Treaties". Article 48, however, is found in the part of Vienna Convention governing "Invalidity, Termination and Suspension of the Operation of Treaties". Article 48 of the Vienna Convention is clearly not a customary rule of interpretation, and therefore cannot apply in a WTO dispute.

12. Moreover, the WTO Agreements themselves already provide procedures should a Member consider it has made a mistake when reflecting concessions in its Schedule. Article XXVIII of the GATT 1994 provides specific procedures for Members to follow should they wish to modify or withdraw a concession. Application of Article 48 of the Vienna Convention would allow a Member to bypass these procedures and to modify or withdraw a concession, casting uncertainty over the actual scope of those concessions, and undermining the function and purpose of Article XXVIII of the GATT 1994.

13. Application of Article 48 of the Vienna Convention would also set a dangerous precedent for WTO disputes. Responding parties could potentially raise an Article 48 defence in every dispute on grounds that the relevant provision of the covered agreement was made "in error". Even the most-favoured-nation principle of Article I:1 of the GATT 1994—a cornerstone of the multilateral trading system—could be subject to challenge. WTO disputes would become consumed by Article 48 defences, as parties use it as a litigation tactic to delay and complicate proceedings.

**4 THE ITA-1 IS NOT A "COVERED AGREEMENT" UNDER THE DSU, AND THERE IS NO BASIS FOR THE PANEL TO INTERPRET THE ITA-1 IN ACCORDANCE WITH THE RULES OF THE VIENNA CONVENTION**

14. India's second argument is that the ITA-1 is the agreement at issue in this dispute, and that the complainants must demonstrate that the products at issue fall within the scope of the ITA-1.<sup>3</sup> This is incorrect.

15. The ITA-1 is not a "covered agreement" within the meaning of Article 1.1 of the DSU. As such, there is no basis for the Panel to "interpret" the ITA-1 in accordance with the rules of the Vienna Convention, because pursuant to Article 3.2 of the DSU, only the provisions of the covered agreements can be interpreted in accordance with the rules of the Vienna Convention.

16. In contrast, there is a legal basis for the Panel to interpret India's tariff concessions, as recorded in its Schedule of Concessions, in accordance with the rules of the Vienna Convention as provided in Article 3.2 of the DSU. The complainants' claims in these disputes is that India has imposed customs duties on products in excess of the tariff bindings in its currently certified Schedule of Concessions inconsistent with Article II:1(a) and (b) of the GATT 1994. India's Schedule is an

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<sup>2</sup> India's first written submission in DS582, section III.B; and India's first written submission in DS584, section III.B.

<sup>3</sup> India's first written submission in DS582, paras. 92 and 126; and India's first written submission in DS584, paras. 75 and 109.

integral part of the GATT 1994<sup>4</sup>, which is an integral part of the WTO Agreement<sup>5</sup>. As both the GATT 1994 and the WTO Agreement are "covered agreements" within the meaning of Article 1.1 of the DSU,<sup>6</sup> the Panel must interpret the relevant tariff concessions in India's Schedule in accordance with the rules of the Vienna Convention.

## **5 CONCLUSION**

17. Mr. Chairman, members of the Panel, this concludes our statement. Thank you very much.

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<sup>4</sup> Article II:7 of the GATT 1994 provides that WTO Members' Schedules of Concessions are an integral part of the GATT 1994. (See Appellate Body Report, *EC – Computer Equipment*, para. 84.)

<sup>5</sup> Article II:2 of the WTO Agreement states that the Agreements contained in the Annexes to the WTO Agreement, which include the GATT 1994, are integral parts of the WTO Agreement. (See Panel Report, *EC – IT Products*, para. 7.16.)

<sup>6</sup> The WTO Agreement is an agreement listed in Appendix 1(A) of the DSU as an agreement covered by the DSU. The GATT 1994 is an agreement listed in Annex 1A of Appendix 1 of the DSU as an agreement covered by the DSU.

**ANNEX C-8****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TÜRKİYE****I. INTRODUCTION**

1. Turkey welcomes this opportunity to present its views as a third party in the disputes DS582, DS584 and DS588. Turkey makes this third party submission because of her systemic interests in the interpretation and implementation of the tariff concessions made by the World Trade Organization (WTO) Members pursuant to the Ministerial Declaration on Trade in Information Technology Products (Information Technology Agreement - ITA).

**II. INFORMATION TECHNOLOGY AGREEMENT**

2. Information Technology Agreement – ITA was signed in 13 December 1996 by Members of the WTO, including Turkey as a signatory party, with the purpose of expanding world trade in information technology products.
3. Product coverage of the Agreement is specified in two Attachments to the ITA, namely Attachment A that lists information technology products based on HS Codes and Attachment B, which lists products based on their names and definitions. Those products can also be classified under corresponding HS codes.
4. ITA features a limited coverage of information technology products, with the object and purpose of reflecting a balance reached by the parties to the Agreement. Thus interpretation of concessions in ITA should not disrupt the balance which is negotiated by the parties.
5. Turkey believes that these cases raise important questions with respect to the interpretation of the tariff concessions made by WTO Members pursuant to the ITA. As a developing country with strong interest in expanding its information technology sector, Turkey contemplates that tariff concessions must be interpreted in a manner in line with the negotiating balance of ITA.
6. While debating the issue of applicability of duty-free treatment for technological products, all WTO Members need to balance the critical issue of promoting technological improvements and keeping in line with the mandated product coverage.
7. Hence, for a new product to be included in ITA, it must be negotiated; it cannot be assumed to be covered by the already established ITA concessions. Indeed, this negotiation procedure is what the ITA foresees explicitly.
8. Paragraph 2 (a) of the ITA Annex demonstrates that the parties to the ITA intended to limit the product coverage only to: (i) those products classified (or classifiable) with the Harmonized System (1996) listed in Attachment A and (ii) those products listed in Attachment B, whether or not they are included in Attachment A. In fact, based on that India, like some other participants, had followed the procedures for the formal rectification and modification of schedules and the Director-General formally certified the schedules in 1997. However, if the parties wish to extend the product coverage of the ITA, they have to follow the procedures set forth in paragraph 3 of the ITA Annex.
9. Paragraph 3 of the ITA Annex provides that the modification of the Attachments could stem not only from "technological developments," but also from "experience in applying tariff concessions" as well as "changes to the HS nomenclature." Therefore, Turkey is of the view that Paragraph 3 undoubtedly shows that any changes with regard to the product coverage of the ITA should be based on the exclusive list of situations mentioned above and should be agreed by consensus.
10. Therefore, if parties wish to extend the product coverage of the ITA, they have to follow the procedures set forth in paragraph 3 of the Annex to the ITA.
11. Paragraph 5 of the ITA Annex requires Members to meet as often as necessary to deal with matters relating to customs classification of information technology products and regulates

the procedures to establish a common understanding on the HS classification of information technology products starting with Attachment B.

12. In that regard, Paragraphs 3 and 5 of the ITA Annex aims to ensure that a new product is added to the coverage of the ITA by consensus, when a technological change in a product creates requirement to do so.

### III. ASSESSMENT

13. We believe India puts forward some quite powerful evidence in her First Written Submissions in DS582, DS584 and DS588 supporting "'new' products which are a result of technological progress are not covered under the ITA-1."<sup>1</sup>
14. Turkey also agrees that "the scope of the ITA-1 is limited to the products classified in Attachment A and listed in Attachment B. There is no language 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-1. The language simply provides for two lists of products which are included in the product scope of the ITA-1."<sup>2</sup>
15. As stated in India's First Written Submissions "a large number of Participants have consistently agreed on the limited product scope of the ITA-1. The Participants have agreed that the product scope of the ITA-1 does not adequately cover the rapid growth of information technology products, and therefore an expansion of the ITA-1 was required in order to liberalize the IT product sector."<sup>3</sup> Various WTO Members, including the complainants the EU and Japan as well as APEC countries had been voicing the need for expansion of the range of tariff free ITA products because of the rapid technological advancements, taking into consideration that every year new IT products are being released. It has been insisted by many WTO members, ITA expansion was necessary to update the Agreement. Many innovative products that had come on the market since the ITA were simply not covered by the Agreement, and the development of those products was hindered by duties. Therefore, by the admission of participants of the ITA, the scope of the Agreement continues to be limited to the products classified in Attachment A and listed in Attachment B of the ITA. It is clear that the Participants agree that technological advancements have not affected the product scope of the ITA.<sup>4</sup>
16. As India stated in its First Written Submissions in DS582, DS584 and DS588, an analysis of the lists of common group of participants of ITA and the Declaration on the Expansion of Trade in Information Technology Products (ITA-2), proves that "new" products based on new technology are not included in ITA lists while they were added to the newly established lists of ITA-2 participants. "In this regard, attention is drawn to the product scope of the ITA-2. The ITA-2 includes "new" products which have not been covered by the ITA-1. The intention of a subset of Participants was to account for the rapid technological advancement which has happened over the years in the product scope of ITA-2. The product scope of the ITA-2 contains several products at issue. Specifically, Attachment A of ITA-2 covers the following products:
- a) Sub-heading 8504.40: Static Converters ) Sub-heading 8517.61: Base Stations
  - c) Sub-heading 8517.62: Machines for the reception, conversion and transmission or regeneration of images or other data, including switching and routing apparatus
  - d) Sub-heading 8517.70: Parts
  - e) Sub-heading 8518.30: Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers.

<sup>1</sup> First written submission of India DS582 , para. 28.

<sup>2</sup> First written submission of India DS584, para. 82.

<sup>3</sup> First written submission of India DS582, para. 109.

<sup>4</sup> First written submission of India DS582, para. 109-120.

In that regard, we support India's statement that "the mere existence of these products in the product scope of ITA-2 implies that these products are 'new' and were not accounted for in the ITA-1."<sup>5</sup>

17. Turkey also shares the view that "the commitments under the ITA-1 are made with reference to HS1996. Therefore, these commitments must be interpreted in light of the 1996 version of the HS and its Explanatory Notes. HS2002 and HS2007 have no bearing on the question of whether the products at issue are covered under the ITA-1"<sup>6</sup>
18. To elaborate further on this differentiation, we would like to highlight the examples given by India:
19. "The tariff heading 8525 covered, 'Transmission Apparatus for Radio-Telephony or Radio Telegraphy' which are "used for the transmission of signals (representing speech, messages or still pictures) by means of electro-magnetic waves which are transmitted through the ether without any line connection." The definition of the Transmission Apparatus of Radio Telephony or Radio Telegraphy is limited to the transmission of signals representing (1) speech, (2) messages, or (3) still pictures. Therefore, no apparatus which can transmit signals representing videos or any other media other than the three listed above can be included in the scope of heading 8525."<sup>7</sup> Hence, telephones for cellular networks cannot be listed under the 1996 version of the HS 8525.20.
20. In addition to that "A comparison of the HS1996 Explanatory Note to Heading 8525 and HS2007 Explanatory Notes to Heading 8517 demonstrates that telephones for cellular networks are not categorized in the general group of "*transmitting and receiving apparatus for radio-telephony and radio-telegraphy*" even under HS2007. The description of radio telephony apparatus of the kind covered under heading 8517 under HS2007 has remained unchanged from those covered under Heading 8525 in HS1996 viz. radio-telephony apparatus for motor vehicles, ships, aircraft, trains, etc. Therefore, it would be fallacious to argue that telephones for cellular networks which are not even covered within the general description of "*transmitting and receiving apparatus for radio-telephony and radio-telegraphy*" in the year 2007, were covered within the general description of transmission apparatus for radio-telephony or radio-telegraphy under HS1996."<sup>8</sup>
21. Turkey also would like to underline the point made by India that "telephones for cellular networks cannot be operated without base stations or LTE equipment. However, base stations were not included in the product scope of the ITA-1."<sup>9</sup>
22. Through all stated above, Turkey considers contrary to the claims of the complainants, the products in question do not fall under the ITA-1. Turkey believes the complainants seek an overly broad or inclusive construction of ITA commitments, threatening the balance established during the negotiation process of ITA.

#### **IV. CONCLUSIONS**

23. Turkey considers that contrary to the claims of the complainants, the products at issue do *not* fall under ITA. Any technologically newly developed product cannot automatically be considered as covered by the ITA. The duty-free treatment cannot be extended to all variants of the products. The procedures outlined in paragraphs 3 or 5 of the Annex of the ITA draw the framework for negotiation for the new products which were not originally included in the Schedules of the Participants.
24. We would like to further add that the litigation process should not diminish Members' rights beyond obligations undertaken at the time of the signing of the ITA. Article 3.2 of the WTO Dispute Settlement Understanding provides that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Our view is that, if accepted, complainants' claims will serve to add to the obligations of many signatory parties of the ITA by expanding the product coverage of the Agreement, without resorting to paragraph 3 of ITA Annex.

<sup>5</sup> First written submission of India DS582, para. 143.

<sup>6</sup> First written submission of India DS582, para. 130, 136.

<sup>7</sup> First written submission of India DS582, para. 151, 152.

<sup>8</sup> First written submission of India DS582, para. 160-162.

<sup>9</sup> First written submission of India DS582, para. 163.

25. Turkey requests the Panels in the disputes DS582, DS584 and DS588 to review the claims taking into account the viewpoint and issues raised in this executive summary.



**ANNEX C-9****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE\***

1. Mr Chairman, distinguished Members of the Panel, it is a pleasure to appear before you today and present the views of Ukraine as a third party in these disputes.
2. In Responses on Questions to the Third Parties Before the First Substantive Meeting Ukraine provided views on the issues whether the Information Technology Agreement ("ITA") is a "covered agreement" within the meaning of Article 1.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and what is the basis for the Panel's authority to interpret the ITA-1 in accordance with the rules of the Vienna Convention on the Law of Treaties (1969) ("Vienna Convention").
3. Today, Ukraine will shortly provide its further views on these issues.
4. Ukraine recognizes that the ITA-1 is an important element in these disputes. At the same time, Ukraine considers that the issue whether the ITA-1 is a "covered agreement" within the meaning of Article 1.1 of the DSU is not quite at the table, and therefore it is not necessary to interpret the ITA-1 itself or to elaborate this issue further in general.
5. The Panel's terms of reference in these disputes 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 [...] and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements (emphasis added).<sup>1</sup>
6. According to the complainants in these cases (the European Union, Japan, and Chinese Taipei), the measures through which India imposed custom duties on certain information and communication technology products are inconsistent with India's obligations under Article II:1(a) and (b) of the General Agreement on Tariffs and Trade ("GATT 1994"). Accordingly, the matter at issue is Article II:1 of the GATT 1994 and understanding of the India's Schedules.
7. The central point of these disputes is not the ITA-1, but rather the interpretation of India's Schedule, which is part of the covered agreements, according to Article II:7 of the GATT 1994.<sup>2</sup>
8. The WTO schedules of concessions are legal instruments that form an integral part of the GATT 1994 and the WTO Agreement. The ITA concessions are included in the participants' WTO schedules of concessions and become part of that Member's obligations under the WTO covered agreements and the Panel may consider the ITA-1 as relevant context for interpreting India's concessions.
9. The ITA-1 may be a part of the Panel's analysis like in the *EC – IT Products dispute* and within the meaning of Article 31(2) (b) of the Vienna Convention.
10. In this regard Ukraine agrees that the Panel have to focus its analysis on the terms of the tariff concessions in India's Schedule and, taking into account the significant technological progress that has occurred lately and changed the IT-sector, to decide if products in these cases fall under ITA-1. At the same time, Ukraine is of the view that not all new products in the IT-sector will have to automatically fall under the ITA-1.

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\* Ukraine requested that its oral statement serves as its executive summary.

<sup>1</sup> WT/DS582/10, WT/DS584/10/Rev.1, WT/DS588/8/Rev.1

<sup>2</sup> Third Party Submission of Brazil, para. 9 referring also to the Panel Report, *EC – IT Products*, para.

7.374 and footnote 3: "According to the International Law Commission, cited by the panel: "What is proposed in paragraph 2 [of Article 31 of the VCLT] is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty".

11. Ukraine considers, that the factual aspects of the case, in particular, whether there is proper identification of the products at issue and whether products are covered by the ITA-1, are key elements in order to complete the analysis under Article II:1(a) and (b) of the GATT 1994. It is important that the Panel considers each invocation carefully, in light of the particular circumstances of the disputes.

12. Therefore, it is clear that the Panel has an authority, legal basis and task to interpret India's tariff concessions set forth in its Schedule of Concessions, and such interpretation should be made in accordance with the rules of the Vienna Convention and objective of providing security and predictability to the multilateral trading system.

13. This concludes Ukraine's oral statement. Thank you for your attention and for giving Ukraine this opportunity to present its views before the Panel. We look forward to answering questions that you may have.

**ANNEX C-10****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UNITED KINGDOM\*****I. INTRODUCTION**

1. Mr Chairperson, Members of the Panel, it is a pleasure to appear before you today to present the views of the United Kingdom as a Third Party in these disputes.

2. In this statement the United Kingdom will make submissions on two issues. First, we will consider the relevance to these disputes of the Ministerial Declaration on Trade in Information Technology Products (the ITA-1), and the legal obligations under Article II of the GATT 1994 and India's Schedule of Concessions. Second, we will address the legal standard under Article 48 of the VCLT.

**II. INDIA'S RELEVANT LEGAL OBLIGATIONS ARE UNDER ARTICLE II OF THE GATT AND ITS SCHEDULE OF CONCESSIONS**

3. Turning first to the relevant legal obligations, the complainants submit that these disputes are grounded in the GATT,<sup>1</sup> whereas India defends this claim partly on the basis that the products at issue are not covered by the ITA-1.<sup>2</sup>

4. The United Kingdom considers the interpretation of India's commitments in its GATT Schedule, and not the ITA-1, to be the central point at issue in this case.

5. Specifically, this case concerns India's commitments under Article II:1(a) and Article II:1(b) of the GATT 1994. Article II:1(a) provides that Members must accord to the commerce of other Members "treatment no less favourable" than that set out in its Schedule of Concessions. Article II:1(b), first sentence, provides that, in particular, Members must not apply ordinary customs duties in excess of those set out in its GATT Schedule. Should the Panel find that India imposes customs duties in excess of the commitments in its GATT Schedule, it would follow that such a measure would be in breach of Article II:1(a) and Article II:1(b), first sentence.

6. Regarding the relevance of the ITA-1, the United Kingdom notes that paragraph 1 of the Annex to the ITA-1 provides that the participants "shall incorporate the measures described in paragraph 2 of the Declaration into its schedule to the General Agreement on Tariffs and Trade 1994". Once the commitments are incorporated into a Member's GATT Schedule, they become a part of that Member's commitments under the GATT. Members' GATT Schedules form an integral part of the GATT.<sup>3</sup>

7. The ITA-1 is not one of the "covered agreements" for the purposes of the Dispute Settlement Understanding. Article 1.1 of the DSU defines the "covered agreements" as those listed in Appendix 1 to the DSU. The ITA-1 is not listed in Appendix 1 and is therefore not one of the covered agreements.

8. Following the incorporation of the commitments into India's GATT Schedule, the only relevance of the ITA-1 to these disputes is that it could provide relevant context in the interpretation of India's obligations under the GATT 1994. Article 31(2)(b) of the VCLT provides that the "context for the purpose of the interpretation of a treaty" includes "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". The ITA-1 is an instrument made by one or more WTO Members in connection with the conclusion of the WTO Agreement and is accepted by the Membership as an instrument related to that Agreement.

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\* The United Kingdom requested that its oral statement serves as its executive summary.

<sup>1</sup> Japan's response to Panel question No. 3; Chinese Taipei's response to Panel question No.3.

<sup>2</sup> India's first written submission, para 85 (DS-584) / para 103 (DS-588).

<sup>3</sup> Article II:7 GATT.

9. This approach is supported by the panel report in *EC – IT Products*.<sup>4</sup> In that dispute, the panel considered the ITA-1 as relevant context in determining the products covered by the commitments in the GATT Schedule of the European Communities (as it then was).<sup>5</sup> In the present case, too, the United Kingdom submits that the Panel could use the provisions of the ITA-1 as relevant context when interpreting India's commitments under its GATT Schedule.

10. Concerning the identification of India's scheduled commitments under the GATT, we note that India refers to the proposed technical rectification<sup>6</sup> of its GATT Schedule, submitted on 25 September 2018. This proposed rectification was submitted pursuant to the 1980 Procedures for Modification and Rectification of Schedules. This proposed rectification was not certified, after objections were raised by a number of Members.

11. India therefore does not seem to rely on the legal effect of its draft rectification. Instead, India claims it is "constrained to invoke the plea of treaty invalidity under international law".<sup>7</sup>

12. Consequently, neither the complainants nor the respondent ask the Panel to consider whether India's draft technical rectification was legally effective; they agree it was not. The United Kingdom agrees with the parties that it is not necessary for the Panel to determine the legal effect of India's draft rectification in this case.

### III. ARTICLE 48 VCLT

13. Turning to Article 48 of the VCLT. India submits that the tariff headings at issue in these disputes are invalid due to its error as to the scope of these commitments, relying on Article 48 of the VCLT.<sup>8</sup> The United Kingdom takes paragraphs 1 and 2 of Article 48 in turn.

14. Article 48(1) of the VCLT provides that an "error" may invalidate a State's consent to be bound by a 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". In deciding whether the alleged error meets this threshold, the Panel must consider, in particular, the following factors. First, whether the alleged error was based on a fact or situation assumed by India to exist, as opposed to an error relating purely to the nature of the legal commitments under the GATT which itself did not raise such a question of fact. Second, whether the error "formed an essential basis of [India's] consent to be bound by the treaty". The United Kingdom agrees with Brazil that Article 48 of the VCLT sets a very high threshold for parties to meet.<sup>9</sup>

15. In accordance with paragraph (2) of Article 48, a State cannot rely on this Article "if the State in question contributed by its own conduct to this error" or if the State was on notice of a possible error. The draft HS2007 transposition was prepared on India's behalf under the Procedure For The Introduction Of Harmonized System 2007.<sup>10</sup> However under this Procedure, developing countries on whose behalf the Secretariat carried out the transposition were required to examine the draft transposition and to either approve it, or provide specific comments on its contents.<sup>11</sup> The United Kingdom submits that the Panel should consider these matters when determining whether or not Article 48 can be invoked.

### IV. CONCLUSION

16. Mr Chairperson, Members of the Panel, this concludes the oral statement of the United Kingdom. We thank you for your attention.

<sup>4</sup> Panel Report, *EC – IT Products*, paras 7.372-7.383.

<sup>5</sup> Panel Report, *EC – IT Products*, para 7.383.

<sup>6</sup> Committee on Market Access - Rectifications and modifications of schedules - Schedule XII – India G/MA/TAR/RS/572.

<sup>7</sup> India's first written submission, para 37 (DS-584) / para 55 (DS-588).

<sup>8</sup> India's first written submission, para 43 (DS-584) / para 61 (DS-588).

<sup>9</sup> Brazil's third-party submission, para 21.

<sup>10</sup> WTO Document WT/L/673.

<sup>11</sup> Procedure For The Introduction Of Harmonized System 2007, para 8.

**ANNEX C-11****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION****I. INDIA'S REQUEST FOR A PRELIMINARY RULING**

1. India argues that the panel requests do not satisfy Article 6.2 of the DSU because they do not sufficiently identify some or all of the products covered by the measures at issue. The text of Article 6.2 does not expressly require that a panel request identify specific products to which the measures at issue apply. In considering India's preliminary ruling request, the Panels must address whether identification of specific products would be required to identify the measures at issue in each panel request, or whether the products at issue flow from the identified measures. The United States notes in that regard that each panel request makes the claim that, through certain instruments listed in the request, India imposes duties on goods within the scope of its bindings for certain tariff lines in excess of the bindings on those goods set forth in its Schedule.

**II. GENERAL FRAMEWORK UNDER ARTICLE II OF THE GATT 1994**

2. The complainants claim that the measures at issue are inconsistent with Articles II:1(a) and (b) of the GATT 1994. Article II (Schedules of Concessions) imposes an obligation on an importing Member to accord to products of other Members treatment no less favorable than that provided for in its Schedule.

3. Article II:1(b) makes clear that a Member's tariff bindings as set out in its Schedule of Concessions are a ceiling. The first sentence of Article II:1(b) sets forth a specific kind of "treatment" that would be inconsistent with paragraph (a) in providing that the products listed in Part I of a Member's Schedule shall, on their import, "be exempt from ordinary customs duties in excess of those set forth and provided therein." Accordingly, should a breach of Article II:1(b) be established, it would follow that a breach of Article II:1(a) has also occurred. In sum, to the extent that a Member imposes ordinary customs duties in excess of those provided in Part I of its Schedule, it is in breach of its obligations in Articles II:1(a) and (b).

4. India largely does not defend its measures based on arguments under Article II. Rather, India's defense is focused on several flawed arguments concerning the 1996 Ministerial Declaration on Trade in Information Technology Products (ITA-1), the process for Harmonized System (HS) transposition in WTO Schedules, Article 48 of the Vienna Convention on the Law of Treaties (Vienna Convention), and the India-Japan Comprehensive Economic Partnership Agreement (CEPA).

**A. Relevance of the Information Technology Agreement (ITA-1)**

5. Contrary to India's assertion, the ITA-1 is not the agreement at issue in these disputes. As is evident from the panel requests, the complainants claim that the measures at issue are inconsistent with Articles II:1(a) and (b) of the GATT 1994. Article II:1 refers to the tariff treatment set forth in a Member's Schedule of Concessions for goods, which is annexed to the Marrakesh Protocol of the GATT 1994. Pursuant to Article II:7 of the GATT 1994, WTO Members' Schedules annexed to the GATT 1994 are an integral part of the GATT 1994.

6. As a WTO Member, India committed to bind tariffs as reflected in Schedule XII – India (India's Schedule). The tariff headings in India's Schedule establish the scope of India's concessions. Accordingly, the relevant question before the Panels is whether the measures at issue would impose duties in excess of the bindings in India's Schedule.

7. Although the ITA-1 is not the relevant agreement in these disputes, the United States notes that India makes several flawed arguments concerning the ITA-1. In particular, India makes misleading arguments with respect to "new technologies" developed since the conclusion of the ITA-1 and the relevance of the Declaration on the Expansion of Trade in Information Technology Products (ITA Expansion).

8. As an initial matter, India's Schedule reflects its participation in the ITA-1. After the ITA-1 was concluded in 1996, participants formally modified their WTO Schedules. India's Schedule reflecting its ITA-1 commitments was certified effective July 2, 1997.

9. India's commitments in its WTO Schedule do not distinguish between "new technologies" and products existing in 1996 at the time of ITA-1 conclusion. In fact, the ITA-1 that formed the basis for entering into those commitments affirmatively contemplated technological evolution.

10. The United States further notes that virtually all ITA-1 products – including computers, peripherals, cell phones, and digital cameras – incorporate significantly improved features as compared to the products available at the time the ITA-1 was concluded. India's position would undermine the fundamental obligations of Article II:1 of the GATT 1994 by allowing participants to disregard tariff commitments on the basis that a product incorporates or constitutes a perceived new technology. The United States also notes that the possibility of technological development with respect to tariff concessions is not limited to the information technology sector. Tariff concessions, including those incorporated into a Member's Schedule as a result of the ITA, apply to all products – regardless of technological development – that meet the terms of the concession, interpreted based on its ordinary meaning in context and light of the agreement's object and purpose.

### **B. Relevance of HS Transposition and India's Rectification Request**

11. India's arguments do not reflect an accurate understanding of the HS transposition process or the legal status of its rectification request. Members' WTO Schedules describe the tariff treatment Members must accord to products using HS terminology. However, the HS Convention does not contain obligations with respect to tariff treatment. Rather, a WTO Member's tariff obligations are contained in its Schedule.

12. The WTO General Council decides on specific procedures to introduce and certify HS changes to Members' Schedules, including certification under the 1980 Procedures. Therefore, the HS transposition process reflects the continuation of tariff commitments, not substantive modifications.

13. The 1980 Procedures also establish specific procedures to address perceived errors in a Schedule, provided that those errors do not modify the scope of a concession. In September 2018, citing the 1980 Procedures, India submitted to the Committee on Market Access a draft Rectification under the category "other rectifications." India's proposal would have substantively altered its WTO commitments with respect to 15 tariff lines from duty-free to unbound. Several Members, including the United States, objected to India's draft Rectification within the three-month period provided by the 1980 Procedures. Therefore, India's draft Rectification was not approved and certified, and India's Schedule as previously certified is unaltered.

14. The United States also notes that there are procedures available to WTO Members seeking to modify or withdraw their tariff commitments, as provided in GATT 1994 Article XXVIII (Modification of Schedules). The 1980 Procedures and the General Council procedures for HS2007 nomenclature updates explicitly refer to Article XXVIII as a distinct action for modifying the scope of tariff concessions. Were India to seek to modify its Schedule, it would need to enter into negotiations with affected Members and offer substantially equivalent concessions, or potentially face compensatory adjustments by those affected Members. India has not availed itself of the Article XXVIII procedures with respect to the tariff lines at issue.

### **C. India's Invocation of Vienna Convention Article 48 (Error) Should be Rejected**

15. Article 48 is not applicable to this dispute. The DSU sets out rules and procedures for the settlement of disputes concerning Members' rights and obligations under the WTO covered agreements (Article 1.1), to preserve the rights and obligations of Members under the covered agreements (Article 3.2), to settle situations in which benefits under the covered agreements are being impaired by another Member's measure (Article 3.4), and to achieve a satisfactory settlement of a matter in accordance with rights and obligations under the covered agreements (Article 3.5). The Vienna Convention is not a "covered agreement" under Appendix 1 of the DSU, and Article 48 is not incorporated into a covered agreement, including the DSU.

16. One aspect of the Vienna Convention is expressly referred to in the DSU. Article 3.2 of the DSU provides that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Therefore, panels are to interpret and apply relevant provisions of WTO covered agreements in accordance with customary rules of interpretation of public international law. Those rules are reflected in Articles 31 through 33 of the Vienna Convention. As constituent text to the WTO Agreement, a Schedule should therefore be interpreted in accordance with Articles 31 through 33.

17. In any event, it would not appear that India has established the factual basis for its claim under Article 48. WTO Members have agreed to follow specific procedures for transposition of HS nomenclature in Members' Schedules. Further, India is a member of the WCO and HS Convention. India would have been able to follow the WCO process for HS updates for the disputed tariff subheadings as later transposed in WTO Member Schedules. Therefore, India's involvement in these processes would appear to undermine its claim of error.

### **EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT**

#### **I. What may be considered as relevant context in interpreting the terms of the concessions in India's Schedule under Article 31 of the Vienna Convention**

18. Most parties and third parties appear to agree that the ITA-1 is not a covered agreement under the DSU and that it may in theory qualify as "context" within the meaning of Article 31(2). However, there is disagreement as to whether the ITA-1 may be relevant context in the interpretative exercise called for in these disputes. The United States considers that the Panels may consider the ITA-1 as context to the extent it is relevant for interpreting India's concessions within the meaning of Article 31(2). Context should be considered to the extent it may shed light on the meaning of the treaty terms at issue. Under the factual circumstances of these disputes, the ITA-1 may be of limited relevance where the tariff headings at issue were originally certified in HS1996 – reflecting Attachment A of the ITA-1 – and therefore the Panels may examine that nomenclature to the extent they consider necessary depending on the heading at issue.

19. Turning to the Harmonized System, again there appears to be agreement that the HS may generally be considered as context. The question is which version of the HS would be relevant to consider in light of the circumstances of these disputes. While the United States agrees that in theory the Panels may consider multiple versions of the HS nomenclature through which India's concessions have been transposed since the commitment was undertaken, earlier HS versions, i.e., HS1996 and HS2002, may be of limited relevance for evaluating the ordinary meaning of the terms of India's existing concessions. The HS2007 would appear to be the most relevant version where India's tariff commitments are certified in that version of the nomenclature.

#### **II. India's argument regarding the preferential agreement between India and Japan (CEPA) in the context of Article II:1 of the GATT 1994 (DS584)**

20. While panels may consider preferential measures in considering the tariff treatment a Member provides, it would be important to consider the scope of any such measures asserted to be applicable. Preferential agreements generally contain unique rules of origin that may limit preferential treatment to goods meeting certain criteria, as Japan asserts is the case with respect to the CEPA. The customs notification put forward by India appears to refer to rules that may limit products that may be considered of origin of Japan, and therefore may not qualify for the treatment provided therein. Also, it may be necessary to consider whether a preferential measure covers all products within the scope of the challenged measures.

21. With respect to Article II:1 of the GATT 1994, a Member may not 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.

**EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS**

22. Response to Question 5: As a general matter, panels may consider the HS and its Explanatory Notes as additional relevant context for the purpose of interpreting the HS-derived language of a particular tariff line in a Member's Schedule. However, the tariff commitment is contained in the Schedule, and the HS may not add to or diminish from that obligation. As the report in EC – IT Products (Panel) explained, "while the HS would always qualify as context for interpreting concessions in a Member's schedule that are based on that nomenclature, or that explicitly or implicitly make reference to it, the relevance of the HS will depend on the interpretative question at issue."

23. Here, India argues that the Panel should look only to HS1996 nomenclature and Explanatory Notes as relevant context because ITA-1 product coverage was defined in part based on HS1996 nomenclature, supposedly limiting the scope of India's commitments. Again, India approaches the interpretation of its commitments from the wrong starting point; it is the tariff headings in India's Schedule that establish the scope of India's concessions, not the ITA-1. Tariff concessions, including those incorporated into a Member's Schedule as a result of the ITA-1, apply to all products that meet the terms of the concession.

24. With respect to which versions of the HS the Panel may consider as additional context, generally the ordinary meaning of a concession is informed by sources indicating the meaning intended by the parties at the time the treaty was concluded. However, the concessions at issue in India's Schedule incorporated after ITA-1 have been continued through the WTO transposition process established by the WTO General Council from HS1996 to HS2002 nomenclature, and from HS2002 to HS2007 nomenclature. While the concessions at issue were not negotiated in HS2007 nomenclature, India's Schedule was most recently certified in HS2007, reflecting the agreement of WTO Members regarding the relationship between the HS2007 and India's Schedule.

25. Response to Question 6: The tariff concessions in a WTO Member's Schedule apply to all products – regardless of technological 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. This is consistent with the findings in the GATT 1947 dispute Greek Increase in Bound Duty, in which the Group of Experts found that later-developed, long-playing gramophone records were covered by the description of "gramophone records" in Greece's schedule of concessions, and that Greece had therefore acted inconsistently with Article II when it imposed higher duties on long-playing records.

26. In fact, virtually all ITA-1 products incorporate significantly improved features as compared to the devices that were available at the time the agreement was concluded. Further, the acquisition of new features is not unique to information technology products; automobiles, light bulbs, and any number of other goods covered by WTO Members' Schedules advance over time. 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.

27. Response to Question 8: The ITA Expansion is not relevant to the Panel's interpretation of India's concessions under the customary rules of interpretation reflected in the Vienna Convention. Like the ITA-1, the ITA Expansion is not a covered agreement within the meaning of the DSU.

28. Further, India is not a participant in the ITA Expansion, and did not record any tariff concessions in its WTO Schedule as a result of the conclusion of that agreement. Thus, under Article 31(2) of the Vienna Convention, the ITA Expansion is not relevant context for interpreting the scope of India's commitments bound in 2005 following the conclusion of the ITA-1. Nor is there any basis to conclude that the ITA Expansion would qualify as a subsequent agreement under Article 31(3).

29. Response to Question 12: Notably, the rectification provision in paragraph 2 of the 1980 Procedures is not the proper vehicle by which a Member seeks to increase the bound duty rates reflected in its Schedule, or reflect that it is no longer bound by certain commitments. Thus, the United States understands that a Member could, for example, use the rectification provision to change its Schedule in order to reflect "amendments or rearrangements which do not alter the scope of a concession." The 1980 Procedures provide the technical mechanism by which a Member may rectify its Schedule, but do not provide an independent basis through which a Member may alter the



substance of its commitments. Indeed, India's proposed "rectification" impacting certain tariff lines at issue in this dispute was rejected for this very reason.

30. On the other hand, where a Member seeks to increase the bound duty rates in its Schedule, or reflect that it is no longer bound, the Member is seeking to alter the substance of its commitments and must therefore follow the procedures set forth in Article XXVIII, subject to the negotiation requirements of that provision. The United States understands that where a Member makes modifications to its Schedule pursuant to Article XXVIII, a Member would also need to follow the 1980 Procedures to modify formally its Schedule annexed to the GATT 1994.

31. Response to Question 16: The United States considers that Article 48 of the Vienna Convention is not applicable in these disputes because it is not a provision of a WTO covered agreement within the meaning of Article 1.1 of the DSU, or a customary rule of interpretation of public international law within the meaning of Article 3.2. As panels are limited to examining the consistency of challenged measures with cited provisions of covered agreements, Article 48 is not applicable, and there is no legal basis for the Panels to interpret or apply this provision.

32. Even if the Panels were to consider India's argument, there are undisputed facts on the record that appear to demonstrate that India does not satisfy the conditions of Article 48(2). For instance, the parties appear to agree that India participated in the process for transposition of its Schedule into HS2007 nomenclature in accordance with established WTO procedures, and that India failed to raise any specific concern or objection during that process with respect to the tariff subheadings at issue. Thus, it appears that 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.

33. Article 48(2) provides that Article 48(1) "shall not apply" in such circumstances. In the event that the Panels seek to apply Article 48 – which, again, there is no legal basis to do – the Panels therefore need not engage in an interpretation of what it means for an error to refer to a "fact or situation" within the meaning of Article 48(1).

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**ANNEX D**

## COMMUNICATIONS CONCERNING THE SUBSTANTIVE MEETINGS

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**ANNEX D-1****PANEL'S COMMUNICATION TO THE PARTIES (31 MARCH 2021)**

As provided for in the Panel's timetable for the above referenced dispute, the first substantive meeting of the Panel with the parties and the third-party session will take place on 3-4 June 2021 and 9 June 2021, respectively.

As the parties are aware, the Covid-19 pandemic continues to present serious challenges for international travel and in-person meetings. In light of such challenges, the Panel has concluded that it will not be possible to hold its first substantive meeting with the parties and the third-party session in traditional face-to-face format in June, with the parties, third parties, panelists and Secretariat staff assisting the Panel all physically present in Geneva on the WTO premises.

In these 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 currently intends to hold both its first substantive meeting and the third-party session with remote participation, more specifically through the Cisco Webex platform.

Considering the time difference between the respective capitals of the parties and the third parties and that of the home locations of the panelists, the Panel intends to organize the first substantive meeting and the third-party sessions along the following timeframes:

<b>DATE</b>	<b>TIME</b>	<b>EVENT</b>
3 June 2021	2 p.m. to 5 p.m. (Geneva time)	First substantive meeting
4 June 2021	2 p.m. to 5 p.m. (Geneva time)	First substantive meeting (continued)
9 June 2021	2 p.m. to 5 p.m. (Geneva time)	Third-party session

Attached are draft Additional Working Procedures concerning meetings with remote participation.

The Panel would welcome comments from the parties on the above proposed arrangements for the first substantive meeting and the third-party session, and on the draft Additional Working Procedures, by 5 p.m. on **12 April 2021**.

**ANNEX D-2****PANEL'S COMMUNICATION TO THE PARTIES (21 APRIL 2021)**

On 31 March 2021, the Panel sent a communication to the parties concerning the first substantive meeting with the parties and the third-party session. The Panel observed that, due to the challenges presented by the Covid-19 pandemic for international travel and in-person meetings, it would not be possible to hold the first substantive meeting and third-party session in the traditional face-to-face format in June 2021. In light of the circumstances, and taking into account the objective of the 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 indicated that it intended to hold both its first substantive meeting and third-party session remotely, through the Cisco Webex platform. The Panel also transmitted to the parties draft Additional Working Procedures for meetings with remote participation. The Panel sought the parties' views on the proposed arrangements.

The parties submitted comments on the Panel's proposed arrangements for the first substantive meeting and third-party session on 12 April 2021. On 16 April 2021, the parties submitted comments on each other's comments, and the third parties<sup>1</sup> submitted comments on the parties' comments regarding the arrangements proposed by the Panel.

Japan states that it has had a consistent view that substantive meetings should be in principle held in person and that it would prefer an in-person first substantive meeting. However, in light of the challenges posed by the Covid-19 pandemic, Japan considers that the meeting could be held in a virtual format. Japan considers that the appropriateness of holding a substantive meeting in a virtual format needs to be determined on a case-by-case basis, depending on, *inter alia*, the degree of novelty, complexity and sensitivity of the issues concerned in each dispute.<sup>2</sup> In this regard, Japan points out that the issue of consistency of the measures at issue with Article II:1 of the GATT 1994 "is simple and not novel" and therefore "the pursuit of prompt settlement of the dispute is warranted".<sup>3</sup>

Japan stresses that the meeting, even if held in virtual format, must be a truly "substantial" one in which timely and interactive communications are ensured.<sup>4</sup> Japan notes that the utmost consideration should be given to concerns related to technical issues, taking into account the parties' due process rights.<sup>5</sup>

For its part, India stresses that the Covid-19 pandemic continues to spread in India at an alarming rate. India observes that, on 11 April, it witnessed the largest number of positive cases globally and the number of new cases (152,879) for that day was 56% higher than the previous peak of 97,894 cases on 16 September 2020.<sup>6</sup> India further submits that 217,353 new cases were recorded on 15 April 2021, i.e. a surge of 42% in positive cases in a period of 5 days.<sup>7</sup> India submits that new restrictions could be introduced in Delhi, which would limit India's ability to invite its delegation to a single meeting room. India requests 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".<sup>8</sup>

In addition, India states that it would not be able to participate in the first substantive meeting remotely for a number of reasons. First, India considers that a contemporaneous oral exchange, which is possible during in-person meetings, is fundamental to a meaningful participation in dispute settlement proceedings.<sup>9</sup> Second, India notes that, in other disputes in which India has participated

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<sup>1</sup> Canada, China, Singapore, Chinese Taipei, and the United States submitted comments on the parties' views.

<sup>2</sup> Japan's comments of 12 April 2021 on Panel's communication dated 31 March 2021.

<sup>3</sup> Japan's comments of 16 April 2021.

<sup>4</sup> Japan's comments of 12 April 2021 on Panel's communication dated 31 March 2021.

<sup>5</sup> Japan's comments of 16 April 2021.

<sup>6</sup> India's comments of 12 April 2021 on Panel's communication dated 31 March 2021.

<sup>7</sup> India's comments of 16 April 2021.

<sup>8</sup> India's comments of 12 April 2021 on Panel's communication dated 31 March 2021, para. 11.

<sup>9</sup> India's comments of 12 April 2021 on Panel's communication dated 31 March 2021, paras. 2 and 10.

and where meetings with remote participation were held, technical difficulties occurred and coordination within the Indian delegation proved impossible.<sup>10</sup> Third, in India's view, the proposed Additional Working Procedures do not safeguard the confidentiality and security of the meeting. In particular, India states that it is not clear how the Panel would ensure that the security and confidentiality protocols are followed by the parties and third parties.<sup>11</sup> In addition, India considers that a meeting of a total duration of six hours, as opposed to two full days, may not contribute to producing a high-quality panel report.<sup>12</sup> According to India, the right to a face-to-face meeting reflects due process and the objective of securing the prompt settlement of a dispute within the meaning of Article 3.3 of the DSU cannot mean that the respondent is presented with an environment where it does not have a meaningful opportunity to present its defence.<sup>13</sup>

India refers to several disputes in which panels have decided to postpone substantive meetings due to pandemic-related travel restrictions. According to India, no reading of Article 3.3 of the DSU must compromise the security and predictability of institutional dispute settlement practice.<sup>14</sup>

Canada, China, Singapore, Chinese Taipei, and the United States, 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. Canada does not object to the Panel's proposed arrangements.<sup>15</sup> China, in light of the uncertainty of possible future developments in the Covid-19 pandemic and related travel restrictions, and in the interest of the prompt settlement of the dispute, welcomes the Panel to consider holding the first substantive meeting virtually.<sup>16</sup> Singapore does not object to the Panel's proposed arrangements.<sup>17</sup> Chinese Taipei agrees with the Panel's proposed arrangements. Chinese Taipei notes that the future development of the Covid-19 pandemic is entirely unforeseeable, and that it could take years for the situation to improve to a point where face-to-face substantive meetings are possible.<sup>18</sup> In Chinese Taipei's view, such a delay would run fundamentally against the aim of Article 3.3 of the DSU for a prompt settlement of the dispute.<sup>19</sup> The United States agrees with India that a contemporaneous oral exchange of views is crucial to the panel process.<sup>20</sup> The United States notes that one WTO panel recently postponed the first substantive meeting due to the Covid-19 pandemic.<sup>21</sup> The United States also observes that holding the first substantive meeting via video conference would pose serious logistical challenges for the participating delegations, who each face varying levels of restrictions, depending on their location, and could be prevented from meeting in person as a delegation.<sup>22</sup> Thus, the United States suggests that the Panel reschedule the meeting and consult with the parties about holding it in person in the future.<sup>23</sup>

Having considered the views of the parties and third parties, the Panel notes, as an initial point, that the DSU does not prescribe a particular format of panel meetings.<sup>24</sup> Therefore, the Panel is not precluded from amending its Working Procedures and conducting meetings in the format it deems appropriate, after consulting with the parties to the dispute, as provided for in Article 12.1 of the DSU. In doing so, the Panel should be mindful of preserving the parties' due process rights. The Panel is also conscious that, pursuant to Article 3.3 of the DSU, the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

While meetings through remote means may be seen by some parties as a sub-optimal solution, they ensure that proceedings are not unduly delayed and that parties' due process rights

<sup>10</sup> India's comments of 12 April 2021 on Panel's communication dated 31 March 2021, para. 5.

<sup>11</sup> India's comments of 12 April 2021 on Panel's communication dated 31 March 2021, para. 6.

<sup>12</sup> India's comments of 12 April 2021 on Panel's communication dated 31 March 2021, para. 7.

<sup>13</sup> India's comments of 12 April 2021 on Panel's communication dated 31 March 2021, para. 10.

<sup>14</sup> India's comments of 16 April 2021, para. 4.

<sup>15</sup> Canada's comments of 16 April 2021.

<sup>16</sup> China's comments of 16 April 2021, para. 2.

<sup>17</sup> Singapore's comments of 16 April 2021.

<sup>18</sup> Chinese Taipei's comments of 16 April 2021.

<sup>19</sup> Chinese Taipei's comments of 16 April 2021.

<sup>20</sup> United States' comments of 16 April 2021, para. 5.

<sup>21</sup> United States' comments of 16 April 2021, para. 6.

<sup>22</sup> United States' comments of 16 April 2021, para. 7.

<sup>23</sup> United States' comments of 16 April 2021, para. 8.

<sup>24</sup> Appendix 3 to the DSU refers to a "substantive meeting of the panel", without specifying a particular format.

are preserved when in-person meetings remain impossible due to travel restrictions and limitations on the number of participants in indoor meetings. The Panel also notes that the obligation to respect the confidentiality of meetings with the Panel applies regardless of the format of the meeting.

At the same time, the Panel is aware of, and sympathetic to, the disruptions and ravages caused by the Covid-19 pandemic and the difficulties faced by the parties in organizing their work. In particular, the Panel is mindful about the alarming rate of growth in Covid-19 cases in India. The Panel takes note of India's observation that, on 11 April, India recorded the largest number of positive cases globally and that the number of new cases (152,879) for that day was 56% higher than the previous peak of 97,894 cases on 16 September 2020.<sup>25</sup> The Panel also notes India's estimate that 217,353 new positive cases were detected in a single day on 15 April 2021, which represents a surge of 42% in five days.<sup>26</sup>

In light of the current Covid-19 situation in India, it is understandable that preparing for and organizing India's participation in a virtual first substantive meeting in this dispute and in the other two disputes in which the same three panelists have been appointed may be unusually difficult. The Panel therefore deems it appropriate at this stage to postpone the first substantive meeting with the parties and the third-party session. The Panel proposes to hold the first substantive meeting and the third-party session in this dispute, and in the other two disputes in which the same three panelists have been appointed, during the weeks of 4 and 11 October 2021. The Panel hopes that, with the roll-out of vaccines, the epidemiological situation will improve so as to allow for an in-person meeting at that time. However, should an unfavourable epidemiological situation and travel restrictions persist, the Panel may nevertheless have to conduct the first substantive meeting with the parties and the third-party session in a virtual format, bearing in mind other relevant considerations, such as the need for the prompt settlement of disputes. The Panel will confirm the format of the first substantive meeting to the parties by 31 August 2021.

In the meantime, the Panel intends to send written questions to the parties and third parties and will request written responses to them before the first substantive meeting. The Panel will communicate further details in due course.

1.1. The Panel invites the parties to inform the Panel of their availability for a meeting during the weeks of 4 and 11 October 2021 and to provide any comments they may have on the draft revised timetable by 5 p.m. on **Friday, 30 April 2021**.

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<sup>25</sup> India's comments of 12 April 2021 on Panel's communication dated 31 March 2021.

<sup>26</sup> India's comments of 16 April 2021, para. 1.

**ANNEX D-3****PANEL'S COMMUNICATION TO THE PARTIES (31 AUGUST 2021)**

On 21 April 2021, the Panel sent to the parties a communication concerning the first substantive meeting. In that communication, the Panel proposed to hold the first substantive meeting and the third-party session in this dispute, and in the other two disputes in which the same three panelists have been appointed, during the weeks of 4 and 11 October 2021. The Panel expressed the hope that, with the roll-out of vaccines, the epidemiological situation would improve so as to allow for an in-person meeting at that time. The Panel also indicated that, should an unfavourable epidemiological situation and travel restrictions persist, the first substantive meeting with the parties and the third-party session may have to be conducted in a virtual format. The Panel indicated that it would confirm the format of the first substantive meeting to the parties by 31 August 2021.<sup>1</sup>

The Panel has been monitoring the epidemiological situation and notes that the Covid-19 pandemic continues to present serious challenges to international travel. Entry into Switzerland remains subject to certain requirements for travellers, and particularly those from so-called "high-risk countries".<sup>2</sup> Some participants in these proceedings may also be subject to travel restrictions and quarantine requirements under domestic policies of their home country. Furthermore, in accordance with the recommendations of the WTO Health Task Force, all official WTO missions and WTO-funded travels, which include panelists' travels to Geneva, continue to be suspended.<sup>3</sup> At the current time, it is not possible to predict when these travel restrictions will be lifted or revised.

The Panel has taken note of India's desire for an in-person meeting. Given the absence of significant prospects of improvement in the status of the Covid-19 pandemic at this time, however, the Panel must proceed with the resolution of the dispute by other reasonable means available to it. In light of these circumstances, the Panel has decided to conduct its first substantive meeting with the parties and the third-party session in a virtual format. As noted in the Panel's communication of 21 April 2021, while meetings through remote means may be seen by some parties as a sub-optimal solution, they ensure that proceedings are not unduly delayed and that parties' due process rights are preserved when in-person meetings remain impossible due to travel restrictions.<sup>4</sup>

The Panel notes that India recognizes that the DSU does not prescribe a particular format for panel meetings.<sup>5</sup> However, India has raised a number of concerns regarding the virtual format of panel meetings. Some of these concerns were addressed in the Panel's communication of 21 April 2021. The Panel addresses the remainder of India's concerns in this communication.

First, as regards India's assertion that "the practice has always been to hold an in-person meeting, unless the parties agree to waive this right in favour of some other format"<sup>6</sup>, the Panel notes that, under Article 12.1 of the DSU, "[p]anelists shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute." Hence, while a panel is obliged to consult with the parties before modifying the Working Procedures in Appendix 3 of the DSU, the parties' agreement is not a prerequisite to such modification.

India further points out several perceived shortcomings of virtual meetings such as: (a) the lack of contemporaneous oral exchange<sup>7</sup>; (b) the proposed duration of the meetings<sup>8</sup>; (c) limited

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<sup>1</sup> Panel's communication to the parties of 21 April 2021.

<sup>2</sup> See High-risk countries, available at <https://www.sem.admin.ch/sem/en/home/sem/aktuell/faq-einreiseverweigerung.html#1668147653> (accessed 30 August 2021).

<sup>3</sup> WTO Health Task Force, "Updates from the HTF", email of 28 May 2021.

<sup>4</sup> Panel's communication to the parties of 21 April 2021.

<sup>5</sup> India's communication of 30 April 2021, para. 5(ii).

<sup>6</sup> India's communication of 30 April 2021, para. 5(ii).

<sup>7</sup> India's communication of 12 April 2021, para. 2.

<sup>8</sup> India's communication of 12 April 2021, paras. 4 and 7. India explains that while in-person meetings of the Panel with the parties would normally last for two full days, the proposed duration of the virtual meeting is three hours each day due to the time difference.

opportunities for coordination within the Indian delegation<sup>9</sup>; and (d) concerns over confidentiality and security of the meeting.<sup>10</sup>

Regarding India's allegation that a virtual meeting would not allow contemporaneous exchanges between the Panel and the parties, the Panel notes that procedures for a virtual meeting seek to replicate those for an in-person meeting as closely as possible. Similar to an in-person meeting, during the virtual meeting, the parties will be given an opportunity to present their opening and closing statements, to respond to the Panel's questions, and to comment on each other's responses. Therefore, the virtual meeting will preserve the possibility of contemporaneous exchanges between the Panel and the parties.

As regards the duration of the meeting, which India perceives as being insufficient, the Panel notes that the duration of an in-person meeting depends, among other things, on the size and complexity of the dispute. The Panel notes that, in the present dispute, the complainant raises claims under a single legal provision – Article II:1 of the GATT 1994. Furthermore, the Panel notes that the first written submissions of the parties in this dispute are not particularly lengthy. The Panel therefore considers that, given the size and complexity of this dispute, six hours would be sufficient for the first substantive meeting of the Panel with the parties. The Panel further underlines the need to take into account the different time zones of the participants and the panelists in determining the timing and duration of the meeting.

Regarding the alleged limited possibilities for coordination within the Indian delegation, the Panel first notes that it is up to India to arrange that, to the extent possible, key members of its delegation are in the same room. India points out difficulties in communication between "the Mission and the numerous stakeholders involved in this dispute while they are all located remotely".<sup>11</sup> The Panel notes that these difficulties could be addressed by means of, for example, India putting in place a separate channel of communication for all members of India's delegation.

As regards India's concerns over potential breaches of confidentiality of the meeting, the Panel recalls that the obligation to respect the confidentiality of the meeting of the Panel applies to the participants regardless of the format of the meeting. Furthermore, as regards the security of the platform used to conduct the meeting, the Panel has been advised that IT security officers in the WTO Secretariat have assessed the security features of Cisco Webex and found it to be a suitable platform to hold virtual panel meetings. The WTO Secretariat has purchased a number of licences from Cisco Webex necessary for hosting meetings with end-to-end encryption. Based on the foregoing and considering that Cisco Webex has been used by several WTO panels and international tribunals, the Panel also intends to use this platform, which it trusts will protect the confidentiality of its first substantive meeting with the parties and the third-party session.

Finally, the Panel notes that the first substantive meeting and the third-party session in this dispute have already been delayed by four months. The Panel is cognizant of, and sympathetic to, the disruptions caused by the Covid-19 pandemic and the difficulties faced by the parties in organizing their work. At the same time, the Panel recalls that, pursuant to Article 3.3 of the DSU, the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. In light of the current situation, the Panel considers that the only means for it to ensure prompt dispute settlement, while also observing the parties' due process rights, is to conduct the first substantive meeting and the third-party session in a virtual mode.

Considering the time difference between the respective capitals of the parties and third parties, and the home locations of the panelists, the Panel intends to organize the first substantive meeting and the third-party session within the following timeframes:

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<sup>9</sup> India's communication of 12 April 2021, para. 5.

<sup>10</sup> India's communication of 12 April 2021, para. 6.

<sup>11</sup> India points out difficulties in communication between "the Mission and the numerous stakeholders involved in this dispute while they are all located remotely". (India's communication of 12 April 2021, para. 5)



<b>DATE</b>	<b>TIME</b>	<b>EVENT</b>
7 October 2021	2 p.m. to 5 p.m. (Geneva time)	First substantive meeting
8 October 2021	2 p.m. to 5 p.m. (Geneva time)	First substantive meeting (continued)
13 October 2021	2 p.m. to 5 p.m. (Geneva time)	Third-party session

The Panel trusts that the parties will have had sufficient time to prepare for the first substantive meeting and to make any necessary internal arrangements aimed at ensuring their effective participation.

Further details about the meeting will be communicated to the parties in due course.

**ANNEX D-4****PANEL'S COMMUNICATION TO THE PARTIES (20 SEPTEMBER 2021)**

In a communication dated 6 September 2021, the Panel invited the parties to provide by 13 September 2021 any additional comments on the draft Additional Working Procedures concerning meetings with remote participation.

Japan did not submit any new comments on the draft Additional Working Procedures.

India indicated that it "is unable to agree [with the Panel's decision to conduct its first substantive meeting with the parties in a virtual format] for the reasons already mentioned in preceding communications", reiterating arguments raised in India's communications of 12, 16, and 30 April 2021.<sup>1</sup> In addition to those arguments, India submits that "a virtual meeting format unduly expands and modifies DSU provisions pertaining to panel procedures and meetings", as evidenced by several "additional obligations proposed in the draft [A]dditional [W]orking [P]rocedures".<sup>2</sup> Moreover, India states that it has not expressly agreed to using Cisco Webex to hold the virtual meeting and that the DSB has not adopted its use either.<sup>3</sup> India therefore "requests for a face to face meeting pursuant to Article 12.10, DSU when remaining hurdles attributable to the travel restrictions caused by the pandemic are removed".<sup>4</sup> If the Panel were to hold a virtual meeting, however, India notes that it "has no choice but to confirm its presence at the proposed virtual meeting".<sup>5</sup>

Invited to comment on India's communication of 13 September 2021, Japan noted that it "does not agree with India's views and supports the Panel's decision to conduct the first substantive meeting in a virtual format". Japan recalls that, although it has had "a consistent view that substantive meetings should be in principle held in a face-to-face format", "the prompt settlement of the dispute is equally important in light of the objective of Article 3.3 of the DSU". Japan highlights that, given the absence of clear prospects that the Covid-19 pandemic will be resolved, holding the meeting in person "is unfeasible within the foreseeable future".<sup>6</sup>

The Panel is keenly aware of the extraordinary disruptions arising from the Covid-19 pandemic that continue to require adaptations in the modalities for dispute settlement work, including for the parties' participation in these proceedings and the Panel's fulfilment of its mandate. Those are the circumstances in which, on 31 August 2021, the Panel decided to conduct the first substantive meeting with the parties and the third-party session in a virtual format, having duly weighed India's request for an in-person meeting against the significant challenges still affecting international travel. Then, as now, there appeared to be no real possibilities for an imminent improvement in circumstances that would make an in-person meeting reasonably practicable. The Panel therefore continues to consider that holding a virtual meeting is the only means capable of ensuring the prompt settlement of the dispute while also observing the parties' due process rights. In these circumstances, the Panel maintains its decision of 31 August 2021 as it relates to the format of the first substantive meeting and thus cannot accede to India's "request[]" for a face to face meeting pursuant to Article 12.10, DSU when remaining hurdles attributable to the travel restrictions caused by the pandemic are removed".<sup>7</sup>

<sup>1</sup> India's communication of 13 September 2021, para. 4.

<sup>2</sup> India's communication of 13 September 2021, para. 4(ii) (referring to paragraphs, 3, 5(3), 9, 10, 11, and 13(3) of the draft Additional Working Procedures concerning meetings with remote participation).

<sup>3</sup> India's communication of 13 September 2021, para. 4(iii).

<sup>4</sup> India's communication of 13 September 2021, para. 8.

<sup>5</sup> India's communication of 13 September 2021, para. 9.

<sup>6</sup> Japan's communication of 15 September 2021, p. 1.

<sup>7</sup> India argues that, applied to the present context, Article 12.10 of the DSU means that India should be afforded (a) the time originally allotted for the first substantive meeting (i.e. two working days) and (b) the traditional format for meetings given the technical difficulties associated with a virtual meeting. (India's communication of 13 September 2021, para. 7) The Panel is mindful of its duty under Article 12.10 to accord India, a developing country Member, sufficient time to prepare and present its argumentation in this dispute. In doing so in light of relevant circumstances, however, the Panel must also recognize and seek to uphold its other obligations under the DSU, including that regarding the prompt settlement of disputes pursuant to Article 3.3.

On 6 September 2021, the Panel invited the parties to the first substantive meeting and afforded them an opportunity to "make any additional comments on the draft Additional Working Procedures", "on which the parties ha[d] already had an opportunity to comment".<sup>8</sup> The Panel observes that, in its comments of 13 September 2021, India raises two main arguments that specifically concern the draft Additional Working Procedures.

The Panel is not persuaded by India's first argument that the draft Additional Working Procedures "unduly expand[] and modif[y]" relevant provisions of the DSU. Panels enjoy a margin of discretion in establishing their own working procedures, provided they do not disregard or modify the substantive provisions of the DSU.<sup>9</sup> While the draft Additional Working Procedures include modalities and technical instructions for virtual meetings that may not be specifically reflected in the Working Procedures in Appendix 3 of the DSU, this does not imply, as a general proposition, that they disregard or modify the substantive provisions of the DSU. Nor do the draft Additional Working Procedures place an undue burden on the parties to the dispute.

One provision of the DSU that India argues would be disregarded in this context is Article 18.2, which concerns the obligation of confidentiality in panel proceedings. India questions the extent to which that obligation can be enforced during a virtual meeting.<sup>10</sup> However, as India itself acknowledges, the obligation to respect the confidentiality of panel proceedings applies to the participants regardless of the format of the meeting.<sup>11</sup> The Panel discerns no reason to doubt that the participants will strictly uphold the confidentiality of the proceedings as they would at an in-person meeting.

This leads the Panel to India's second argument regarding the draft Additional Working Procedures, namely, that Cisco Webex as a third-party platform provider has not been expressly agreed to by India or formally adopted in the DSB. While taking note of India's views, the Panel is satisfied that Cisco Webex is a reliable, secure, and technically feasible means to conduct virtual meetings in the present circumstances.<sup>12</sup> This is supported by the demonstrably positive experience dispute settlement panels have had using the platform over the past several months. Accordingly, the Panel has decided to proceed with using Cisco Webex for the conduct of the first substantive meeting and third-party session.

Finally, the Panel takes note of India's confirmation of attendance to the first substantive meeting and attaches to this communication the Additional Working Procedures concerning meetings with remote participation, adopted on 20 September 2021.

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<sup>8</sup> Pursuant to the timetable adopted on 4 December 2020, the first substantive meeting was originally scheduled for 3-4 June 2021 and the third-party session for 9 June 2021. On 31 March 2021, the Panel (a) informed the parties that it intended to hold both its first substantive meeting and the third-party session with remote participation and (b) forwarded them a draft of Additional Working Procedures concerning meetings with remote participation. The parties were invited to submit their views with regard to both elements by 12 April 2021, which they did. The parties commented on each other's comments regarding the above two elements on 16 April 2021. On 21 April 2021, in view of the Covid-19 situation in India and after consulting with the parties, the Panel decided to postpone the first substantive meeting and third-party session.

<sup>9</sup> To recall, Article 12.1 of the DSU provides that "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute." See also Appellate Body Report, *India – Patents (US)*, para. 92.

<sup>10</sup> India's communication of 13 September 2021, paras. 4(ii) and 5.

<sup>11</sup> India's communication of 13 September 2021, para. 4(ii).

<sup>12</sup> As previously indicated, the Panel has also been advised that IT security officers in the WTO Secretariat have assessed the security features of Cisco Webex and found it to be a suitable platform to hold virtual panel meetings. (Panel's communication to the parties of 31 August 2021)

**ANNEX E**

## OTHER DECISIONS BY THE PANEL

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**ANNEX E-1****PANEL'S DECISION ON REQUESTS FOR ENHANCED THIRD-PARTY RIGHTS****Issued on 27 January 2021**

The Panel is in receipt of the requests for enhanced third-party rights (the "requests") submitted by the European Union and Chinese Taipei on 21 and 22 December 2020, respectively, of India's responses of 11 January 2021 asking the Panel to reject those requests, and of Japan's response of 11 January 2021 agreeing with the requests. The Panel is also in receipt of the comments on the requests submitted by China, the Russian Federation, Turkey, and the United States on 11 January 2021.

After 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 the granting of certain enhanced third-party rights to the European Union and Chinese Taipei. In evaluating whether the European Union and Chinese Taipei have demonstrated an interest in the dispute that goes beyond the "substantial interest" that all third parties having notified such an interest to the DSB are presumed to have in the matter at issue, the Panel has weighed and balanced several factors. Such factors include the similarity between this dispute and the two other disputes in which the same three persons have been appointed to serve as panelists<sup>1</sup>; the status of the European Union and Chinese Taipei as sole complainants in the parallel proceedings in DS582 and DS584, respectively; the parties' inability to agree as to the appropriateness of fully harmonizing the timetable for the panel process in the three disputes under Article 9.3 of the DSU; and the need to uphold the requirements of due process.<sup>2</sup>

In light of the foregoing, and after giving due regard to the scope of the requests and the need to maintain the distinction drawn in the DSU between the rights of parties and third parties, the Panel hereby:

- a. grants the European Union and Chinese Taipei 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; and
- b. rejects the remainder of the request, namely, with regard to the possibility of (i) attending the first and second substantive meetings of the parties with the panel, (ii) making oral statements, orally replying to questions and asking questions to the parties or other third parties at those meetings, and (iii) reviewing the draft summary of their own arguments in the descriptive part of the Panel Report.

Finally, mindful of the particular circumstances of this dispute and the status of the European Union and Chinese Taipei as complainants in the parallel proceedings, the Panel has decided not to extend the enhanced rights mentioned in paragraph (a), above, to the other third parties.

Revised Working Procedures reflecting the decision of the Panel accompany this letter. The relevant modifications concern paragraphs 21bis and 30(d).

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<sup>1</sup> The three disputes in which the same panelists have been appointed are DS582, DS584, and DS588.

<sup>2</sup> Appellate Body Reports, *EC – Hormones*, para. 154.

**ANNEX E-2****PANEL'S DECISION ON INDIA'S PRELIMINARY OBJECTION AND PRELIMINARY RULING REQUEST****Issued on 7 July 2021****1 INTRODUCTION**

1.1 On 8 April 2021, India submitted a request for a preliminary ruling under Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), which was incorporated in India's first written submission.

1.2 On 14 April 2021, the Panel invited Japan to comment on India's preliminary ruling request by 29 April 2021. The Panel also invited the third parties to express their views on India's request by the same date. On 23 April 2021, Japan requested that the deadline for submitting comments on India's request be extended until 13 May 2021. India, in principle, did not object to the extension request.<sup>1</sup> Since 13 May was a WTO non-working day, the Panel extended the deadline until 17 May 2021.

1.3 On 17 May 2021, Japan submitted its comments on India's requests. On the same date, Canada, the European Union, and Chinese Taipei, third parties, provided their comments. The United States had commented on India's requests in its third-party submission of 22 April 2021.

1.4 On 23 June 2021, the Panel informed the parties that it would issue a communication regarding India's preliminary ruling request on 28 June 2021.

1.5 On 28 June 2021, India sent a communication to the Panel, requesting the Panel to defer the communication and give the parties an opportunity to respond to questions from the Panel and present views on issues raised by India's requests at the first substantive meeting of the Panel with the parties.<sup>2</sup> On the same date, the Panel informed the parties that, in light of India's communication, the Panel had decided to suspend the issuance of the Panel's communication regarding India's preliminary ruling request and invited Japan to comment on India's communication by 1 July 2021. On 1 July 2021, Japan submitted its comments regarding India's request.<sup>3</sup>

1.6 We address, first, the issue of the timing of the Panel's communication regarding India's preliminary ruling request. We then turn to the substantive aspects of India's preliminary ruling request.<sup>4</sup>

**2 TIMING OF THE PANEL'S COMMUNICATION REGARDING INDIA'S PRELIMINARY RULING REQUEST**

2.1 We begin with India's request of 28 June 2021 to delay the issuance of the Panel's communication regarding India's preliminary ruling request. We first summarize the arguments of the parties, before addressing India's request.

**2.1 Main arguments of the parties**

2.2 India considers that Japan's submission "elicit[s] further discussions on key issues" raised by India's preliminary ruling request.<sup>5</sup> India therefore requests the Panel to defer the communication

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<sup>1</sup> India stated that it did not object to Japan's request "provided the extension does not affect India's preferences for time periods on any subsequent or other filings that India may need to or is required to make". (India's communication to the Panel, 27 April 2021)

<sup>2</sup> India's communication to the Panel, 28 June 2021, para. 3.

<sup>3</sup> Japan's communication to the Panel, 1 July 2021.

<sup>4</sup> This communication will become an integral part of the Panel's final report, subject to any changes that may be necessary in light of comments received from the parties during the interim review.

<sup>5</sup> India's communication to the Panel, 28 June 2021, para. 3.

and give the parties an opportunity to respond to questions from the Panel and present views on issues raised by India's preliminary ruling request at the first substantive meeting of the Panel.<sup>6</sup> According to India, "[s]uch a deferral would contribute to India being afforded an opportunity to adequately pursue its claims and establish the facts in the context of proceedings conducted in a balanced and orderly manner."<sup>7</sup> India states that it ascribes significant importance to the preliminary issues arising in this dispute and "intends to ensure that these preliminary issues on which submissions have been made prior to the first substantive meeting are properly discussed and considered at the first substantive meeting".<sup>8</sup>

2.3 Japan submits that the Panel has the discretion to decide when to issue its preliminary ruling. Japan is of the view that a preliminary ruling will effectively contribute to the efficient progression of the panel proceeding and that deferring the preliminary ruling might depart from the spirit of Article 3.3 of the DSU that provides for the prompt settlement of disputes. According to Japan, the parties and third parties have 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".<sup>9</sup>

## **2.2 Panel's evaluation of India's request to defer the issuance of its communication regarding India's preliminary ruling request**

2.4 As an initial point, we note that the DSU does not contain specific rules of procedure governing the treatment of preliminary ruling requests or other preliminary objections raised by the parties to a dispute.<sup>10</sup> However, paragraph 4(1)(a) of the Working Procedures, adopted by the Panel in this dispute, provides as follows:

India shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Japan shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

2.5 The Working Procedures adopted in this dispute thus do not mandate several rounds of written submissions or questions from the Panel, nor do they grant to the parties the right to present their views on any preliminary ruling request at the first substantive meeting of the Panel or at any other meeting.

2.6 Depending on the circumstances of the case, a panel may find it appropriate, when assessing a request for a preliminary ruling, to solicit further submissions from the parties, pose questions, or seek the parties' views during a meeting. However, as observed by the panel in *Argentina – Import Measures*, "[a]ny of those steps is not an acquired right for the parties, but is instead an instrument for a panel to obtain the necessary information that will allow it to rule on the relevant issues."<sup>11</sup> In the present case, having perused the parties' submissions, the Panel is satisfied that it can make a decision regarding India's requests on the basis of the arguments and evidence contained therein. The Panel thus does not find it necessary to request further submissions, pose questions to the parties, or to seek the parties' views at the first substantive meeting of the Panel.

2.7 India refers to four disputes in which the panel issued a preliminary ruling only after a meeting with the parties.<sup>12</sup> We do not consider that the approach of these four panels evinces a consistent practice to necessarily seek the parties' views on preliminary ruling issues in the course of a substantive meeting. Rather, panels' practice on such issues has varied, and whether a meeting is

<sup>6</sup> India's communications to the Panel, 28 June 2021, para. 3 and 1 July 2021, para. 3.

<sup>7</sup> India's communication to the Panel, 28 June 2021.

<sup>8</sup> India's communication to the Panel, 1 July 2021, para. 4.

<sup>9</sup> Japan's communication to the Panel, 29 June 2021.

<sup>10</sup> We note, however, that Article 12.2 of the DSU stipulates that "[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process."

<sup>11</sup> Panel Reports, *Argentina – Import Measures*, Addendum D-2, para. 3.16.

<sup>12</sup> India's communication to the Panel, 28 June 2021, para. 4 (referring to Panel Reports in *China – Raw Materials*, para. 1.11; *Canada – Wheat Exports and Grain Imports*, para. 1.8; *China – Electronic Payment Services*, para. 1.6; and *Turkey – Textiles*, para. 1.8).

needed to seek the parties' views on a preliminary ruling request is decided by each panel depending on the circumstances of the dispute.<sup>13</sup>

2.8 In this regard, we recall that, pursuant to paragraph 4(1)(b) of the Working Procedures, "[t]he Panel may issue a preliminary ruling ... before, during or after the first substantive meeting." Thus, the Working Procedures provide the Panel with a discretion to decide, in light of the circumstances of the case, when it is appropriate to issue a preliminary ruling. India recognizes the Panel's discretion in this regard.<sup>14</sup>

2.9 Furthermore, we do not agree with India's view that its request that the Panel defer its communication on India's preliminary ruling request "does not prejudice the complainant in any way whatsoever".<sup>15</sup> India's preliminary ruling request concerns fundamental questions related to the Panel's jurisdiction. By ascertaining that the panel request complies with the requirements of Article 6.2 of the DSU, the preliminary ruling ensures that the matter before the Panel has been properly identified and allows the parties to adequately prepare for the first substantive meeting.

2.10 Finally, we recall that Article 3.3 of the DSU lays down the principle of the prompt settlement of disputes. As noted above, in this dispute, having perused the parties' submissions, the Panel was satisfied that it could make a decision regarding India's preliminary ruling request based on the arguments and evidence contained therein. In these circumstances, allowing a further exchange between the parties on these issues would unnecessarily extend the proceedings, contrary to the principle of prompt settlement of disputes.

2.11 Accordingly, given that India's preliminary ruling request concerns matters related to the Panel's jurisdiction, and in keeping with the principle of prompt settlement of disputes under Article 3.3 of the DSU, we consider it appropriate to resolve them before the first substantive meeting of the Panel with the parties.

### **3 PRELIMINARY RULING OF THE PANEL UNDER ARTICLE 6.2 OF THE DSU**

3.1 We now turn India's preliminary ruling request, which concerns the compliance of Japan's panel request with the requirements of Article 6.2 of the DSU. We start by briefly summarizing the arguments of the parties and third parties. Thereafter, we examine the consistency of Japan's panel request with Article 6.2 of the DSU.

#### **3.1 Main arguments of the parties and third parties**

##### **3.1.1 Main arguments of the parties**

3.2 India submits that Japan's panel request does not satisfy the conditions laid down in Article 6.2 of the DSU.<sup>16</sup> In particular, highlighting the requirements of Article 6.2 to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, India argues that "the identification of specific measures at issue may

<sup>13</sup> Our review of the 23 panel reports circulated between 1 January 2019 and 30 June 2021 demonstrates that eight of them contain a preliminary ruling (*US – Facts Available, Korea – Stainless Steel Bars, Indonesia – Chicken (Article 21.5 – Brazil), EU – Cost Adjustment Methodologies II (Russia), EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), India – Export Related Measures, U.S. – Renewable Energy, and Russia – Traffic in Transit*). Four of these panels issued their preliminary ruling after a single round of the parties' comments (*US – Facts Available, Indonesia – Chicken (Article 21.5 – Brazil), EU – Cost Adjustment Methodologies II (Russia)*, and *EC and certain member States – Large Civil Aircraft (Article 21.5 – EU)*), and five of them issued a preliminary ruling before the first substantive meeting (or the substantive meeting in the case of the two Article 21.5 disputes) with the panel (*US – Facts Available, EU – Cost Adjustment Methodologies II (Russia), EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), India – Export Related Measures, and U.S. – Renewable Energy*). None of the eight panels held a separate meeting regarding a preliminary ruling request.

<sup>14</sup> India states:

Para. 4(1)(b) provides discretion to the Panel to issue a preliminary finding "before, during or after the first substantive meeting". The word "may" in this para is indicative of the discretion the Panel has in order to provide findings "before, during or after the first substantive meeting".

(India's communication to the Panel, 28 June 2021, para. 5)

<sup>15</sup> India's communication to the Panel, 28 June 2021, para. 5.

<sup>16</sup> India's first written submission, para. 20.



require the identification of specific products ..., or conversely, the measure at issue may then identify the products at issue."<sup>17</sup> India asserts that, in a number of previous disputes that dealt with issues pertaining to Articles II:1(a) and (b) of the GATT 1994 and Article 6.2 of the DSU, the disputed measures have led to the identification of the products at issue.<sup>18</sup> According to India, by contrast, "the measures at issue in the present instance - stated to be India's legal instruments via which India imposes customs duties on products falling under certain sub-headings - do not necessarily lead to a sufficiently specific or positive identification of the products at issue."<sup>19</sup> India further argues that "[t]he lack of specificity in Japan's submission is further compounded by Japan not explicitly confirming that the classification of the products at issue falls under the contested sub-headings."<sup>20</sup> For India, the "indeterminacy in Japan's submissions compromises not only India's ability to defend itself but also that of the Panel to articulate a clear and reasoned decision."<sup>21</sup>

3.3 Japan argues that its panel request satisfies the requirements of Article 6.2 of the DSU.<sup>22</sup> According to Japan, India's arguments refer to Japan's first written submission instead of its panel request and pertain to the merits of Japan's claims.<sup>23</sup> Japan also argues that India's argument concerning the identification of the products at issue in the panel request is erroneous because Article 6.2 does not contain such a requirement.<sup>24</sup> Furthermore, Japan asserts that the measures it has identified in the panel request define the products at issue.<sup>25</sup> Finally, Japan argues that, contrary to India's assertion, the manner in which the measures at issue are identified in Japan's panel request is sufficient to allow India to understand the subject of this dispute and defend itself.<sup>26</sup> Japan thus requests the Panel to reject India's preliminary ruling request.<sup>27</sup>

### 3.1.2 Main arguments of the third parties

3.4 Canada states that it agrees with the comments contained in the United States' third-party submission.<sup>28</sup>

3.5 The European Union<sup>29</sup> argues that, while assessing consistency with Article 6.2 of the DSU entails scrutinizing the panel request, India's arguments do not refer to Japan's panel request.<sup>30</sup> The European Union also stresses that India's arguments concerning product classification and the scope of specific exemptions do not pertain to compliance with Article 6.2, but rather to the merits of the claims.<sup>31</sup> According to the European Union, India has failed to make a *prima facie* case in favour of its preliminary ruling request and India's request should be rejected for this reason alone.<sup>32</sup>

3.6 Chinese Taipei<sup>33</sup> submits that, while India sets out in its request the legal standard under Article 6.2 of the DSU, India does not specify what specific requirements the panel request does not

<sup>17</sup> India's first written submission, para. 23.

<sup>18</sup> India's first written submission, paras. 24-25.

<sup>19</sup> India's first written submission, para. 25 and fn 41 thereto.

<sup>20</sup> India's first written submission, para. 26.

<sup>21</sup> India's first written submission, para. 30. India requests the Panel to find that "Japan has been unable to satisfy the threshold requirements of specificity under Article 6.2 of the DSU" and that "[c]onsequently, all other products except the ones explicitly classified by Japan under the contested sub-headings, especially tariff items 8517.62.90 and 8517.70.90, are beyond the scope of the present dispute." (Ibid. para. 263)

<sup>22</sup> Japan's comments on India's preliminary ruling request, paras. 2-3.

<sup>23</sup> Japan's comments on India's preliminary ruling request, paras. 31-33.

<sup>24</sup> Japan's comments on India's preliminary ruling request, paras. 34-38.

<sup>25</sup> Japan's comments on India's preliminary ruling request, para. 39.

<sup>26</sup> Japan's comments on India's preliminary ruling request, paras. 40-41.

<sup>27</sup> Japan's comments on India's preliminary ruling request, paras. 2-3 and 42.

<sup>28</sup> Canada's comments on India's preliminary ruling request.

<sup>29</sup> The European Union notes "the overlap between India's requests in DS582 and in the parallel cases DS584 and DS588" and indicates that, "[i]nsofar as that overlap exists, the European Union - in its position as third party in DS584 and DS588 - refers to its submission DS582 by reference". (European Union's cover e-mail of 17 May 2021 to its comments on India's preliminary objection and preliminary ruling request in DS584)

<sup>30</sup> European Union's comments on India's preliminary objection and preliminary ruling request in DS582, paras. 36-37.

<sup>31</sup> European Union's comments on India's preliminary objection and preliminary ruling request in DS582, para. 38 (referring to India's first written submission, paras. 42-44).

<sup>32</sup> European Union's comments on India's preliminary objection and preliminary ruling request, para. 39.

<sup>33</sup> Chinese Taipei notes "the overlap in the scope of India's preliminary ruling request in the present dispute with that of DS588, in which [Chinese Taipei] is complainant" and indicates that, "[a]s such, [Chinese Taipei] refers the Panel to its comments on India's preliminary ruling request in DS588 for the Panel's

comply with.<sup>34</sup> Chinese Taipei argues that the text of Article 6.2 does not require an identification of the products at issue, but only refers to the identification of the "specific measures at issue".<sup>35</sup> Chinese Taipei also asserts that India appears to have mistakenly made substantive arguments in its preliminary ruling request when addressing issues of tariff classification. According to Chinese Taipei, Article 6.2 requires a brief submission of the "claims" and not the "arguments" supporting those claims, which are clarified in subsequent submissions.<sup>36</sup>

3.7 The United States argues that Article 6.2 does not expressly require that a panel request identify specific products to which the measures at issue apply.<sup>37</sup> According to the United States, in the context of claims under Articles II:1(a) and (b) of the GATT 1994, prior panels and the Appellate Body have considered that an identification of specific products is required only to the extent necessary to identify the measures at issue.<sup>38</sup> The United States also asserts that India's arguments regarding alleged errors in the Harmonized System (HS) transposition process, proper classification of products under the contested tariff subheadings, and insufficient precision in the complainants' written submissions as to specific products, go to the merits of the complainant's claims, not to the identification of measures in the panel request.<sup>39</sup>

## 3.2 Panel's evaluation of India's preliminary ruling request

### 3.2.1 General observations

3.8 Article 6.2 of the DSU reads, in relevant part:

The request for the establishment of a panel shall be in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3.9 Article 6.2 sets out two principal requirements that a panel request must comply with: (a) the identification of the specific measures at issue and (b) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>40</sup>

3.10 Whereas Article 6.2 sets forth the requirements for a panel request, India does not argue that Japan's *panel request* does not properly identify the specific measures at issue. Nor does India argue that Japan's *panel request* does not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required under Article 6.2 of the DSU. Rather, throughout its preliminary ruling request, India refers to Japan's *first written submission* in raising the alleged lack of specificity in the identification of the products at issue in this dispute.<sup>41</sup>

3.11 Furthermore, India raises issues pertaining to the classification of products and applicable rates of duty, which concern the merits of Japan's claims rather than the specific requirements of

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reference, to the extent of such overlap." (Chinese Taipei's cover e-mail of 17 May 2021 to its comments on India's preliminary objection and preliminary ruling request in DS584)

<sup>34</sup> Chinese Taipei's comments on India's preliminary objection and preliminary ruling request in DS588, para. 3.1.

<sup>35</sup> Chinese Taipei's comments on India's preliminary objection and preliminary ruling request in DS588, para. 3.5 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 165).

<sup>36</sup> Chinese Taipei's comments on India's preliminary objection and preliminary ruling request in DS588, para. 3.23.

<sup>37</sup> United States' third-party submission, para. 10.

<sup>38</sup> United States' third-party submission, para. 11. The United States argues that, in considering India's request for a preliminary ruling, the Panel must address whether identification of specific products would be required to identify the measures at issue or whether the products at issue flow from the identified measures. (Ibid. para. 13)

<sup>39</sup> United States' third-party submission, paras. 14-15.

<sup>40</sup> The other two requirements are that the panel request must be in writing and must indicate whether consultations were held. (Appellate Body Reports, *Russia – Railway Equipment*, para. 5.26 and fn 95 thereto; and *Korea – Dairy*, para. 120) These two requirements have been complied with and are not challenged by India.

<sup>41</sup> For example, India states:

The lack of specificity in the Japan's submission is further compounded by Japan not explicitly confirming that the classification of the products at issue falls under the contested sub-headings. (India's first written submission, para. 26. See also *ibid.* paras. 27, 30, and fns 32-34 to paras. 21-22, fns 41-42 to paras. 25-26, and fn 44 to para. 27)

Article 6.2 of the DSU.<sup>42</sup> In this regard, we note that it is well established that issues pertaining to the merits of a complainant's claims, as opposed to jurisdictional issues, are not properly subject to preliminary ruling requests.<sup>43</sup>

3.12 India also argues that Japan does not identify the products at issue with sufficient specificity.<sup>44</sup> First, as noted, India points to the alleged lack of specificity in the description of the products at issue in Japan's first written submission, not in its panel request.<sup>45</sup> Second, in any event, Article 6.2 of the DSU does not require that a panel request identify the relevant products. Rather, it requires the identification of the specific measures at issue.<sup>46</sup> The identification of the products at issue is "a consequence of the scope of application of the specific measures at issue", and thus "it is the *measure* at issue that generally will define the *product* at issue."<sup>47</sup> Therefore, the identification of the products at issue is generally not a separate and distinct element of a panel's terms of reference.<sup>48</sup>

3.13 We note that it may be necessary to identify the specific products at issue in the panel request in instances where classification decisions of customs authorities are under challenge, in order to identify the specific measures at issue.<sup>49</sup> However, this is not the case in the dispute before the Panel. As explained in detail below, Japan defines the measures at issue as a number of legal instruments that impose duties on products that are covered by certain tariff lines of India's First Schedule. In our view, therefore, the identification of the products at issue flows from the description of the measures at issue in Japan's panel request, and we agree with Japan that the relevant products are those that fall under the scope of the identified tariff lines.<sup>50</sup>

3.14 These reasons alone provide us with sufficient grounds to reject India's preliminary ruling request. Nevertheless, with a view to providing a comprehensive response to India's request, and noting that panels can address on their own motion "certain issues of a fundamental nature", in particular "issues which go to the root of their jurisdiction"<sup>51</sup>, we proceed to examine whether Japan's panel request complies with the requirements of Article 6.2 of the DSU.

3.15 Accordingly, we will examine, in turn, whether Japan's panel request: (a) identifies the specific measures at issue; and (b) provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

### 3.2.2 Identification of the specific measures at issue

3.16 As explained above, the arguments raised by India do not concern Japan's panel request and pertain instead to its first written submission. These arguments are therefore not pertinent to an assessment of whether Japan's panel request complies with the requirements of Article 6.2 of the DSU.

3.17 Japan, for its part, argues that its panel request identifies the measures at issue in accordance with the requirements of Article 6.2 of the DSU.<sup>52</sup> According to the Japan, it is clear from the panel request that the measures at issue are the "specific legal instruments" listed in the relevant sections

<sup>42</sup> India's first written submission, paras. 26-27. See also fn 49 to para. 30, in which India discusses the burden of proof.

<sup>43</sup> See Appellate Body Report, *Australia – Apples*, paras. 423-425. See also Panel Report, *Russia – Traffic in Transit*, paras. 7.331-7.339.

<sup>44</sup> India's first written submission, para. 29.

<sup>45</sup> For example, India states:

Indeed, Japan's submissions only describe at best an indeterminate (and seemingly 'residuary') list of products which do not apparently benefit from extant statutory exemptions.

(India's first written submission, para. 30)

<sup>46</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 166 (referring to Appellate Body Report, *EC – Computer Equipment*, para. 67). See also Panel Reports, *EC – IT Products*, para. 7.194.

<sup>47</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 165. (emphasis original)

<sup>48</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 165.

<sup>49</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 165. See also Panel Reports, *EC – IT Products*, para. 7.194.

<sup>50</sup> See Japan's comments on India's preliminary ruling request, paras. 13-14, 16-17, 19-20, 22-23, and 25-26.

<sup>51</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

<sup>52</sup> Japan's comments on India preliminary ruling request, para. 2.

of the panel request, "focusing particularly on the aspect that India applies a duty to products" falling under the relevant tariff lines in India's First Schedule.<sup>53</sup>

3.18 As noted above, one of the requirements of Article 6.2 of the DSU is that a panel request identifies the specific measures at issue. It must do so with sufficient precision, so that what is referred to adjudication could be discerned from the panel request.<sup>54</sup> This requirement is met if the panel request identifies the measures at issue with sufficient particularity so as to indicate the nature of the measures and the gist of what is at issue.<sup>55</sup> We now turn to assess the compliance of the Japan's panel request with this requirement.

3.19 Japan's panel request reads, in relevant part:

## **I. IDENTIFICATION OF THE MEASURES AT ISSUE**

### **1. Telephones for cellular networks or for other wireless networks**

India applies a 20% duty to products (telephones for cellular networks or for other wireless networks) falling under tariff item nos. 8517 12 11, 8517 12 19, and 8517 12 90 of the First Schedule to the Customs Tariff Act, 1975 ("First Schedule"), which clearly exceeds the applicable bound rate of 0% set forth in India's Schedule of Concessions and Commitments annexed to the GATT 1994 ("India's Schedule"). The measures at issue through which the duties are imposed include:

- a. the Customs Act, 1962 ("Customs Act");  
...; and
- i. any amendments, replacements, extensions, implementing measures or other related measures regarding the measures referred to above.

### **2. Base stations**

India applies a 20% duty to products (base stations) falling under tariff item no. 8517 61 00 of the First Schedule, which clearly exceeds the applicable bound rate of 0% set forth in India's Schedule. The measures at issue through which the duties are imposed include:

- a. the Customs Act;  
...; and
- i. any amendments, replacements, extensions, implementing measures or other related measures regarding the measures referred to above.

### **3. Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus**

India applies 20% or 10% duties, depending on the types of products, to products (machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus) falling under tariff item no. 8517 62 90 of the First Schedule, which clearly exceeds the applicable bound rate of 0% set forth in India's Schedule. The measures at issue through which the duties are imposed include:

- a. the Customs Act;  
...; and
- q. any amendments, replacements, extensions, implementing measures or other related measures regarding the measures referred to above.

<sup>53</sup> Japan's comments on India preliminary ruling request, paras. 13-14, 16-17, 19-20, 22-23, and 25-26.

<sup>54</sup> Appellate Body Report, *US – Continued Zeroing*, para. 168.

<sup>55</sup> Appellate Body Report, *US – Continued Zeroing*, para. 169.

#### **4. Parts of telephone sets and other apparatus for the transmission or reception of voice, images or other data**

##### **(1) Populated, loaded or stuffed printed circuit boards**

India applies 20% duty to products (populated, loaded or stuffed printed circuit boards) falling under tariff item no. 8517 70 10 of the First Schedule, which clearly exceeds the applicable bound rate of 0% set forth in India's Schedule. The measures at issue through which the duties are imposed include:

- a. the Customs Act;  
...; and
- q. any amendments, replacements, extensions, implementing measures or other related measures regarding the measures referred to above.

##### **(2) Parts of telephone sets and other apparatus for the transmission or reception of voice, images or other data other than populated, loaded or stuffed printed circuit boards**

India applies 10% or 15% duties, depending on the types of products, to products (parts of telephone sets and other apparatus for the transmission or reception of voice, images or other data other than populated, loaded or stuffed printed circuit boards) falling under tariff item no. 8517 70 90 of the First Schedule, which clearly exceeds the applicable bound rate of 0% set forth in India's Schedule. The measures at issue through which the duties are imposed include:

- a. the Customs Act;  
...; and
- x. any amendments, replacements, extensions, implementing measures or other related measures regarding the measures referred to above.<sup>56</sup>

3.20 As the excerpt from Japan's panel request demonstrates, Japan has identified the measures at issue as a number of legal instruments that impose duties on products classified under certain tariff lines in India's First Schedule.<sup>57</sup> For each of the product categories, the panel request identifies a duty applied to products falling under determined items of India's First Schedule, and lists the relevant legal instruments through which, in Japan's view, the duties are imposed.<sup>58</sup>

3.21 Our examination of Japan's panel request reveals that it identifies the measures at issue with sufficient particularity so as to indicate the nature and gist of those measures. We agree with Japan that, based on its panel request, it is clear that Japan takes issue with certain legal instruments that impose duties on products classified under the enumerated tariff lines in India's First Schedule that, in Japan's view, exceed the bound rate.<sup>59</sup>

3.22 We therefore conclude that the identification of the measures at issue in Japan's panel request is consistent with the requirements of Article 6.2 of the DSU.

#### **3.2.3 Brief summary of the legal basis of the complaint sufficient to present the problem clearly**

3.23 We now turn to the second requirement of Article 6.2, which is the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3.24 As noted above, India does not specifically argue that Japan's panel request does not provide a brief summary of the legal basis of the complaint that is sufficient to present the problem clearly, as required by Article 6.2 of the DSU.

<sup>56</sup> Request for the establishment of a panel by Japan, WT/DS584/9, pp. 1-5. (fns omitted)

<sup>57</sup> Request for the establishment of a panel by Japan, WT/DS584/9, pp. 1-5.

<sup>58</sup> Request for the establishment of a panel by Japan, WT/DS584/9, pp. 1-5.

<sup>59</sup> See also Japan's first written submission, para. 13.

3.25 Japan, for its part, submits that its panel request provides a summary of the legal basis of the complaint in accordance with the requirements of Article 6.2 of the DSU.<sup>60</sup> According to Japan, its panel request states that the measures at issue are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.<sup>61</sup>

3.26 The requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly entails precision in identifying the legal basis of the complaint, i.e. the treaty provisions claimed to have been violated.<sup>62</sup> Furthermore, in order to "present the problem clearly", the panel request must plainly connect the challenged measures to the provisions of the covered agreements claimed to have been violated.<sup>63</sup> With these considerations in mind, we now examine Japan's panel request.

3.27 Japan's panel request reads in relevant part:

## II. LEGAL BASIS FOR THE COMPLAINTS

Japan considers that each of the foregoing measures is inconsistent with India's obligations under the following provisions:

- i. Article II:1(a) of the GATT 1994 because India has failed to accord to Japan's commerce treatment no less favourable than that provided for in the appropriate Part of India's Schedule;
- ii. Article II:1(b) of the GATT 1994 because India has failed to exempt the products of the territory of Japan, on their importation into India's territory, from ordinary customs duties in excess of those set forth and provided in India's Schedule; and
- iii. Article II:1(b) of the GATT 1994 because India has failed to exempt such products 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 the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the territory of India on that date.

As a result, India's foregoing measures also appear to nullify or impair the benefits accruing to Japan directly or indirectly within the meaning of Article XXIII:1 of the GATT 1994.<sup>64</sup>

3.28 Our examination of Japan's panel request reveals that it identifies the provisions of the covered agreement claimed to have been violated by the measures at issue, i.e. Articles II:1(a) and (b) of the GATT 1994. Furthermore, the panel request plainly connects those provisions to the measures at issue by briefly explaining how each of the measures listed in the panel request is inconsistent with India's obligations under the corresponding legal provisions.<sup>65</sup>

3.29 We therefore conclude that Japan's panel request provides a brief summary of the complaint that is sufficient to present the problem clearly, within the meaning of Article 6.2 of the DSU.

## 3.3 Conclusion

3.30 In light of the foregoing, we reject India's preliminary ruling request and conclude that Japan's panel request meets the requirements of Article 6.2 of the DSU.

<sup>60</sup> Japan's comments on India's preliminary ruling request, para. 2.

<sup>61</sup> Japan's comments on India's preliminary ruling request, fn 1 to para. 2.

<sup>62</sup> Appellate Body Report, *Thailand – H-Beams*, para 97. See also Appellate Body Reports, *Korea – Dairy*, para. 124 and *Russia – Railway Equipment*, para. 5.28.

<sup>63</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 162. See also Appellate Body Report, *Russia – Railway Equipment*, para. 5.27.

<sup>64</sup> Request for the establishment of a panel by Japan, WT/DS584/9, p. 5.

<sup>65</sup> Request for the establishment of a panel by Japan, WT/DS584/9, p. 5.

**ANNEX E-3****PANEL'S DECISION ON JAPAN'S EVIDENTIARY OBJECTION****Issued on 16 May 2022****1 INTRODUCTION**

1.1. On 31 March 2022, during the Panel's second substantive meeting with the parties, the Panel addressed a question to India regarding whether Professor Waibel's legal opinion, which had been submitted as Annex II to India's second written submission, constituted evidence or part of India's arguments.<sup>1</sup> 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 commented on India's response, objecting to India's characterization of Professor Waibel's legal opinion as evidence. Japan argued that, to the extent the opinion could be considered evidence, it should be disregarded by the Panel because, *inter alia*, the submission of that opinion as evidence was inconsistent with the Panel's Working Procedures.

1.2. 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 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.<sup>2</sup>

1.3. Having received Japan's written objection, as well as India's comments on that objection, we consider that it is useful and appropriate in the present circumstances to issue a decision to the parties, in advance of India's submission of Professor Waibel's legal opinion as evidence, regarding whether the filing of that exhibit would be inconsistent with the Panel's Working Procedures. We note that, although at the time of issuing this decision India has yet to submit the relevant exhibit, the content of the forthcoming exhibit has already been submitted to the Panel as Annex II of India's second written submission.

**2 MAIN ARGUMENTS OF THE PARTIES**

2.1. Japan notes that, in its oral response to a question from the Panel at the second substantive meeting, India indicated that Professor Waibel's "legal opinion", attached as Annex II to India's second written submission, constituted "evidence" in support of India's arguments.<sup>3</sup> Japan disagrees with India's characterization of that legal opinion and submits that, to the extent that the opinion can be considered evidence, it should be disregarded by the Panel. First, Japan argues that, to the extent that it constitutes evidence, the legal opinion could and should have been submitted by India no later than the first substantive meeting because it does not constitute evidence necessary for purposes of rebuttal or for answers to questions or comments on answers provided by Japan, in accordance with the Panel's Working Procedures.<sup>4</sup> Second, Japan argues that, even if the legal opinion constitutes evidence, it should not be given any weight by the Panel as it is not an objective and neutral expert opinion, because it was drafted upon express request from India, to support

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<sup>1</sup> 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:

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? (footnote omitted)

<sup>2</sup> Panel question No. 62, sent on 11 April 2022.

<sup>3</sup> Japan's objection to India's submission of Prof. Waibel's opinion as evidence, para. 1.

<sup>4</sup> Japan's objection to India's submission of Prof. Waibel's opinion as evidence, para. 3.

India's position.<sup>5</sup> Japan submits that Professor Waibel appears to act as India's counsel rather than as an independent expert, and his lack of neutrality is indicated by his inclusion in India's delegation list for the second substantive meeting.<sup>6</sup> Japan further considers that Professor Waibel's opinion suffers from "a number of incorrect assumptions", "contains several erroneous legal arguments", and "reflects a lack of understanding of the multilateral system of tariff concessions under the [WTO] and, in particular, of the reciprocal and mutually advantageous nature of such tariff concessions."<sup>7</sup>

2.2. India argues that Professor Waibel's "expert opinion" is "evidence that supplements its arguments".<sup>8</sup> India highlights that the use of expert reports is "common to various forms of international adjudication and is not unknown to WTO jurisprudence".<sup>9</sup> India notes that while there are no specific WTO rules regarding the admissibility or neutrality of party-appointed experts, India followed the International Bar Association Rules on the Taking of Evidence in International Arbitration 2020 (IBA Rules), and notes that the IBA Rules have "near-universal acceptance in international dispute settlement procedures".<sup>10</sup> India submits that "Japan offers no substantive reasons for its unsubstantiated challenge to India's (rightful) characterization of Prof. Waibel's opinion as expert evidence."<sup>11</sup> India further considers that submission of this evidence is within the requirements of the Working Procedures, since it "was in light of Japan's ill-founded arguments on certain issues concerning Article 48 of the Vienna Convention in the course of the first substantive meeting (which is also reflected in Japan's responses to the Panel's questions) that India commissioned Prof. Waibel's expert opinion to clarify such issues".<sup>12</sup> India therefore considers that this evidence constitutes "evidence necessary for purposes of rebuttal or answers to comments provided by the other party".<sup>13</sup> Regarding Japan's assertion that Professor Waibel's legal opinion is not objective or neutral, India emphasizes that it has followed the IBA Rules and IBA Guidelines, and that the absence of rules regarding party-appointed experts in WTO procedures cannot suffice to question the neutrality of India's expert evidence.<sup>14</sup> India submits that it is for the Panel to weigh the "relevance and materiality" of the evidence.<sup>15</sup> India also considers that Japan's argument that Professor Waibel's opinion is flawed is a "baseless indictment of an expert opinion containing demonstrable analytical rigour".<sup>16</sup>

### 3 DECISION OF THE PANEL

3.1. We note at the outset that aspects of Japan's arguments – raised both orally at the second substantive meeting and in writing following that meeting – do not concern the admissibility of Professor Waibel's legal opinion as an exhibit, but rather pertain to the probative value or weight that the Panel should ascribe to that legal opinion. Such arguments include Japan's disagreement with India's characterization of the expert opinion as "evidence", the alleged lack of neutrality of Professor Waibel's legal opinion, and alleged flaws in that legal opinion. In our view, the extent to which a party's exhibits substantiate its arguments, the neutrality of those exhibits, and the merits of those exhibits, are all questions that pertain not to the admissibility of such evidence, but rather to the weight that a panel should ascribe to that evidence.<sup>17</sup> We therefore consider that these arguments by Japan are not relevant to the question of whether Professor Waibel's legal opinion is

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<sup>5</sup> Japan's objection to India's submission of Prof. Waibel's opinion as evidence, para. 4.

<sup>6</sup> Japan's objection to India's submission of Prof. Waibel's opinion as evidence, para. 4.

<sup>7</sup> Japan's objection to India's submission of Prof. Waibel's opinion as evidence, para. 6.

<sup>8</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 2.

<sup>9</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 2.

<sup>10</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 2.

<sup>11</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 2.

<sup>12</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 3.

<sup>13</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 3.

<sup>14</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 3.

<sup>15</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 3.

<sup>16</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 3.

<sup>17</sup> We also do not consider it necessary, nor do we see any basis in our Working Procedures or elsewhere, to question a party's characterization of exhibits it submits in support of its arguments as "evidence". The question of whether a party's exhibit substantiates or supports the assertions of that party is distinct from the question of whether those exhibits constitute "evidence". We further note that whether arguments are introduced by a party as their own assertions, or as evidence *in support of* one's assertions, the Panel's mandate remains the same – to objectively assess the matter before it.



admissible as an exhibit. In this decision, we exclusively address whether Professor Waibel's legal opinion is admissible as evidence, in conformity with our Working Procedures.<sup>18</sup>

3.2. Paragraph 5 of our Working Procedures states that:

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.
- (2) If any new evidence has been admitted pursuant to an additional exception granted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

3.3. Pursuant to our Working Procedures, as a general rule, evidence must be submitted no later than during the first substantive meeting. However, evidence may be submitted thereafter: (i) if it is necessary for purposes of rebuttal; (ii) if it is necessary for answers to questions or comments on answers provided by the other party; or (iii) upon a showing of good cause the Panel grants an exception to the general rule.

3.4. We understand that Japan considers the submission of Professor Waibel's legal opinion as evidence to be contrary to paragraph 5 of our Working Procedures, because such an exhibit would not constitute evidence necessary for purposes of rebuttal or necessary for answers to questions or comments on answers provided by Japan. Japan considers that Professor Waibel's legal opinion does not constitute evidence for purposes of rebuttal because India could have submitted Professor Waibel's legal opinion at the time of filing its first written submission.<sup>19</sup> India, for its part, considers that Professor Waibel's legal opinion constitutes evidence necessary for purposes of rebuttal because India commissioned that legal opinion in response to Japan's arguments at and following the first substantive meeting.<sup>20</sup>

3.5. In our view, it is natural, if not inevitable, that over the course of dispute settlement proceedings, parties' arguments will evolve and develop. The process of responding to the assertions and arguments of the other party may necessitate elaboration or substantiation of aspects of one's initial arguments, in order to adequately rebut those assertions and arguments. Furthermore, what may appear to be minor issues early in the proceedings can take on new significance later on, necessitating the submission of additional arguments or evidence. In our view, it is both reasonable and consistent with our Working Procedures that evidence for purposes of rebuttal be introduced after the first substantive meeting in order to rebut another party's rebuttal of one's own initial position. This is notwithstanding that such evidence may relate to arguments that were initially raised by the adducing party.

3.6. Having said that, we also note that the opportunity to further substantiate or develop arguments through the submission of additional evidence should not be read as a free licence to submit extensive or factually intensive evidence at a late stage of the proceedings, in particular evidence that not only was available at an earlier stage of the proceedings but was plainly necessary in order to make one's case. Indeed, while panels have an interest in making their determinations on the basis of a complete factual and evidentiary record, there is also an interest in "prompt" and efficient dispute settlement proceedings.<sup>21</sup> Moreover, parties' due process rights should entail a sufficient opportunity to review and comment on any new evidence that is submitted. These

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<sup>18</sup> Japan has not argued or demonstrated how an alleged lack of neutrality of Professor Waibel's legal opinion, or flaws in that legal opinion, would preclude India from submitting that document as evidence. In our view, such arguments do not pertain to the admissibility of the legal opinion as evidence, and it is therefore not necessary to address these arguments at this stage. Such arguments can be addressed, if necessary, in the Panel's assessment of the merits of the parties' claims and arguments, to be set forth in the Panel's Report.

<sup>19</sup> Japan's objection to India's submission of Prof. Waibel's opinion as evidence, para. 3.

<sup>20</sup> India's response to Japan's objection to India's submission of Prof. Waibel's opinion as evidence, p. 3.

<sup>21</sup> Article 3.3 of the DSU explicitly indicates that "*prompt* settlement" of disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

considerations also ought to be taken into account in assessing the admissibility of evidence submitted for purposes of rebuttal of arguments made earlier in the proceedings.

3.7. In the present dispute, we note that Professor Waibel's legal opinion is concerned specifically with the applicability and application of Article 48 of the Vienna Convention. These issues were first introduced in the context of these proceedings by India in its first written submission and, over the course of the proceedings, have given rise to an elaborate exchange of views between the parties and with the third parties. We further understand that, while India could have sought and adduced Professor Waibel's legal opinion at the time of filing its first written submission, the necessity of doing so may only have become clear to India over the course of the parties' exchange of views. Moreover, India's second written submission arguably represented India's first opportunity to substantively rebut Japan's arguments on Article 48 as raised at the first substantive meeting and in written responses to questions from the Panel following that meeting.<sup>22</sup>

3.8. For these reasons, and in particular given the importance that the parties attach to this issue, it would seem neither surprising nor inappropriate for India to seek to further substantiate its assertions regarding Article 48 of the Vienna Convention at the time of submitting its second written submission. In our view, therefore, the submission of Professor Waibel's legal opinion as an exhibit indeed qualifies as submission of "evidence necessary for purposes of rebuttal" in accordance with paragraph 5(1) of our Working Procedures. We also note that our Working Procedures do not require that rebuttal evidence be filed at any particular time after the first substantive meeting. Moreover, in our view, it would be an unreasonably strict interpretation of our Working Procedures to preclude the submission of evidence at a later stage solely on the basis that this evidence could have been adduced at an earlier stage of the proceedings.

3.9. As to whether Japan's due process rights are respected by the submission of this evidence at this stage of the proceedings, we recall that India initially submitted this evidence as an annex to its second written submission, thereby giving Japan the opportunity to comment on the content of that opinion during the second substantive meeting. We also recall that, after the filing of India's written responses to the Panel's questions following the second substantive meeting (due on 23 May 2022), Japan will have the opportunity to provide comments on those responses by 21 June 2022. Since Panel question No. 62 specifically requested India to provide the legal opinion as an exhibit, Japan will have the opportunity to review and provide comments on the forthcoming exhibit in the context of making comments on India's written responses to the Panel's questions. We also note that, over and above the fact that Professor Waibel's legal opinion has been on the Panel's record as part of India's second written submission since the filing of that submission on 15 February 2022, it is also limited in its length and scope, such that its inclusion on the Panel's record as an exhibit entails no significant additional burden on either the Panel or Japan.

3.10. For the foregoing reasons, we do not consider that India's filing of Professor Waibel's legal opinion following the second substantive meeting is inconsistent with our Working Procedures, nor do we consider that the filing of that exhibit would otherwise prejudice Japan's due process rights. We therefore reject Japan's objection to India's submission of Professor Waibel's legal opinion as an exhibit and invite Japan to provide any comments on that exhibit in the course of its comments on India's response to Panel question No. 62. As the parties are aware, and as highlighted above, the deadline for filing comments on the other party's responses is **21 June 2022**.

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<sup>22</sup> This is because, pursuant to our Working Procedures, the parties were not given the opportunity to comment on each other's written responses to questions following the first substantive meeting and prior to filing their second written submissions.