"products of territories of other Members" in Article II:1(b) – an issue which is not before us in this dispute – nothing in the text of this provision indicates that *preferential* rules of origin, such as those contained in CEPA Rules 2011, are "inbuilt" in that phrase. We consider, therefore, that the origin requirements set forth in CEPA Rules 2011 are not encompassed in the phrase "products of territories of other Members" in Article II:1(b), first sentence. To the extent that, pursuant to Notification No. 69/2011, products of Japan are required to comply with origin requirements set forth in CEPA Rules 2011 to be exempted from customs duty, it follows that Notification No. 69/2011 does not accord unconditional duty-free treatment to products of Japan falling under the tariff items at issue in this dispute.

7.450. As to India's argument that Japan has not raised a "claim" regarding the "equivalency of or the effect of difference" between so-called "in-built" origin criteria in Article II:1 of the GATT 1994 and the origin rules applied under the CEPA, we agree that Japan has not raised a claim regarding Notification No. 69/2011. Indeed, Japan's arguments concerning Notification No. 69/2011 are merely in response to India's arguments that Notification No. 69/2011 "negates" Japan's claim.[1104] In our view, it is insufficient for India, as the respondent seeking to demonstrate that the measures at issue are not WTO-inconsistent, to merely identify the existence of a legal instrument and assert that the complainant, who based no claims on that legal instrument, has failed to demonstrate that that instrument is WTO-inconsistent. Thus, we do not consider that Japan's alleged failure to demonstrate any "distinction" between the CEPA Rules 2011 and the phrase "products of territories of other Members" in Article II:1(b) means that Japan has failed to substantiate its burden of proof under Articles II:1(a) and (b) of the GATT 1994 with respect to the challenged measures.

7.451. We recall that, pursuant to Articles II:1(a) and (b), India has the obligation to grant unconditional duty-free treatment on an MFN basis to all products covered by the tariff items at issue, including all such products of Japan, as set forth in its WTO Schedule. We have found that the origin requirements set forth in CEPA Rules 2011 constitute preferential rules of origin and are not "inbuilt" in the phrase "products of territories of other Members" in Article II:1(b), first sentence, of the GATT 1994. To the extent that the products of Japan falling under the tariff items at issue are required to comply with such origin requirements to be exempted from customs duties, those products of Japan are not accorded unconditional duty-free treatment.

7.452. Accordingly, we find that India has not established that, pursuant to Notification No. 69/2011, it is acting consistently with its WTO obligations under Articles II:1(a) and (b), because Notification No. 69/2011 does not grant unconditional duty-free treatment to all products of Japan at issue in this dispute.

## 8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude as follows:

a. In respect of India's assertions concerning its WTO tariff commitments, we find that:

   i. The ITA is not a covered agreement within the meaning of the WTO Agreement and the DSU, does not set forth India's legal obligations at issue in this dispute, and does not otherwise limit the scope of India's tariff commitments as set forth in its WTO Schedule;

   ii. The circumstances of this case do not satisfy the substantive requirements of Article 48 of the Vienna Convention, and we therefore decline to read aspects of India's WTO Schedule as invalid; and

   iii. India's request for findings that Japan acted inconsistently with the 1980 Decision is not within our terms of reference, and we consequently do not have the legal mandate to make such findings.

b. In respect of Japan's claims that India's tariff treatment of certain products is inconsistent with Articles II:1(a) and (b) of the GATT 1994, we find that:

[1104] India's second written submission, para. 125.

i. India's tariff treatment of products falling within the scope of tariff items 8517.12.11 and 8517.12.19 of India's First Schedule at the time of the Panel's establishment, and which presently fall within the scope of tariff items 8517.13.00 and 8517.14.00 of India's First Schedule, is inconsistent with Articles II:1(a) and (b) of the GATT 1994;

ii. India's tariff treatment of products falling within the scope of tariff item 8517.61.00 of India's First Schedule is inconsistent with Articles II:1(a) and (b) of the GATT 1994;

iii. India's tariff treatment of certain products falling within the scope of tariff item 8517.62.90 of India's First Schedule is inconsistent with Articles II:1(a) and (b) of the GATT 1994;

iv. India's tariff treatment of certain products falling within the scope of tariff items 8517.70.10 and 8517.70.90 of India's First Schedule at the time of the Panel's establishment, and which presently fall within the scope of tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of India's First Schedule, is inconsistent with Articles II:1(a) and (b) of the GATT 1994;

v. India's tariff treatment of products classified under tariff item 8517.12.90 of India's First Schedule at the time of the Panel's establishment, and which presently fall within the scope of tariff item 8517.14.00 is consistent with Articles II:1(a) and (b) of the GATT 1994;

vi. Japan has failed to demonstrate that, even where India accords products at issue treatment that is consistent with Article II:1(b) of the GATT 1994, the measures at issue in this dispute accord treatment less favourable than that set forth in India's WTO Schedule, inconsistent with Article II:1(a) of the GATT 1994, on the ground that India's customs notifications lack foreseeability or predictability, thus affecting conditions of competition for traders; and

vii. India has failed to establish that Notification No. 69/2011 brings India into compliance with its WTO obligations pursuant to Articles II:1(a) and (b) of the GATT 1994.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with Articles II:1(a) and (b) of the GATT 1994, they have nullified or impaired benefits accruing to Japan under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that India bring its measures into conformity with its obligations under Articles II:1(a) and (b) of the GATT 1994.