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INDIA – TARIFF TREATMENT ON CERTAIN GOODS IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

REPORT OF THE PANEL

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

EUROPEAN UNION

INDIA

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX D

COMMUNICATIONS BY THE PANEL CONCERNING THE SUBSTANTIVE MEETINGS

ANNEX E

OTHER DECISIONS BY THE PANEL

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
Colombia – Textiles	Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Chicken Cuts	Panel Reports, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R *(Brazil)* / WT/DS286/R *(Thailand)*, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, p. 9295 / DSR 2005:XX, p. 9721
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EC – Hormones (Canada)	Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, p. 235
EC – Hormones (Canada) (Article 22.6 – EC)	Decision by the Arbitrator, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS48/ARB, 12 July 1999, DSR 1999:III, p. 1135
EC – Hormones (US) (Article 22.6 – EC)	Decision by the Arbitrator, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, DSR 1999:III, p. 1105
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933

Short Title	Full Case Title and Citation
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
EU – Poultry Meat (China)	Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, WT/DS492/R and Add.1, adopted 19 April 2017, DSR 2017:III, p. 1067
Greece – Phonograph Records	Group of Experts Report, *Greek Increase in Bound Duty* L/580, 9 November 1956, unadopted
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
India – Solar Cells	Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Procurement	Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, p. 3541
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, p. 2363
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – COOL (Article 21.5 – Canada and Mexico)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW, DSR 2015:IV, p. 2019
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – Countervailing and Anti-Dumping Measures (China)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R, DSR 2014:VIII, p. 3175
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7

Short Title	Full Case Title and Citation
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

LIST OF FREQUENTLY CITED EXHIBITS

Panel Exhibit	Short Title (where applicable)	Full Title
Exhibit EU-2	Customs Act 1962	The Customs Act, 1962, Act No. 52 of 1962 (13 December 1962)
Exhibit EU-3	Customs Tariff Act 1975	The Customs Tariff Act, 1975, No. 51 of 1975 (18 August 1975)
Exhibit EU-4		Hon'ble Supreme Court in the case of *Kasinka Trading and ANR v. Union of India and ANR*, 1994 (74) ELT 782 (S.C.)
Exhibit EU-5		Hon'ble Supreme Court in the case of *Share Medical Care v. Union of India and ORS*, 2007 (209) ELT 321 (S.C.)
Exhibit EU-6		Hon'ble CESTAT, *Cipla Ltd. v. Commissioner of Customs*, 2007 (218) ELT 547 (Tri. – Chennai)
Exhibit EU-7		Hon'ble CESTAT, *Burroughs Wellcome (I) Ltd. v. Commissioner of Central Excise*, 2007 (216) ELT 522 (Tri. – Chennai)
Exhibit EU-9	Notification No. 24/2005	Notification No. 24/2005 (1 March 2005)
Exhibit EU-10	Notification No. 25/2005	Notification No. 25/2005 (1 March 2005)
Exhibit EU-11	Notification No. 67/2017	Notification No. 67/2017 (14 July 2017)
Exhibit EU-12	Notification No. 57/2017	Notification No. 57/2017 (30 June 2017)
Exhibit EU-13	Notification No. 22/2018	Notification No. 22/2018 (2 February 2018)
Exhibit EU-14	Notification No. 23/2019	Notification No. 23/2019 (6 July 2019)
Exhibit EU-15	Finance Act 2018	The Finance Act, 2018, No. 13 of 2018 (28 March 2018)
Exhibit EU-16	Notification No. 02/2019	Notification No. 02/2019 (29 January 2019)
Exhibit EU-19	Finance Act 2019	The Finance (No. 2) Act, 2019, No. 23 of 2019 (1 August 2019)
Exhibit EU-24	Notification No. 133/2006	Notification No. 133/2006 (31 December 2006)
Exhibit EU-28	Finance Act 2020	The Finance Act, 2020, No. 12 of 2020 (27 March 2020)
Exhibit EU-29	Notification No. 38/2018	Notification No. 38/2018 (2 April 2018)
Exhibit EU-30	Notification No. 76/2018	Notification No. 76/2018 (11 October 2018)
Exhibit EU-31	Notification No. 02/2020	Notification No. 02/2020 (2 February 2020)
Exhibit EU-34	Notification No. 50/2017	Notification No. 50/2017 (30 June 2017)
Exhibit EU-35	Notification No. 36/2018	Notification No. 36/2018 (2 April 2018)
Exhibit EU-40	Constitution of India 2015	The Constitution of India, Government of India (9 November 2015)
Exhibit EU-41	Rules of Procedure in Lok Sabha	Rules of Procedure and Conduct of Business in Lok Sabha, 15th edn, (Lok Sabha Secretariat, 2014)
Exhibit EU-42	Notification No. 6/2018	Notification No. 6 /2018 (2 February 2018)
Exhibit EU-43		"Draft Articles on the Law of Treaties with commentaries" in *Yearbook of the International Law Commission* (1966), Vol. II, Commentary to Article 45
Exhibit EU-44	WCO, HS Committee document 41.337 E	World Customs Organization, Harmonized System Committee document 41.337 E (19 August 1997)
Exhibit EU-45	WCO, HS Committee document 42.034 E	World Customs Organization, Harmonized System Committee document 42.034 E (30 January 1998)
Exhibit EU-46	WCO, HS Committee document 42.100 E	World Customs Organization, Harmonized System Committee document 42.100 E (31 March 1998)
Exhibit EU-49	Notification No. 36/2019	Notification No. 36/2019 (30 December 2019)
Exhibit EU-51	HS2002 Explanatory Notes to Chapter 85	World Customs Organization, Harmonized System Nomenclature 2002 Explanatory Notes to Section XVI, Chapter 85

Panel Exhibit	Short Title (where applicable)	Full Title
Exhibit EU-54	General Rules for the Interpretation of the Harmonized System	World Customs Organization, General Rules for the Interpretation of the Harmonized System
Exhibit EU-55	WCO, Classification Opinion on "smartphones" (2018)	World Customs Organization, Classification Opinion on "smartphones" (2018)
Exhibits EU-56, IND-9	HS2007 Section Notes to Section XVI	World Customs Organization, Harmonized System Nomenclature 2007, Section Notes to Section XVI
Exhibit EU-59	First Schedule as of 2016/2017	First Schedule to India's Customs Tariffs Act, Consolidated Version 2016/2017
Exhibit EU-60		World Customs Organization, Classification Opinions on subheading 8517.62 (2015)
Exhibit IND-2		International Court of Justice, *Case concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, Judgment of 20 June 1959: ICJ Reports 1959, p. 209
Exhibit IND-3		International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6
Exhibit IND-6	HS1996 Explanatory Notes to Heading 8525	World Customs Organization, Harmonized System Nomenclature 1996 Explanatory Notes, 2nd edn (1996), Heading 8525
Exhibit IND-8	HS2007 Explanatory Notes to Heading 8517	World Customs Organization, Harmonized System Nomenclature 2007 Explanatory Notes, 4th edn (2007), Heading 8517
Exhibit IND-13		M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009)
Exhibit IND-14		T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018)
Exhibit IND-39		Notification No. 24/2005 (1 March 2005) as amended by Notification Nos. 132/2006, 11/2014, 19/2016, 32/2016, 67/2016, 58/2017, 38/2018, 76/2018, 36/2019 and 06/2020
Exhibit IND-40		Notification No. 25/2005 (1 March 2005) as amended by Notification Nos. 133/2006, 26/2007, 15/2012, 67/2017, 39/2018, 23/2019, 36/2019 and 07/2020
Exhibit IND-41		Notification No. 50/2017 (30 June 2017) as amended by Notification Nos. 76/2017, 92/2017, 6/2018, 29/2018, 32/2018, 40/2018, 72/2018, 03/2019, 25/2019, 30/2019, 31/2019, 37/2019, 01/2020, 35/2020, 42/2020 and 02/2021
Exhibit IND-42		Notification No. 57/2017 (30 June 2017) as amended by Notification Nos. 22/2018, 37/2018, 69/2018, 75/2018, 02/2019, 24/2019 and 02/2020
Exhibit IND-50	Email from IDB, WTO, to India (8 November 2013)	Email correspondence dated 8 November 2013 from IDB, WTO, to the Permanent Mission of India to the WTO, Subject: "HS2007 transposition file: India"
Exhibit IND-51	Email from Market Access Intelligence Section, WTO, to India (12 February 2014)	Email correspondence dated 12 February 2014 from Market Access Intelligence Section, WTO, Senior Statistical Officer, to the Permanent Mission of India to the WTO, Subject: "RE: HS2007 transposition file . India"
Exhibit IND-54	Notification No. 3/2021	Notification No. 3/2021 (1 February 2021)
Exhibit IND-57	HS2017 Explanatory Notes to Heading 8518	World Customs Organization, Harmonized System Nomenclature 2017 Explanatory Notes, 4th edn (2017), Heading 8518
Exhibit IND-59	HS2017 Explanatory Notes to Heading 8517	World Customs Organization, Harmonized System Nomenclature 2017 Explanatory Notes, 4th edn (2017), Heading 8517
Exhibit IND-66	Finance Act 2021	The Finance Act 2021, No. 13 of 2021
Exhibit IND-73	Notification No. 15/2022	Notification No. 15/2022 (1 February 2022)
Exhibit IND-78	India's rectification request, G/MA/TAR/RS/572	Rectification and Modification of Schedules, Schedule XII - India, Communication to the Secretariat (25 September 2018), G/MA/TAR/RS/572
Exhibit IND-79	Prof. M. Waibel, Legal Opinion on Error	Prof. M. Waibel's Legal Opinion on Error and Curriculum Vitae
Exhibit IND-81		Circular No. 04/2022 (27 February 2022)

Panel Exhibit	Short Title (where applicable)	Full Title
Exhibit IND-82	Indian Wireless Telegraphy Act 1933	The Indian Wireless Telegraphy Act 1933, No. 17 of 1933
Exhibit IND-83		Notification No. 71 (25 September 1953)
Exhibit IND-85		Cambridge Advanced Learner's Dictionary online, definition of "impair" https://dictionary.cambridge.org/dictionary/english/impair (accessed 22 May 2022)
Exhibit IND-87	Chapter 85 of the HS2022	World Customs Organization, Harmonized System Nomenclature, 7th edn (2022), Chapter 85
Exhibit IND-88		World Customs Organization, Harmonized System Committee, 49th Session, "Classification of the Machines Commercially Referred to as 'Tablet Computers'" (13 February 2012) document NC1730E1a; and World Customs Organization, Harmonized System Committee, 50th Session, "Possible Amendments to the Compendium of Classification Opinions and Explanatory Notes arising from the Decisions taken by the Committee at its 49th Session" (19 July 2012) document NC1775E1a
Exhibit IND-89	Notification No. 57/2021	Notification No. 57/2021 (29 December 2021)
Exhibit IND-90	Notification No. 02/2022	Notification No. 02/2022 (1 February 2022)
Third-party Exhibits JPN-22, TPKM-6	Provisional Collection of Taxes Act 1931	The Provisional Collection of Taxes Act, 1931, Act No. 16 of 1931 (28 September 1931)
Third-party Exhibit JPN-4	Letter from Japan to India (9 November 2018)	Letter dated 9 November 2018 from the Permanent Mission of Japan to the Permanent Mission of India, Rectification and Modification of Schedule (India's WTO Schedule XII)
Third-party Exhibit TPKM-3	Letter from Chinese Taipei to India (19 October 2018)	Letter dated 19 October 2018 from the Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the Permanent Mission of India

ABBREVIATIONS USED IN THIS REPORT

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

1 INTRODUCTION

1.1 Complaint by the European Union

1.1. On 2 April 2019, the European Union requested consultations with India pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 21 May 2019 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 17 February 2020, the European Union requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 29 June 2020, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the European Union in document WT/DS582/9, in accordance with Article 6 of the DSU.[3]

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

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS582/9 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

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

1.6. On 19 August 2020, the European Union requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 31 August 2020, the Director-General accordingly composed the Panel as follows:

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

1.3 Panel proceedings

1.3.1 General

1.7. The Panel held an organizational meeting with the parties on 19 November 2020.[6]

1.8. The Panel adopted its Working Procedures[7] and timetable[8] on 4 December 2020, after consulting with the parties.

1.9. The European Union submitted its first written submission on 28 January 2021. India submitted its first written submission on 8 April 2021.

[1] WT/DS582/1.
[2] WT/DS582/9.
[3] Dispute Settlement Body, Minutes of the meeting held on 29 June 2020, WT/DSB/M/442, p. 13.
[4] WT/DS582/10.
[5] Formerly "Turkey". (See WT/INF/43/Rev.23).
[6] For more details regarding the organizational phase of the dispute, see section 1.3.2 below.
[7] The Panel revised its Working Procedures on 27 January 2021.
[8] The Panel's timetable was revised on 4 May 2021, 26 October 2021, 28 April 2022, 30 September 2022 and 6 February 2023.

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

1.11. On 20 July 2021, the Panel sent questions for written responses before the first substantive meeting and the third-party session to the parties and third parties. The parties and third parties[9] submitted their written responses on 20 September 2021.

1.12. The Panel held its first substantive meeting with the parties in virtual format on 5-6 October 2021.[10] Prior to the meeting, the Panel sent the parties a list of questions to be answered orally at the meeting.[11] A joint session with the third parties in this dispute and in the other two disputes in which the same panelists had been appointed[12] took place in virtual format on 13 October 2021. Following these meetings, the Panel sent written questions to the parties and third parties on 18 October 2021. The parties and third parties sent their written responses on 24 November 2021.

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

1.14. The Panel held its second substantive meeting with the parties on 29-30 March 2022 in hybrid format.[13] Prior to the substantive meeting, the Panel sent the parties a list of questions to be answered orally at the meeting. Following the meeting, the Panel sent written questions to the parties. Written responses to these questions were received on 23 May 2022, and comments on the other party's responses were received on 21 June 2022.

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

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

1.3.2 Organizational phase - Working Procedures and timetable

1.17. On 16 October 2020, noting that the same panelists served on *India – Tariffs on ICT Goods (EU)* (DS582), *India – Tariffs on ICT Goods (Japan)* (DS584), and *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588), and mindful of Article 9.3 of the DSU, the Panel sent a pre-organizational meeting questionnaire to the parties seeking their views on how to set up the timetable and working procedures in the three disputes.[14] The Panel also invited the parties to indicate whether they agreed to have a single organizational meeting for this dispute and the other two disputes in which the same panelists were serving, or whether they preferred separate organizational meetings.

1.18. While the European Union agreed to have a single joint organizational meeting for the three disputes in which the same panelists had been appointed[15], India requested that consecutive separate organizational meetings be held for each dispute.[16]

1.19. Additionally, the European Union considered that the Panel should hold joint substantive meetings for the three disputes, as in the case of a single panel under Article 9.1 of the DSU, and a joint third-party session. Should the Panels decide not to hold joint substantive meetings, the European Union considered that "those third parties which are a complainant in one of the other two

[9] Brazil, Canada, Japan, Korea, Chinese Taipei, Türkiye, Ukraine, and the United States provided responses to the Panel.

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

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

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

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

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

[15] European Union's communication (22 October 2020).

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

proceedings must be accorded enhanced third party rights in the two other proceedings, including the right to attend the entire substantive meeting." The European Union further indicated that "[p]ursuant to Article 9.3 of the DSU, the Panel should, to the greatest extent possible, conduct a single panel process, with a single record, resulting in separate reports contained in a single document in such a manner that the rights that parties or third parties would otherwise have enjoyed are in no way impaired." For the European Union, documents submitted by the parties to the Panel as well as questions from the Panel to the parties should be shared with the parties in the other two disputes.[17]

1.20. India stated that "the three disputes involve distinctly different claims and arguments" and "the measures identified by the complainants in their respective requests for the establishment of a panel are also different." India had no objection to the timetables in the three proceedings being harmonized "to the extent that they allow India, a developing country respondent, sufficient time to effectively respond to three different complaints." To that end, India agreed to have common dates set for the written submissions of the complainants. Furthermore, "[g]iven the likely differences in the complainants' presentation of their claims and arguments", India requested sufficient time to prepare and present its arguments. Insofar as meetings were concerned, India stated that "the timetables cannot collapse the proceedings into a single, identical process by holding common substantive meetings for all the three disputes." India considered that "its ability to respond to distinct claims and arguments requires separate substantive meetings to be devoted to each dispute." Therefore, India requested that "the substantive meetings between the respective parties be held separately and sequentially on consecutive days". India suggested that, "[i]n order to achieve efficiency, a single, consolidated third party session may be held" and "encouraged" each third party to submit a single submission, "identifying the dispute(s) to which its views related". India indicated that it would not object if the Panel adopted identical working procedures for the three disputes.[18]

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

1.22. The Panel adopted its Working Procedures and timetable on 4 December 2020.[22] In its communication transmitting the Working Procedures and timetable to the parties, the Panel indicated that it had noted the parties' agreement as well as differences of views regarding the conduct of the proceedings in this dispute and in the other two disputes in which the same panelists had been appointed. In taking its decisions in relation to the Working Procedures and timetable, the Panel endeavoured to balance the efficient conduct of the proceedings with the parties' due process rights under the DSU, bearing in mind Article 9.3 of the DSU. The Panel decided, *inter alia*, that the first substantive meeting with the parties would be held separately for each dispute and the meetings would be scheduled on consecutive dates and in the sequential order of the DS numbers of the disputes. A joint third-party session would be held in DS582, DS584 and DS588. The Panel added that it would advise on the conduct of the second substantive meeting in due course, after consulting with the parties. Finally, the deadlines for submissions were harmonized in the three disputes.[23]

[17] European Union's communication (22 October 2020).
[18] India's communication (22 October 2020), p. 1.
[19] India's communication (26 October 2020).
[20] Panel's communication to the parties (26 October 2020).
[21] The Panel held separate consecutive organizational meetings in DS582, DS584, and DS588.
[22] When adopting the timetable for these proceedings the Panel took into account Article 12.10 of the DSU and ensured that India, a developing country Member and the respondent in this dispute, had sufficient time to prepare and present its argumentation.
[23] Panel's communication to the parties (4 December 2020).

1.3.3 Format of the substantive meetings

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

1.3.3.1 Format of the first substantive meeting

1.24. The first substantive meeting of the Panel was initially scheduled for 1-2 June 2021. On 31 March 2021, the Panel sent a communication to the parties noting that the COVID-19 pandemic continued to present serious challenges for international travel and in-person meetings. The Panel concluded that, in light of those challenges, it would not be possible to hold its first substantive meeting with the parties and the third-party session in the traditional face-to-face format in Geneva on the WTO premises. The Panel indicated that, under the prevailing circumstances, and taking into account the objective of prompt settlement of disputes set out in Article 3.3 of the DSU and the need to preserve the parties' due process rights, the Panel intended to hold both its first substantive meeting and the third-party session with remote participation, through the Cisco Webex platform. The Panel provided the parties with draft Additional Working Procedures concerning meetings with remote participation and invited the parties to comment on the proposed arrangements for the first substantive meeting and the third-party session, and on the draft Additional Working Procedures.[24]

1.25. The European Union agreed with the Panel's proposed arrangements for the first substantive meeting and third-party session.[25] India informed the Panel that it would not be able to participate in the first substantive meeting remotely for several reasons. India requested the Panel "to wait, observe the [COVID-19] situation in India and hold the first substantive meeting in this dispute only when the situation improves so as to permit face to face meetings".[26]

1.26. On 13 April 2021, the Panel invited the parties to comment on each other's comments on the Panel's proposed arrangements for the first substantive meeting and third-party session, and on the draft Additional Working Procedures concerning meetings with remote participation.[27] On the same date, the Panel also invited the third parties to express their views on the parties' comments regarding the Panel's communication of 31 March 2021.[28]

1.27. The European Union submitted that the Panel "has the ultimate power to decide on procedural matters as per Article 12.1 and 2 of the DSU, even where the parties are unable to come to an agreement on this matter and it should exercise that power in a way that ensures both respect of due process and the prompt settlement of the dispute". For the European Union, online hearings were "perfectly possible from a technical perspective and there are several precedents for the participation of panelists in WTO proceedings via remote video/audio communication tools". Furthermore, "[v]ideoconferencing enables effective communication, avoids unnecessary delays, keeps people safe in troubled pandemic times, and reduces CO2 emissions." Finally, the European Union observed that online hearings were widely employed by domestic courts, as a temporary measure during the pandemic, including by the European Court of Justice, the US Supreme Court, the International Court of Justice, and the Supreme Court of India. Given the unpredictable nature of the COVID-19 pandemic, the European Union considered that it was crucial to prevent any further delays in the timetable.[29]

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

[24] Panel's communication to the parties (31 March 2021). A copy of this communication can be found in Annex D-1 of the Report.
[25] European Union's communication (7 April 2021).
[26] India's communication (12 April 2021).
[27] Panel's communication to the parties (13 April 2021).
[28] Panel's communication to the third parties (13 April 2021).
[29] European Union's communication (16 April 2021).

that "a virtual meeting format without the consent of all parties would be inconsistent with Article 3.1 and 3.2" of the DSU and that "[t]he margin of discretion held by panels under Article 12.1 does not extend to modifying 'substantive provisions' of the DSU." For India, "the manner in which domestic judicial proceedings are conducted is not germane to the issue before the Panel." India reiterated its concerns regarding security and confidentiality of the proceedings, as well as the difficulty of extending technical support to members of its delegation who were working remotely. India considered that the Panel could not "amend the working procedures and conduct the first substantive meeting in virtual format as it would modify substantive provisions of the DSU and impair the respondent's due process rights."[30]

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

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

1.31. On 31 August 2021, the Panel informed the parties and third parties that, in view of the epidemiological situation, the first substantive meeting and the third-party session would be conducted in virtual format on 5-6 and 13 October 2021, respectively.[32] On 6 September 2021, the Panel invited the parties to comment on the Panel's draft Additional Working Procedures concerning meetings with remote participation.

1.32. On 20 September 2021, the Panel confirmed its decision of 31 August 2021 to conduct the first substantive meeting in a virtual format.[33] On the same date, the Panel adopted Additional Working Procedures concerning meetings with remote participation for the first substantive meeting.[34]

1.3.3.2 Format of the second substantive meeting

1.33. On 22 February 2022, noting that measures related to COVID-19 had been relaxed in certain parts of the world, the Panel sent a communication to the parties enquiring about the feasibility of an in-person meeting in Geneva. The Panel invited the parties to indicate whether, taking into consideration remaining restrictions on international travel and their more general policy on official travel, the parties would be in a position to attend the second substantive meeting in person at the WTO premises on 29-30 March 2022. In light of the Panel's decision to hold separate meetings on consecutive days in the three disputes in which the same panelists had been appointed, the Panel decided to consolidate all four parties' views regarding the organization of the second substantive meetings. To that end, the Panel copied its communication to the representatives of the complainants in DS584 and DS588 and asked that the parties do so as well when conveying their views.[35]

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

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

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

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

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

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

1.34. The European Union confirmed that its representatives would attend the second substantive meeting in person at the WTO premises on 29-30 March 2022.[36]

1.35. India requested that the Panel provide for a hybrid hearing, in which the parties' representatives could attend the meeting in-person at the WTO premises and also participate through a virtual mode.[37]

1.36. On 2 March 2022, the Panel informed the parties that, in light of the responses of the parties in DS582, DS584, and DS588[38], the Panel intended to hold the second substantive meeting in the three disputes in a hybrid format, thus allowing for both in-person participation at the WTO premises and simultaneous remote participation via the Webex platform.[39] On 18 March 2022, the Panel adopted Additional Working Procedures concerning meetings with remote participation for the second substantive meeting.[40]

1.3.4 Requests for enhanced third-party rights

1.37. On 22 and 23 December 2020, the Panel received requests for enhanced third-party rights from Chinese Taipei and Japan, respectively. Japan and Chinese Taipei requested that the Panel grant them the following enhanced third-party rights: (i) to receive copies of all written submissions of the parties, their oral statements, rebuttals and responses to questions from the Panel and each other, through all stages of the proceedings; (ii) to be present for the entirety of all substantive meetings of the Panel with the parties; (iii) to be allowed to make oral statements, to orally reply to questions, and to ask questions to the parties or other third parties, as appropriate, in those meetings; and (iv) to review the draft summary of their own arguments in the descriptive part of the Panel Report.[41]

1.38. Japan and Chinese Taipei noted that enhanced third-party rights had been granted in previous disputes to address "practical considerations arising from a third party's involvement as a party in a parallel panel proceeding".[42] According to Japan and Chinese Taipei, their interest in the parallel disputes extended beyond the "substantial' interest" in Article 10.2 of the DSU because of their involvement as parties in, respectively, DS584 and DS588.[43] Japan and Chinese Taipei argued that the decision to compose the panels in the three disputes with the same three panelists, as well as the decision by the Panel to hold a joint third-party session in DS582, DS584 and DS588 – at the request of India – confirmed the fact that the matters in those disputes overlapped substantially.[44] Japan and Chinese Taipei stated that they had "an exceptionally strong interest in the Panel's assessment of the matter in the two parallel disputes" and it was "a matter of due process for [them] to have the possibility of hearing and following the discussions in the substantive meetings in the parallel proceedings in order to be in a position to properly defend [their] interests during the substantive meeting[s] in [their] own case[s]".[45]

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[36] European Union's communication (23 February 2022).

[37] India's communication (25 February 2022).

[38] Noting the rapidly changing situation concerning the COVID-19 pandemic and the resulting possibility that not all members of Japan's delegation might be able to travel to Geneva, Japan suggested that the second substantive meeting be held in a hybrid format. (Japan's communication in DS584 (25 February 2022)). Chinese Taipei indicated that, with the rapidly changing situation concerning the COVID-19 pandemic, it did not intend to send a delegation to attend the second substantive meeting in person at the WTO premises. (Chinese Taipei's communication in DS588 (25 February 2022)).

[39] Panel's communication to the parties (2 March 2022).

[40] The Panel's Additional Procedures for the second substantive meeting can be found in Annex A-3 of the Report.

[41] Japan's communication (23 December 2020), p. 1; Chinese Taipei's communication (22 December 2020), pp. 1-2.

[42] Japan's communication (23 December 2020), pp. 1-2; Chinese Taipei's communication (22 December 2020), p. 2. Both communications refer to Panel Reports, *EC – Hormones (Canada)*, para. 8.17; *US – COOL*, para. 2.7; *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 1.15-1.16; and Decisions of the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC) / EC – Hormones (US) (Article 22.6 – EC)*, para. 7.

[43] Japan's communication (23 December 2020), p. 2; Chinese Taipei's communication (22 December 2020), p. 2.

[44] Japan's communication (23 December 2020), p. 2; Chinese Taipei's communication (22 December 2020), p. 2.

[45] Japan's communication (23 December 2020), p. 2; Chinese Taipei's communication (22 December 2020), pp. 2-3.

1.39. The Panel invited the parties and the other third parties to comment on the requests. While the European Union agreed with the requests by Japan and Chinese Taipei[46], India asked the Panel to reject those requests.[47]

1.40. India stated that granting the enhanced third-party rights requested by Japan and Chinese Taipei would require the parties' agreement, so as not to affect the balance guaranteed by the DSU (such as the right to confidentiality) and in order to avoid due process concerns. India submitted that the only reason cited in the requests, (i.e. their status as a complainant in a parallel proceeding) "cannot be the only factor on the basis of which such extraordinary rights may be granted" over the objection of a party.[48]

1.41. According to India, a panel's discretion to grant enhanced third-party rights was circumscribed by the relevant DSU provisions[49] and by due process considerations.[50] In itself, the status as a complainant in a parallel dispute did not "automatically result[] in an interest over and above those held by other third parties in this dispute" and the requesting third parties had not established compelling circumstances for seeking such additional rights.[51] India submitted that, without prejudice to the applicability of Article 9 of the DSU to this dispute and the other two disputes where the same panelists were appointed, this provision "has been found to not address the question of rights of third parties" in parallel disputes.[52] For India, "any due process consideration in having a right to be heard and having an adequate opportunity thereto, are already sufficiently addressed by [the requesting third parties'] exercise of their right to initiate panel procedures under the DSU and their standard third party rights under Article 10 [of the] DSU in this dispute."[53] The requests for enhanced third-party rights "would inappropriately blur the distinction with the complainant".[54] India was of the view that the first two rights requested by Japan and Chinese Taipei affected India's "right to confidentiality of its submissions and positions under Article 18.2 [of the] DSU" and the last two rights implied those third parties' "active involvement at par with that of the complaining party [which] would also entail an additional burden" for India.[55]

1.42. China, the Russian Federation, Türkiye, and the United States, as third parties, provided comments on the requests submitted by Japan and Chinese Taipei.[56]

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

[46] European Union's communications (11 January 2021).
[47] India's communications (11 January 2021).
[48] India's communications (11 January 2021), para. 3.
[49] India's communications (11 January 2021), para. 5 (referring to Appellate Body Reports, *India – Patents (US)*, para. 92; and *US – FSC (Article 21.5 – EC)*, para. 241).
[50] India's communications (11 January 2021), para. 5 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147).
[51] India's communications (11 January 2021), para. 6.
[52] India's communications (11 January 2021), para. 7.
[53] India's communications (11 January 2021), para. 9 (referring to Panel Report, *US – Washing Machines*, para. 1.12).
[54] India's communications (11 January 2021), para. 11 (referring to Panel Report, *India – Quantitative Restrictions*, para. 5.95).
[55] India's communications (11 January 2021), paras. 14-15.
[56] China and Türkiye generally supported the requests while the United States opposed them. The Russian Federation noted that, if granted, enhanced third-party rights should extend to all third parties.

those questions following the second substantive meeting." The Panel rejected the remainder of the requests.[57] On the same date, the Panel revised the Working Procedures to reflect its decision.[58]

1.3.5 Disclosure of a panelist's professional engagements

1.44. On 4 February 2021, the Chairperson of the Panel informed the parties that a panelist had signed a new disclosure form under the Rules of Conduct for the DSU, reflecting an update of professional engagements. The update conveyed the information that the consortium employing the panelist was eligible, alongside with other law firms, to provide legal services to a WTO Member in the field of international law, trade negotiations and dispute settlement, on request by the Government of that Member. The panelist further indicated that this information was publicly available and that, as of the date of the communication, the consortium had not provided any legal service to that WTO Member. The Panel invited the parties to comment in this regard.[59]

1.45. The European Union indicated that it had no comments on the Panel's communication.[60]

1.46. India noted that the situation disclosed involved a WTO Member which was part of the European Union when consultations took place, and which could exercise its right to join as a third party in this dispute. India was therefore concerned that the situation disclosed might present a direct conflict of interest that ought to be avoided. India requested the panelist concerned to provide an undertaking that the panelist's employer would avoid incurring any obligation or accepting any benefit from the Member in question that could result in a direct or indirect conflict or give rise to justifiable doubts as to the proper performance of the panelist's dispute settlement duties, in particular with respect to instructions which directly or indirectly related to the subject matter of, and measures at issue in, this dispute.[61]

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

1.3.6 Preliminary ruling

1.48. On 8 April 2021, India made a preliminary objection and requested a preliminary ruling, both incorporated in its first written submission. In its preliminary objection, India claimed that the Panel's composition had been determined in violation of Articles 8.6 and 8.7 of the DSU and requested that the Panel decline to exercise jurisdiction in this dispute.[62] In its preliminary ruling request, India claimed that the European Union's panel request did not satisfy the conditions laid down in Article 6.2 of the DSU.[63]

1.49. On 14 April 2021, the Panel invited the European Union to comment on India's preliminary objection and preliminary ruling request. Third parties that wished to comment on these matters were also invited to do so.

[57] The Panel's decision can be found in Annex E-1 of the Report. On 24 February 2021, the Panel received a communication from India commenting on the Panel's decision. In that communication, India stated that "reasons for granting the additional privileges are not available in [the Panel's] decision" and that "India reserves the right to request the Panel to revisit this decision as these proceedings progress." (India's communication (24 February 2021)). The Panel acknowledged receipt of India's communication and took note of India's views. (Panel's communication to the parties and third parties (25 February 2021)).
[58] The revision concerned paragraphs 21bis and 30(d) of the Working Procedures.
[59] Panel's communication to the parties (4 February 2021).
[60] European Union's communication (5 February 2021).
[61] India's communication (9 February 2021).
[62] India's first written submission, paras. 21 and 238.
[63] India's first written submission, para. 36.

1.50. On 23 June 2021, the Panel informed the parties that it intended to issue a communication regarding India's preliminary objection and preliminary ruling request on 28 June 2021. On 28 June 2021, India requested the Panel to defer the issuance of its communication so as to ensure that these issues "are properly discussed and considered at the first substantive meeting."[64] On the same day, the Panel informed the parties that, in light of India's communication, it would suspend the issuance of the Panel's communication and invited the European Union to comment on India's request.[65]

1.51. The European Union responded that it had a legitimate interest in obtaining a ruling from the Panel on these fundamental questions promptly and requested the Panel to issue the preliminary rulings requested by India as soon as possible.[66]

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

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. The European Union challenges the duties applied by India to imports of certain information communication technology (ICT) products, on the ground that such duties are in excess of the relevant tariff bindings set forth in India's WTO Schedule.[68] According to the European Union, the ICT products concerned fall within the scope of the following tariff items[69] in India's WTO Schedule: 8504.40 ex02; 8517.12; 8517.61; 8517.62; 8517.70 ex01, ex02, and ex03; 8518.30 ex01; and 8544.42 ex01.[70] The European Union identifies a number of legal instruments through which India applies the alleged tariff treatment to products falling under these tariff items.[71]

2.2 India's customs regime

2.2.1 Main legal instruments

2.2. The main legislative instruments governing the imposition of customs duties on imports of goods into India are the Customs Act, 1962, Act No. 52 of 13 December 1962 (Customs Act 1962)[72] and the Customs Tariff Act, 1975, Act No. 51 of 18 August 1975 (Customs Tariff Act 1975).[73]

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

> Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the … [Customs Tariff Act], or any other law for the time being in force, on goods imported into, or exported from, India.[74]

[64] India's communication (28 June 2021).
[65] Panel's communications to the parties (28 and 29 June 2021).
[66] European Union's communication (29 June 2021).
[67] The Panel's decision can be found in Annex E-2 of the Report.
[68] Request for the establishment of a panel by the European Union (European Union's panel request), WT/DS582/9.
[69] We understand that under the Harmonized System (HS) nomenclature, entries at the four-digit level are referred to as "headings", entries at the six-digit level are referred to as "subheadings", and entries at the eight, or more, digit level are referred to as "tariff lines". We also note that the parties do not adhere consistently to this nomenclature. (See e.g. European Union's first written submission, para. 13; and India's first written submission, para. 38). In this Report, we use the term "tariff item" to refer to subheadings and tariff lines set forth in India's WTO Schedule and First Schedule. Where useful for the purposes of clarity, we use the terms "subheading" and "tariff line" as per the HS nomenclature.
[70] European Union's panel request, p. 1.
[71] European Union's panel request. We address the parties' assertions regarding these legal instruments in the context of assessing the merits of the European Union's claims in section 7 below.
[72] Customs Act 1962, (Exhibit EU-2).
[73] Customs Tariff Act 1975, (Exhibit EU-3).
[74] Customs Act 1962, (Exhibit EU-2), section 12.

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

> The rates at which duties of customs shall be levied under the Customs Act, 1962 (52 of 1962), are specified in the First and Second Schedules.[75]

2.5. The First Schedule of the Customs Tariff Act 1975 sets out maximum duty rates leviable on imports of goods into India.[76] The First Schedule is based on the World Customs Organization's (WCO's) Harmonized System (HS) Nomenclature.[77] At the time of the Panel's establishment, India's First Schedule was based on the HS Nomenclature 2017 Edition (HS2017).[78] Subsequently, during the Panel proceedings, India amended its First Schedule to align it with the HS Nomenclature 2022 Edition (HS2022).[79]

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

2.2.2 Parliament's power to amend the First Schedule

2.7. The Indian Parliament may amend the First Schedule through a Finance Bill or Finance Act.[80] A Finance Bill becomes a Finance Act once passed by both Houses of Parliament and assented to by the President.[81]

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

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

2.2.3.1 Power to increase tariff rates

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

> Where in respect of any article included in the First Schedule, the Central Government is satisfied that the import duty leviable thereon under section 12 of the Customs Act, 1962 (52 of 1962) should be increased and that circumstances exist which render it necessary to take immediate action, it may, by notification in the Official Gazette, direct

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[75] Customs Tariff Act 1975, (Exhibit EU-3), section 2.

[76] The European Union put on record the 2016/2017 consolidated version of the First Schedule. (First Schedule as of 2016/2017, (Exhibit EU-59)). The European Union also notes that the tariff duties applicable to various products have changed over time, and therefore the consolidated version of the First Schedule submitted by the European Union does not necessarily reflect the changes to those tariff rates. (European Union's response to Panel question No. 100(b), para. 36). Moreover, in its third-party submission, Japan notes that India has not officially published the First Schedule in a single document. However, according to Japan, the latest First Schedule can be found in hard-copy format published by third-party publications, and online on the website of the Central Board of Indirect Taxes and Customs (CBIC), Department of Revenue, Ministry of Finance, India. (Japan's third-party submission, para. 25. See also Chinese Taipei's third-party submission, para. 3.26). The parties to this dispute do not contest these assertions.

[77] European Union's response to Panel question No. 99, para. 34; India's response to Panel question No. 99, para. 37.

[78] India's response to Panel question No. 26, para. 78. The European Union does not contest this assertion.

[79] India's second written submission, para. 105 (referring to Finance Act 2021, (Exhibit IND-66)). The European Union does not contest this assertion.

[80] European Union's first written submission, paras. 38-41. See also Chinese Taipei's third-party submission, para. 3.27. India does not contest this assertion. Moreover, pursuant to Section 3 of the Provisional Collection of Taxes Act, a Bill that provides for the imposition or increase of a customs duty may enter into force the day after it is introduced to Parliament. Such Bill ceases to have force of law when it comes into operation as an enactment. (Provisional Collection of Taxes Act 1931, (Japan's third-party Exhibit JPN-22 / Chinese Taipei's third-party Exhibit TPKM-6), sections 3, 4(1), and 4(2)(a)).

[81] The Constitution of India 2015, (Exhibit EU-40), Articles 109-122; Rules of Procedure in Lok Sabha, (Exhibit EU-41), rule 219.

> an amendment of that Schedule to be made so as to provide for an increase in the import duty leviable on such article to such extent as it thinks necessary:
>
> Provided that the Central Government shall not issue any notification under this subsection for substituting the rate of import duty in respect of any article as specified by an earlier notification issued under this sub-section by that Government before such earlier notification has been approved with or without modifications under sub-section (2).[82]

2.10. Notifications issued by the Government pursuant to section 8A(1) of the Customs Tariff Act 1975 are approved by each House of Parliament by way of resolution.[83] Such notifications may also be rescinded by the Government at any time by subsequent notification.[84]

2.2.3.2 Power to exempt goods from import duties

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

> If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.[85]

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

2.13. Notifications exempting goods from import duties (exemption notifications) may be amended, superseded or rescinded by other exemptions notifications issued by the Government in the exercise of its powers under Section 25(1) of the Customs Act 1962.[86] The Government can also withdraw exemptions issued under Section 25 at any time if the "'public interest' so demand[s]" and the Government determines that the exemption does not require to be extended any further.[87] In certain instances, two exemption notifications or two different entries in the same exemption notification may apply to the same tariff item. In such cases, an importer can claim the treatment afforded under the most beneficial exemption notification or entry.[88]

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[82] Customs Tariff Act 1975, (Exhibit EU-3), section 8.

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

[84] Customs Tariff Act 1975, (Exhibit EU-3), section 7(4). Further, section 11A(1) of the Customs Tariff Act 1975 empowers the Government to amend the First Schedule where it is satisfied that it is necessary to do so in the public interest, by notification in the Official Gazette. (Ibid. section 11A(1)). Notifications issued under section 11A(1) must also be approved by both Houses of Parliament. (Ibid. section 11A(2)).

[85] Customs Act 1962, (Exhibit EU-2), section 25(1).

[86] European Union's first written submission, para. 55. India does not contest this assertion.

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

[88] Hon'ble Supreme Court in the case of *Share Medical Care v. Union of India and ORS*, 2007 (209) ELT 321 (S.C.), (Exhibit EU-5); Hon'ble CESTAT, *Cipla Ltd. v. Commissioner of Customs*, 2007 (218) ELT 547 (Tri. – Chennai), (Exhibit EU-6); and Hon'ble CESTAT, *Burroughs Wellcome (I) Ltd. v. Commissioner of Central Excise*, 2007 (216) ELT 522 (Tri. – Chennai), (Exhibit EU-7). See also European Union's response to Panel question No. 24(b), paras. 70-71; and India's response to Panel question No. 78, paras. 62-63.

2.2.4 Conclusion

2.14. From the foregoing, and in light of the clarifications of the parties, we understand that, under India's customs regime, the duty rates set out in the First Schedule are not necessarily the duty rates applied to imported products. Rather, the applied duty rate is based not only on the First Schedule, but also on any relevant customs notifications which relate to the tariff item at issue.[89] In sum, the duty rates applicable to imports of goods into India are to be understood from reading the First Schedule in light of relevant customs notifications.

2.3 India's WTO Schedule

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

2.16. India's WTO Schedule is based on the HS nomenclature, which is a multilaterally agreed system of classifying goods for customs purposes.[90] The HS nomenclature, which is established under the HS Convention, is administered by the WCO.[91] The WCO regularly amends the HS to update the nomenclature. When an updated nomenclature is published, the WCO publishes correlation tables, also referred to as concordance tables, which identify the correlations between the product scope of HS headings and subheadings in the previous version of the nomenclature as compared to the new version.[92]

2.17. In the WTO, Members' Schedules are regularly updated in order to reflect newer versions of the HS nomenclature. This process of updating a Member's Schedule is referred to as a transposition. Prior to the establishment of the WTO, procedures were adopted that required the Contracting Parties to the General Agreement on Tariffs and Trade 1947 (GATT 1947) to incorporate updated nomenclature into their Schedules and, if necessary, conduct negotiations under Article XXVIII of the GATT 1947 if the transposition resulted in a change in the scope of the concession.[93]

2.18. On 13 December 1996, a number of WTO Members concluded the Ministerial Declaration on Trade in Information Technology Products (ITA). India joined the ITA on 26 March 1997. The ITA participants agreed among themselves to bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the GATT 1994, with respect to certain products.[94] The Annex to the ITA requires that participants "shall incorporate" such measures into their Schedules annexed to the GATT 1994, and indicates that their Schedules should be modified

[89] India's response to Panel question No. 27, para. 80, and No. 79, para. 67. The European Union refers to the duties set out in the First Schedule as "basic customs duty (BCD) rate". (European Union's first written submission, paras. 34-35, and 38). In its first written submission, India uses the term "BCD" to refer to the duty rates set forth in the First Schedule. (See e.g. India's first written submission, paras. 149, 166, 173, and 185). Subsequently, India clarified that its reference to "basic customs duty" in its first written submission should be read as "standard rate". (India's response to Panel question No. 79, para. 67). In this Report, when referring to the duty rates set out in the First Schedule we do so explicitly. We use the term "applied duty rate" to refer to the rate applied to imports, taking into account all relevant legal instruments (including relevant customs notifications).

[90] See e.g. India's response to Panel question No. 1, paras. 10-11.

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

[92] See e.g. General Council Decision of 18 July 2001 on Concessions under the Harmonized Commodity Description and Coding System, A Procedure for Introduction of Harmonized System 2002, Changes to Schedules of Concessions (General Council Decision on HS2002 Transposition Procedures), WT/L/407, Attachment A, p. 2; General Council Decision of 15 December 2006 on A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database (General Council Decision on HS2007 Transposition Procedures), WT/L/673, Annex 2, para. 7.

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

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

in accordance with the GATT Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (1980 Decision).[95] India, as a participant in the ITA, proposed a modification to its WTO Schedule, which was circulated on 2 April 1997 for review by all WTO Members, pursuant to the 1980 Decision. These changes to India's Schedule, which were based on the HS Nomenclature 1996 Edition (HS1996), were certified on 2 October 1997.[96]

2.19. Subsequently, WTO Members agreed to update their WTO Schedules to align them with the HS Nomenclature 2002 Edition (HS2002). For the transposition to HS2002, additional procedures regarding the transposition process were adopted by the General Council, but the obligation remained on Members to perform the transposition process.[97]

2.20. In 2006, in preparation for the transposition of Members' Schedules from the HS2002 to the HS Nomenclature 2007 Edition (HS2007), the General Council adopted a Decision concerning "A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database" (Decision on HS2007 Transposition Procedures).[98] Pursuant to that Decision, developed country Members were to prepare their own transpositions from the HS2002 to the HS2007, and the WTO Secretariat was requested to "transpose the schedules of developing country Members, except for those who undertake to prepare their own transposition and submit a notification to this effect".[99]

2.21. Since India did not indicate that it intended to undertake the transposition of its Schedule from the HS2002 to the HS2007, the WTO Secretariat undertook to prepare India's transposition. On 8 November 2013, the Secretariat communicated to India via email the draft files for the HS2007 transposition of India's Schedule.[100]

2.22. Following receipt of the draft transposition files prepared by the WTO Secretariat, India provided comments on the draft files.[101] The Secretariat then communicated a revised file to India for approval.[102] A multilateral review session was held in the Committee on Market Access on 23 April 2015, during which the draft files were approved by Members in the Committee on Market Access.[103] The draft modifications to the Schedule were circulated on 12 May 2015 and, since no objections were received within three months of circulation, on 12 August 2015 the changes to the Schedule were certified.[104]

2.23. On 25 September 2018, India requested that its Schedule be rectified, in accordance with the 1980 Decision, in order to correct "certain errors contained in its HS2007 Schedule".[105] Specifically, India requested that its commitments with respect to 15 tariff items be rectified to "Unbound", including certain of the tariff items at issue in this dispute.[106] In its request, India stated that "[w]hile transposing the HS2002 schedule to HS2007 schedule on the products concerned, errors occurred,

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

[96] WT/Let/181.

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

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

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

[100] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50).

[101] Email from Market Access Intelligence Section, WTO, to India (12 February 2014), (Exhibit IND-51). India did not provide comments or seek clarifications regarding the transposition of the tariff items at issue in this dispute.

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

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

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

[105] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-78), p. 1.

[106] India requested that, *inter alia*, the following tariff items be rectified to "unbound": 8517.12 (telephones for cellular networks or for other wireless networks); 8517.61 (base stations); ex 8517.62 (other machines for the reception, conversion and transmission or regeneration of voice, images or other data including switching and routing apparatus); ex 8517.70 (parts of 8517.12, 8517.61, ex 8517.62 and ex 8517.69); and ex 8517.70 (other parts). (India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-78), Appendix 2, p. 3).

resulting in wrong bound tariff commitments on certain lines which were inadvertently included in the Schedule."[107] According to India, "the various tariff subheadings for which India is seeking rectification to its HS2007 Schedule" were not covered by the commitments in the ITA, and "[t]he new products became part of the schedule on account of the WCO transposition from HS2002 to HS2007".[108] India considered that the rectification did not alter its commitments "either under GATT 1994 or the ITA[]"[109], and that "[t]he errors in the HS2007 scheduling should be interpreted as an inadvertent oversight by India on binding of products not covered by the ITA[] at 0%".[110]

2.24. Several Members, including Canada[111], China[112], the European Union[113], Japan[114], Chinese Taipei[115], Switzerland[116], and the United States[117] objected to India's proposed rectification under the 1980 Decision. In light of these objections, and in accordance with the 1980 Decision[118], India's rectification request has not, to date, been certified.

2.25. In light of the foregoing, India's WTO Schedule presently indicates, *inter alia*, the following tariff commitments[119]:

	Ex	Description	Bound rate
85		Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles	
8504		Electrical transformers, static converters (for example, rectifiers) and inductors.	
8504.40		-Static converters	
8504.40	02	--Static converters for automatic data processing machines and units thereof, and telecommunication apparatus	0%
8517		Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28	
8517.12		--Telephones for cellular networks or for other wireless networks	0%
8517.61		--Base stations	0%
8517.62		--Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus	0%

[107] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-78), p. 1.
[108] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-78), Appendix 1, p. 2.
[109] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-78), p. 1.
[110] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-78), Appendix 1, p. 2.
[111] Council for Trade in Goods, Minutes of the meeting held on 11 and 12 April 2019, G/C/M/134, p. 40; Committee on Market Access, Minutes of the meeting held on 11 November 2019, G/MA/M/71, para. 15.4.
[112] Council for Trade in Goods, Minutes of the meeting held on 11 and 12 April 2019, G/C/M/134, para. 12.5; Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 14 May 2019, G/IT/M/70, para. 1.14.
[113] Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, para. 18.4; Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 30 October 2018, G/IT/M/69, paras. 1.19-1.21; and Committee on Market Access, Minutes of the meeting held on 9 October 2018, G/MA/M/68, para. 134.
[114] Letter from Japan to India (9 November 2018), (Japan's third-party Exhibit JPN-4); Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, para. 18.13.
[115] Letter from Chinese Taipei to India (19 October 2018), (Chinese Taipei's third-party Exhibit TPKM-3); Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 30 October 2018, G/IT/M/69, para. 1.36.
[116] Council for Trade in Goods, Minutes of the meeting held on 11 and 12 April 2019, G/C/M/134, para. 12.12.
[117] Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, paras. 18.7-18.8; Committee on Market Access, Minutes of the meeting held on 9 October 2018, G/MA/M/68, para. 131.
[118] The 1980 Decision indicates that proposed changes shall become a certification provided that no objection has been raised by a Member within three months of being communicated to all Members. (GATT, 1980 Decision, L/4962, para. 3).
[119] WT/Let/181; WT/Let/1072.

	Ex	Description	Bound rate
8517.70.00		-Parts	
8517.70.00	01	--Parts and accessories of the machines of heading 84.71: For populated PCBs	0%
8517.70.00	02	--Parts and accessories of the machines of heading 84.71: Other	0%
8517.70.00	03	--Other	0%
8518		Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets.	
8518.30		-Headphones, earphones and combined microphone/speaker sets	
8518.30	01	--Line telephone handsets	0%
8544		Insulated (including enamelled or anodised) wire, cable (including co-axial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fibre cables, made up of individually sheathed fibres, whether or not assembled with electric conductors or fitted with connectors.	
8544.4		-Other electric conductors, for a voltage not exceeding 1,000 V:	
8544.42	01	--Of a kind used for telecommunications	0%

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests the Panel to find that, by applying ordinary customs duties in excess of the tariff bindings set forth in its WTO Schedule, with regard to products falling under the tariff items identified by the European Union, India is acting inconsistently with its obligations under Articles II:1(a) and (b) of the GATT 1994.[120] The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with its WTO obligations.[121]

3.2. India requests the Panel to find that:

a. The products at issue are not covered under the ITA, and the HS2007 Schedule which was certified in error included products not originally covered by the ITA[122];

b. Since the products at issue are not covered under the ITA, the draft rectification circulated by India is of a "purely formal character".[123] Therefore, the objection raised by the European Union to the draft rectification was unfounded, contrary to paragraph 3 of the 1980 Decision, and impeded India's right to rectify its Schedule under the 1980 Decision[124];

c. India is not imposing duties on the following imported products and is therefore acting in line with its commitments under the ITA:

   i. Line telephone handsets;

   ii. Products falling under subheadings 8544.42 and 8544.49 of its WTO Schedule[125]; and

d. The commitments under the contested subheadings of India's WTO Schedule are invalid due to "error" within the meaning of Article 48 of the Vienna Convention on the Law of Treaties (Vienna Convention).[126]

[120] European Union's first written submission, para. 175.
[121] European Union's first written submission, para. 176.
[122] India's first written submission, para. 239(c); second written submission, para. 168 (b).
[123] India's first written submission, para. 239(d); second written submission, para. 168 (c).
[124] India's second written submission, para. 160; response to Panel question No. 74, para. 53.
[125] India's first written submission, paras. 239(e) and (f).
[126] India's first written submission, para. 239(h); second written submission, para. 168(a).

4 ARGUMENTS OF THE PARTIES

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

5 ARGUMENTS OF THE THIRD PARTIES

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

6 INTERIM REVIEW

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

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

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

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

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

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

6.1 General issues concerning India's WTO tariff commitments

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

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

6.8. In its request for interim review, India asserts that the Panel's reasoning in paragraphs **7.135** to **7.137** of the Interim Report "inverts rather than addresses India's arguments".[127] India considers that "it is irrelevant what India's conduct signalled to the WTO members (if anything at all)" and "[w]hat is relevant is whether India was provided with the required flagging of the relevant tariff lines – the absence of which led to India's flawed assumption".[128] India requests the Panel to "provide further clarity on its reasoning and conclusion, including for the Panel's basis to seek additional evidence from India regarding the 'conditional basis for accepting the changes to its Schedules' to confirm the existence of an assumption".[129]

6.9. The European Union does not comment on India's request.

6.10. At the outset, we recall that it is uncontested that the burden of proof under Article 48(1) of the Vienna Convention falls on the party invoking Article 48. With that in mind, we note that throughout the course of these proceedings, India has argued that the "error" (within the meaning of Article 48 of the Vienna Convention) that occurred during the transposition of its Schedule was an expansion of India's WTO tariff commitments beyond those contained in the ITA.[130] On this basis, India has argued that the "assumption" which allegedly constituted an "essential basis" of India's consent to be bound by its Schedule was that its WTO tariff commitments would not be expanded beyond the ITA.[131]

6.11. Thus, in applying the distinct elements of Article 48(1), we have assessed, *inter alia*, whether India has demonstrated that its assumption (i.e. that the transposition of its WTO Schedule to the HS2007 would not expand the scope of its WTO tariff commitments beyond its ITA undertakings) formed an essential basis of its consent to be bound by its WTO Schedule.[132] Having reviewed the evidence and arguments adduced by the parties, including with respect to India's conduct at the time of the transposition, we have concluded that India has failed to meet its burden of proof with respect to this element of the analysis under Article 48(1). Briefly put, there is no persuasive evidence before us that, at the time of the transposition process, an essential basis for India's consent to be bound by its transposed WTO Schedule was that the scope of its WTO tariff commitments would be no broader than the ITA (with respect to relevant ITC products). In response to India's request, we have modified paragraph **7.137** of the Interim Report to clarify this.

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

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

6.14. We further note that India also argues that what matters in this context is whether India "was provided with the required flagging of the relevant tariff lines".[133] We disagree. We recall that this step of the analysis assesses whether India's assumption regarding the scope of the ITA and the scope of its WTO Schedule constituted an essential basis of its consent to be bound by that Schedule.

[127] India's request for interim review, para. 15.
[128] India's request for interim review, para. 15.
[129] India's request for interim review, para. 16.
[130] See e.g. India's first written submission, para. 57; second written submission, para. 19.
[131] India states that it "assumed at the time of the certification of [India's] 2007 Schedule that the HS2007 transposition did not expand India's tariff commitments beyond India's obligations under the ITA[]". (India's first written submission, para. 59). Similarly, India states that "its mistaken assumption was that the HS2007 did not expand India's tariff commitments beyond India's obligations under the ITA[]. That remains India's clearly articulated position." (India's opening statement at the second meeting of the Panel, p. 2).
[132] See section 7.3.3.2.3.4 below.
[133] India's request for interim review, para. 15.

Regardless of whether the relevant tariff items were adequately flagged by the WTO Secretariat, there is no indication before us that India's consent to be bound by its WTO Schedule was conditional upon the product scope of its WTO tariff commitments not exceeding the product scope of the ITA. In other words, even if the WTO Secretariat had failed to flag the relevant tariff items, that would not prove (or even seem to be relevant to) India's assertions regarding its *stated* assumption being an essential basis of its consent to be bound.[134] Thus, India's argument regarding the alleged failure of the Secretariat to flag the relevant tariff items is not pertinent to our assessment of this specific aspect of India's arguments under Article 48(1).

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

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

6.16. India notes the Panel's conclusion that the WTO Secretariat "fulfilled its obligation to flag the complex technical transpositions … thereby put[ting] India on notice of the error", notwithstanding the Panel's observation in paragraph **7.192** of the Interim Report that "both parties … may read document G/MA/283 differently".[135] India states that it is unclear "how a document like G/MA/283 should be read differently by different parties on a contested issue, and yet somehow justifiably meet its purpose".[136] India requests the Panel to "address the contradictions arising out of its legal reasoning and make suitable modifications".[137]

6.17. The European Union does not comment on India's request.

6.18. While we consider that the Interim Report sufficiently conveyed the Panel's reasoning on this issue, we have in any event modified paragraphs **7.191** to **7.192** of the Interim Report in order to further elucidate that reasoning. For the sake of additional clarity, we consider it useful to note here that although the parties appear to agree that document G/MA/283 does not flag any tariff items, the parties are in fact saying two different things when they make their respective assertions. The European Union explains that its "position is that the transposition from HS2002 to HS2007 did not modify the scope of the tariff concessions at issue in this dispute. Therefore, there was nothing to be 'flagged' by the Secretariat."[138] The European Union elaborates that, "[t]he 2012 Methodology Note … informed all Members that 'the scope of heading 85.17 has been expanded and the transposition of heading 85.25 entails the transfer of certain products to heading 85.17'. These changes to the HS nomenclature, however, did not imply a modification of the scope of the tariff concessions at issue in this dispute."[139] Thus, the European Union appears to assert that the WTO Secretariat was only required to flag those tariff items for which there were actual changes in the scope of concessions. That assertion, however, does not square with the plain language of the flagging obligation imposed on the WTO Secretariat – "[a]ny tariff line for which a change in the scope of a concession *may have occurred* due to the complex technical nature of the transposition shall be clearly flagged."[140] The European Union does not reconcile, on the one hand, its assertion that because there were no changes in scope the Secretariat was not required to flag any tariff items, with, on the other hand, the obligation on the Secretariat to flag any tariff item for which a change in scope *may* have occurred. In any event, for our purposes, we understand that when the European Union says that the WTO Secretariat did not flag any tariff items, the European Union

[134] India's arguments during interim review might be interpreted as suggesting that its "assumption" for purposes of Article 48 was that the WTO Secretariat would flag the relevant tariff items. Notwithstanding that India has not framed its alleged error under Article 48 in this manner, we recall that in the context of applying Article 48(2), we have indeed assessed India's arguments regarding the WTO Secretariat's alleged failure to flag the relevant tariff items, and concluded that the WTO Secretariat correctly and appropriately flagged *all* relevant tariff items. (See paras. 7.175-7.193 below). Thus, if India had alleged that the "error" under Article 48(1) was that the WTO Secretariat had failed to flag the relevant tariff items (*quod non*), our findings indicate that no such error occurred.

[135] India's request for interim review, para. 17.

[136] India's request for interim review, para. 18.

[137] India's request for interim review, para. 18.

[138] European Union's comments on India's response to Panel question No. 90(a)(i) and (ii), para. 4.

[139] European Union's comments on India's response to Panel question No. 90(a)(i) and (ii), para. 4.

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

means that the WTO Secretariat did not flag any tariff items whose product scope had, in fact, changed.

6.19. That assertion by the European Union that the WTO Secretariat did not flag any tariff items because their product scope had not actually changed is not the same as India's assertions that the WTO Secretariat failed to flag any tariff items for which the product scope of the concession *may have* changed. In contrast to the European Union, India acknowledges that the flagging obligation on the WTO Secretariat applied to *possible* changes of scope, but India maintains that, contrary to that obligation, the WTO Secretariat did not flag any relevant tariff items. Thus, when India says that document G/MA/283 does not flag any tariff items, India means that document G/MA/283 does not flag any tariff items for which the product scope of the concessions may have changed.

6.20. In short, while the parties appear to agree that the WTO Secretariat did not flag any relevant tariff items, they are in fact making different assertions. In our findings regarding this issue, we have addressed distinctly: (i) India's arguments regarding whether the Secretariat satisfied its obligation to flag tariff items for which the product scope of the concession *may* have changed[141]; and (ii) the European Union's argument that the Secretariat did not flag any tariff items for which the product scope of the concession actually changed.[142]

6.21. India also notes that in paragraph **7.196** of the Interim Report, the Panel "concludes that India's argument deletes the word 'possible' as contained in Article 48(2) …, thereby requiring the state to 'be unmistakeably aware of the actual error'".[143] India considers that "the word 'possible' has little to do with the customary international law standard which applies in the present instance 'that no interested party should fail to notice the error' or indeed a 'possible error'."[144] India states that the "thrust of that international legal standard is in relation to how evident an error (or a possible error) must be for a State to be put on notice under Article 48(2)".[145] According to India, "that standard is in the context of the prominence of an error or a possible error, and not in the context of the range of errors that might be covered in its scope".[146] India requests the Panel to provide "further clarity" on the conclusions reached by the Panel on this issue.[147]

6.22. The European Union does not comment on India's request.

6.23. We note that the issue being addressed in the relevant paragraphs is India's argument that "for a state to be put on notice of a possible error, the circumstances should be such that no interested party should fail to notice the error or be under a misapprehension about it."[148] The Report addresses this argument and ultimately concludes that the relevant standard under this element of Article 48(2) is whether the State was on notice of a *possible* error, not an *actual* error. Those are plainly different things. We see no need to modify or further clarify our reasoning on this issue.

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

6.2.1 Tariff item 8504.40 ex02 of India's WTO Schedule

6.24. India requests us to delete language in paragraph **7.260**, and footnote **660** thereto, of the Interim Report highlighting a contradiction in India's argument regarding the tariff treatment accorded to static converters for cellular mobile phones. India maintains that it chose to not contest the assertions made by the European Union on the duty rate applied to such products.[149] The European Union does not comment on India's request. We note that, as illustrated in paragraph 7.258, India indeed made different arguments on the tariff treatment accorded to such products. Nonetheless, we have made modifications in order to more precisely reflect India's arguments.

[141] See paras. 7.175-7.191 below.
[142] See para. 7.192 below.
[143] India's request for interim review, para. 19.
[144] India's request for interim review, para. 19.
[145] India's request for interim review, para. 19.
[146] India's request for interim review, para. 19.
[147] India's request for interim review, para. 20.
[148] India's second written submission, para. 29. See also India's first written submission, para. 73.
[149] India's request for interim review, paras. 21-22.

6.2.2 Tariff item 8517.12 of India's WTO Schedule

6.25. India submits that the description of the parties' arguments regarding the tariff treatment accorded to products classified under tariff item 8517.12 is "not accurate when viewed at the 8-digit HS level".[150] India requests the deletion of language in paragraph **7.284** of the Interim Report to the effect that it is uncontested that, at the Panel's establishment, India's First Schedule imposed a standard duty rate of 20% on products classified under tariff item 8517.12. India suggests that a more accurate reflection of the parties' arguments is that it is uncontested that India's First Schedule imposed a standard duty rate of 20% on products classified under tariff items 8517.12.11 and 8517.12.19, and that those tariff items "would come under the tariff item 8517.12".[151]

6.26. The European Union does not comment on India's request for review.

6.27. We recall that the parties agree that at the time of the Panel's establishment, India's First Schedule imposed a standard duty rate of 20% on products classified under tariff items 8517.12.11, 8517.12.19 and 8517.12.90 (all of which fall under tariff item 8517.12).[152] Therefore, paragraph 7.284 of the Interim Report accurately reflects the parties' arguments. Moreover, that same paragraph also indicates that the tariff treatment accorded to products under tariff item 8517.12.90 differed from that set forth in the First Schedule, as products falling thereunder were exempted from customs duties. This information is also uncontested by the parties.[153] We therefore decline to make the changes requested by India.

6.2.3 Tariff items 8517.61 and 8517.70 ex01, ex02, and ex03 of India's WTO Schedule

6.28. During the interim review process, we considered it useful to clarify certain factual issues pertaining to Serial No. 425 of Notification No. 50/2017. On 14 December 2022, we sent a question to the parties concerning this issue. On 21 December 2022, the parties responded to that question. On 11 January 2023, the parties indicated that they had no comments on the other party's response. In its response to our question, India referred to Notification No. 02/2022. On 18 January 2023, we invited India to submit Notification No. 02/2022 as an exhibit. On 20 January 2023, India submitted Notification No. 02/2022 as Exhibit IND-90.

6.29. We understand that, in light of the parties' responses to our question, and on the basis of Notification No. 02/2022, Serial No. 425 of Notification No. 50/2017 was omitted from that Notification pursuant to Notification No. 02/2022.[154] Therefore, with effect from 1 February 2022, the tariff treatment applicable to base station controllers, base transreceiver stations, and antenna systems, as well as *parts* of those products, pursuant to that Serial No., is no longer applicable.[155] We have accordingly modified relevant paragraphs in sections 7.4.4 and 7.4.6.

7 FINDINGS

7.1 Introduction

7.1. The European Union claims that India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994 by imposing tariff treatment on certain information communication technology (ICT) products that is inconsistent with the commitments inscribed in India's WTO Schedule.[156] The European Union specifically challenges the tariff treatment accorded by India to products falling under the following tariff items[157] of India's WTO Schedule: 8504.40 ex02; 8517.12; 8517.61; 8517.62; 8517.70 ex01, ex02, and ex03; 8518.30 ex01 and 8544.42.00 ex01. The European Union considers that such tariff treatment is provided through India's domestic customs regime, comprising

[150] India's request for interim review, para. 23.
[151] India's request for interim review, para. 23.
[152] European Union's first written submission, para. 94 (referring to Finance Act 2019, (Exhibit EU-19); India's first written submission, para. 149.
[153] European Union's first written submission, para. 104; and India's response to Panel question No. 108(a), para. 58.
[154] India's response to Panel question No. 134.
[155] Notification No. 02/2022, (Exhibit IND-90).
[156] European Union's second written submission, para. 78.
[157] As noted above, we use the term "tariff item" to refer to subheadings and tariff lines set forth in India's WTO Schedule and First Schedule. Where useful for the purposes of clarity, we use the terms "subheading" and "tariff line" as per the HS nomenclature. (See fn 69 to para. 2.1 above).

in particular India's First Schedule and various customs notifications. Essentially, the European Union submits that the tariff treatment provided by India is inconsistent with India's WTO Schedule because: (i) duties applied by India to certain such products are in excess of the duty-free rates that India is obliged to provide under its WTO Schedule; and (ii) duty-free treatment that is accorded to certain products is subject to conditions that are not set forth in India's WTO Schedule.

7.2. For tariff items 8518.30 ex01 and 8544.42.00 ex01, India acknowledges that the tariff commitments set forth in its WTO Schedule indeed constitute relevant binding tariff commitments, but submits that products falling under such tariff items are subject to duty-free treatment, without being subject to any conditions, and consequently such tariff treatment is consistent with its WTO tariff commitments.[158] With respect to the other tariff items at issue in this dispute, India argues that "there is no violation of Article[s] II:1(a) and (b) of the GATT 1994 since the contested sub-headings under the 2007 Schedule are a result of an error."[159] India argues that when India's WTO Schedule was transposed from the HS2002 to the HS2007, "an error by India and a likely oversight by other [WTO] Members" occurred, such that India's "schedule of concessions was certified in error".[160] India argues that it had "communicated to the wider WTO membership previously that it did not intend to expand its tariff commitments beyond those contained in the ITA" and that "it would not have agreed to the certification of its schedule of concessions if it were aware that such certification would effectively expand India's commitments beyond those contained in the ITA[]".[161] India submits that, pursuant to Article 48 of the Vienna Convention, the tariff commitments for these tariff items in its WTO Schedule were certified in error, and consequently are both invalid and unbound.[162] India refers to the Legal Opinion of Professor Michael Waibel who asserts that the WTO Secretariat "bears at least some of the responsibility for the errors".[163] India also asserts that the complainant violated paragraph 3 of the GATT Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (1980 Decision) by objecting to India's request to rectify its Schedule, through that Decision.[164] Finally, with respect to certain specific aspects of the European Union's claims, India claims that the European Union has failed to adequately identify the products at issue.[165] India also argues that a number of the conditions challenged by the European Union are not of a kind that are required to be inscribed in a WTO Schedule.[166]

7.3. We proceed with our analysis in several steps. We first describe the legal standard under Articles II:1(a) and (b) of the GATT 1994. Having set forth the legal standard, we address three general issues concerning India's WTO tariff commitments and the application of ArticlesII:1(a) and (b) in the circumstances of this dispute, namely: (i) the relevance of the ITA; (ii) India's plea of error under Article 48 of the Vienna Convention; and (iii) India's arguments concerning its rectification request under the 1980 Decision. Having addressed these general issues, we then turn to assess whether India is acting inconsistently with Articles II:1(a) and (b).

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

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

> (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in the Schedule, be exempt from ordinary customs duties in

[158] India's response to Panel question No. 66, para. 29; second written submission, para. 4.
[159] India's response to Panel question No. 50, para. 106.
[160] India's second written submission, para. 1.
[161] India's second written submission, paras. 3 and 25. See also India's first written submission, para. 57.
[162] India's first written submission, paras. 90-91.
[163] India's response to Panel question No. 90(b), para. 15 (quoting Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-79), para. 39).
[164] India's second written submission, para. 160.
[165] See e.g. India's response to Panel question No. 105, paras. 52-55, and No. 117, para. 71.
[166] See e.g. India's response to Panel question No. 103, paras. 48-49.

> excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.5. Previous panels have found that "Article II generally … protects expectations of a competitive relationship (or conditions of competition) and not expectations of any particular trade volume."[167] Moreover, the Appellate Body has stated that Article II:1 "serves the important function of preventing Members from applying duties that exceed the bound rates agreed to in tariff negotiations and incorporated into their Schedules of Concessions".[168]

7.6. We agree with prior interpretations of Articles II:1(a) and (b) such that, while paragraph (a) of Article II:1 "contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule"[169], paragraph (b) "prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule."[170] Similarly, where a measure is inconsistent with Article II:1(b), first sentence, on the ground that the tariff treatment is subject to "terms, conditions or qualifications" that are not set forth in the relevant WTO Schedule, such tariff treatment would necessarily constitute treatment less favourable than that set forth in the Schedule. In short, where a measure is inconsistent with Article II:1(b), first sentence, it is also inconsistent with Article II:1(a).[171] Thus, in a situation where a measure is challenged under both Article II:1(a) and Article II:1(b), first sentence, it is logical to begin the analysis by assessing the measure's consistency with Article II:1(b) since the language of Article II:1(b), first sentence, "is more specific and germane".[172]

7.7. Applying Article II:1(b), first sentence, in the context of this dispute entails comparing the treatment that India is obligated to provide in its WTO Schedule with the tariff treatment that India accords to the products at issue under the challenged measures.[173] If we determine that India imposes ordinary customs duties[174] on products in excess of the bound rate set forth in India's WTO Schedule, or alternatively grants the required tariff treatment to those products but subject to terms, conditions or qualifications that are not set forth in the Schedule, then we would conclude that India is acting inconsistently with Articles II:1(a) and (b).[175]

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[167] Panel Report, *Russia – Tariff Treatment*, para. 7.18 (referring to Panel Reports, *EC – IT Products*, para. 7.757).

[168] Appellate Body Report, *Colombia – Textiles*, para. 5.34 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47).

[169] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.

[170] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.

[171] Panel Reports, *EC – Chicken Cuts*, para. 7.64; *EC – IT Products*, para. 7. 747.

[172] See e.g. Panel Report, *Russia – Tariff Treatment*, para. 7.48 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45).

[173] In assessing claims under Articles II:1(a) and II:1(b), previous panels have examined whether the complainant had established the following three elements: (a) the treatment accorded to the products at issue in the relevant schedule; (b) the treatment accorded to the products at issue under the challenged measures at issue; and (c) whether the challenged measures result in less favourable treatment of the products at issue than that provided for in the relevant schedule and, more specifically, whether the challenged measures result in the imposition of duties and charges on the products at issue in excess of those provided for in the relevant schedule. (Panel Reports, *EC – Chicken Cuts*, para. 7.65; *EC – IT Products*, para. 7.100).

[174] The parties do not dispute that where the tariff treatment at issue in this dispute concerns "duties" applied by India, such duties constitute "ordinary customs duties" within the meaning of Article II:1(b). We note that a previous panel found that the expression "ordinary customs duties" refers to "duties collected at the border which constitute 'customs duties' in the strict sense of the term (*stricto sensu*)" and "this expression does not cover possible extraordinary or exceptional duties collected in customs". (Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85). In our view, the duties at issue in this dispute are indeed ordinary customs duties within the meaning of Article II:1(b), first sentence.

[175] We also note that it is not necessary to find that *all* products falling under a specific tariff item are treated inconsistently with the WTO Schedule, to conclude that India is acting inconsistently with Article II:1(b), first sentence. As the panel in *EC – IT Products* found, "if we were to determine that some products fall within the scope of duty-free concessions in the EC Schedule, then if the challenged measures provide for the application of duties to those products covered by the concession, this would be sufficient to find a breach of Article II." (Panel Reports, *EC – IT Products*, para. 7.116).

7.8. We further note that, in response to a question from the Panel, both parties agree that the reference in Article II:1(b), first sentence, to "terms, conditions or qualifications" does not extend to general conditions for importation.[176] Indeed, in our view, to the extent that a Member imposes a general condition on importation (i.e. a condition that must be satisfied in order for the product to enter the market), this would not necessarily mean that such condition constitutes a term, condition, or qualification that must be met in order to receive certain tariff treatment. Such a general condition, where it is not tied to tariff treatment, does not appear to be a term, condition, or qualification, that must be inscribed in a Member's Schedule, pursuant to Article II:1(b), first sentence. Where, however, a condition *is* tied to certain tariff treatment, such that a relevant product must satisfy the condition in order to be eligible for the tariff treatment provided for in a Member's Schedule, Article II:1(b), first sentence, requires such condition to be inscribed in the Member's Schedule.

7.9. Pursuant to Article II:7 of the GATT 1994, Members' WTO Schedules of concessions are an integral part of the GATT 1994. They are also, therefore, integral parts of the WTO Agreement, binding on all Members, pursuant to Article II:2 of the WTO Agreement. Moreover, they form part of the covered agreements listed in Appendix 1 of the DSU. Pursuant to Article 1.2 of the DSU, the rules and procedures of the DSU apply to such covered agreements. Consequently, Article 3.2 of the DSU, which states that the provisions of the covered agreements are to be clarified "in accordance with customary rules of interpretation of public international law", applies to the interpretation of Members' WTO Schedules and the concessions set out therein.[177] When interpreting Members' Schedules in accordance with customary rules of treaty interpretation, the Harmonized System (HS) and its Explanatory Notes have been found to constitute relevant "context" pursuant to Article 31(1) of the Vienna Convention.[178] However, the relevance of the HS depends on the specific interpretative question at issue, including whether the relevant concessions were based on the HS.[179]

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

7.3 General issues concerning India's WTO tariff commitments

7.3.1 Overview

7.11. As explained above, under Articles II:1(a) and (b) of the GATT 1994, WTO Members are obligated to provide tariff treatment that is in accordance with the commitments set forth in "the appropriate Schedule annexed to [the GATT 1994]". Thus, to assess whether a Member is acting inconsistently with Articles II:1(a) and (b), a panel must compare a Member's obligations as set forth in the relevant WTO Schedule to the tariff treatment applied by that Member under the measures at issue.[180]

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[176] See parties' responses to Panel question No. 103.

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

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

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

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

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

[180] We understand that tariff items for which a Member has not made a tariff binding need not be included in the WTO Schedule. (See e.g. European Union's response to Panel question No. 101, para. 48; and India's comments on the European Union's response to Panel question No. 101, paras. 18-19).

7.12. In the present dispute, it is uncontested that the "appropriate Schedule" for the purpose of assessing India's compliance with Articles II:1(a) and (b) is India's WTO Schedule. It is further uncontested that the tariff commitments for two tariff items set forth in India's WTO Schedule (namely tariff items 8518.30 ex01 and 8544.42.00 ex01) constitute binding WTO tariff commitments with which we must assess India's compliance in the present proceedings. However, with respect to the other tariff items at issue in this dispute (namely tariff items 8504.40 ex02; 8517.12; 8517.61; 8517.62; and 8517.70 ex01, ex02, and ex03), the parties disagree over the content of India's WTO tariff commitments.

7.13. Throughout the course of these proceedings India has argued that: (i) the relevant binding tariff commitments are set forth in the Information Technology Agreement (ITA) and those commitments are static and did not change due to their incorporation into India's WTO Schedule[181]; (ii) pursuant to Article 48 of the Vienna Convention, aspects of India's WTO Schedule are invalid (and the relevant tariff commitments unbound) as a consequence of an error on the part of India during the transposition of the Schedule from the HS2002 to the HS2007[182]; and (iii) the errors in India's WTO Schedule are of a formal nature and were therefore capable of rectification pursuant to the 1980 Decision.[183]

7.14. The European Union, for its part, considers that: (i) India's WTO tariff commitments are set forth in India's WTO Schedule and the ITA did not render the commitments in that Schedule static[184]; (ii) there was no error in the transposition of India's Schedule to the HS2007 and, even if there was such an error, India either contributed to or was put on notice of the possibility of that error, such that the requirements of Article 48 are not satisfied in this dispute[185]; and (iii) there is no basis for the Panel to make the findings requested by India regarding the European Union's objection to India's rectification request under the 1980 Decision.[186]

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

7.3.2 The relevance of the ITA

7.3.2.1 Introduction

7.16. As described in section 2.3 above, on 13 December 1996 a number of WTO Members concluded the ITA. India joined the ITA on 26 March 1997. The ITA participants agreed among themselves to bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the GATT 1994, with respect to certain products.[187] The Annex to the ITA requires that participants "shall incorporate" such measures into their Schedules annexed to the GATT 1994, and indicates that their Schedules should be modified in accordance with the 1980 Decision.[188] India, as a participant in the ITA, proposed a modification to its WTO Schedule, which was circulated on 2 April 1997 for review by all WTO Members, pursuant to the 1980 Decision. These changes to India's Schedule, which were based on the HS1996, were certified on 2 October 1997.[189]

[181] See e.g. India's opening statement at the second meeting of the Panel, p. 5.
[182] See e.g. India's first written submission, paras. 55-91.
[183] See e.g. India's response to Panel question No. 74, para. 53. In India's view, the European Union's objection to India's request to rectify its Schedule under the 1980 Decision was unfounded in law, inconsistent with the 1980 Decision, and impeded India's right to rectify its Schedule, and India requests the Panel to find accordingly.
[184] See e.g. European Union's opening statement at the first meeting of the Panel, paras. 56-78; and second written submission, paras. 43-62.
[185] See e.g. European Union's opening statement at the first meeting of the Panel, paras. 10-55; and second written submission, paras. 3-17.
[186] See e.g. European Union's second written submission, paras. 18-42.
[187] The relevant products are identified in the ITA as "(a) all products classified (or classifiable) with [HS1996] headings listed in Attachment A to the Annex [to the ITA]; and (b) all products specified in Attachment B to the Annex [to the ITA], whether or not they are included in Attachment A". (ITA, WT/MIN(96)/16, para. 2).
[188] Paragraphs 1 and 2 of the Annex to the ITA. See also 1980 Decision, L/4962.
[189] WT/Let/181.

7.17. In section III (titled "Background") of its first written submission in this dispute, the European Union, *inter alia*, describes certain aspects of the ITA. The European Union notes the ITA's conclusion in December 1996, India's joining the ITA in March 1997, and the requirement under paragraph 2 of the ITA for all participants to bind and eliminate customs duties and other duties and charges within the meaning of Article II:1(b) of the GATT 1994 on all products identified in Attachments A and B.[190] The European Union further notes that, pursuant to paragraph 2 of the ITA Annex, ITA participants were required to modify their WTO Schedules in order to implement their obligations under the ITA.[191] In the next sub-section of section III of its first written submission, the European Union refers to two subsequent transpositions of India's WTO Schedule, including the transposition of India's WTO Schedule to the HS2007.[192] Thereafter, in setting forth its legal argument underpinning its claims that India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994, the European Union does not refer to the ITA, but compares India's commitments in its present WTO Schedule to the tariff treatment provided by India to certain imported products pursuant to India's First Schedule and relevant customs notifications.[193]

7.18. In its first written submission, India states that the European Union suggested that India's concessions were based on the ITA, "although without actually establishing that the products at issue were covered under the ITA[]".[194] India elaborated that it would subsequently seek to establish that the products at issue were not covered under the ITA, and therefore the 2007 Schedule was certified in error and the objections against India's rectification request under the 1980 Decision were without merit.[195] India further states that "the burden of proof is on the EU to prima facie demonstrate that the products at issue were covered by the ITA[]" and "the EU does not even offer a hint of which entries in the ITA[] allegedly covered the products at issue".[196] India devotes approximately 32 pages[197] of its first written submission to demonstrating that the products at issue are not covered by the ITA.[198] A significant component of India's argument is its view that "the intention of the parties [to the ITA] … was not to include the vast range of information technology products which would be developed in the future".[199]

7.19. In response to questions from the Panel, the European Union clarified that its claim is under Articles II:1(a) and (b) of the GATT 1994, and that the "legal obligations at issue in the present case are therefore Article II:1 of the GATT 1994, and India's Schedules and the tariff bindings provided for in those schedules."[200] The European Union indicated that the ITA "is *not* the source of India's legal obligations relevant in the present case".[201] The European Union further considered that "the development of new technologies and new products does not alter the content or scope of the legal obligations provided for in India's Schedule of concessions", and that "[w]hat counts is … not whether a product is 'new' or whether it has undergone technical advancements", but rather "whether a specific product is within the scope of a tariff schedule, and in particular within the scope of the product descriptions in that schedule".[202]

7.20. In response to questions from the Panel, India further clarified its views regarding the relevance of the ITA in the context of this dispute. India explained that, in its view, its "obligations under the ITA[] are static, i.e., are limited to the product scope as defined in the ITA[]", and "[t]he

[190] The European Union elaborates that Attachment A to the ITA contained a "table listing HS1996 headings (four digits) and subheadings (six digits) with their corresponding 'HS descriptions'", including certain "HS1996 subheadings covering products at issue in this dispute". (European Union's first written submission, para. 24).

[191] European Union's first written submission, paras. 21-27.

[192] European Union's first written submission, paras. 28-31.

[193] European Union's first written submission, section IV.

[194] India's first written submission, para. 92.

[195] India's first written submission, para. 93.

[196] India's first written submission, para. 126.

[197] See India's first written submission, paras. 92-221.

[198] India's first written submission, para. 126.

[199] India's first written submission, para. 102. In addition to referring to the ordinary meaning of the text of the ITA, India considers that subsequent practice indicates that the scope of the ITA does not extend to new products. (Ibid. paras. 96-123). India highlights, in particular, that the participants in the ITA "have agreed that the product scope of the ITA[] does not adequately cover the rapid growth of information technology products, and therefore an expansion of the ITA[] was required in order to liberalize the IT product sector". (Ibid. para. 109 (underlining original)).

[200] European Union's response to Panel question No. 3, para. 11.

[201] European Union's response to Panel question No. 3, para. 11. (emphasis original)

[202] European Union's response to Panel question No. 8, paras. 21 and 23.

transposition of India's schedule from HS1996 to HS2002 or HS2007 does not affect or change India's obligations under the ITA[]".[203] India elaborated that "the ITA[] did not include the range of additional products that could be developed in the future".[204] India further considered this relevant to the present dispute, because "the EU develops arguments in relation to sub-headings 8517.12, 8504.40, 8517.61, 8517.62, and 8517.70, which presently relate to products that were not covered by the ITA[] as they were beyond the scope of commitments made under the ITA[]".[205] India argued that its "obligations under the ITA[] are distinguishable and 'separate from' the commitments under the contested sub-headings in the 2007 Schedule", and "India has made no commitments regarding the contested products since such contested products are not covered under the ITA[]".[206]

7.21. Throughout the course of these dispute settlement proceedings, the parties continued to exchange views on the relevance of the ITA to this dispute. In India's view, the European Union itself asserts that the "source of India's commitments for the products at issue is the ITA[]" and the European Union's claims must fail because "the products at issue are not covered by the ITA[]".[207] India considers that "a resolution of this issue lies in interpreting the scope of ITA[] which is relevant to the present dispute in various ways".[208] In response to a question from the Panel regarding the legal relevance of the ITA, India responded that: (i) "[t]he ITA[] is an instrument that is critical to this dispute and applies in different ways for the European Union and India. Indeed, it is instrumental for analysing India's claim under Article 48 of the VCLT"; and (ii) "the ITA[] also serves as an important comparative benchmark for determining if the draft rectification request to the 2007 Schedule submitted by India in 2018 was of a purely formal character".[209]

7.22. The European Union for its part, continues to insist that it is India's "schedule which is at the centre of this case and which contains India's international legal obligations relevant in this case, not the ITA[]".[210] The European Union considers that the ITA is not a covered agreement and the "question of the consistency of India's measures with the ITA[] is not before this Panel".[211] In the European Union's view, India misrepresents the European Union's position, and it is clear that the European Union made reference to the ITA solely "for the purposes of providing the background of the case", not in order to base its legal claim on the ITA.[212] The European Union submits that it does not bear any burden of showing that the products at issue are covered by the ITA.[213] The European Union further considers that the ITA has no relevance for the interpretation of any of the tariff items at issue in this dispute, because "the content of those tariff lines is clear".[214]

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

7.24. We therefore proceed to address, in this section: (i) whether the ITA sets forth India's tariff commitments for purposes of applying Articles II:1(a) and (b) of the GATT 1994; and (ii) whether the ITA otherwise limits the scope of the tariff commitments contained in India's WTO Schedule. We note, in doing so, that the parties' arguments concerning the ITA pertain specifically to the European Union's claims regarding products covered by tariff items 8504.40, 8517.12, 8517.61, 8517.62, and 8517.70 of India's WTO Schedule.[215]

[203] India's response to Panel question No. 1, para. 1.
[204] India's response to Panel question No. 1, para. 5.
[205] India's response to Panel question No. 1, para. 8.
[206] India's response to Panel question No. 1, para. 9.
[207] India's opening statement at the first meeting of the Panel, para. 22. See also India's first written submission, para. 126; and response to Panel question No. 4, para. 19.
[208] India's opening statement at the first meeting of the Panel, para. 22.
[209] India's response to Panel question No. 65, paras. 24 and 26. See also India's second written submission, paras. 34 and 36.
[210] European Union's opening statement at the second meeting of the Panel, para. 19.
[211] European Union's second written submission, para. 46.
[212] European Union's second written submission, paras. 48-49.
[213] European Union's second written submission, para. 51.
[214] European Union's second written submission, para. 55.
[215] See India's first written submission, paras. 124-221; response to Panel question No. 66, para. 29; and second written submission, paras. 83-148.

7.3.2.2 Whether the ITA sets forth India's legal obligations

7.3.2.2.1 Main arguments of the parties

7.25. India argues that the legal issue that lies "[a]t the heart of this dispute" is whether the products identified by the European Union are covered under the ITA.[216] India states that "it is clear that the parties to the dispute agree that the source of the purported commitments could only be the ITA[]."[217] India states that it "consider[s] itself bound by the obligations under the ITA[]" but argues that those obligations are "separate from the commitments under the contested sub-headings that were certified in error via the HS2007 transposition".[218]

7.26. The European Union considers that the "legal obligations at issue in the present case are … Article II:1 of the GATT 1994, and India's Schedules and the tariff bindings provided for in those schedules."[219] The European Union submits that the ITA "is *not* the source of India's legal obligations relevant in the present case".[220] The European Union elaborates that insofar as it makes reference to the ITA, "such reference is for the purposes of providing the background of the case".[221] The European Union further considers that the ITA is not a covered agreement within the meaning of the DSU.[222]

7.3.2.2.2 Main arguments of the third parties

7.27. Brazil considers that the ITA "is not a covered agreement within the meaning of Article 1.1 of the DSU, and, therefore, the Panel has no authority to interpret the ITA[]".[223] In Brazil's view, "the main issue of the present dispute concerns the correct interpretation of India's Schedule, not the interpretation of the ITA[]."[224]

7.28. Canada argues that the ITA "is not a 'covered agreement' within the meaning of Article 1.1 of the DSU as it is not an agreement listed in Appendix 1 to the DSU".[225] Canada considers that "it is not necessary in the case at hand to interpret the ITA[] itself", and rather "the Panel's task is to interpret India's tariff commitments set forth in its Schedule of Concessions annexed to the GATT 1994".[226] Canada considers that the ITA "may be considered as relevant context within the meaning of Article 31 of the Vienna Convention for the purposes of interpreting the terms of the concessions at issue, but the ITA[] is not itself the subject of the Panel's analysis in this case."[227]

7.29. Japan submits that the ITA is not a covered agreement within the meaning of Article 1.1 of the DSU, and consequently "the Panel lacks jurisdiction to clarify the rights and obligations of the parties under the ITA[]".[228] Japan considers that the ITA "is not directly relevant to the interpretation of India's tariff concessions at issue."[229] In Japan's view, India errs when it refers to 'the obligations under the ITA[]'", because what is relevant is India's obligations under Article II:1 of the GATT 1994 and under India's WTO Schedule.[230] Japan argues that "the focus of the interpretative exercise is on the relevant tariff concessions made by India in its Schedule, not the ITA[]".[231]

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[216] India's first written submission, para. 24.
[217] India's opening statement at the first meeting of the Panel, para. 23.
[218] India's first written submission, para. 92.
[219] European Union's response to Panel question No. 3, para. 11.
[220] European Union's response to Panel question No. 3, para. 11. (emphasis original)
[221] European Union's second written submission, para. 49.
[222] European Union's opening statement at the first meeting of the Panel, paras. 62-67; second written submission, paras. 46-53.
[223] Brazil's third-party response to Panel question No. 1, para. 2.
[224] Brazil's third-party response to Panel question No. 1, para. 2.
[225] Canada's third-party response to Panel question No. 1, para. 1.
[226] Canada's third-party response to Panel question No. 1, para. 2.
[227] Canada's third-party response to Panel question No. 1, para. 2.
[228] Japan's third-party response to Panel question No. 1, para. 2.
[229] Japan's third-party response to Panel question No. 2, para. 8.
[230] Japan's third-party response to Panel question No. 15, para. 4.
[231] Japan's third-party response to Panel question No. 15, para. 5.

7.30. Korea "is of the view that the agreement at issue in this dispute is not the ITA[], but the GATT 1994."[232] Korea considers that the ITA "may be used as 'context' to interpret India's tariff concessions at issue in this dispute".[233]

7.31. Norway submits that the ITA is not a "covered agreement" within the meaning of Article 1.1 of the DSU, but could serve as relevant context within the meaning of Article 31(2)(b) of the Vienna Convention. For Norway, the Panel's main task in this dispute is to interpret India's commitments contained in its WTO Schedule.[234]

7.32. Chinese Taipei argues that the ITA is not a covered agreement within the meaning of Article 1.1 of the DSU and consequently there is no basis for the Panel to interpret the ITA in accordance with the rules of the Vienna Convention.[235] Chinese Taipei considers that "the Panel must interpret the relevant tariff concessions in India's Schedule in accordance with the rules of the Vienna Convention", and that "India's tariff concessions made pursuant to the ITA[] are properly inscribed in its currently certified Schedule of Concessions reflecting the 2007 HS nomenclature".[236] According to Chinese Taipei, the ITA "formed the basis for India to enter into the commitments to provide duty-free treatment to products falling under the tariff concessions at issue, and, as such, constitutes an important part of the factual background in this dispute".[237] Chinese Taipei further states, however, that the "relevant treaty for the interpretation of the tariff concessions at issue in this dispute is India's currently certified Schedule of Concessions reflecting the 2007 HS nomenclature".[238]

7.33. Türkiye submits that the claims raised in this dispute "have to be analysed with a view to ensuring that the rights of the Members of the ITA are not adversely affected as a result of any improper interpretation of the scope of this Agreement" and the Panel "should decide if products with newly developed technologies fall under [the] ITA without any further negotiations." For Türkiye, this case raises "important questions with respect to the interpretation of the tariff concessions made by WTO Members pursuant to the ITA".[239]

7.34. Ukraine notes that "ITA concessions are included in the participants' WTO schedules of concessions and become part of that Member's obligations under the WTO covered agreements".[240] Ukraine argues that "taking into account the connection between ITA[] and the GATT 1994, in Ukraine's view, the ITA[] is a 'covered agreement' within the meaning of Article 1.1 of the DSU."[241]

7.35. The United States considers that the ITA is not a covered agreement under the DSU and, pursuant to its terms of reference, the Panel "is not tasked with interpreting the ITA[] in this dispute".[242] According to the United States, "the Panel is tasked with interpreting the relevant provisions of the GATT 1994, including the tariff concessions in India's Schedule, rather than the

[232] Korea's third-party response to Panel question No. 3, p. 1.
[233] Korea's third-party response to Panel question No. 3, p. 1.
[234] Norway's third-party statement, para. 2.
[235] Chinese Taipei's third-party response to Panel question No. 1, para. 2, incorporating Chinese Taipei's response to panel question No. 2 in *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588). (In its responses of 20 September 2021 to questions from the Panel to the third parties before the first substantive meeting, Chinese Taipei responded to Panel question Nos. 1 to 12 by stating "Please see our response to this question posed to the parties in DS588". In a communication to the parties in this dispute, the Panel confirmed its understanding that Chinese Taipei's responses to the Panel's questions as a party in DS588, are on the record in this dispute, DS582. The parties did not object or otherwise comment. (See European Union's communication, 7 July 2022; and India's communication, 7 July 2022)).
[236] Chinese Taipei's third-party response to Panel question No. 1, para. 1, and No. 2, para. 2, incorporating Chinese Taipei's response to panel question No. 2, para. 4, and No. 3, para. 7, in *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588)).
[237] Chinese Taipei's third-party response to Panel question No. 2, para. 2, incorporating Chinese Taipei's response to panel question No. 3, para. 11, in *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588).
[238] Chinese Taipei's third-party response to Panel question No. 2, para. 2, incorporating Chinese Taipei's response to panel question No. 3, para. 11, in *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588).
[239] Türkiye's third-party submission, paras. 2, 4 and 9.
[240] Ukraine's third-party response to Panel question No. 1, para. 8.
[241] Ukraine's third-party response to Panel question No. 1, para. 9.
[242] United States' third-party response to Panel question No. 1, paras. 2-3.

ITA[]".[243] The United States therefore considers that "India is mistaken that its commitments are 'under the ITA[]'".[244]

7.3.2.2.3 Panel's assessment

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

7.37. We recall that the European Union's claim in this dispute is that India is acting inconsistently with its obligations under Articles II:1(a) and (b) of the GATT 1994.[245] The European Union has not, in any of its submissions, articulated any claim based on a provision of the ITA. We recognize that the European Union described the ITA, in its first written submission, as relevant *factual* background to explain the history of India's tariff commitments at issue in this dispute. However, we do not read the European Union's references to the ITA as articulating any claim of inconsistency or requesting us to find that India is acting inconsistently with the ITA. Thus, in our view, the European Union has not asserted that India is acting inconsistently with the ITA nor does the European Union request us to make any such finding.[246]

7.38. As described above[247], the legal standard under Articles II:1(a) and (b) entails comparing the treatment that India is obligated to provide in its WTO Schedule with the tariff treatment that India accords to the products at issue. This provision does not refer to the ITA, nor does any other provision in the GATT 1994. We therefore see no textual link in the GATT 1994 indicating that Members' legal obligations, for the purposes of applying Articles II:1(a) and (b), could be contained in the ITA.

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

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

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

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

7.41. Thus, the ITA specifically requires WTO Members who are participants in the ITA to incorporate their ITA undertakings into their WTO Schedules annexed to the GATT 1994. It appears to us, therefore, that any undertakings made under the ITA only become binding WTO obligations

[243] United States' third-party response to Panel question No. 1, para. 3.
[244] United States' third-party response to Panel question No. 5, para. 9.
[245] European Union's first written submission, paras. 1-4, 86-87, 106-107, 117-118, 131-132, 153-154, 162-163, and 173-175. See also European Union's second written submission, para. 78; and panel request, p. 3.
[246] Indeed, to the extent that such a claim was brought, we struggle to see how it would fall within our terms of reference, read in light of the European Union's panel request in this dispute.
[247] See section 7.2 above.

under Articles II:1(a) and (b) of the GATT 1994 if they are incorporated into Members' WTO Schedules. Once incorporated into a Member's WTO Schedule, such concession shall be treated no differently to any other concession contained in that Schedule. Consequently, it is the WTO Schedule of each ITA participant that sets forth those legal obligations within the broader WTO legal structure – not the ITA.

7.42. In this respect, we observe that the ITA does not constitute a covered agreement within the meaning of the WTO Agreement and the DSU. The DSU indicates that its rules and procedures apply to disputes brought pursuant to the dispute settlement provisions of the agreements listed in Appendix 1 of the DSU and concerning Members' rights and obligations under provisions of the WTO Agreement.[248] The ITA is not listed in Appendix 1 of the DSU, nor is the ITA listed in Annexes 1 to 4 of the WTO Agreement. Thus, in contrast to India's WTO Schedule[249], the ITA is not a "covered agreement" within the meaning of the WTO Agreement and the DSU.[250]

7.43. We recognize that, in India's view, the ITA is the relevant instrument imposing India's legal obligations in this dispute. We also recognize that the signing of the ITA forms part of the factual and historical background to this dispute. That the ITA may have *induced* India, as a factual matter, to undertake certain WTO tariff commitments does not mean that, as a legal matter, the ITA sets forth India's WTO legal obligations at issue in this dispute. Furthermore, having reviewed India's submissions, we see no argument that explains how the ITA can be read into Articles II:1(a) and (b) as the "source" of a Member's legal obligations under those provisions. To the extent that India's arguments related to the ITA focus on its relevance for purposes of interpreting the obligations set forth in India's WTO Schedule, we address those arguments below.[251] We note India's view that the European Union refers to the ITA as the relevant source of law in this dispute.[252] As explained above, however, we disagree with that understanding of the European Union's arguments and claims.

7.44. As a final point of note with respect to this issue, we observe India's argument that "the European Union asserts that a comparison with the ITA[] is not relevant because the ITA[] is not a 'covered agreement' within the meaning of Article 1.1 of the DSU".[253] According to India, "by that token, India's Schedule in WT/Let/886 (i.e., its Schedule based on the HS2002) which is no longer

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

[249] See para. 7.9 above.

[250] We note India's argument that "at the very least, the contents of Attachment A and Attachment B of the ITA[] were incorporated in WT/LET/181 dated July 2, 1997 which is a covered agreement within the meaning of Article 1 of the [DSU]". (India's response to Panel question No. 2, para. 14). We understand that document WT/Let/181 contained certain changes to India's WTO Schedule that were certified on 2 October 1997. For the reasons already explained above, we understand that India's WTO Schedule is indeed a covered agreement. That does not make the ITA a covered agreement. We also note India's argument that if the ITA is not a covered agreement, then "India's Schedule in WT/Let/886 (i.e. its Schedule based on the HS2002) which is no longer in currency can equally not be considered a covered agreement." (India's comments on the European Union's response to Panel question No. 89, para. 2). We address this argument in paras. 7.44-7.45 below.

[251] See section 7.3.2.3 below.

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

> India reiterates that the EU fails to clearly articulate the precise source of India's commitments under the contested sub-headings. For instance, as also noted previously, India notes that the EU does not identify the precise commitments of the ITA[], which would cover the products at issue. Indeed, the EU's difficulty in articulating the source of India's commitments under the contested sub-headings is apparent in their submissions which (while principally basing themselves on the 2007 Schedule) attempt to link the present dispute to India's commitments under the ITA[] without identifying the basis of such linkage. For instance, the EU argues that HS1996 sub-headings 8471.80, 8473.30, ex8504.40, 8517.22, 8517.30, 8517.50, 8517.80, 8517.90, ex8518.30, ex8525.10, 8525.20, ex8529.90 and ex8544.41 cover "*the products at issue in this dispute.*" However, the EU has failed to demonstrate the relevance of these sub-headings in the dispute or how the products at issue are covered by the aforementioned sub-headings. India maintains that the burden of proof is on the EU to substantiate its claim and to prima facie demonstrate that the products at issue were covered by the ITA[].

(India's response to Panel question No 5, paras. 21-22 (emphasis original))

[253] India's comments on the European Union's response to Panel question No. 89(b), para. 2.

in currency can equally not be considered a covered agreement".[254] India considers that "there is no legal basis to term a schedule (WT/Let/886), which has been replaced with a subsequent schedule (WT/Let/1072), as a covered agreement".[255]

7.45. We have examined the relevant documents surrounding each transposition of India's WTO Schedule and we understand that following a transposition exercise it is not the case that a "new" Schedule replaces an "old" Schedule. Rather, the documents that are agreed upon by Members, adopted as binding, and certified as such by the Director-General, contain certain *changes* to the relevant Schedules.[256] Indeed, the process through which these changes are certified is under the 1980 Decision.[257] That Decision does not set forth procedures for *replacing* a Member's Schedule, but rather sets forth procedures for "modification" and "rectification", and the adoption of "changes".[258] Thus, the files that are certified following each transposition process do not set forth *all* of India's tariff concessions, but rather only those tariff items that have changed as a result of the transposition exercise.[259] India is therefore incorrect when it suggests that its HS2002 Schedule was "replaced with" its HS2007 Schedule. To the contrary, India only has one WTO Schedule concerning trade in goods, which is indeed a covered agreement, and which has been changed several times over the years through various recourses to the 1980 Decision.[260] The fact that India's WTO Schedule is a covered agreement does not imply *ipso facto* that the ITA is a covered agreement. India's WTO Schedule is explicitly recognized as an integral part of the covered agreements.[261] The ITA, which is a distinct legal instrument from India's WTO Schedule, is not.

7.46. To conclude, we understand that the European Union's claims in this dispute are exclusively under Articles II:1(a) and (b) of the GATT 1994. Having reviewed the ITA, we understand that the undertakings contained therein were only operationalized within the WTO legal system through their incorporation into Members' Schedules. We also note that the ITA is not a covered agreement within the meaning of the WTO Agreement and the DSU. While we recognize that the ITA may have been relevant to India's decision to undertake certain WTO tariff commitments, we consider that those WTO legal obligations are distinct from the ITA. Moreover, it is those WTO tariff commitments, set forth in India's WTO Schedule, that are the source of India's legal obligations for the purposes of applying Articles II:1(a) and (b). In short, we consider that India's legal obligations, for purposes of assessing its compliance with Articles II:1(a) and (b), are the tariff commitments set forth in India's WTO Schedule.[262]

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

7.3.2.3.1 Main arguments of the parties

7.47. India considers that the ITA "represents a static source of commitments on ICT products".[263] According to India, those commitments "were negotiated and agreed to in the context of HS1996, and were then incorporated into the schedules of concessions of member countries – including India."[264] India considers that "[t]hose static commitments did not become elastic by virtue of their

[254] India's comments on the European Union's response to Panel question No. 89(b), para. 2.
[255] India's comments on the European Union's response to Panel question No. 89(b), para. 2.
[256] See WT/Let/181; WT/Let/886; and WT/Let/1072.
[257] See WT/Let/181; WT/Let/886; and WT/Let/1072.
[258] 1980 Decision, paras. 1-3 and 5.
[259] See WT/Let/181; WT/Let/886; and WT/Let/1072.
[260] In this Report, we consider it useful to use the nomenclature of "India's WTO HS1996 Schedule", "India's WTO HS2002 Schedule", and "India's WTO HS2007 Schedule" to refer to India's Schedule as it existed following each transposition to that iteration of the HS nomenclature. References in this Report to India's WTO Schedule, without identifying any version of the HS nomenclature, refer to India's WTO Schedule as most recently transposed (i.e. based on the HS2007). This nomenclature, however, should not be read to imply that India has been bound by three distinct WTO Schedules.
[261] See para. 7.9 above.
[262] Regarding India's argument that the European Union bears the burden of demonstrating that certain products fell within the scope of the ITA, since we do not consider that the ITA constitutes a source of India's legal obligations in this dispute, we also do not consider that, in order to prevail in its claims under Articles II:1(a) and (b), the European Union must demonstrate that the products at issue fall within the scope of the ITA. Rather, the European Union must demonstrate that the products at issue fall within the scope of relevant tariff commitments set forth in India's WTO Schedule.
[263] India's opening statement at the second meeting of the Panel, p. 5.
[264] India's opening statement at the second meeting of the Panel, p. 5.

incorporation into concession schedules."[265] In India's view, the ITA "was a sui-generis instrument with commitments over a limited scope of products and required *those* commitments to reflect in the relevant tariff sub-headings of the schedule of concessions of parties."[266] India considers that, "[u]nder Article 31(4) of the Vienna Convention, those sub-headings would require to be interpreted in accordance with the special meaning the parties intended them to have – by engaging with HS1996 and its explanatory notes, read in the context of ITA[]."[267] As a general matter, India considers that the ITA constitutes "interpretative context to India's schedule of concessions".[268]

7.48. In support of its arguments regarding the static nature of its commitments on these ICT products, India refers, as an example, to "Transmission Apparatus for Radio-Telephony or Radio-Telegraphy" (which fell under HS1996 heading 8525, and was covered under Attachment A of ITA). India submits that the product scope of its commitments with respect to such products "was limited by the then HS Explanatory Notes to devices capable of transmitting (1) speech, (2) messages, or (3) still pictures".[269] India notes that this "limitation [was] also reflected in HS2002".[270] India submits that, "[c]learly, that static product definition is a closed and limited one which could not have covered cellular phones capable of transmitting videos, base stations, and LTE equipment."[271]

7.49. Also in support of its arguments regarding the static nature of its commitments under the ITA, India refers to the WTO Schedules of concessions of various participants in the ITA who were later also participants in the Ministerial Declaration on the Expansion of Trade in Information Technology Products (ITA Expansion).[272] India submits that, "[a]n analysis of the Schedules of Concessions of 36 such participants to the ITA[] reveal that they did not grant any concessions to certain products at issue until they modified their concessions in keeping with the ITA Expansion."[273] According to India, "the very purpose of the ITA Expansion was to extend concessions to a wider range of products accounting for technological progress and market evolution which could not be covered within the ITA[]", and "[t]he fact that the ITA Expansion covers almost all products at issue in the present case - explicitly those under sub-headings 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[]".[274] India also refers to what it considers constitutes "subsequent practice" in support of its interpretation, namely: "the HS2007 schedules of some WTO Members reflect NIL duty for certain contested tariff lines, whereas these Members continue to impose duties on such tariff lines"; "some ITA[] Participants have not committed to a NIL duty for certain contested tariff lines"; and "certain ITA[] participants who are not participants to the ITA Expansion continue to impose duties on products covered under certain contested tariff lines."[275]

7.50. The European Union considers that the ITA could be considered to be "context" within the meaning of Article 31(2)(b) of the Vienna Convention, but argues that the ITA is not relevant to the interpretation of the tariff items of India's WTO Schedule at issue because "the content of those tariff lines is clear".[276] The European Union also considers that the content of the ITA is not "limited to such products or technical features of products which existed at that signing" and notes that the ITA "uses broad language and generic terms".[277] In the European Union's view, "the products at issue in the present case were all covered by the ITA[]".[278] Regarding the ITA Expansion, the European Union considers that "nothing in the text of the ITA-Expansion indicates that the ITA-Expansion

[265] India's opening statement at the second meeting of the Panel, p. 5.
[266] India's opening statement at the second meeting of the Panel, p. 5. (emphasis original)
[267] India's opening statement at the second meeting of the Panel, p. 5.
[268] India's second written submission, para. 35.
[269] India's opening statement at the second meeting of the Panel, p. 5.
[270] India's opening statement at the second meeting of the Panel, p. 5.
[271] India's opening statement at the second meeting of the Panel, p. 5.
[272] Under the ITA Expansion, the participants agreed to "bind and eliminate customs duties and other duties and charges of any kind", within the meaning of Article II:1(b) of the GATT 1994, with respect to certain specified products. (Ministerial Declaration on the Expansion of Trade in Information Technology Products, WT/MIN(15)/25, Annex, para. 1; WT/L/956, para. 1). We understand that the participants in the ITA Expansion do not include all participants in the ITA. In particular, India is not a participant in the ITA Expansion. (See India's opening statement at the first meeting of the Panel, para. 5).
[273] India's opening statement at the second meeting of the Panel, p. 6.
[274] India's opening statement at the second meeting of the Panel, p. 6.
[275] India's opening statement at the second meeting of the Panel, p. 6.
[276] European Union's second written submission, paras. 54-55.
[277] European Union's opening statement at the first meeting of the Panel, para. 77.
[278] European Union's opening statement at the second meeting of the Panel, para. 21.

covers only such products which were not covered by the ITA[] and that therefore the product scope of these two documents is mutually exclusive".[279]

7.51. The European Union further considers that "neither the ITA-Expansion nor the practices of participants to the ITA-Expansion can be regarded as 'subsequent practice' within the meaning of Article 31.3(b)" of the Vienna Convention.[280] Regarding India's assertion that the ITA Expansion could be a supplementary means of interpretation, within the meaning of Article 32 of the Vienna Convention, the European Union submits that the meaning of the ITA is neither ambiguous nor obscure, such that the conditions for recourse to supplementary means of interpretation are not fulfilled in the present case.[281] Moreover, regarding the alleged "subsequent practice" identified by India, the European Union considers that the official statements quoted by India "are general political statements, which do not establish a specific interpretation of the ITA[]".[282] The European Union also considers that the "applied tariff schedules of other WTO Members do not purport to interpret the ITA[]", and "even if those Members imposed tariff duties on products which are subject to this claim, the practice of such Members and potential incompliance with their commitments under GATT Article II does not provide a relief for India from its obligation to respect the commitments in its certified WTO Schedule".[283]

7.3.2.3.2 Main arguments of the third parties

7.52. Brazil states that "the task before the Panel concerns the interpretation of India's Schedule in line with the objective of ensuring the predictability and security of the reciprocal and mutually agreed concessions that are the cornerstone of the WTO architecture."[284] Brazil further considers that "technological evolution cannot lead to unilateral reclassifications by importing Members in ways that may circumvent the tariff commitments they negotiated and registered in their WTO Schedules".[285] Brazil argues that, "[o]therwise, the security and predictability of the tariff concessions in the Schedules will be seriously undermined".[286]

7.53. Canada considers that "the scope of coverage of a concession is determined by an examination of the meaning of the terms contained in the commitments set out in a Member's Schedule".[287] Canada considers that the ITA "may be considered as relevant context for the purposes of interpreting the meaning of these terms".[288] Canada further argues that "tariff concessions under the Uruguay Round and ITA[] are not static and do not encompass only those products in existence at that time."[289] Canada considers that "[t]he HS is updated to account for new products and Members' obligations and tariff bindings will either apply to these new products to the extent that they fall within existing tariff lines or will not apply to such new products should a Member exclude them from coverage".[290] Canada argues that "the Panel's task in this case is to determine whether India has made tariff commitments with respect to the products at issue, and if so, whether duties have been imposed on the products at issue in this case in excess of the tariff bindings set out in India's 2007 Schedule."[291] Canada considers that an interpretation that finds that a Member's WTO tariff commitments "are static and unable to capture technological advancement would undermine the WTO system of tariff concessions by allowing Members to simply disregard tariff commitments on the basis that a product incorporates, or has become, a new technology".[292]

7.54. Japan submits that "the concessions at issue are those included in the currently certified schedule of India" and the ITA "does not appear to be legally relevant by virtue of either Article 31 or Article 32 of the Vienna Convention with regard to the interpretation of India's concessions as

[279] European Union's second written submission, para. 61.
[280] European Union's second written submission, para. 62.
[281] European Union's opening statement at the second meeting of the Panel, para. 39.
[282] European Union's opening statement at the second meeting of the Panel, para. 33 (referring to India's first written submission, fn 157 to para. 104).
[283] European Union's opening statement at the second meeting of the Panel, para. 36.
[284] Brazil's third-party response to Panel question No. 2, para. 10.
[285] Brazil's third-party response to Panel question No. 6, para. 15.
[286] Brazil's third-party response to Panel question No. 6, para. 15.
[287] Canada's third-party response to Panel question No. 2, para. 4.
[288] Canada's third-party response to Panel question No. 2, para. 4.
[289] Canada's third-party response to Panel question No. 6, para. 10.
[290] Canada's third-party response to Panel question No. 6, para. 10.
[291] Canada's third-party response to Panel question No. 6, para. 13.
[292] Canada's third-party response to Panel question No. 6, para. 14.

included in its currently certified Schedule".[293] Japan considers that "[n]either technological development nor product development modify the scope of a tariff concession."[294] Japan also considers that "the ITA Expansion qualifies as neither context, nor a supplementary means of interpretation, and is therefore not relevant for the purposes of interpreting the concessions at issue".[295] Japan asserts that "India's argument based on the ITA[] is irrelevant, and thus, the Panel's analysis should focus on the text of India's currently certified tariff concessions".[296]

7.55. Korea considers that the ITA "may be used as 'context' to interpret India's tariff concessions at issue in this dispute".[297] Korea submits that "as a general matter, modifications to the scope of a Member's rights and obligations under certain schedule of concessions can only be made by actually changing the schedule itself."[298] Korea clarifies, however, that "this is not to say that the development of new technologies and new products cannot be incorporated into the previously established scope of tariff concessions in a Member's WTO Schedule as a matter of *interpretation*."[299] Korea also notes that "the mere existence of the products in the scope of the ITA Expansion does not lead to the conclusion that these products were not accounted for in the ITA[]."[300]

7.56. Norway argues that "the obvious starting point … must be the commitments made in the schedules".[301] Furthermore, in Norway's view, "an interpretation which implies that a product segment could automatically be released from binding commitments upon technological advancement would seriously undermine the system".[302] Norway therefore "strongly disagrees with India's perceived assertion that including technological advancement within a product segment falling within the tariff line listed in Attachment A would involve expansion of 'new' products".[303]

7.57. Chinese Taipei argues that "the ITA[] and India's Schedule of Concessions are two separate distinct documents" and that "[t]his dispute concerns the *implementation* of India's concessions as provided in its Schedule".[304] In Chinese Taipei's view, "if tariff concessions were not subject to HS transpositions, they would become static", which would "render tariff concessions meaningless over time, as the relevant products may no longer exist or become obsolete".[305] Chinese Taipei considers that "Members would be forced to conduct constant renegotiations for concessions on 'new' products, and the scope of tariff concessions would be uncertain", which "is not how tariff concessions are meant to operate so as to achieve security and predictability".[306]

7.58. Türkiye submits that "[a]lthough a large number of high-tech products were covered [by the ITA, it] envisages the incorporation of additional products in parallel to technological developments provided that the parties to the ITA negotiate and agree by consensus."[307] Türkiye further considers that the products at issue in this dispute are not covered by the ITA, and that as "[a]ny technologically newly developed product cannot automatically be considered as covered by ITA[], … the duty-free treatment cannot be extended to all variants of the products."[308] Türkiye considers that the Panel's "interpretation of concessions in ITA[] should not disrupt the balance which is negotiated by the parties".[309] Türkiye shares India's view that the product scope of the ITA "has remained the same since 1997", and is "defined in accordance with the product coverage envisaged in HS1996 at that point in time".[310] Türkiye also shares India's view that new "'products which are a result of technological progress are not covered under the ITA[]'".[311] Türkiye considers that the

[293] Japan's third-party response to Panel question No. 2, paras. 11 and 16.
[294] Japan's third-party response to Panel question No. 6, para. 22.
[295] Japan's third-party response to Panel question No. 9, para. 32.
[296] Japan's third-party response to Panel question No. 15, para. 6.
[297] Korea's third-party response to Panel question No. 3, p. 1.
[298] Korea's third-party response to Panel question No. 7, p. 2.
[299] Korea's third-party response to Panel question No. 7, p. 2. (emphasis original)
[300] Korea's third-party response to Panel question No. 10, p. 3.
[301] Norway's third-party submission, para. 7.
[302] Norway's third-party submission, para. 8.
[303] Norway's third-party submission, para. 9.
[304] Chinese Taipei's third-party response to Panel question No. 15, para. 1. (emphasis original)
[305] Chinese Taipei's third-party response to Panel question No. 15, para. 2.
[306] Chinese Taipei's third-party response to Panel question No. 15, para. 2.
[307] Türkiye's third-party response to Panel question No. 2, p. 2.
[308] Türkiye's third-party response to Panel question No. 2, p. 3.
[309] Türkiye's third-party response to Panel question No. 3, p. 3.
[310] Türkiye's third-party response to Panel question Nos. 4-5, p. 4.
[311] Türkiye's third-party response to Panel question Nos. 8-10, p. 8 (quoting India's first written submission, para. 28).

complainant seeks "an overly broad or inclusive construction of ITA[] commitments, damaging the balance established during the negotiation process of ITA[]."[312] Türkiye submits that "India has no obligation to extend concessions to products which were not included in the scope of an HS heading or sub-heading at the time ITA[] concessions were negotiated".[313]

7.59. The United States considers that "the Panel may consider the ITA[] as relevant context within the meaning of Article 31 of the Vienna Convention".[314] The United States also considers that "[t]he 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".[315] The United States argues that "India's position would undermine the fundamental obligations of Article II:1 of the GATT 1994 by allowing Members to disregard tariff commitments on the basis that a product incorporates or constitutes a perceived new technology".[316] In the United States' view, "[t]he ITA Expansion is not relevant to the Panel's interpretation of India's concessions under the customary rules of interpretation reflected in the VCLT."[317] The United States also argues that "India is mistaken that the coverage of a product under the ITA Expansion necessarily excludes the product from the scope of the ITA[]".[318]

7.3.2.3.3 Panel's assessment

7.60. We understand that, in India's view, its commitments under the ITA are "static" and, therefore, India considers that its WTO tariff commitments exclude new products resulting from technological innovations that occurred after the ITA was concluded.[319]

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

7.62. Having said that, we note India's argument that its "static commitments" in the ITA "did not become elastic by virtue of their incorporation into concession schedules".[320] We also note India's argument that certain tariff items of its WTO Schedule have a "special meaning" intended by the parties, pursuant to Article 31(4) of the Vienna Convention. We therefore consider it relevant to examine whether, as a matter of legal interpretation, the ITA limits or modifies the scope of India's WTO tariff commitments as set forth in its WTO Schedule (notwithstanding that it does not set forth those tariff commitments).

7.63. We start by recalling that Members' WTO Schedules, as an integral part of the GATT 1994 and the WTO Agreement, are to be interpreted in accordance with customary rules of interpretation of public international law, pursuant to Article 3.2 of the DSU.[321] We also understand that a tariff concession in a Member's WTO Schedule applies to all products, falling under the terms of the concession, as interpreted based on its ordinary meaning when read in context, and in light of the object and purpose of the agreement. This includes new products that come into existence as a result of technological innovation, and which did not exist at the time that the concession in the Schedule was agreed upon. In this respect, we agree with prior interpretations of the scope of Members' obligations under their WTO Schedules.[322]

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[312] Türkiye's third-party response to Panel question Nos. 8-10, p. 9.
[313] Türkiye's third-party response to Panel question No. 15, p. 2.
[314] United States' third-party response to Panel question No. 3, para. 4.
[315] United States' third-party response to Panel question No. 6, para. 13.
[316] United States' third-party response to Panel question No. 6, para. 14.
[317] United States' third-party response to Panel question No. 8, para. 18.
[318] United States' third-party response to Panel question No. 9, para. 21.
[319] In India's view, the ITA "did not include the range of additional products that could be developed in the future." (India's response to Panel question No. 1, para. 5).
[320] India's opening statement at the second meeting of the Panel, p. 5.
[321] See para. 7.9 above. See also Appellate Body Reports, *EC – Computer Equipment*, para. 84; *EC – Export Subsidies on Sugar*, para. 167; and Panel Reports, *EC – Chicken Cuts*, para. 7.87.
[322] In *China – Publications and Audiovisual Products*, China argued that the principle of progressive liberalization contained in Article XIX of the GATS "does not allow for the expansion of the scope of the

7.64. We further recall that, when interpreting Members' Schedules in accordance with customary rules of treaty interpretation, the HS has been found to constitute relevant "context" pursuant to Article 31(1) of the Vienna Convention.[323] However, the relevance of the HS depends on the specific interpretative question at issue (including whether the relevant concessions were based on the HS).[324] It is also uncontested by the parties that, pursuant to the rules of interpretation of the HS, any product at any moment in time must fall within the product scope of a tariff item in the HS nomenclature.[325] This necessarily includes new products that come into existence, for instance as a consequence of technological innovations, subsequent to a given HS nomenclature having been concluded. We agree with the parties on this point.[326]

7.65. Thus, for those Members whose WTO Schedules are based on the HS, such as India[327], where a product is classified under a particular HS heading or subheading of a Member's Schedule, that product would also fall within the scope of a WTO Member's obligations unless the Schedule specifies otherwise. This includes new products that only come into existence following the binding of a Member's commitments with respect to the relevant heading or subheading.

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

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commitments of a WTO Member by interpreting the terms used in the Schedule based on the meaning of those terms at the time of interpretation." (Appellate Body Report, *China – Publications and Audiovisual Products*, para. 390). The Appellate Body stated that "the terms used in China's GATS Schedule ('sound recording' and 'distribution') are sufficiently generic that what they apply to may change over time." (Ibid. para. 396). According to the Appellate Body, "GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995." (Ibid.). The Appellate Body elaborated that:

> [I]nterpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments, which are undertaken through successive rounds of negotiations, and which must be interpreted in accordance with customary rules of interpretation of public international law.

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

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

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

[325] India's response to Panel question No. 10, para. 31 ("[t]he General Rules of Interpretation, annexed to the [HS Convention], allow for **all** products to be classified under one or the other heading of any version of the HS, and therefore, also the Schedule of Concessions of any given country (if unbound tariff lines are also included in the Schedule of Concessions)" (emphasis original)); European Union's response to Panel question No. 101 ("[t]he European Union considers that the HS nomenclature is exhaustive in the sense that every good must find its place in the HS").

[326] We observe that the General Rules for the Interpretation of the Harmonized System, in addition to setting out detailed rules for classification, set forth a residual interpretative rule that goods which cannot otherwise be classified "shall be classified under the heading appropriate to the goods to which they are most akin". (See General Rules for the Interpretation of the Harmonized System, (Exhibit EU-54), para. 4).

[327] See para. 2.16 above.

7.67. In our view, India's argument rests on two premises: (i) the product scope of Attachment A of the ITA is static, such that it "does not include technological advancements"[328]; and (ii) the ITA similarly limits the product scope of India's WTO Schedule.[329] We note that it would only be necessary to interpret the ITA for purposes of assessing India's first premise if India is correct regarding the second premise. Given that the ITA is not a covered agreement, and does not set forth the tariff concessions at issue in this dispute, we proceed on an *arguendo* basis to assess whether, assuming that the product scope of the ITA is indeed static, the ITA limits the product scope of India's WTO Schedule.

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

7.69. In our view, India's interpretation is at odds with the multilateral principles of reciprocity and mutually advantageous arrangements underpinning the multilateral trading system.[330] To interpret the product scope of ITA participants' WTO Schedules differently from the Schedules of Members that are *not* participants in the ITA, when the product scope of those commitments is on its face identical, would also substantially undermine the security and predictability of Members' tariff commitments.

7.70. We note that India has not pointed to any provision in the ITA indicating that the ITA excluded from the scope of participants' WTO tariff commitments new products resulting from technological developments, if such new products were to fall within the scope of the relevant tariff commitments in Members' Schedules as interpreted pursuant to the general rules of treaty interpretation. We are aware of India's argument that the ITA specifically requires ITA participants to "meet periodically" and modify the product scope of the ITA "in light of technological developments".[331] In our view, the requirement that parties should meet periodically to review the product scope of the ITA suggests that the ITA participants anticipated expanding the scope of the ITA to include additional tariff items that were not initially included. We fail to see how this requirement could imply that products coming into existence after the conclusion of the ITA and otherwise falling within the scope of Members' tariff commitments as set forth in their WTO Schedules would be excluded from the coverage of Members' existing WTO commitments.

7.71. We also note India's argument that its WTO Schedule should be given a "special meaning", pursuant to Article 31(4) of the Vienna Convention, because the participants to the ITA "intended to limit the scope of Attachment A to the HS1996 Nomenclature".[332] Article 31 of the Vienna Convention

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

[329] India's opening statement at the second meeting of the Panel, p. 5.

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

[331] India's first written submission, para. 101 (quoting ITA, Annex: Modalities and Product Coverage, para. 3).

[332] India's second written submission, para. 45. Aspects of India's arguments in this regard frame its invocation of Article 31(4) as concerning the special meaning that the participants in the ITA allegedly intended to attribute to the ITA. For the reasons explained above, we do not consider the ITA to set forth India's legal obligations, and, hence, we do not need to assess whether the participants in the ITA intended to ascribe a special meaning to certain terms in that agreement. Nevertheless, we understand that India's references to Article 31(4) may also be read as advocating an interpretation of India's WTO Schedule whereby the ITA limits the scope of India's WTO tariff commitments. We recall India's argument that the "static commitments" contained in the ITA "did not become elastic by virtue of their incorporation into concession schedules, and that the ITA "was a sui-generis instrument with commitments over a limited scope of products and required *those* commitments to reflect in the relevant tariff sub-headings of the schedule of concessions of parties." (India's opening statement at the second meeting of the Panel, p. 5 (emphasis original)). It would seem to follow that if India considers that the parties to the ITA intended for a special meaning to be ascribed to the terms of the ITA, pursuant to Article 31(4) of the Vienna Convention, and India considers that the terms of the ITA limits the terms of its WTO Schedule, then, in India's view, the terms of its WTO Schedule are also subject to a

sets forth the "General rule of interpretation" of international treaties. Paragraph 4 of Article 31 indicates that:

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

7.72. In our view, the reference in this provision to "the parties" includes *all* parties to a treaty, and not *some* of those parties.[333] We note that India's WTO Schedule forms part of the GATT 1994 and the WTO Agreement. The "parties" to the GATT 1994 and the WTO Agreement include all Members of the WTO. Moreover, India's WTO Schedule governs its tariff obligations with respect to all imports from *all* WTO Members, and not solely the participants in the ITA. We understand that the ITA was not signed by all WTO Members. Since the ITA was agreed to by only some of the Members of the WTO, we do not see how the ITA could signal the intentions of the parties to the WTO Agreement with respect to any of its treaty terms (including the terms set forth in India's WTO Schedule). We therefore consider that the present circumstances do not satisfy the requirements of Article 31(4), since the ITA does not express the intentions of the parties to the WTO Agreement.

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

7.74. India argues that Members' intentions to maintain a static product scope for the ITA is demonstrated by the content of the ITA itself, various subsequent practice of the participants in the ITA, and the product scope of the ITA Expansion. Regarding the content of the ITA itself, India argues that "[t]here is no language [in the ITA] to suggest that all ICT products which may exist at the time of signing or in the future will be included in the product scope of the ITA[]".[334] India also refers to paragraph 3 of the Annex to the ITA, which states that "[p]articipants shall meet periodically under the auspices of the Council on Trade in Goods to review the product coverage specified in the Attachments, with a view to agreeing, by consensus, whether in the light of technological developments, experience in applying tariff concessions, or changes to HS nomenclature, the Attachments should be modified to include additional products."[335] Regarding the subsequent practice of the participants in the ITA, India argues that "various statements and pronouncements made by multiple Participants as 'subsequent practice' to the ITA[] … establish that the Participants agree that the product scope of the ITA[] is limited and not automatically updated".[336] Regarding the ITA Expansion, India argues that the scopes of the ITA and the ITA Expansion are mutually exclusive and therefore any products covered by the ITA Expansion fall outside the scope of the ITA.[337]

7.75. We understand that India's arguments in this respect pertain to the respective scope and content of the ITA and the ITA Expansion. Thus, India relies on two agreements concluded by *some* Members to interpret the rights and obligations of *all* Members. As explained above, the interpretation advocated by India would essentially read identical tariff commitments of various WTO Members differently, depending on whether they were participants in the ITA and the

special meaning intended by the parties, pursuant to Article 31(4) of the Vienna Convention. For the sake of comprehensiveness, we address this issue hereunder.

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

[334] India's first written submission, para. 99.

[335] India's first written submission, para. 101 (quoting ITA, Annex, para. 3).

[336] India's second written submission, para. 49.

[337] See e.g. India's first written submission, paras. 140-148; opening statement at the second meeting of the Panel, p. 6; and response to Panel question No. 62, para. 20.

ITA Expansion. In our view, the scope and content of the ITA and ITA Expansion cannot modify the scope and content of India's tariff commitments as set forth in its WTO Schedule.

7.76. Similarly, the statements and pronouncements referred to by India as relevant "subsequent practice" relate to the ITA, and not to the content of India's WTO Schedule. If we were to take into consideration the actions of certain participants in the ITA for purposes of interpreting India's WTO Schedule, it would conflate these two agreements in a manner that is legally incorrect. ITA participants may debate the scope and content of their obligations under the ITA. However, even assuming that those debates constitute "subsequent practice" to the ITA – an issue on which we refrain from taking any position – they do not concern India's WTO Schedule and necessarily exclude a considerable portion of the WTO Membership who are *not* participants in the ITA. As stated above, we do not consider that a group of WTO Members can define treaty terms for all WTO Members.

7.77. Having said that, given the importance that India appears to attribute to the product scope of the ITA Expansion, we wish to briefly note there is no indication in the ITA Expansion that the product scope of that agreement does not overlap with the ITA. We understand, in fact, that the negotiating history of the ITA Expansion suggests that there is indeed such an overlap of products.[338] We do not consider it necessary, for purposes of resolving this dispute, to enter into the question of which products are covered by the ITA as compared to the ITA Expansion. We simply note that it does not necessarily follow that the fact that a product is covered by the ITA Expansion implies that such product did not already fall within the scope of the ITA itself (or, more importantly, the concessions set forth in relevant Members' WTO Schedules).

7.78. Finally, we note India's argument that the ITA "qualifies as context to Schedule[s] of Concessions under Article 31(2)(b) of the Vienna Convention and is therefore relevant for interpreting the tariff concessions at issue in this dispute".[339] In our view, however, India is not relying on the ITA as context to interpret its WTO Schedule but rather is seeking to replace the content of that WTO Schedule with the content of the ITA. The application of Articles II:1(a) and (b) of the GATT 1994 entails the application of Members' obligations as contained in their WTO Schedules, not the ITA. Those legal instruments are not the same and, for the reasons articulated above, we do not consider that the existence of the ITA replaces or modifies the content of India's WTO Schedule, or calls for a specific interpretative approach to certain tariff commitments contained in that Schedule. We also recall that the relevance of contextual aids to interpreting Members' Schedules can vary depending on the interpretative question at issue.[340]

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

[338] Document G/IT/SPEC/15 contains a compilation of "Proposed Additions to Product Coverage: Compilation of Participants' Submissions", and notes that for certain proposed tariff items to be included in the ITA Expansion, "part of the tariff line is already covered in the ITA". (Proposed Additions to Product Coverage: Compilation of Participants' Submissions, G/IT/SPEC/15, p. 1). We note India's argument that this document "was issued during the negotiations under Paragraph 3 of the Annex to the ITA[]", that "these negotiations ultimately failed to reach a consensus" and were "relaunched in the year 2012". (India's opening statement at the first meeting of the Panel, para. 39). Given that India itself indicates that "the negotiations were relaunched", we do not see why India considers that this document "is not a part of the negotiating history of ITA Expansion". (Ibid.).

[339] India's response to Panel question No. 4, para. 18. We note the finding of the panels in *EC – IT Products* that the ITA "may serve as context within the meaning of Article 31(2)(b) of the Vienna Convention for the purpose of interpreting tariff concessions". (Panel Reports, *EC – IT Products*, para. 7.383). The panels in that dispute considered that the ITA represented an instrument "made by one or more parties in connection with the conclusion of the treaty". (Ibid. para. 7.384).

[340] See para. 7.64 above.

7.80. For the foregoing reasons, we consider it appropriate to assess the scope of India's WTO tariff commitments by looking at India's WTO Schedule. Where necessary, we will interpret the scope of that Schedule by applying the general rules of interpretation set forth in Article 31 of the Vienna Convention. For the reasons articulated above, we do not consider it relevant to examine the product scope of the ITA as "context" to interpret India's WTO Schedule. In addition, we do not consider that Members' subsequent practice with respect to the ITA (such as the scope of the ITA Expansion) can modify the scope of India's WTO Schedule.[341]

7.3.2.4 Conclusion

7.81. We have addressed above India's contentions that the ITA is the source of India's legal obligations in this dispute. We disagree. We have also addressed above whether the ITA modifies or limits the scope of India's WTO tariff commitments set forth in its WTO Schedule. Without taking a position on whether the scope of India's concessions under the ITA is "static" in nature, we consider that the ITA cannot overwrite the tariff commitments set forth in India's WTO Schedule (which are *not* static in nature). We therefore proceed to apply Articles II:1(a) and (b) by comparing, on the one hand, the tariff treatment accorded by India to certain products, and, on the other hand, India's WTO tariff commitments as set forth in its WTO Schedule. Before doing so, however, we address India's arguments regarding Article 48 of the Vienna Convention and its rectification request under the 1980 Decision.[342]

7.3.3 Article 48 of the Vienna Convention

7.3.3.1 Introduction

7.82. As described in section 2.3 above, in 2006, in preparation for the transposition of Members' Schedules from the HS2002 to the HS2007, the General Council adopted a Decision on HS2007 Transposition Procedures. Pursuant to that Decision, developed country Members were to prepare their own transpositions from the HS2002 to the HS2007, and the WTO Secretariat was requested to "transpose the schedules of developing country Members, except for those who undertake to prepare their own transposition and submit a notification to this effect".[343] Since India did not indicate that it intended to undertake the transposition of its Schedule from the HS2002 to the HS2007, the WTO Secretariat prepared India's transposition and, on 8 November 2013, communicated to India via email the draft files for the HS2007 transposition of India's Schedule.[344] Following receipt of the draft transposition files prepared by the WTO Secretariat, India provided comments on the draft files.[345] The Secretariat then communicated a revised file to India for approval.[346] A multilateral review session was held in the Committee on Market Access on 23 April 2015, during which the draft files were approved by Members.[347] The draft modifications to the Schedule were circulated on 12 May 2015 and, since no objections were received within three months of circulation, on 12 August 2015 the changes to the Schedule were certified.[348]

7.83. India submits that, at the time of the transposition of its WTO Schedule to the HS2007, it had understood that the scope of its tariff concessions would not be expanded from the commitments it had undertaken under the ITA. However, in India's view, the transposition of its Schedule resulted

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

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

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

[344] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50).

[345] India did not provide comments or seek clarifications regarding the transposition of the tariff items at issue in this dispute. (Email from Market Access Intelligence Section, WTO, to India (12 February 2014), (Exhibit IND-51)).

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

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

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

in an expansion of its tariff commitments from the ITA. India contends that it "was not put on clear notice (via WTO communication or otherwise) as to the exact changes being effected due to the increased product complexity of the ITA product coverage via the contested sub-headings".[349] India argues that Article 48 of the Vienna Convention is an applicable rule of law which codifies the principle of customary international law whereby "freedom of consent [i]s an indispensable condition for treaty validity" such that "a State cannot have freely concluded a treaty if at the time of giving its consent it was under a misapprehension relating to the subject matter of the treaty".[350] India considers that "the core issue before the Panel is whether the products at issue are entitled for exemption from customs duty as a result of informed and free consent of India, or a result of technicalities invoked by" the complainant.[351] India further submits that, although Article 48 would ordinarily lead to the invalidation of the entire treaty, in these circumstances the contested tariff items are separable from the rest of the Schedule such that only the contested tariff items are invalid, in accordance with Article 44 of the Vienna Convention.[352] India submits that since the contested tariff items are invalid, they are "rendered unbound".[353]

7.84. The European Union agrees with India that Article 48 of the Vienna Convention constitutes customary international law that is applicable in WTO dispute settlement.[354] However, the European Union considers that the present circumstances fail to satisfy the substantive requirements of paragraphs 1 and 2 of Article 48. Specifically, the European Union argues that the alleged error does not relate to a "fact or situation" within the meaning of Article 48(1). The European Union further argues that, in any event, India cannot avail itself of Article 48(1) because India contributed by its own conduct to the error and the circumstances were such as to put India on notice of a possible error, within the meaning of Article 48(2).[355] The European Union also considers that India has not demonstrated that the requirements of Articles 44 and 45 of the Vienna Convention are satisfied in the present proceedings.[356]

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

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

7.86. A Commentary on the Vienna Convention states that Article 48 is "based on the premise that freedom of consent … is an indispensable condition for the validity of a treaty" and a "State cannot be considered to have freely concluded a treaty if at the time of giving its consent, it was under a misapprehension about the subject matter of the treaty".[357] The Commentary also notes that "reliance on error as a ground for invalidating consent may easily be abused", and consequently Article 48 seeks to "preserve the 'reality of consent' while at the same time protecting the stability of treaties and the good faith of the other parties by clearly defining the conditions under which an error is capable of invalidating consent".[358]

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[349] India's first written submission, fn 101 to para. 65.
[350] India's first written submission, para. 55.
[351] India's second written submission, para. 5.
[352] India's first written submission, paras. 86-90.
[353] India's first written submission, para. 91.
[354] European Union's response to Panel question No. 14, paras. 41-52.
[355] European Union's opening statement at the first meeting of the Panel, paras. 18-55; second written submission, paras. 3-17.
[356] European Union's response to Panel question No. 91, paras. 9-22.
[357] T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), p. 879.
[358] T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), pp. 879-880. (emphasis omitted)

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

7.88. We understand that the requirements of paragraphs 1 and 2 are cumulative – if any of the requirements of either paragraph are not satisfied, then a party's invocation of error under Article 48 fails. Paragraph 3, which distinguishes Article 48 from Article 79 of the Vienna Convention, is not relevant in the present dispute.[359]

7.89. A threshold issue concerns whether Article 48 of the Vienna Convention constitutes an applicable rule of law that can be invoked in WTO dispute settlement. While the parties to this dispute agree that Article 48 is applicable in WTO dispute settlement, the issue of applicability is contested by several of the third parties.[360] We note that one panel has previously found that customary international law regarding error in treaty formation is applicable in WTO dispute settlement and that Article 48 is a codification of that customary international law.[361] In our view, it would only be necessary for us to take a position on this issue if it is the case that the substantive requirements of Article 48 are indeed satisfied. If the substantive requirements of Article 48 are not satisfied, then it is a moot question whether Article 48 is an applicable rule of law in WTO dispute settlement. We therefore defer addressing the question of applicability until after we have examined the substantive requirements of Article 48. A similar approach has been taken by several previous panels.[362]

7.90. We also note the parties' disagreement concerning Article 45 of the Vienna Convention.[363] Article 45 concerns the loss of a right to invoke a ground for, *inter alia*, invalidating the operation of

[359] Having said that, we note, without further comment, that India's argument that the errors set forth in its Schedule are merely "formal errors", such that objections to its rectification request were unfounded (see section 7.3.4 below), is difficult to reconcile with India's reliance on Article 48 of the Vienna Convention, which explicitly indicates in Article 48(3) that errors relating only to the wording of a treaty do not affect the validity of the treaty and are addressed under Article 79 of the Vienna Convention, and not Article 48. In this respect, we tend to agree with the European Union that "the error invoked by India under Article 48 of the VCLT in these proceedings and the error invoked by India in support of its request for a rectification under the 1980 Procedures are legally distinct and manifestly incompatible with each other." (See European Union's response to Panel question No. 74, para. 100).

[360] See e.g. European Union's response to Panel question No. 14, paras. 41-55; India's response to Panel question No. 16, paras. 47-53; Chinese Taipei's third-party statement, paras. 11-13; Japan's third-party response to Panel question No. 11, para. 38 and third-party statement, paras. 15-20 and 25; Korea's third-party response to Panel question No. 17, paras. 7-9 and third-party submission, paras. 11-12; and United States' third-party submission, paras. 42-43.

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

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

[363] European Union's response to Panel question No. 91, paras. 17-22; India's first written submission, paras. 79-85.

a treaty.[364] The parties contest whether, even assuming that the requirements of Article 48 are satisfied, India has nonetheless lost its right to invoke Article 48 because, pursuant to Article 45(b), India "must by reason of its conduct be considered as having acquiesced in the validity of the treaty". As with the issue of Article 48's applicability, we consider that it would only be necessary to address the applicability and application of Article 45 if we were to conclude that the substantive requirements of Article 48 are satisfied and that Article 48 is applicable in WTO dispute settlement.

7.91. We further observe the parties' disagreement regarding Article 44 of the Vienna Convention.[365] We understand that under the structure and logic of the Vienna Convention, if the cumulative requirements of Articles 45 and 48 are applicable and satisfied, then, pursuant to the terms of Article 44(2) of the Vienna Convention, this would invalidate the relevant State's consent to be bound by the *entire treaty* – not specific *aspects* of that treaty.[366] In the present case, the alleged error concerns India's WTO Schedule, which is annexed to the GATT 1994, which in turn forms part of the broader package of covered agreements constituting, as a whole, the WTO Agreement.[367] India contends, however, that in accordance with the requirements of Article 44(3) of the Vienna Convention, because India invokes error "only with respect to the contested sub-headings … such contested sub-headings are separable from the sub-headings comprising the 2007 Schedule on the whole", and therefore only specific tariff items of India's WTO Schedule would need to be invalidated.[368] While this issue is contested by the parties, in accordance with our approach to issues arising under Article 45, we consider that it would only be necessary for us to address the applicability and application of Article 44(3) if we were to conclude in India's favour with respect to the substantive requirements of Article 48, and the applicability of that Article, as well as the applicability and application of Article 45.

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

7.3.3.2 Article 48(1)

7.3.3.2.1 Main arguments of the parties

7.93. India argues that certain tariff items in its WTO Schedule are invalid, and therefore unbound, because it "was in error as to the scope of the contested sub-heading commitments in the 2007 Schedule, at the time of its certification, as a result of the complex nature of the HS2002 to HS2007 transposition".[369] India submits that it "would not have agreed to the contested sub-heading commitments if it was clear that the HS2007 transposition was effectively expanding India's commitments beyond India's obligations under the ITA[]".[370] India argues that this is "because … it never intended on joining the [ITA Expansion] and made several pronouncements regarding the same".[371] India provides considerable argumentation seeking to demonstrate that its commitments

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

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

[365] See European Union's response to Panel question No. 91, paras. 9-16; India's first written submission, paras. 86-91.

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

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

[368] India's first written submission, para. 87. Article 44(3) states that:

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

[369] India's first written submission, para. 57.

[370] India's first written submission, para. 63.

[371] India's first written submission, para. 63 (referring to WTO, Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 1 November 2012,

as set forth in its certified WTO Schedule cover products that are not covered by the ITA.[372] India considers that its error "in relation to the material scope of the commitments under the contested sub-headings at the time the 2007 Schedule was certified" is a "fact or a situation" within the meaning of Article 48(1), because the word "situation" covers "the overall condition or circumstance prevailing at a particular time".[373] India notes that "a leading commentary … observes that 'Article 48 does not exclude mixed questions of fact and law and the line between one and the other may not always be easy to draw'".[374] India considers that "the fact that an error might have legal consequences (as indeed all contested errors would) does not make the error a legal error".[375]

7.94. According to the European Union, "India's mistaken 'assumption', at the time of the certification of its 2007 GATT Schedule, 'that the HS2007 transposition did not expand India's tariff commitments beyond India's obligations under the ITA[]'" was not in error, because the transposition of India's WTO Schedule did not "expand the scope of India's pre-existing tariff concessions".[376] Moreover, the European Union submits that "[t]he term 'relates to a fact or situation' makes it clear that an 'error of law' does not constitute a ground for invalidating consent".[377] The European Union argues that the present alleged "error involves a misinterpretation by India of the terms of the treaty on which the European Union bases its claims" and such an error "is a manifest unmixed error of law", which falls outside the scope of Article 48(1).[378]

7.3.3.2.2 Main arguments of the third parties

7.95. Brazil considers that "the 'material scope of commitments' resulting from [HS] transpositions is a 'fact' or 'situation' in relation to which a State could hypothetically be in error."[379] Brazil refers to the complex nature of the transposition process in support of its view that a "possible change in scope of a concession resulting from a HS transposition could be portrayed as an objective fact or situation within the meaning of Article 48".[380] Brazil also states that "the current international jurisprudence regarding error in the consent of treaties and Article 48 establishes a very high threshold for demonstrating that the consent of a party to an agreement was made in error".[381]

7.96. Canada argues that "it is possible that the certification of India's 2007 Schedule could be considered the conclusion of a treaty and, further, that a State's understanding as to the scope of its tariff concessions prior to certification of its Schedule could qualify as a 'fact or a situation … assumed by that State to exist at the time' within the meaning of Article 48."[382] Canada considers that "the 'fact or situation' allegedly assumed by India here … captures the products at issue, the

G/IT/M/56). See also ibid. para. 59 and fn 90 thereto (referring to Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, paras. 1.5 and 3.11).

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

[373] India's response to Panel question No. 67, para. 31.

[374] India's response to Panel question No. 67, para. 32 (quoting M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), (Exhibit IND-13), p. 608).

[375] India's response to Panel question No. 67, para. 32.

[376] European Union's opening statement at the second meeting of the Panel, para. 5 (quoting India's first written submission, para. 59).

[377] European Union's second written submission, para. 7. The European Union notes in this regard that the commentary of the International Law Commission to the Final Draft of the Vienna Convention indicates that the term "'fact or situation' was intended to make clear that an error of law does not constitute a ground for invalidating consent". (European Union's opening statement at the first meeting of the Panel, para. 24 (referring to "Draft Articles on the Law of Treaties with commentaries" in *Yearbook of the International Law Commission* (1966), Vol. II, Commentary to Article 45, (Exhibit EU-43), p. 244, para. 6)). The European Union also notes that if "errors of law were covered by Article 48.1 of the VCLT, it would be open to the respondent in virtually every WTO dispute to invoke, as an alternative defence, the invalidity of its consent to the provisions relied upon by the claimant, on the ground that the respondent had made an error with regard to the correct interpretation of that provision". (Ibid. para. 29).

[378] European Union's second written submission, para. 11.

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

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

[381] Brazil's third-party submission, para. 21 (referring to International Court of Justice (ICJ), *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6; ICJ, *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999: ICJ Reports 1999, p. 1045; Permanent Court of International Justice (PCIJ), *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 September 1933, PCIJ (ser. A/B) No. 53.; and ICJ, *Case concerning Sovereignty over certain Frontier Land (Belgium v. Netherlands)*, Judgment of 20 June 1959: ICJ Reports, p. 209).

[382] Canada's third-party response to Panel question No. 16, para. 3.

terms used to accurately describe them, and the context surrounding the decision to accept, or choose, the terms used to describe the concession", such that "it appears to be an error that includes factual elements".[383] Canada also questions whether "purely formal or technical amendments to treaties, such as those which occur during the certification of tariff schedules following a transposition process, could satisfy the requirement of forming an 'essential basis' of a State's consent to be bound by the treaty."[384]

7.97. Japan argues that India has failed to demonstrate that the present circumstances satisfy the requirements of Article 48(1) because: (i) India has failed to demonstrate the existence of an error, since the transposition to the HS2007 merely transposed existing commitments without changing the scope of those concessions; and (ii) India failed to demonstrate that a material error related to a "fact or situation" exists.[385] Japan considers that "[t]here was no error because India's tariff concessions as included in its Schedule which was certified in 1997, after the conclusion of the ITA[], already covered the products at issue."[386] Japan considers that this "is demonstrated by the correlation tables between the HS 2002/HS 1996 and the HS 2007 which were prepared by the secretariat of the WTO ('WTO Secretariat') and circulated to the WTO Members."[387] Japan also submits that "[a]n error regarding the scope of a tariff commitment clearly does not concern 'a fact or situation' since it relates to the scope [of] a treaty provision".[388]

7.98. Korea argues that it is clear from India's statements that India's alleged error does not seem to involve an error relating to a "fact or situation", and relates, instead, to the scope of India's obligations or commitments under its Schedule.[389] Korea argues that "the scope of a Member's commitment cannot be 'the existence of a fact'" but rather "is a legal question which requires interpretation of the treaty provision".[390]

7.99. Chinese Taipei submits that "no error occurred, and India has not shown otherwise".[391] Chinese Taipei further argues that, if it exists, India's alleged error is actually an error of law which falls outside the scope of Article 48.[392] Chinese Taipei considers that "India's alleged mistaken view as to the 'material scope of the commitments' under the tariff concessions at issue is no more than a mistaken view of its obligations on tariff concessions", and "[e]rrors of law are not covered by Article 48(1) of the Vienna Convention".[393]

7.100. The United States argues that "it appears that the alleged error concerns India's legal interpretation of its WTO commitments and the terms of its WTO Schedule rather than a particular 'fact or situation'".[394] The United States notes India's characterization of the error "as concerning 'the complex nature of the HS2002 to HS2007 transposition'" as well as India's position "that it 'never intended to expand its tariff commitments with respect to ICT products beyond the remit of India's obligations as contained in the ITA[]'".[395]

7.3.3.2.3 Panel's assessment

7.3.3.2.3.1 General considerations

7.101. Article 48(1) indicates that:

> A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist

[383] Canada's third-party response to Panel question No. 16, para. 5.
[384] Canada's third-party response to Panel question No. 17, para. 7.
[385] Japan's third-party statement, paras. 22-23.
[386] Japan's third-party response to Panel question No. 16, para. 10. (footnote omitted)
[387] Japan's third-party response to Panel question No. 16, para. 10. (footnotes omitted)
[388] Japan's third-party response to Panel question No. 16, para. 11.
[389] Korea's third-party submission, para. 13.
[390] Korea's third-party response to Panel question No. 16, para. 6.
[391] Chinese Taipei's third-party response to Panel question No. 16, para. 8.
[392] Chinese Taipei's third-party response to Panel question No. 16, paras. 5-9.
[393] Chinese Taipei's third-party response to Panel question No. 16, para. 9.
[394] United States' third-party response to Panel question No. 16, para. 9.
[395] United States' third-party response to Panel question No. 16, para. 9 (quoting India's first written submission, para. 57).

at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

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

7.103. It is uncontested that the burden of demonstrating that the requirements of Article 48(1) are satisfied in a given case rests on the party invoking Article 48.[396] We recall that India's assertion of error is that India had assumed that the transposition of its Schedule to the HS2007 did not result in an expansion of its tariff commitments beyond those set forth in the ITA, while, according to India, such expansion did in fact occur.

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

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

7.105. The first element of the test under Article 48(1) requires the invoking party to demonstrate that, at the time when the treaty was concluded, it made a certain assumption. In this dispute, India asserts that, at the time that it certified its WTO HS2007 Schedule, India assumed that "the HS2007 transposition did not expand India's tariff commitments beyond India's obligations under the ITA[]".[397] We therefore proceed to assess whether India held this assumption.

7.106. India argues that the existence of its assumption is demonstrated by the fact that, at the time of the certification of the changes to the Schedule, "India had already made its intention clear of not expanding its obligations under the ITA[] via the HS2007 transposition or otherwise", and "India was already levying duties beginning 2014 on certain ICT products which were ostensibly at variance with the commitments under the contested sub-headings it was entering into at the same time via the HS2007 transposition".[398] India refers to "several pronouncements" made by India indicating that India did not intend to join the ITA Expansion.[399] India submits that, "[c]learly, India's intent was never to expand upon its obligations under the ITA[], with such intent having been communicated in advance via various committee meetings as well as confirmed in practice via certain customs tariff levies."[400]

7.107. The European Union notes that India did not indicate to the WTO Secretariat or Membership its desire to not extend its WTO tariff commitments beyond those contained in the ITA.[401]

7.108. We note at the outset that the evidence adduced by India does not conclusively indicate that, at the time of the transposition, it assumed that the scope of its WTO tariff commitments would

[396] European Union's response to Panel question No. 14, para. 45 ("[t]he burden of proof is on the defendant alleging the error"); India's response to Panel question No. 17, para. 57 ("the party invoking error bears the burden of proving that the conditions under Article 48(1) have been met").
[397] India's first written submission, para. 27.
[398] India's first written submission, para. 64.
[399] India's first written submission, para. 63.
[400] India's first written submission, para. 64.
[401] European Union's comments on India's response to Panel question No. 95, para. 11.

not be expanded beyond the scope of its ITA undertakings. India points primarily to the following passage from the Minutes of the meeting held on 1 November 2012[402]:

> 2.10 The representative of India thanked Korea for hosting both the technical discussions as well as the transparency session. India's position on the effects of ITA was well known as articulated during the symposium in May. India's IT manufacturing had dipped quite profusely due to the ITA I. In the spirit of constructiveness, India had conducted stakeholder consultations around the country. The general concern was the relevance of many of the IT products or the ICT sector. The consolidated list (JOB/IT/7/Rev.1) could create an inversion in the duty structure, the multiple-use of many products and the difficulty in monitoring at the customs level for many of the products which had multiple-use. He informed the Committee about his government's national electronics policy with ambitious targets in terms of manufacturing in the electronics sector, as well as the overall manufacturing sector of the country. As a result, stakeholders had expressed serious reservations and he wanted to place these reservations on record.[403]

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

7.110. India also refers to the following passages of the Minutes of the meeting held on 15 May 2012[404]:

> 1.5 The representative of India thanked the Chairman for his report on the IT Symposium and requested that his country's name be removed from the sentence which stated that some countries had benefited from the ITA in terms of increasing employment, IT spending and investment.
>
> …
>
> 3.11 The representative of India thanked the US delegation and other co-sponsors for the concept paper. He supported the statement made by El Salvador also on behalf of others (Guatemala, Honduras, Nicaragua and the Dominican Republic) on the fact that the Committee would need to take into account the flexibilities required by many developing countries in the expansion of IT products. He asked the United States and other co-sponsors a question on the concept paper regarding the issue of the critical mass. He wondered whether there were any specific numbers in terms of the critical mass for product expansion as proposed by the co-sponsors. His second question concerned the mandate that the co-sponsors quoted, i.e., paragraph 3 of the Annex to the Ministerial Decision. He asked whether there was reference to both tariffs as well as to NTBs in the same paragraph or how the United States and other co-sponsors were trying to delink tariffs from NTBs. At the Symposium, many of the US industry participants were adamant that only tariffs should be addressed. On NTBs, he wanted to know whether any of the ITA Participants were looking at disciplining standards on IT products which he thought was a very critical area for NTBs and which were really the fundamental market access barriers to these products. The applied tariffs were not so substantial as so to create those market access barriers and many companies were managing to export their products. On the issue of classification divergences, he said that it was an issue that comprised 55 products and had not been resolved for the past 15 years. He doubted that one could just brush it aside in terms of saying that these were complicated by HS96, HS2002 or HS2007 nomenclature changes as otherwise the participants would have actually solved the problem in the first place. He posed a question to the Secretariat regarding procedures for consultations concerning the

[402] India's first written submission, fn 88 to para. 57, fn 90 to para. 59, fns 96-98 to paras. 63-64, fn 102 to para. 66, fn 108 to para. 70, and fn 213 to para. 143.

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

[404] India's first written submission, fn 90 to para. 59.

> decision of Paragraph 3 of the Annex to the Ministerial Declaration which gave the mandate to the CTG. He said that there was a decision which came out later on the implementation of the Ministerial Declaration, G/L/160. In his view, it talked about the mandate of this particular Committee as well as the fact that the first review would be conducted in 1997 and 1998. However, there were no procedures in place for subsequent reviews. Thus he wished to have some clarification from the Secretariat on this.[405]

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

7.112. As to paragraph 3.11, we observe that India's delegate highlighted that the issue of classification divergences (presumably in relation to products covered by the ITA) was an issue that affected 55 products, which had not been resolved since the signing of the ITA, and he "doubted that one could just brush it aside in terms of saying that these were complicated by HS96, HS2002 or HS2007 nomenclature changes as otherwise the participants would have actually solved the problem in the first place".[406] This passage indicates to us that India was fully aware of differences of opinion among the Members regarding the HS classification of certain ITA products. It does *not* indicate to us that India assumed that the transposition of its Schedule would not expand the scope of its WTO tariff commitments beyond the scope of its ITA undertakings.

7.113. We also note India's argument that its understanding and intentions with respect to its Schedule were clear from the fact that, as from 2014, prior to the certification of the changes to the Schedule, India had already begun levying duties on certain products that fall under the contested tariff items. In our view, however, this argument is partially undermined by the fact that, prior to 2014, India had indeed been according duty-free treatment to almost all products at issue in this dispute.[407] Moreover, we understand that the majority of products at issue in this dispute continued to receive duty-free treatment until as recently as 2017 (and 2018 in the case of some products).[408]

7.114. We do not wish to speculate on India's reasons for applying certain duties in 2014, some months before its transposed Schedule would be certified. We are wary, however, of accepting a Member's act of potential WTO-inconsistency as evidence that the Member misunderstood the scope of its WTO obligations.[409] To a certain extent, it would be circular if parties invoking Article 48 of the Vienna Convention could rely on their violation of treaty obligations to demonstrate that they committed an "error" in agreeing to be bound by that treaty. We therefore do not consider that India's application of duties to certain products at issue in this dispute demonstrates that, at the time when the changes to its WTO Schedule were certified following the HS2007 transposition process, India assumed that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings.

7.115. Notwithstanding our reservations regarding the evidence adduced by India, we recognize that evidence of an "assumption" may be difficult to obtain. To the extent that such an assumption is a widely held implicit understanding, there may be little to no documentary evidence. We therefore do not consider India's lack of documentary evidence sufficient to conclude that India has not met its burden of proof with respect to the existence of its assumption. We also note India's arguments

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

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

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

[408] See European Union's first written submission, paras. 79-84, 91-104, 111-115, 122-129, and 138-152. We recognize, in making these observations, that even if India's tariff commitments with respect to these products were "unbound" prior to the conclusion of the transposition exercise, India was naturally free to apply duty-free treatment if it so wished. Nevertheless, the fact that India applied duty-free treatment to the overwhelming majority of the products at issue in this dispute until 2017 does undermine its assertion that its application of duties as from 2014 demonstrates its assumption regarding the transposition process.

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

and assertions in the course of these proceedings regarding the assumptions it held during the transposition process.[410]

7.116. On balance, taking into account the necessary evidentiary limitations attached to providing proof of an assumption, we accept in good faith India's arguments and explanations in the course of these dispute settlement proceedings. Accordingly, we find that, at the time of the transposition, India assumed that the scope of its WTO commitments was limited to the scope of its ITA undertakings, with respect to those tariff commitments adopted by India in order to implement its ITA undertakings, and that the scope of those tariff commitments would not be expanded through the HS2007 transposition process.[411]

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

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

7.118. India argues that "the difficulty in articulating a workable distinction between errors of law and errors of fact has been evident from as early as the drafting of the VCLT".[412] According to India, "[t]hat a mistaken 'fact or situation' may have legal consequences (as indeed all contested errors would) does not make the error a legal error".[413] India submits that its "factual or situational error was in relation to the inadvertent expansion of the scope of its commitments via the 2007 transposition, which was contrary to India's stated position and intent of not expanding upon its ITA[] commitments".[414] In India's view, "similar errors relating to technical entries have previously been considered as a potential ground for invalidity in international law."[415]

7.119. The European Union argues that the alleged "error involves a misinterpretation by India of the terms of the treaty on which the European Union bases its claims" and "[s]uch an error is a manifest unmixed error of law and, therefore, falls squarely outside the scope of Article 48.1 of the VCLT".[416] The European Union further argues that "[i]f errors of law were covered by Article 48.1 of the VCLT, it would be open to the respondent in virtually every WTO dispute to invoke, as an alternative defence, the invalidity of its consent to the provisions relied upon by the claimant, on the ground that the respondent had made an error with regard to the correct interpretation of that provision".[417]

7.120. We note that India does not dispute that purely legal errors (for instance, a mistaken interpretation of a legal obligation contained in a treaty) do not qualify as errors relating to a fact or situation, within the meaning of Article 48(1).[418] Indeed, we agree with the parties that pure legal error falls outside the scope of Article 48(1).[419] At the same time, we recognize that a Commentary

[410] See e.g. India's first written submission, para. 63; and opening statement at the second meeting of the Panel, p. 2.

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

[412] India's response to Panel question No. 67, para. 32. See also India's second written submission, paras. 8 and 20-23.

[413] India's second written submission, para. 22. See also India's response to Panel question No. 67, para. 33.

[414] India's second written submission, para. 22.

[415] India's response to Panel question No. 67, para. 33.

[416] European Union's second written submission, para. 11.

[417] European Union's opening statement at the first meeting of the Panel, para. 29.

[418] See e.g. India's second written submission, paras. 21-22; and response to Panel question No. 67.

[419] The principle that errors of law fall outside the scope of Article 48(1) is outlined in the Commentary on the Vienna Convention. A Commentary on the Vienna Convention indicates that "[a]s a general rule, an

to the Vienna Convention suggests that "[a]n error of law may … qualify as a ground for vitiating consent if it also raises questions of fact."[420]

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

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

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

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

7.124. India argues that "it should be evident that India would not have certified the contested sub-headings in its 2007 Schedule had it not been in error" and that "India had communicated to the wider WTO membership previously that it did not intend to expand its tariff commitments beyond those contained in the ITA[]".[421] As evidence of these communications, India refers to the same evidence and arguments adduced to demonstrate the existence of its assumption, specifically "several pronouncements" made by India indicating that India did not intend to join the ITA Expansion.[422] India argues that "[c]learly, India's intent was never to expand upon its obligations under the ITA[], with such intent having been communicated in advance via various committee meetings as well as confirmed in practice via certain customs tariff levies."[423] India argues that "if India were already aware that the HS2007 transposition was going to expand its commitments beyond the ITA[] and had gone as far as to caution against such potential expansion specifically, it would not have certified the schedule in error as it did."[424]

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error of law cannot in itself be regarded as 'an error relating to a fact or situation'" and that "[e]rrors relating to international law are genuine errors of law and are as such immaterial under Art 48 para. 1". (T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), pp. 886 and 888). We agree with this reasoning. We further note that in the *Eastern Greenland* case, *Petroleum Development v Sheikh of Abu Dhabi*, and the *Temple of Preah Vihear*, the relevant international tribunals consistently found that errors of law may not be invoked as invalidating consent to be bound by a treaty. (Ibid. p. 887 (referring to PCIJ, *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 September 1933, PCIJ (ser A/B) No. 53, p. 22; *Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144; and ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961: ICJ Reports 1961, p. 17, at p. 30)).

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

[421] India's second written submission, para. 24.

[422] India's first written submission, para. 63.

[423] India's first written submission, para. 64.

[424] India's response to Panel question No. 95, para. 31.

7.125. The European Union notes that India did not indicate to the WTO Secretariat or Membership its desire to not extend its WTO tariff commitments beyond those contained in the ITA.[425]

7.126. We observe that the procedures to be followed in conducting the transposition of Members' Schedules to the HS2007 were regulated in a series of documents that were approved by WTO Members and which are publicly available. The overarching procedural framework for the transposition process was established in the General Council Decision of 15 December 2006 on A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database, WT/L/673 (General Council Decision on HS2007 Transposition Procedures).[426] The General Council Decision further indicates certain procedural steps to be followed by the Secretariat. Specifically, the Secretariat had to "abide by the technical procedures described in Annex 2 to th[e] Decision".[427] Annex 2 of that Decision indicates, *inter alia*, that "[t]he transposition shall be based on the information provided by the [WCO], which is included in the WTO documents G/MA/W/67 and G/MA/W/76" and "[a] detailed concordance table between the HS2002 and the HS2007 nomenclatures shall be prepared by the Secretariat using these documents as the basis".[428] We note that documents G/MA/W/67 and G/MA/W/76 are documents circulated by the Committee on Market Access, containing certain communications from the WCO, including (in document G/MA/W/76) correlation tables drawn up by the WCO Secretariat to implement changes from the HS2002 to the HS2007, in accordance with instructions received from the HS Committee.[429]

7.127. We also note that, as part of the WTO Secretariat's preparations for the transposition of developing country Members' Schedules, the Committee on Market Access approved document G/MA/283, titled "Transposition of Members' CTS Files to the HS 2007 Nomenclature – Notes on Methodology" (hereafter "document G/MA/283").[430] This document, in its introduction, explains that it "describes the guidelines that the Secretariat intend[ed] to follow for the implementation of the HS 2007 transposition" and "provides a detailed description of the methodology that the Secretariat [would] follow in the HS 2007 transposition exercise".[431] Furthermore, Annex I of document G/MA/283 contains the HS2002 to HS2007 correlation tables prepared by the WTO Secretariat, based on document G/MA/W/76, but updated to account for "[f]urther amendments to the HS by the WCO".[432]

[425] European Union's comments on India's response to Panel question No. 95, para. 11.

[426] See e.g. India's first written submission, fn 52 to para. 37, fn 71 to para. 48, and fn 100 to para. 65; European Union's response to Panel question No. 75, para. 107 and fn 74 thereto.

[427] General Council Decision on HS 2007 Transposition Procedures, WT/L/673, para. 5.

[428] General Council Decision on HS 2007 Transposition Procedures, WT/L/673, Annex 2, para. 7.

[429] Committee on Market Access, International Convention on the Harmonized Commodity Description and Coding System – Changes in the Harmonized System to be introduced on 1 January 2007, G/MA/W/67; Committee on Market Access, Harmonized Commodity Description and Coding System – Changes in the Harmonized System to be Introduced on 1 January 2007, G/MA/W/76. We note that none of the parties appears to have referred to document G/MA/W/76 in their submissions to the Panel. It is, however, explicitly referenced in the General Council Decision on HS2007 Transposition Procedures, contained in document WT/L/673, which is referred to by the parties. (See e.g. India's first written submission, fn 100 to para. 65). We therefore consider that the parties and the Panel were on notice of this document's potential relevance to the issues arising in this dispute. Moreover, since document WT/L/673 is relied upon by the parties, and explicitly refers to document G/MA/W/76, we consider that, as a publicly accessible WTO document, document G/MA/W/76 is part of the official record. In our view, this approach accords with the approach taken by a previous panel in analogous circumstances. (See Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.370). We further note that, even to the extent that this publicly available WTO document was not specifically identified in the evidence adduced by the parties, we do not consider that this would preclude us from taking it into account. In our view, panels are not obliged to disregard publicly available WTO documents of which they are aware, and which bear directly on the matters before them, simply because such documents were not raised by the parties to the dispute.

[430] Committee on Market Access, Transposition of Members' CTS Files to the HS 2007 Nomenclature – Notes on Methodology, approved on 26 April 2012, G/MA/283. We note that none of the parties referred to document G/MA/283 in their submissions to the Panel, until this document was raised by the Panel in a question to the parties. It is, however, referenced numerous times in an Exhibit submitted to the Panel by India. (See Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50), Attachment 3, CTS HS2007 Transposition Note XII - India). In accordance with our approach to document G/MA/W/76, we consider that document G/MA/283 is part of the official record. (See fn 429 to para. 7.126 above).

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

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

7.128. Having reviewed these documents governing the conduct of the transposition process, we see no mention of the ITA. We therefore understand that, for all intents and purposes, WTO Members and the WTO Secretariat did not consider the ITA to be relevant to the transposition process. Rather, WTO Members appeared to share an understanding that the transposition exercise would follow the correlation tables that were prepared at the multilateral level by the WCO, updated by the WTO Secretariat, and approved multilaterally by the WTO Members themselves at the General Council and the Committee on Market Access.[433] Importantly, these correlation tables identified the "correlations" between HS2007 tariff items and HS2002 tariff items – in other words, how the product scope of tariff items under the HS2002 overlapped with that of tariff items under the HS2007.[434] Since these procedures did not contemplate any kind of comparison or discussion of the ITA, we understand that if India, or indeed any Member, had considered the ITA to be relevant to the transposition of their WTO tariff commitments, they would have had to make that clear.

7.129. These documents indicate that, in the absence of any evidence to the contrary, India's governing assumption and intention, during the transposition of its Schedule, was for the WTO Secretariat to follow the agreed-upon procedures, including the relevant agreed-upon correlation tables. The fact that India approved the content of these documents governing the transposition process, including at the General Council and in the Committee on Market Access, without objection, indicated at the time to the WTO Members and to the WTO Secretariat (and indicates to us now) that India intended for the transposition of its Schedule to follow those multilaterally approved procedures, including the relevant correlation tables.[435]

7.130. It is in this context that we observe India's assertion that "the WTO Membership, at large, including the European Union, could not have been unaware of India's very public and unequivocal stance against the expansion of the ITA[] including the fact that it was already levying duties in derogation to the 2007 Schedule at the time of its certification".[436] As evidence of its "persistent expression of its stand to not be bound by commitments beyond the ITA[] via any process which would have such an effect", India refers to "several pronouncements" that it made.[437] Specifically, India refers to the Minutes of two meetings of the Committee of Participants on the Expansion of Trade in Information Technology Products, held on 15 May 2012 and 1 November 2012.

7.131. We have reviewed the Minutes of these meetings in paragraphs 7.108 to 7.112 above. We see no indication in any of India's statements during those meetings that India's willingness to be bound by the changes to its WTO Schedule resulting from its transposition to the HS2007 Schedule was conditional on the product scope of that Schedule being limited to its undertakings under the ITA. A simple comparison of India's arguments in these dispute settlement proceedings to the statements made by India during those meetings reveals no overlap. We therefore do not see any evidence of India's alleged "persistent expression of its stand to not be bound by commitments beyond the ITA[] via any process which would have such an effect".[438]

7.132. In our view, aspects of these Minutes indicate that Members disagreed as to the tariff classification of products falling under the ITA.[439] Thus, India was on notice that there was a difference of opinion among ITA participants regarding certain classification issues, including with respect to the scope of their ITA undertakings. This makes India's failure to highlight its alleged assumption regarding the relationship between the ITA and its WTO tariff commitments during the transposition process even more glaring, considering its present assertion that this assumption constituted an *essential basis* for its consent to be bound by its transposed Schedule.

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

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

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

[436] India's second written submission, para. 30.

[437] India's response to Panel question No. 95, para. 40; first written submission, para. 63 and fn 213 to para. 143.

[438] India's response to Panel question No. 95, para. 30.

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

7.133. We also note that in these dispute settlement proceedings India has not sought to demonstrate that any *technical* errors occurred during the transposition process.[440] India does argue that the WTO Secretariat, in preparing India's transposition files, acted inconsistently with paragraph 4 of the General Council Decision on HS2007 Transposition Procedures, because the Secretariat failed to clearly flag certain tariff items "for which a change in the scope of a concession may have occurred due to the complex technical nature of the transposition".[441] We address that issue further below.[442] For our present purposes, however, we note that India has not sought to demonstrate that the Secretariat incorrectly applied the correlation tables that were agreed upon by Members (in particular the correlation tables that were approved by the General Council and the Committee on Market Access).

7.134. Thus, notwithstanding that the transposition was conducted in accordance with the agreed-upon correlation tables, India is (and asserts that it was at the time) unwilling to be bound by the transposed Schedule. India argues that it was only willing to be bound by its Schedule if the scope of its concessions in the transposed HS2007 Schedule was no broader than the scope of its obligations in the ITA. In our view, if India had held such condition to be fundamental to its willingness to be bound by the outcome of the transposition process, it would have made this condition obvious. Indeed, as discussed in greater detail below, India had numerous opportunities to do so.[443] Based on the evidence before us, we can see no point at which India made such a statement or otherwise expressed that intention.

7.135. We note that in support of its arguments under Article 48, India submits as evidence a Legal Opinion by Professor Waibel.[444] In our view, Professor Waibel's Legal Opinion is inapposite insofar as it relates to the evidentiary question of whether India's assumption (during the transposition process and at the time of certifying the changes to its Schedule resulting from that process), that the scope of its tariff concessions would be limited to the scope of its undertakings in the ITA, constituted an essential basis for India's willingness to be bound by the changes to its Schedule. There is no indication in Professor Waibel's Legal Opinion that he has any knowledge regarding this factual question.

7.136. We recognize Professor Waibel's assertion that "[t]here is no indication, given India's persistently expressed desire to the contrary, that India wished to expand the coverage of its existing tariff bindings under the ITA[]".[445] As explained above, however, India's agreement on the correlation tables and procedures and failure to mention the ITA in the context of the transposition process signalled to WTO Members and the WTO Secretariat that it intended for the Secretariat to follow those correlation tables and procedures. If India had wished otherwise, it could and should have said so. According to the evidence before us, India did not do so. In short, there is no indication in the evidence before us that India's assumption that the scope of its concessions with respect to certain ICT products would be limited to the product scope of the ITA constituted an essential basis for its consent to be bound by the changes to its Schedule.

7.137. To sum up, we recall that the burden of proof under Article 48(1) is on India. With respect to this element of Article 48(1), India has provided no persuasive evidence that its assumption constituted an essential basis of its consent to be bound by the certified Schedule. To the contrary, India's conduct throughout the transposition process indicates that such a condition was not an essential basis of its consent. On the basis of the evidence before us, we consider that India has failed to satisfy its burden of demonstrating that its assumption (i.e. that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings) constituted an essential basis for its consent to be bound by its HS2007 Schedule.

[440] See India's response to Panel question No. 95(b).
[441] India's first written submission, fn 101 to para. 65.
[442] See section 7.3.3.3.3.2 below.
[443] See para. 7.203 below.
[444] Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-79).
[445] Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-79), para. 37.

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

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

7.139. India argues that the scope of its WTO tariff commitments was expanded beyond the scope of its ITA undertakings, because the products covered by tariff items 8504.40, 8517.12, 8517.61, 8517.62, and 8517.70 of its WTO HS2007 Schedule were not covered by the ITA.[446] India explains that if it "never intended to undertake tariff commitments on ICT products beyond those contained in the ITA[] (with the commitments under the contested sub-headings being beyond those in the ITA[]) then India has only been consistent in its levy of customs duties except for the inadvertent error in understanding the scope of [its] complex HS2007 transposition (unintentionally subscribing to obligations beyond those in the ITA[])".[447] India also emphasizes that it never intended to undertake concessions with respect to products covered under the ITA Expansion, and that "[t]here were simply no negotiations or commitments undertaken by India with respect to products that are specifically covered within the ITA [Expansion]".[448]

7.140. The European Union argues that India's assumption was not in error because the transposition of its WTO Schedule to the HS2007 merely transposed pre-existing concessions into a new version of the HS nomenclature and "did not purport to expand and, in practice, did not expand the scope of India's pre-existing tariff concessions".[449] According to the European Union, "India did not err by assuming that the HS 2007 transposition could not expand the scope of pre-existing concessions in India's GATT Schedule", but rather "India erred by assuming that those pre-existing concessions could not cover any products that did not exist at the time when the ITA[] was concluded."[450] The European Union further argues that the scope of the ITA is not "limited to such products or technical features of products which existed at that signing"[451], and submits that "all of the products at issue in the present case are covered by the ITA[]."[452]

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

7.142. First, we emphasize that India's assertion of error concerns a purported expansion in the scope of its WTO tariff commitments as compared to the ITA. We recall that the HS2007 transposition process did not take into account and did not purport to transpose Members' ITA undertakings. Rather, the HS2007 transposition process sought to transpose Members' WTO tariff commitments from the HS2002 to the HS2007. In this respect, India does not argue that any technical mistakes occurred in the transposition of its Schedule to the HS2007.[453] As noted above, it is uncontested that the WTO Secretariat correctly followed the correlation tables communicated by the WCO, updated by the WTO Secretariat, and approved by the General Council and the Committee on Market Access.[454]

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[446] India's first written submission, paras. 66 and 92-221.
[447] India's first written submission, para. 66.
[448] India's first written submission, para. 68.
[449] European Union's opening statement at the first meeting of the Panel, para. 19.
[450] European Union's opening statement at the first meeting of the Panel, para. 20.
[451] European Union's opening statement at the first meeting of the Panel, para. 77.
[452] European Union's response to Panel question No. 62(b), para. 27.
[453] See India's response to Panel question No. 95. Specifically, while India considers that certain changes were not flagged by the WTO Secretariat, as required under the relevant procedures, India "does not argue or emphasize any other facets of the technical exercise of transposing India's Schedules in accordance with the multilaterally agreed and approved procedures and correlation tables". (Ibid. para. 32). India also agrees that no mistakes occurred in any prior transpositions of its WTO Schedule. (India's response to Panel question No. 89).
[454] We therefore see no need to examine the accuracy of the WCO's correlation tables, the updated correlation tables prepared by the WTO Secretariat and approved by the General Council and the Committee on

7.143. As indicated, however, India argues that its "mistaken assumption" at the time that it agreed to be bound by its HS2007 Schedule was not in relation to the transposition of its tariff commitments from the HS2002 to the HS2007, but rather in relation to the scope of its ITA undertakings as compared to its WTO Schedule.[455] In this respect, we have already concluded above that India is mistaken with respect to the relationship between the ITA and its WTO Schedule.[456] Specifically, we concluded that as a general rule the product scope of Members' tariff concessions contained in their WTO Schedules evolves over time to capture products that may come into existence as a result of technological developments, and that this general rule is not changed for certain WTO Members by virtue of their participation in the ITA.[457]

7.144. Second, we also note that the parties have conducted a substantial exchange of views regarding whether the ITA and India's WTO tariff commitments in its HS1996 Schedule covered "telephones for cellular networks or for other wireless networks". We note, in particular, that India's arguments with respect to several other products at issue in this dispute appear to be premised on its argument that telephones for cellular networks or for other wireless networks were not covered by the ITA.[458] Given the importance that the parties attribute to this issue, we consider it useful to address the parties' arguments as to whether these products were covered by India's tariff concessions in its WTO HS1996 Schedule.

7.145. In this respect, India argues that it is not obliged to provide duty-free treatment to "telephones for cellular networks or for other wireless networks" in its WTO HS2007 Schedule, because its commitments under the ITA did not extend to such products.[459] India argues that "transmission apparatus" within the meaning of tariff item 8525.20 of the HS1996 referred specifically to "transmission apparatus for radio-telephony or radio telegraphy".[460] India submits that such transmission apparatus were defined in the HS1996 Explanatory Notes as apparatus "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".[461] India considers that this definition in the HS1996 Explanatory Notes sets forth a "cumulative and exhaustive list" of products falling under this tariff item, such that "no apparatus which can transmit signals representing any other media other than the three listed above, can be included in the scope of heading 8525".[462] India considers that since "mobile phones transmit signals representing video information and other forms of multimedia", they fall outside the scope of heading 8525 of the HS1996.[463] India acknowledges that the Explanatory Notes to the HS1996 were amended to add mobile phones as an example of transmission apparatus covered by heading 8525.[464] India considers, however, that this does not change the "main definition" of such transmission apparatus as being limited to apparatus capable of transmitting speech, messages, or still pictures.[465] Moreover, India argues that "the product scope agreed upon by India was the product scope as delineated by the Explanatory Notes as on October 2, 1997" and since the amendment was adopted in 1998, it is not relevant to the interpretation of India's tariff commitments.[466] India submits that mobile phones capable of transmitting video were, in fact, classified under tariff item 8543.89 of the

Market Access, or the transposition process as undertaken by the WTO Secretariat. (See also para. 7.203 below).

[455] India's opening statement at the second meeting of the Panel, p. 2.

[456] See section 7.3.2.3 above.

[457] See para. 7.66 above.

[458] The parties' arguments with respect to "telephones for cellular networks or for other wireless networks" appear to be determinative as to whether products falling under tariff items 8504.40 ex01, 8517.12, 8517.61, and 8517.70 of India's WTO HS2007 Schedule were already covered by the ITA. (See India's first written submission, paras. 149-184 and 204-221).

[459] India considers that "[t]he issue before the Panel is whether sub-heading 8525.20 [of the HS1996] – 'Transmission apparatus incorporating reception apparatus' could cover telephones for cellular networks." (India's first written submission, para. 151).

[460] India's first written submission, para. 152. India highlights that tariff heading 8525 of the HS1996, referred to "transmission apparatus for radio-telephony, radio-telegraphy, …, whether or not incorporating reception apparatus or sound recording or reproducing apparatus". (Ibid. (referring to HS1996 Explanatory Notes to Heading 8525, (Exhibit IND-6)).

[461] India's second written submission, para. 87 (quoting HS1996 Explanatory Notes to Heading 8525, (Exhibit IND-6)). (underlining original)

[462] India's second written submission, para. 88.

[463] India's second written submission, para. 89.

[464] India's second written submission, paras. 91-92.

[465] India's second written submission, para. 93.

[466] India's second written submission, para. 94.

HS1996, which covers "other" products falling under heading 8543, which covers "electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter".[467]

7.146. The European Union argues that telephones for cellular networks or for other wireless networks were classified as "transmission apparatus incorporating reception apparatus" under tariff item 8525.20 of the HS1996, and were therefore covered by India's ITA undertaking with respect to this tariff item.[468] The European Union notes that the definition of "transmission apparatus for Radio-telephony or Radio-Telegraphy" in the Explanatory Notes to the HS1996 is broad and is not exhaustive, as indicated by the use of the words "inter alia".[469] The European Union also notes that the Explanatory Notes were amended in 1998 to explicitly indicate that "[c]ellular telephones or mobile phones" were classified under heading 8525 of the HS1996.[470]

7.147. It is uncontested that, under the ITA, India undertook to provide duty-free treatment to "transmission apparatus incorporating reception apparatus", falling under tariff item 8525.20 of the HS1996.[471] India implemented this undertaking in its WTO HS1996 Schedule, such that a bound duty rate of 0% was inscribed with respect to "[t]ransmission apparatus incorporating reception apparatus" falling under tariff item 8525.20 of the HS1996.[472] The issue debated by the parties is whether cellular telephones or mobile phones (presently classified under tariff item 8517.12 of India's WTO HS2007 Schedule) were classified under tariff item 8525.20 of India's WTO HS1996 Schedule.

7.148. We understand that mobile phones, on their face, are indeed transmission apparatus incorporating reception apparatus.[473] Based on its ordinary meaning, we therefore see no reason to consider that telephones for cellular networks or other wireless networks would not fall within the scope of tariff item 8525.20 of India's WTO HS1996 Schedule.

7.149. It is also uncontested that the HS1996 and its Explanatory Notes constitute relevant contextual aids for interpreting the scope of India's WTO tariff commitments as set forth in its HS1996 Schedule. We note India's argument that the HS1996 Explanatory Notes exhaustively defined relevant "transmission apparatus" falling under tariff item 8525.20 as apparatus "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".[474] India considers that because "mobile phones transmit signals representing video information and other forms of multimedia", they fall outside the scope of heading 8525 of the HS1996.[475]

7.150. The parties do not dispute that mobile phones are indeed apparatus capable of transmitting speech, messages, or still pictures. In our view, the fact that mobile phones can *also* transmit other signals does not eliminate the fact that they are capable of transmitting signals representing speech, messages, or still pictures. We do not read the HS Explanatory Notes prior to the 1998 amendment as excluding from the scope of tariff item 8525.20 products that completely satisfy the requirement of being capable of transmitting speech, messages, and still pictures, but nevertheless are also

[467] India's second written submission, para. 96.
[468] European Union's response to Panel question No. 62(b), para. 30.
[469] European Union's response to Panel question No. 62(b), para. 34.
[470] European Union's response to Panel question No. 62(b), paras. 36-39 (referring to WCO, HS Committee document 41.337 E, (Exhibit EU-44); WCO, HS Committee document 42.034 E, (Exhibit EU-45); and WCO, HS Committee document 42.100 E, (Exhibit EU-46)).
[471] See e.g. India's first written submission, para. 150.
[472] WT/Let/181.
[473] A mobile phone is "[o]riginally: a radio telephone installed in a vehicle. In later use: a portable wireless telephone that transmits and receives signals via a cellular … network; a cell phone; *esp*. (in later use) a smartphone" (Oxford English Dictionaries online, definition of "mobile phone" https://www.oed.com/view/Entry/253434?redirectedFrom=mobile+phone& (accessed 17 October 2022)); "a phone that is connected to the phone system by radio instead of by a wire, and can be used anywhere its signals can be received" (Cambridge Dictionary online, definition of "mobile phone" https://dictionary.cambridge.org/dictionary/english/mobile-phone (accessed 17 October 2022)); "a phone that you can carry with you and use to make or receive calls wherever you are" (Collins Dictionary online, definition of "mobile phone" https://www.collinsdictionary.com/dictionary/english/mobile-phone (accessed 17 October 2022)).
[474] India's second written submission, para. 87 (quoting HS1996 Explanatory Notes to Heading 8525, (Exhibit IND-6)). (underlining original)
[475] India's second written submission, para. 89.

capable of transmitting other signals.[476] Thus, the unamended HS1996 Explanatory Notes suggest to us that cellular and mobile phones could fall within the scope of tariff item 8525.20 of India's WTO HS1996 Schedule.

7.151. We further note that the WCO amendment of the HS1996 Explanatory Notes, introduced in 1998, unambiguously indicates that cellular and mobile phones were indeed classified under tariff item 8525.20 of the HS1996.[477] We disagree with India that this amendment is not relevant as it occurred subsequent to India's inscription of its duty-free commitment with respect to this tariff item in its WTO Schedule. As we have explained above, we consider that Members' WTO commitments are not static, and India has not pointed to any provision of the ITA indicating that Members' WTO tariff commitments undertaken in relation to the ITA would exclude products that subsequently come into existence due to technological development and that would otherwise fall within the scope of that tariff item. In short, we see no basis to exclude this amendment of the Explanatory Notes from our consideration. That amendment further suggests that tariff item 8525.20 of the HS1996 covered mobile phones. This is reinforced by the HS2002 Explanatory Notes, which also indicate that transmission apparatus for radio-telephony or radio-telegraphy, falling under heading 8525 of the HS2002, covers "[p]ortable radio-telephones, usually battery operated, of the 'walkie-talkie' type, as well as cellular telephones (also called 'mobile phones')".[478]

7.152. We note that as an alternative to tariff item 8525.20, India submits that mobile phones were in fact classified under tariff item 8543.89 of the HS1996, which covers "other" products falling under heading 8543 (covering "electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter").[479] Under the General Rules for the Interpretation of the HS, when goods are classifiable under two or more headings, "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description."[480] Moreover, if goods cannot otherwise be classified, they shall be "classified under the heading appropriate to the goods to which they are most akin".[481] In our view, heading 8525 of India's WTO HS1996 Schedule provides a more specific description of "telephones for cellular networks or for other wireless networks" than heading 8543 of that Schedule and, in any event, such products are more akin to transmission apparatus capable of transmitting speech, messages, and still pictures than they are to the more generic definition of "electrical machines and apparatus, having individual functions".

7.153. We therefore understand that India's WTO tariff commitments in its HS1996 Schedule with respect to "[t]ransmission apparatus incorporating reception apparatus" falling under tariff item 8525.20 covered, *inter alia*, telephones for cellular networks or for other wireless networks. We note that when India's Schedule was transposed to the HS2002, these commitments remained unchanged.[482] Following the transposition of its Schedule to the HS2007, the commitments under tariff item 8525.20 of the HS2002 were split into four distinct HS2007 tariff items, including tariff item 8517.12 of the HS2007, which covers "[t]elephones for cellular networks or for other wireless networks".[483] Thus, India's WTO tariff commitments with respect to telephones for cellular

[476] We also note India's argument that "a radiotelephone is a device which uses radio signals between fixed points", whereas "telephones for cellular networks use radio waves to transmit a signal to a base station nearby [which then] re-transmits the signal". (India's first written submission, para. 153). India considers that "'radio telephones' and 'telephones for cellular networks' are distinct products and cannot be clubbed into the same category". (Ibid. para. 154 (emphasis omitted)). We disagree. As India itself acknowledges, "telephones for cellular networks use radio waves to transmit a signal". (Ibid. para. 153). This would seem to constitute the very definition of "radio-telephony" within the meaning of the HS1996, including the Explanatory Notes thereto.

[477] The amendment of the Explanatory Notes adds the following language to the Explanatory Note for Heading 8517: "Cellular telephones or mobile phones, including car telephones, are classified in heading 85.25." Additionally, the amendment changes the Explanatory Note for Heading 8525, such that the group of apparatus constituting "transmission apparatus for radio-telephony or radio-telegraphy" includes, *inter alia*, "[p]ortable radio-telephones, usually battery operated, of the 'walkie-talkie' type, as well as portable radio-telephones (cellular telephones also called 'mobile phones') including apparatus which can be fitted inside a vehicle (car telephones)". (WCO, HS Committee document 41.337 E, (Exhibit EU-44); WCO, HS Committee document 42.034 E, (Exhibit EU-45); and WCO, HS Committee document 42.100 E, (Exhibit EU-46)).

[478] HS2002 Explanatory Notes to Chapter 85, (Exhibit EU-51), p. 1667.

[479] India's second written submission, para. 96.

[480] See General Rules for the Interpretation of the Harmonized System, (Exhibit EU-54), para. 3(a).

[481] See General Rules for the Interpretation of the Harmonized System, (Exhibit EU-54), para. 4.

[482] WT/Let/886.

[483] See G/MA/283; and WT/Let/1072.

networks or for other wireless networks were initially set forth as an undertaking in the ITA, were made binding WTO tariff commitments pursuant to certain amendments introduced into India's WTO HS1996 Schedule, were not affected by the changes to India's Schedule during the HS2002 transposition process, and following the HS2007 transposition exercise are presently set forth in tariff item 8517.12 of India's HS2007 Schedule.[484]

7.154. To conclude, we recall that, in light of our findings with respect to the third element of Article 48(1), it is not necessary for us to form a definitive conclusion on the fourth element. We nevertheless considered it useful to make certain observations regarding the parties' arguments on whether India erred in assuming that the scope of its WTO tariff commitments did not expand as compared to the ITA. To that end, we have observed, first, that India has not argued that any transpositions of its WTO Schedule were conducted inconsistently with the relevant correlation tables agreed to by Members. We have further observed that India's argument of "error" in invoking Article 48 relates to the scope of the ITA as compared to its WTO HS2007 Schedule and, in this respect, we have already concluded that India misunderstands the relationship between the ITA and its WTO Schedule. Second, we have observed that India's tariff commitments in its HS2007 Schedule with respect to products presently classified under tariff item 8517.12 did not expand from India's tariff commitments in its WTO HS1996 Schedule.[485] While we do not consider these findings necessary to resolve the legal issues in this dispute, we nevertheless hope that they may be useful to the parties.

7.3.3.2.3.6 Conclusion regarding Article 48(1)

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

7.156. Having come to this conclusion with respect to Article 48(1), it could suffice for us to conclude our analysis of Article 48 here.[486] Nevertheless, we consider it useful for purposes of resolving the parties' dispute to continue to address the parties' arguments regarding Article 48(2).

7.3.3.3 Article 48(2)

7.3.3.3.1 Main arguments of the parties

7.157. India submits that the burden of "proving the vitiating circumstances" described in Article 48(2) falls on the "party opposing the plea of error" (i.e. the complainant).[487] In any event, India argues that its error "was in the context of a complex and technical transposition exercise undertaken by the WTO Secretariat" and that it "neither contributed actively to such an error nor was there a circumstance that put it on notice of such possible error".[488] India submits that "for a State to be put on notice of a possible error, the circumstances should be such that no interested party should fail to notice the error or be under any misapprehension about it."[489] India further submits that Article 48(2) requires the party claiming error "to have employed all reasonable (rather

[484] We further understand that, as a consequence of the foregoing interpretation, India's WTO tariff commitments with respect to products falling under tariff items 8504.40, 8517.61, and 8517.70 of its WTO HS2007 Schedule similarly have not expanded. This is because India's arguments that products falling under tariff items 8504.40, 8517.61, and 8517.70 of its WTO Schedule fall outside the scope of the ITA are directly premised on India's understanding that products falling under tariff item 8517.12 of its WTO Schedule fall outside the scope of the ITA. (See India's first written submission, paras. 170, 182, 209, and 219).

[485] We also noted that this interpretation of India's tariff commitment with respect to tariff item 8517.12 of Its WTO HS2007 Schedule implies that India's tariff commitments with respect to products falling under tariff items 8504.40, 8517.61, and 8517.70 of its WTO HS2007 Schedule similarly have not expanded. (See fn 484 to para. 7.153 above).

[486] See para. 7.87 above.

[487] India's second written submission, para. 25 (referring to T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), p. 893).

[488] India's first written submission, para. 70.

[489] India's first written submission, para. 73. See also India's second written submission, para. 29.

than possible) means of establishing the facts when concluding the treaty and of having taken precautions to avoid any error".[490]

7.158. India submits that its error "was not unlikely given the surrounding circumstances (including that of an admittedly complex technical transposition which was not flagged)".[491] India also notes that "the communication (Transposition Note) received from the Secretariat accompanying the Transposition Files specifically mentioned certain 'technical issues' and 'complex changes' – but … those notations by the Secretariat did not cover the tariff lines at issue in the present dispute."[492] India also submits that prior to the certification of the Schedule, its "unequivocal public stance" had been that "it would not commit to obligations beyond those under the ITA[]".[493] India considers that the panel's findings in *Korea – Procurement* suggest that "there exists a duty for all negotiating parties to verify the concessions being offered" and "[i]n the present context, that would imply that the EU ought to have reconciled India's stance of intending no further commitments on ICT products vis-à-vis its certification of the 2007 Schedule".[494]

7.159. The European Union submits that, as the party invoking Article 48, India bears the burden of proving all the constituent elements of Article 48, including the conditions contained in Article 48(2).[495] The European Union argues that India had the possibility to prepare its own transposition and, "having chosen not to do so, India cannot shift the responsibility for the alleged error to the WTO Secretariat."[496] Moreover, the European Union considers that India had "ample opportunity to review the drafts, to request clarifications and provide comments and, if necessary, to object to the transposition from HS2002 to HS2007 prepared by the WTO Secretariat", but India did not do so.[497] The European Union also considers that the findings of the panel in *EC – IT Products* "should have alerted India to the possibility that India's assumption that GATT concessions linked to the ITA[] did not cover 'new products' could be in error".[498]

7.160. As to the complexity of the process, the European Union submits that "it can be safely presumed that the drafts prepared by the WTO Secretariat were, or at least could have been, reviewed by highly qualified Indian customs officials with the required ability to understand all their implications and identify any possibl[e] inconsistencies with India's 'assumptions' regarding the

[490] India's first written submission, para. 69 (quoting M. E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff, 2009), (Exhibit IND-13), p. 609; and referring to T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), p. 894). (emphasis omitted) See also India's second written submission, para. 28.

[491] India's second written submission, para. 30. In a Legal Opinion submitted by India as evidence in support of its assertions, Professor Waibel submits that "for the most part, the error was not of India's making, and any contribution by India to the error is minor and excusable rather than substantial". (Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-79), para. 39). Professor Waibel states that the "WTO Secretariat carried out the transposition with limited input from India … It was the Secretariat rather than India that was holding the pen. Consequently, the Secretariat bears at least some of the responsibility for the errors in this transposition process". (Ibid.). Professor Waibel emphasizes that "[e]ven though [the transposition] procedure was not meant to lead to any change in the scope of concessions and other commitments, it did result in such changes, without the WTO Secretariat flagging the disputed changes to India." (Ibid. (referring to WT/L/673, para. 3) (emphasis omitted)).

[492] India's response to Panel question No. 19, para. 60 (referring to Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50), Attachment 3, CTS HS2007 Transposition Note XII - India).

[493] India's first written submission, para. 75.

[494] India's first written submission, para. 77.

[495] European Union's response to Panel question No. 71, para. 91.

[496] European Union's opening statement at the first meeting of the Panel, para. 35. The European Union considers this to be similar to the situation in the *Temple of Preah Vihear* case, where the ICJ "held that Thailand was barred from relying on a plea of error since the Thai authorities had themselves entrusted the work of producing the maps to the French officers". (Ibid. para. 36 (referring to *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6, (Exhibit IND-3), at pp. 26-27)).

[497] European Union's opening statement at the first meeting of the Panel, para. 44. Specifically, the European Union notes that India sought no clarifications from the WTO regarding the draft HS07 file, and when India provided comments to the Secretariat, none of those comments concerned the tariff items at issue in this dispute. (Ibid. paras. 40-41). The European Union also notes that India did not raise any objection to the draft HS07 file during the multilateral review of the file, nor did India object to certification when the file was circulated for purposes of certification. (Ibid. paras. 42-43).

[498] European Union's opening statement at the first meeting of the Panel, para. 55.

scope of its pre-existing concessions".[499] The European Union considers that the "the drafts communicated by the WTO Secretariat as part of the transposition process put India on notice that India's 'assumption' that the products at issue were not covered by the HS 2007 transposition, because they were 'new products' which did not exist yet at the time where the ITA[] was negotiated, was in error".[500] The European Union also considers that the panel reports in *EC – IT Products* "addressed in detail the relevance of the status of technology at the time of negotiating the ITA[]" and "should have alerted India to the possibility that India's assumption that GATT concessions linked to the ITA[] did not cover 'new products' could be in error".[501]

7.3.3.3.2 Main arguments of the third parties

7.161. Brazil does not take a position on the application of Article 48(2) in this dispute, but considers that "the current international jurisprudence regarding error in the consent of treaties and Article 48 establishes a very high threshold for demonstrating that the consent of a party to an agreement was made in error".[502]

7.162. Canada argues that "[u]pon review of the draft HS07 file, despite the available information, India did not inquire further as to the scope of the concessions and thus, by its own conduct, arguably contributed to the alleged error regarding the scope of such concessions."[503] Furthermore, according to Canada, "the availability of …[HS] 2007 concordance documentation may further suggest that the circumstances were such as to put India on notice as to a possible error in understanding the scope of the concessions".[504] Canada considers that "[i]n the draft HS07 file prepared for India by the Secretariat, the tariff lines at issue in this case were not flagged by the Secretariat as possibly changing the scope of the concessions".[505] Canada also considers that "[t]he jurisprudence on Article 48 further suggests that it is difficult to invoke Article 48 where qualified personnel of a State review the documentation at issue".[506] Canada considers that, "absent any indication to the contrary by India, there is a presumption that qualified personnel reviewed the draft HS07 file prior to its certification by India".[507] Canada also considers that the jurisprudence on Article 48 "suggests that there is a certain level of diligence that is required on the part of the State invoking the error in order to demonstrate that its conduct did not contribute to the error".[508] Canada submits that "the Secretariat offered the results of its transposition procedures to India, and India, in exchange, was required to review and verify the Schedule and to make any relevant inquiries if something was uncertain or unclear."[509]

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[499] European Union's opening statement at the first meeting of the Panel, para. 50. The European Union further argues that since the transposition process did not change the scope of any concessions, "there was no reason why the WTO Secretariat should have 'flagged' those tariff lines to India". (European Union's second written submission, para. 16). The European Union also considers that India's error was not in assuming that the HS 2007 transposition did not expand the scope of pre-existing concessions, but in assuming that those pre-existing concessions did not cover products that did not exist when the ITA was concluded. The European Union submits that the transposition procedure "did not require the WTO Secretariat to anticipate that India would make that 'assumption' and to 'flag' to India that such 'assumption' would be in error". (Ibid. para. 17).

[500] European Union's opening statement at the first meeting of the Panel, para. 54.

[501] European Union's opening statement at the first meeting of the Panel, para. 55.

[502] Brazil's third-party submission, para. 21 (referring to ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6; ICJ, *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999: ICJ Reports 1999, p. 1045; PCIJ, *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 September 1933, PCIJ (ser. A/B) No. 53.; and ICJ, *Case concerning Sovereignty over certain Frontier Land (Belgium v. Netherlands)*, Judgment of 20 June 1959: ICJ Reports, p. 209). See also Brazil's third-party response to Panel question No. 17.

[503] Canada's third-party submission, para. 13.

[504] Canada's third-party submission, para. 13.

[505] Canada's third-party submission, para. 15.

[506] Canada's third-party submission, para. 19 (referring to ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6, (Exhibit IND-3), at p. 26).

[507] Canada's third-party submission, para. 19.

[508] Canada's third-party submission, para. 16 (referring to ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand),* Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6, (Exhibit IND-3), at p. 26).

[509] Canada's third-party submission, para. 18.

7.163. Japan highlights that "during the negotiations leading to the certification of India's Schedule based on HS 2007, India's representatives repeatedly examined and had ample opportunities to avoid the alleged error and correct it before the certification".[510]

7.164. Korea contends that "India appears to have contributed to the alleged error and was duly put on notice about it."[511] According to Korea, "India had ample opportunity and access to appropriate redress mechanisms to avoid the alleged error and to fix it."[512] Korea notes that "the process of transposition was done in accordance with a detailed procedure that allowed India to carefully examine the proposed updates and comment on them."[513] Korea also notes that the transposition procedures "provided for a multilateral review process during which modifications could be made to the updated schedules", but "India did not object to the now disputed tariff lines during the multilateral review".[514] In Korea's view, "India should not be entitled to shift responsibility for its error onto the WTO Secretariat as India had not been proscribed from preparing its own HS2007 transposition, and India neglected to verify the specifics of the transposition's effects despite knowing that it had the potential to change the scope of its concessions."[515]

7.165. The United States observes that "India participated in the process for transposition of its Schedule into HS2007 nomenclature in accordance with established WTO procedures, and … failed to raise any specific concern or objection during that process with respect to the tariff subheadings at issue".[516] According to the United States, "India has not established that it did not contribute by its own conduct to the alleged error, or that the circumstances were such that India was not on notice of the alleged error."[517]

7.3.3.3.3 Panel's assessment

7.3.3.3.3.1 General considerations

7.166. Article 48(2) states that:

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

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

7.168. The question before us is whether India contributed by its own conduct to that error and/or the circumstances were such as to put India on notice of a possible error. The parties have expressed differing opinions on the burden of proof under Article 48(2). The European Union considers that India, as the party invoking Article 48, must demonstrate that it did not contribute to the error and the circumstances were not such as to put India on notice of a possible error.[518] India considers that the burden is on the European Union, as the party objecting to the invocation of Article 48, to demonstrate that India either contributed to the error or that the circumstances were such as to put India on notice of a possible error.[519] In our view, there is ample information before us (in the form

[510] Japan's third-party statement, para. 24.
[511] Korea's third-party submission, para. 14.
[512] Korea's third-party submission, para. 15.
[513] Korea's third-party submission, para. 15.
[514] Korea's third-party submission, paras. 16-17.
[515] Korea's third-party submission, para. 19.
[516] United States' third-party response to Panel question No. 16, para. 8.
[517] United States' third-party response to Panel question No. 16, para. 8.
[518] European Union's response to Panel question No. 14, para. 45 ("[t]he burden of proof is on the defendant alleging the error"). See also European Union's opening statement at the first meeting of the Panel, para. 14.
[519] India's second written submission, para. 25 (referring to T. Rensmann, "Article 48" in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, 2nd edn (Springer, 2018), (Exhibit IND-14), p. 893).

of the arguments and evidence adduced by the parties) to apply Article 48(2), regardless of which party bears the burden of proof. As explained below, we do not consider the arguments and evidence of the parties to be in *equipoise*. We therefore do not consider it necessary to resolve the question of which party bears the burden of proof under Article 48.[520]

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

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

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

7.171. We recall that the evidence adduced by India in this dispute indicates that in 2012, three years prior to the certification of the changes to India's WTO Schedule resulting from the HS2007 transposition process, India was aware of differences of opinion among the Members regarding the HS classification of certain products falling within the scope of the ITA.[521] Specifically, the Minutes of a meeting of the Committee of Participants on the Expansion of Trade in Information Technology Products indicate that "[o]n the issue of classification divergences, [India's delegate] said that it was an issue that comprised 55 products and had not been resolved for the past 15 years."[522] India's delegate "doubted that one could just brush it aside in terms of saying that these were complicated by HS96, HS2002 or HS2007 nomenclature changes as otherwise the participants would have actually solved the problem in the first place."[523] This statement by India suggests that India was aware not only of product classification differences among ITA participants, but that HS transpositions (including the HS2007 transposition process) could have substantial implications for those classification differences.

7.172. We further recall that Members agreed on the procedures to be followed in that transposition process, including the relevant correlation tables prepared by the WCO, updated by the WTO Secretariat, and agreed upon by WTO Members.[524] In addition to setting forth the correlation tables indicating the relevant overlaps in product coverage as between the HS2002 and the HS2007, those procedures also indicate that the scope of Members' tariff concessions could *potentially* change through the transposition process.

7.173. In this respect, the General Council Decision on HS2007 Transposition Procedures instructs that, "*to the extent possible*, the scope of the concessions and other commitments shall remain unchanged".[525] The General Council Decision further indicates that "[a]ny tariff line for which a change in the scope of a concession may have occurred due to the complex technical nature of the transposition shall be clearly flagged."[526] The General Council Decision also provides for the procedures to be followed in the event that a Member disagrees with the way in which the scope of a concession has changed.[527] Specifically, paragraph 15 of the General Council Decision states that "[*w]here the scope of a concession has been modified* as a result of the transposition in a way that

[520] See e.g. Panel Report, *India – Solar Cells*, fn 269 to para. 7.104.
[521] See para. 7.112 above.
[522] Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, para. 3.11. We recall that India adduced these Minutes. (See India's first written submission, para. 59 and fn 90 thereto).
[523] Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 15 May 2012, G/IT/M/55, para. 3.11.
[524] See paras. 7.126-7.128 above.
[525] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4. (emphasis added)
[526] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4.
[527] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4.

impairs the value of the concession, GATT Article XXVIII consultations and renegotiations shall be entered into by the Member concerned."[528]

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

7.175. Indeed, India acknowledges that, pursuant to paragraph 15 of the General Council Decision, "[i]n ordinary circumstances, it would be the WTO Member … concerned aided by the procedures of the transposition exercise that would be responsible for determining whether a transposition process resulted in changes to the scope of its concessions".[529] India argues, however, that "in the present instance, the role of the WTO Secretariat is nevertheless also relevant to the extent it was an active participant in the transposition process."[530] India refers to Professor Waibel's Legal Opinion, which states that since "it was the Secretariat rather than India that was holding the pen … the Secretariat bears at least some of the responsibility for the errors in this transposition process".[531] Professor Waibel's Legal Opinion echoes multiple submissions by India in which India argues that "the contested tariff lines – all of which comprised complex technical transpositions which changed the scope of India's concessions – were required to be adequately flagged according to the procedure for transposition".[532]

7.176. We observe that India, referring to Professor Waibel's Legal Opinion, asserts that because the WTO Secretariat conducted the transposition of India's WTO Schedule on behalf of India, if there was a change in the scope of Members' concessions then the burden was on the WTO Secretariat to identify that change in scope. A close reading of the General Council Decision on HS2007 Transposition Procedures, however, indicates *not* that the WTO Secretariat had to affirmatively identify any changes in concessions, but rather that they had to clearly flag "[a]ny tariff line for which a change in the scope of a concession *may have occurred due to the complex technical nature of the transposition*".[533] In other words, the General Council Decision did not place an affirmative burden on the WTO Secretariat – or indeed Members preparing their own transpositions – to decisively conclude on the question of whether there was a change in the scope of concessions. Rather, in any situation where the scope of a concession "may" have changed due to the "complex technical nature of the transposition", this possibility had to be flagged. To the extent that the WTO Secretariat faithfully followed the correlation tables approved by the General Council and the Committee on Market Access, this, it seemed, would substantially mitigate against the possibility that there would be any disagreement as to whether the scope of any Member's concessions changed through the transposition process. Since these correlation tables were specifically prepared and approved in order to indicate the overlaps in product coverages as between the HS2002 and the HS2007, it would seem to follow that if the Secretariat followed those correlation tables (and it is uncontested that they did so), then there would have been *no change* in the scope of Members' concessions.

[528] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 15. (emphasis added)

[529] India's response to Panel question No. 90(b), para. 14. We note India's argument, regarding paragraph 15 of the General Council Decision on HS2007 Transposition Procedures, that "the phrase 'the scope of [the] concession has been modified … in a way that impairs the value of the concession' does not necessarily apply to the present circumstance" because "the ordinary meaning of the term impair is to 'weaken or damage something so that it is less effective' … [and i]n the present instance, the value of concessions given by India has not been impaired, but in fact, has been extended without any reciprocal benefits." (Ibid. para. 16 (quoting Cambridge Advanced Learner's Dictionary online, definition of "impair" https://dictionary.cambridge.org/dictionary/english/impair (accessed 22 May 2022), (Exhibit IND-85)). We do not consider it necessary to take a position on whether paragraph 15 was applicable to India. Rather, we note that the existence of paragraph 15 (along with paragraph 4) put India on notice of the *possibility* that the transposition process could result in a change to the value of the tariff concessions.

[530] India's response to Panel question No. 90(b), para. 14.

[531] India's response to Panel question No. 90(b), para. 15 (quoting Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-79), para. 39).

[532] India's response to Panel question No. 77, para. 59.

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

7.177. Nevertheless, we recognize that the General Council Decision on HS2007 Transposition Procedures acknowledged that such a possibility could occur, and required the WTO Secretariat (and Members in their preparation of their own transpositions) to clearly flag any tariff line for which a change in the scope of a concession may have occurred due to the complex technical nature of the transposition.[534]

7.178. In this context, we recall that on 8 November 2013 the WTO Secretariat transmitted to India, via email, the draft HS2007 transposition files prepared by the Secretariat.[535] The Secretariat's cover email referred to four attached documents: (i) the draft HS07 file; (ii) an Excel version of the database; (iii) notes and comments from the Secretariat, titled "HS2007 Transposition Note" (hereafter "Transposition Note"); and (iv) "document G/MA/283 describing in detail the methodology used by the Secretariat for th[e] exercise".[536] Attachment 3 to that email, containing the Secretariat's Transposition Note for India's Schedule, also refers to document G/MA/283. Specifically, that Transposition Note, under the heading "Processing strategy", indicates that "[a] detailed description of the transposition methodology is presented in documents G/MA/283 of 22 May 2012 and WT/L/673 of 18 December 2006."[537]

7.179. Document G/MA/283, titled "Transposition of Members' CTS Files to the HS 2007 Nomenclature – Notes on Methodology", was approved by the Committee on Market Access on 26 April 2012. The introduction to that document explains that it "describes the guidelines that the Secretariat intend[ed] to follow for the implementation of the HS 2007 transposition" and "provides a detailed description of the methodology that the Secretariat [would] follow in the HS 2007 transposition exercise".[538]

7.180. At the most general level, document G/MA/283 indicates that two types of changes to Members' Schedules could result from the transposition process: (i) "clarifying changes" (which did not change the scope of the HS subheadings); and (ii) "structural changes" (which *always* changed product coverage of one or more HS subheadings).[539] Specifically with respect to structural changes, document G/MA/283 identifies 196 structural changes, defined by 355 groups of correlations, and elaborates that each of these structural changes can be categorized as: (i) one-to-one relationships, where one HS2002 subheading corresponds exactly to one HS2007 subheading; (ii) splitting of one HS2002 subheading into two or more new HS2007 subheadings; (iii) merging two or more HS2002 subheadings into one new HS2007 subheading; or (iv) more complex cases, involving both splitting and merging of whole or part of different HS2002 subheadings.[540] With respect to the last of these categories, namely "complex changes", document G/MA/283 explains that:

> A complex change includes both splitting and merging of the whole or part of different subheadings. Since a specific change can combine splits and mergers differently, it is difficult to find a standard way of dealing with the transposition as it was in the previous cases. It is for this reason that manual intervention will be required for most of the complex changes. Moreover, some complex changes could involve as many as 20 to 30 subheadings from different HS 2002 headings, Chapters, and even Sections. In order to maintain all these concessions in the new HS 2007 nomenclature, complicated coding structures and descriptions need to be introduced. And the situation could be even more complicated if national breakouts are involved.[541]

7.181. Document G/MA/283 elaborates that "[t]he categorization for each individual correlation is indicated in Annex I".[542] Annex I of document G/MA/283 contains a correlation table prepared by the WTO Secretariat, which identifies, *inter alia*, all 355 groups of correlations (of HS2002 tariff items to HS2007 tariff items), the "category" of the correlation group, and any remarks in the WCO's concordance table.

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[534] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4.
[535] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50).
[536] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50), p. 1.
[537] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50), Attachment 3, CTS HS2007 Transposition Note XII - India, p. 1.
[538] G/MA/283, paras. 1-2.
[539] G/MA/283, para. 1.2.
[540] G/MA/283, para. 1.5.
[541] G/MA/283, para. 2.10.
[542] G/MA/283, para. 1.6.

7.182. We observe that all the tariff items that changed during the HS2007 transposition process, and in respect of which India invokes Article 48 in this dispute, are identified in the table of correlations set forth in Annex I of document G/MA/283.[543] Their inclusion in that table indicates that such changes are "structural" in nature. The table also explicitly identifies the changes to these tariff items as "complex" and includes certain comments on the changes to these tariff items, namely that "[t]he structure of heading 85.17 has been revised based on technological progress in the high technology sector" and "[a]t the same time, the scope of heading 85.17 has been expanded and the transposition of heading 85.25 entails the transfer of certain products to heading 85.17".[544] We note that these comments on the changes to these tariff items also appear in document G/MA/W/76, containing the correlation tables as communicated to the WTO by the WCO.[545]

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

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

7.185. We note India's assertions that "the language in [document G/MA/283] is, at best, ambiguous and indicates a restructuring (between sub-heading 85.17 and sub-heading 85.25) and not the flagging of a clear expansion in scope due to a complex technical transposition".[546] India considers that "the complex technical nature of the transposition was such that India was not put on clear notice (via communication from the WTO Secretariat or otherwise) as to the exact changes being effected due to the increased product complexity of the ITA[] product coverage via the contested sub-headings".[547]

7.186. We recall that the General Council Decision on HS2007 Transposition Procedures did not require the WTO Secretariat to determine whether there had been a "clear expansion" in the scope of concessions. Rather, the Secretariat was expected to clearly flag "[a]ny tariff line for which a change in the scope of a concession *may have occurred due to the complex technical nature of the transposition*".[548] Document G/MA/283 identifies the changes to the relevant tariff items as complex in nature, indicates that new products have been added to the scope of heading 8517, and highlights that the scope of heading 8517 has expanded. This, in our view, suffices to identify to Members that

[543] See para. 7.127 above.
[544] G/MA/283, Annex I, entries 299-300, p. 41.
[545] G/MA/W/76, p. 30.
[546] India's response to Panel question No. 90(a), para. 8.
[547] India's response to Panel question No. 90(a), para. 8.
[548] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4. (emphasis added)

the changes to these tariff items *may* have implicated the scope of concessions under those tariff items.

7.187. We also note India's argument that the Secretariat's Transposition Note contained in its email to India "described certain complex changes to India's Schedule in specific relation to sub-heading 28.52 and sub-heading 3006.10" and India "sought clarifications and commented on HS 2007 sub-heading 28.52 via an email to the Secretariat".[549] In India's view, the Secretariat's Transposition Note was an "exhaustive document in relation to entries that were sought to be 'clearly flagged' for the exercise of transposition".[550]

7.188. In this respect, we emphasize that document G/MA/283 is itself explicitly referenced in that same Transposition Note. The Transposition Note, the cover email, and the inclusion of document G/MA/283 in the Secretariat's email to India all advised India to scrutinize document G/MA/283, which unambiguously identifies a significant number of changes occurring during the transposition process as "complex" in nature. Moreover, a very brief review of the "comments" included in the correlation table contained in document G/MA/283 would have enabled India to observe that, according to the WCO, the product scope of numerous headings and subheadings was expanded through the transposition process, including heading 85.17.[551] The fact that these possible changes of scope, all of which related to explicitly *complex* changes, were comprehensively flagged in document G/MA/283 means that India is incorrect that the only complex changes flagged by the Secretariat were those identified in the Secretariat's Transposition Note.

7.189. Moreover, we note that the specific section of the Secretariat's Transposition Note that, in India's view, contains this allegedly "exhaustive"[552] list of complex changes possibly changing the scope of the concessions appears under the subheading, "Additional Technical Issues". That is one of six subheadings in the Transposition Note: (i) "Introduction"; (ii) "Sources"; (iii) "Processing strategy"; (iv) "Additional Technical Issues"; (v) "Problems encountered during processing"; and (vi) "Content of HS07 transposition database".[553] Under this subheading, "Additional Technical Issues", the Transposition Note identifies certain issues pertaining to: (i) "AG – non-AG breakdown"; and (ii) "Simplified correlations".[554] Under "[s]implified correlations", the Transposition Note states that "[b]ased on an analysis of HS2007 changes included in the WCO correlation table, the Secretariat proposed the simplification of some correlations as described in detail in Annex I of G/MA/283. If a Member intends to make use of the standard correlation table or take other approaches, it would need to inform the Secretariat."[555] The Transposition Note further states that:

[549] India's response to Panel question No. 90(a), para. 10.

[550] India's response to Panel question No. 90(a), para. 10.

[551] Document G/MA/283 indicates, *inter alia*, the following: "[t]he scope of subheading 3006.10 was expanded to cover also sterile absorbable surgical or dental yarn and sterile surgical or dental adhesion barriers, whether or not absorbable"; "[t]he scope of heading 38.21 was expanded to cover also prepared culture media for maintenance of micro-organisms and prepared culture media for the development and maintenance of plant, human or animal cells"; "[t]he scope of new subheadings 7321.19 and 7321.89 has been expanded to cover other cooking appliances and plate warmers, and other appliances of heading 73.21"; "the scope of heading 85.17 has been expanded"; "[t]he scope of subheading 9030.20 has been expanded to cover all kinds of oscilloscopes and oscillographs"; "[t]he scope of instruments and apparatus of subheadings 9030.31 and 9030.39 is no longer limited to instruments and apparatus without a recording device". (G/MA/283, Annex I, pp. 28, 30, 37, 41, and 43).

[552] India's response to Panel question No. 90(a), para. 10.

[553] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50), Attachment 3, CTS HS2007 Transposition Note XII - India, pp. 1-3.

[554] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50), Attachment 3, CTS HS2007 Transposition Note XII - India, p. 1. The technical issues arising in relation to "AG – non-AG breakdown" pertained to specific issues arising due to negotiating texts as well as two cases "where the HS2007 transposition results in a mix of AG and non-AG products". (Ibid.).

[555] Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50), Attachment 3, CTS HS2007 Transposition Note XII - India, p. 2. We observe that document G/MA/283 describes in detail how there was a "need for simplification", in order to avoid excessively complex Schedules which would undermine the purpose of the transposition exercise. Specifically, according to document G/MA/283:

> In the HS 2002 transposition exercise, a significant amount of manual work by the Secretariat focused on a number of changes relating to chemical wastes in HS Chapter 38 and to paper in HS Chapter 48. These changes involved many subheadings and implied very complicated correlations between the HS 1996 and HS 2002. Since the methodology followed by the Secretariat was a pure technical transposition without altering any concessions for these subheadings, the result was complex coding structures, and sometimes very complex technical descriptions, which had to be

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

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

7.191. Thus, with respect to whether the WTO Secretariat complied with its procedural obligations such as to put India on notice as to possible changes of scope, we consider that: (i) pursuant to the General Council Decision on HS2007 Transposition Procedures, the WTO Secretariat was required to flag any tariff item for which a change in the scope of a concession "*may* have occurred" due to the complex technical nature of the transposition[556]; and (ii) through document G/MA/283 (and the numerous references to this document in its communication to India), the WTO Secretariat satisfied that requirement. In our view, the WTO Secretariat clearly flagged all tariff items (including the tariff items at issue in this dispute) for which a change in the scope of the concession "may have occurred" due to the complex technical nature of the transposition.[557]

7.192. We recognize that both parties to this dispute assert that the WTO Secretariat did *not* flag the relevant tariff items at issue.[558] We have addressed India's arguments in this respect above. As to the European Union, we note the European Union's view that "the transposition from HS2002 to HS2007 did not modify the scope of the tariff concessions at issue in this dispute" and that "[t]herefore, there was nothing to be 'flagged' by the Secretariat".[559] The European Union's argument appears to imply that the WTO Secretariat was required to flag those tariff items for which there had, in fact, been a change in the scope of tariff concessions. We recall, however, that the Secretariat was not required to make such a determination. Rather, it was required to flag those tariff items with respect to which a change in product scope *may have occurred due to the complex*

> introduced in order to retain all the details of concessions. The advantage of this methodology is that it is technically correct (in the sense of representing exactly the same concessions as before), and thus it helps Members to avoid potential disputes and lengthy negotiations on changes in the concessions resulting from the transposition. On the other hand, the disadvantage is that in many cases it resulted in very complicated product codes and descriptions, which often deviate from those found in national applied tariff schedules and caused difficulties when making links between bound and applied tariffs. Moreover, this practice led to a proliferation of HS 1996 duty rates in HS 2002 tariff lines which may in fact represent somewhat theoretical allocations, covering little or no actual trade. In fact, some of the new breakouts might be virtually empty, with no traded products actually being classified under them. It could therefore be argued that the complication of the WTO schedules of concessions is in contradiction with the original purpose of these HS changes, namely, a simplification of the tariff structure to better deal with current needs and to allow for a comparison of the bound and the applied duties.

(G/MA/283, para. 4.2)

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

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

[558] India's second written submission, paras. 29-30; European Union's opening statement at the first meeting of the Panel, para. 47 and comments on India's response to Panel question No. 90(a)(i) and (ii), para. 4.

[559] European Union's comments on India's response to Panel question No. 90(a)(i) and (ii), para. 4.

nature of the transposition.[560] In our view, the Secretariat did exactly that with respect to all relevant complex structural changes. The onus then shifted to the Members, in reviewing these complex changes, to assess whether they considered that "the scope of a concession has been modified as a result of the transposition in a way that impairs the value of the concession".[561] Thus, pursuant to the General Council Decision on HS2007 Transposition Procedures, the WTO Secretariat was only required to flag those tariff items with respect to which the product scope of the concession *may* have changed. In our view, the WTO Secretariat did precisely that, and the European Union's arguments do not imply otherwise.

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

7.194. Before concluding as to whether the foregoing factual circumstance satisfies the requirements of Article 48(2), we note India's interpretation of the legal standard under Article 48 such that, "for a state to be put on notice of a possible error, the circumstances should be such that no interested party should fail to notice the error or be under a misapprehension about it."[562] As support for this interpretation, India refers to two judgments by the International Court of Justice (ICJ), in which cases error was invoked as a basis to invalidate a State's consent to be bound by a treaty. India refers to *Case concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, where "in the contested map 'which was to become part of the Boundary Convention, it was shown clearly, and in a manner which could not escape notice, that the disputed plots belonged to Belgium'".[563] India also refers to *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, where the ICJ concluded that "the map itself drew such pointed attention to the *Preah Vihear* region that no interested person, nor anyone charged with the duty of scrutinizing it, could have failed to see what the map was purporting to do in respect of that region".[564] India also states that "Article 48 of the VCLT does not regard as relevant whether the error was the result of an intentional act or of negligence, or of bad faith".[565]

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

7.196. We also note that neither of the cases cited by India pertains to the application of Article 48 of the Vienna Convention. Indeed, we find the plain language of Article 48(2) impossible to square with India's interpretation of the legal standard applicable thereto. Article 48(2) refers to the invoking State being put on notice of "a possible error". India asserts that for a State to be put on notice of a *possible error*, the circumstances should be such that "no interested party should fail to notice *the error*".[566] India's interpretation of Article 48(2) deletes the word "possible", and requires that the State in question be unmistakeably aware of the actual error.

7.197. In our view, Article 48(2) is clear on its face. Contrary to India's argument that a State must necessarily have known of the error in order to meet the standard of being "put on notice of a

[560] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 4.
[561] General Council Decision on HS2007 Transposition Procedures, WT/L/673, para. 15.
[562] India's response to Panel question No. 90(a), para. 11. See also India's second written submission, para. 29.
[563] India's second written submission, para. 29 (quoting ICJ, *Case concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, Judgment of 20 June 1959: ICJ Reports 1959, p. 209, (Exhibit IND-2), pp. 225-227).
[564] India's second written submission, para. 29 (quoting ICJ, *Case concerning the Temple of Preah Vihear* (*Cambodia* v. *Thailand*), Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6, (Exhibit IND-3), at p. 26).
[565] India's response to Panel question No. 20, para. 67.
[566] India's first written submission, para. 73. (emphasis added)

possible error", we consider that Article 48(2) merely requires that the State was on notice of the possibility that such an error could occur.

7.198. Applying that legal standard to the facts, as described above, we recall that India alleges that its "error" at the time of the certification of its Schedule was its mistaken assumption that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings. We consider that India was on notice that the HS2007 transposition exercise could have implications for the classification differences of ITA participants regarding their ITA undertakings. Furthermore, in the circumstances of the HS2007 transposition exercise, India was on notice of the possibility that the scope of the concessions set forth in tariff items 8517.12, 8517.61, 8517.62, and 8517.70 of its HS2007 Schedule *may* have expanded as a consequence of the complex changes to those tariff items.[567] If India was on notice of the possibility that its WTO tariff commitments in its HS2007 Schedule may have expanded from the scope of the commitments set forth in its HS2002 Schedule, then India was also necessarily on notice that its WTO tariff commitments may have expanded as compared to the scope of its commitments in its HS1996 Schedule, and the scope of its ITA undertakings. In our view, therefore, India was put on notice of the possibility of an "error", as India defines its error, within the meaning of Article 48(2).

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

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

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

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

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

7.203. India could have objected or made comments during any of the multilateral sessions reviewing and approving the correlation tables to be used by Members and the WTO Secretariat during the transposition process (i.e. the General Council when it decided on the Transposition Procedures and the Committee on Market Access when it approved document G/MA/283). India could also have objected or made comments when it received the draft transposition files from the WTO Secretariat in 2013. India could further have raised objections or made comments during the

[567] As to India's invocation of error with respect to tariff item 8504.40, we recognize that India could not have been on notice of any possible error, since this tariff item did not change during the transposition process. However, the fact that this tariff item did not change during the transposition process also means that there could not have been any error, on the part of India, during the transposition process. (See generally G/MA/W/76; G/MA/283; Email from IDB, WTO, to India (8 November 2013), (Exhibit IND-50); and Email from Market Access Intelligence Section, WTO, to India (12 February 2014), (Exhibit IND-51)).

multilateral review session held in April 2015. Notwithstanding these three specific opportunities set forth in the transposition procedures, India, on its own initiative, could have raised any concerns or objections either bilaterally (to the WTO Secretariat) or multilaterally (in the Committee on Market Access or other relevant WTO committees) at *any time* during the nine-year transposition process, which started in 2006 and (in the case of India) ended in 2015. India did not do so.

7.204. Additionally, we recall that India itself was aware of Members' differences of opinion with respect to product classification under the ITA.[568] Indeed, India was also on notice of the possibility that such differences of opinion with respect to product classification could have implications for the HS2007 transposition process.[569] To the extent that India remained silent on such issues in the context of the transposition exercise, WTO Members and the WTO Secretariat could only assume that India was satisfied that the transposition exercise would follow the multilaterally approved correlation tables.

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

7.206. In short, we consider that India had both specific and general opportunities to highlight to Members and to the WTO Secretariat any concerns that it may have had regarding the relationship between the ITA and its HS2007 Schedule. India did not do so. In our analysis of Article 48(1) above, we concluded that India's failure to raise such concerns means that there is no evidence that India's concerns in this respect constituted an "essential basis" for its consent to be bound.[570] For the purposes of applying Article 48(2), we moreover note that India's failure to raise those concerns would appear to have directly contributed to the alleged error arising in the first place.

7.207. We also highlight that, as a Member of the WTO, it was India's responsibility to verify the scope of its legal commitments before undertaking to accept those commitments. Indeed, the transposition procedures, which had been approved by India, explicitly required the Members to assess whether the "scope of a concession has been modified as a result of the transposition in a way that impairs the value of the concession". This was not a minor responsibility. Moreover, India has not asserted that its customs officials or government representatives lacked sufficient expertise to properly review or understand the implications of India's commitments as set forth in the draft Schedule prepared by the WTO Secretariat. India's failure to properly review its legal commitments is not a "minor and excusable"[571] contribution to the creation of the alleged error, and would indeed seem to be a significant contributing factor in causing the error to occur, especially taking into account that India had already approved the correlation tables relied upon by the Secretariat, and was on notice that the changes to the tariff items at issue were complex, accounted for technological developments, and, in some instances, might have increased the scope of the tariff items.

7.208. We note that India appears to consider that other actors, such as other WTO Members and the WTO Secretariat, also contributed to the error. We understand however, that the WTO Secretariat correctly followed the transposition procedures that had been multilaterally agreed (including by India). While India has asserted that the Secretariat failed to follow the transposition procedures by failing to flag the relevant tariff items, this is contradicted by the existence of document G/MA/283, which was referred to numerous times in the Secretariat's communications to

[568] See para. 7.112 above.

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

[570] See para. 7.155 above.

[571] Prof. M. Waibel, Legal Opinion on Error, (Exhibit IND-79), para. 39.

India, and which was included in the bundle of documents transmitted by the Secretariat to India with the draft transposition files.[572] Moreover, since India did not communicate any concerns regarding the ITA to the WTO Secretariat during the transposition process, the WTO Secretariat could not have contributed to India's apparent misunderstanding regarding the scope of its commitments under the ITA and the Schedule (even assuming that there was an increase in the scope of those commitments).

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

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

7.3.3.3.3.4 Conclusion regarding Article 48(2)

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

7.3.3.4 Conclusion

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

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

7.3.4 India's rectification request under the 1980 Decision

7.3.4.1 Introduction

7.214. As described in section 2.3 above, on 25 September 2018, India requested a rectification of its WTO Schedule in accordance with the 1980 Decision, "for the purpose of correcting certain errors contained in its HS2007 Schedule".[573] India stated that the supposed errors occurred while

[572] India's only ground for arguing that the Secretariat did not follow those transposition procedures is that "the contested tariff items were not adequately flagged". (India's response to Panel question No. 77, paras. 59 and 61. See also India's response to Panel question No. 95, para. 32). We have addressed that argument and dismissed it. In our view, the Secretariat did indeed follow the agreed-upon transposition procedures, including with respect to flagging possible changes of product scope.

[573] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-78), p. 1.

transposing its HS2002 Schedule to its HS2007 Schedule.[574] India also stated that the draft rectification did not "alter India's commitments either under GATT 1994 or the ITA[], as contained in the WTO document WT/Let/181 dated 2 October 1997."[575]

7.215. Several WTO Members, including the European Union, objected to India's draft rectification.[576] The European Union took the view that the proposed rectification "did not constitute a change of a purely formal character, but rather that it altered the scope of India's GATT 1994 commitments." The European Union "considered that the changes were not within the terms of paragraph 2 of the 1980 Decision".[577]

7.216. In these proceedings, India argues that through its rectification request it sought to correct an "inadvertent error of a purely formal character", and that the draft rectification was in accordance with the 1980 Decision.[578] According to India, the HS2007 Schedule is to be read in light of the originally negotiated concessions such that products that "have never been negotiated upon remain outside the scope of the 2007 Schedule."[579] India requests us to "recognize and declare that the Draft Rectification was of a purely formal character and the European Union's objections on the same were unfounded."[580] Specifically, India requests us to:

> [A]ssess the objection raised by the European Union. If the Panel were to find that the ITA[] did not cover the products at issue, it will be evident that the Draft Rectification was of a purely formal character. Therefore, the objection raised by the European Union to the Draft Rectification would be unfounded in law and would be contrary to Paragraph 3 of the 1980 [Decision]. Further, such a determination shall also establish that the European Union's action impeded India's right to rectify its Schedule under the 1980 [Decision].[581]

7.217. India clarifies that it does not seek the certification of the draft rectification by the Panel through the dispute settlement mechanism.[582]

7.3.4.2 Main arguments of the parties

7.218. India argues that the European Union "acted beyond the prescriptions of Paragraph 3 of the 1980 Decision by raising an objection unfounded in law", and that "the European Union's objections were an impediment to India's right to make a formal rectification to its Schedule of Concessions under the 1980 [Decision]."[583] As to the legal basis for the Panel to make findings requested by India, India maintains that the 1980 Decision is a "covered agreement" within the meaning of Article 1.1 of the DSU, by virtue of it being an "other decision[] of the Contracting Parties to the GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994.[584] Therefore, India posits that the Panel has authority to interpret the draft rectification and clarify the rights and obligations of the Members under it pursuant to Article 3.2 of the DSU.[585] India adds that Article 11 of the DSU obliges the Panel to "objectively assess the facts of the dispute and examine the conformity of Members' actions with

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[574] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-78), p. 1.
[575] India's rectification request, G/MA/TAR/RS/572, (Exhibit IND-78), p. 1.
[576] Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, para. 18.4; Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the meeting held on 30 October 2018, G/IT/M/69, paras. 1.19-1.21; Committee on Market Access, Minutes of the meeting held on 9 October 2018, G/MA/M/68, para. 134.
[577] Council for Trade in Goods, Minutes of the meeting held on 12 and 13 November 2018, G/C/M/133, para. 18.4.
[578] India's first written submission, para. 26.
[579] India's first written submission, para. 53. See also India's response to Panel question No. 50, para. 109.
[580] India's first written submission, para. 53.
[581] India's response to Panel question No. 74, para. 53. See also India's second written submission, para. 166.
[582] India's second written submission, para. 167.
[583] India's response to Panel question No. 74, para. 49. See also India's second written submission, para. 160.
[584] India's response to Panel question No. 74, paras. 50-51; second written submission, paras. 161-162 (referring to Panel Report, *US – FSC*, para. 7.63).
[585] India's response to Panel question No. 74, para. 52; second written submission, para. 164 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53).

covered agreements."[586] India also submits that the Panel has an obligation to assess "if the objection raised by the European Union is in good faith or if it is merely an instrument to force India to grant concessions on products, which it never agreed to."[587] In response to an argument by the European Union that India's request is a "counter-claim", India submits that "India's claim with regard to the Draft Rectification is not a counter-claim".[588] India submits that given that in its view the 1980 Decision is a "covered agreement", the Panel is "obligated to assess the complaint in light of the 1980 [Decision]". For India, "[a]ny 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 the complainant's objections to the Draft Rectification essential for an objective assessment of the facts of the dispute under Article 11 of the DSU."[589] Moreover, India posits that if it is found that the proposed draft rectification is of a purely formal character, "it would lead to the conclusion that the bound rates assigned to the products at issue were clearly in error and that such concessions were capable of rectification via the 1980 [Decision]."[590] India also contends that as a consequence of such a finding, "it would be found that the bound rates assigned to the products at issue are a consequence of a formal error and are therefore severally void. Therefore, there can be no violation of Article II:1(a) and Article II:1(b) of the GATT if the contested tariff lines of India's schedule of concessions are void."[591]

7.219. For its part, the European Union submits that there is no legal basis, under the DSU, for the Panel to recognize and declare that the Draft Rectification was of a purely formal character and that the European Union's objections on the same were unfounded.[592] The European Union maintains that the 1980 Decision is not an "other decision[] of the Contracting Parties to the GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994, and is therefore not a covered agreement within the meaning of Article 1.1 of the DSU.[593] The European Union also indicates that because its panel request has not referred to India's draft rectification or to the 1980 Decision, the Panel lacks the authority, pursuant to its terms of reference, to make findings regarding India's draft rectification or the 1980 Decision.[594] The European Union argues that India's request in this respect is a "counter-complaint" within the meaning of Article 3.10, second sentence, of the DSU because "India claims that the European Union violated paragraph 3 of the 1980 [Decision] by objecting to India's Draft Rectification Request and requests the Panel to make a positive finding to that effect".[595] Thus, according to the European Union, Article 3.10 of the DSU precludes India from bringing "counter-claims against the complaining party".[596] The European Union also maintains that its objection to the proposed rectification was "entirely founded" because "it was manifest that the proposed rectification was not of 'purely formal character'".[597] The European Union also considers that the error invoked by India under Article 48 of the Vienna Convention in these proceedings and the error invoked by India in support of its request for a rectification under the 1980 Decision are "legally distinct and manifestly incompatible with each other."[598] For the European Union, the error alleged by India under Article 48 of the Vienna Convention in this dispute is "a very material one" and is "an error in India's consent relating to the scope of the commitments included in the 2007 certification"

[586] India's response to Panel question No. 74, para. 52.
[587] India's response to Panel question No. 74, para. 52; second written submission, para. 165.
[588] India's response to Panel question No. 97, para. 35.
[589] India's response to Panel question No. 97, para. 36.
[590] India's response to Panel question No. 74, para. 55. See also India's response to Panel question No. 97, para. 35.
[591] India's second written submission, para. 167.
[592] European Union's second written submission, paras. 19-42.
[593] European Union's second written submission, paras. 22-29.
[594] European Union's response to Panel question No. 96, para. 26.
[595] European Union's response to Panel question No. 98, paras. 28-32.
[596] European Union's second written submission, para. 31.
[597] European Union's second written submission, para. 33. Addressing India's arguments that "[i]f the Panel were to find that the ITA[] did not cover the products at issue, it will be evident that the Draft Rectification was of a purely formal character", the European Union submits that the "relevant comparison is between the existing text of a Member's WTO schedule, i.e. in this case the text of India's certified [WTO] Schedule following the transposition to HS 2007, and the text of the proposed rectification to that schedule". (Ibid. paras. 36-37 (quoting India's response to Panel question No. 74, para. 53)). For the European Union, when that comparison is made, "it is beyond dispute that the rectification requested by India would substantially 'alter the scope of the concession' and cannot therefore be regarded as being of 'purely formal character'". (Ibid. para. 38 (quoting India's response to Panel question No. 53, para. 4, and No. 65, para. 26)).
[598] European Union's response to Panel question No. 74, para. 100.

but "not an error in the text of the treaty"; while the error invoked under the 1980 Decision was allegedly a purely formal error, and was an error in the text of the treaty.[599]

7.3.4.3 Main arguments of the third parties

7.220. Brazil submits that because "[t]here seems to be agreement amongst the parties that India's draft rectification has not been certified …, India's schedule has not been modified by virtue of the draft rectification, since the procedures under the 1980 Decision have not been completed given the objections that were raised."[600] Brazil therefore "does not see any basis in the DSU or in the Panel's terms of reference in [this] dispute[] for the Panel to overturn the objections that were raised in connection with India's draft rectification."[601]

7.221. Canada considers that a determination on whether India's draft rectification was of a purely formal character is not within the purview of a panel, and would amount to the Panel substituting its views for those of WTO Members, thereby overriding the procedures that have been agreed to by all WTO Members.[602] Canada also maintains that even assuming *arguendo* the Panel had capacity to consider India's request for findings, the Panel would still need to analyse whether the products at issue were covered by the tariff items as amended by the draft rectification, and determine whether India imposes on those products duties in excess of those set forth in its Schedule.[603]

7.222. Japan submits that there is no legal basis for the Panel to make the findings requested by India under the DSU or any other covered agreement. Japan maintains that such findings go against the Panel's mandate, which is limited by Articles 3.2 and 11 of the DSU.[604] Japan adds that there is no absolute right for a proposed rectification to be automatically accepted, or a corresponding obligation of other Members to accept that rectification request.[605] Moreover, Japan considers that it is not for the Panel to rule on the nature of a rectification request, or objections on that request. Rather, when a Member's rectification request is objected to, that Member ought to follow the procedure set out in Article XXVIII of the GATT 1994 in order to effectuate the proposed change.[606] Japan also argues that, given that WTO Members other than the complainants in this and the parallel disputes objected to India's draft rectification, any findings by the Panel would risk undermining the rights of those WTO Members and raise serious systemic concerns regarding of the reliability and predictability of the system of tariff concessions.[607] Finally, Japan maintains that any findings by the Panel on India's request would be *inutile* because those findings would not affect the validity of objections by other WTO Members, and until the draft rectification is certified in accordance with the 1980 Decision, the proposed changes would have no legal effect.[608]

7.223. Korea submits that the Panel's mandate is confined to its terms of reference, which do not include recognizing and declaring the invalidity of the complainant's objections to India's rectification request.[609] Further, Korea considers that negotiation and agreement among Members are the "essence of the modification and/or rectification procedure" under Article XXVIII of the GATT 1994 and the 1980 Decision. Therefore, Korea is concerned that the possibility of negotiations under those procedures would be undermined if a Member's objection to a proposed rectification is declared unfounded by the Panel.[610] Korea maintains that regardless of the Panel's findings on India's draft rectification, India's obligations are to be assessed in light of India's existing Schedule because "treaty terms are not based on a subjective intent of one Party, but rather on a common intent of all relevant Parties interpreted through the general rule of treaty interpretation".[611]

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[599] European Union's response to Panel question No. 74, paras. 101-102.
[600] Brazil's third-party response to Panel question No. 19, para. 13.
[601] Brazil's third-party response to Panel question No. 19, para. 14.
[602] Canada's third-party response to panel question No. 19, para. 14, and No. 20, para. 16.
[603] Canada's third-party response to panel question No. 20, para. 17.
[604] Japan's third-party response to Panel question No. 19, para. 23.
[605] Japan's third-party response to Panel question No. 19, para. 24.
[606] Japan's third-party response to Panel question No. 19, para. 25.
[607] Japan's third-party response to Panel question No. 19, para. 26.
[608] Japan's third-party response to Panel question No. 20, paras. 31-32.
[609] Korea's third-party response to Panel question No. 19, para. 12 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22).
[610] Korea's third-party response to Panel question No. 19, para. 13.
[611] Korea's third-party response to Panel question No. 20, para. 14 (referring to Appellate Body Report, *EC – Computer Equipment*, para. 84).

7.224. Chinese Taipei submits that the DSU does not provide a legal basis for the Panel to "recognize and declare that the Draft Rectification was of a purely formal character and [the complainant's] objections on the same were unfounded".[612] For Chinese Taipei, neither "India's Draft Rectification nor the 1980 [Decision] are 'covered agreements' within the meaning of Article 1.1 of the DSU".[613] Chinese Taipei also argues that pursuant to its terms of reference, the Panel in this dispute "is neither required nor authorized" to make findings with respect to India's draft rectification or the 1980 Decision.[614] Chinese Taipei maintains that certification of a Schedule pursuant to the 1980 Decision is subject to the agreement of all WTO Members, who are provided an opportunity to object to the proposed modifications, and therefore such a matter is not to be decided by a dispute settlement panel.[615] Thus, for Chinese Taipei, the Panel is "called upon to determine whether India violates its commitments under Articles II:1(a) and II:1(b) of the GATT 1994 based on India's last certified Schedule under HS2007."[616]

7.225. The United States argues that there is no legal basis in the DSU for the Panel to determine that India's draft rectification request was of a purely formal character and the objections to that request were unfounded.[617] According to the United States, although the 1980 Decision was agreed upon by WTO Members, it is not a "covered agreement" within the meaning of Article 1.1 of the DSU. Thus, the DSU does not contemplate that a panel would make findings regarding Member's actions under the 1980 Decision.[618] The United States also considers that the findings requested by India could raise questions on altering the balance of rights and obligations struck with respect to India's WTO Schedule.[619] Moreover, the United States argues that the 1980 Decision does not contemplate recourse to WTO dispute settlement where an objection is made.[620] Finally, the United States maintains that pending any resolution of the objections raised by other WTO Members, the authentic text of India's Schedule remains unaltered.[621]

7.3.4.4 Panel's assessment

7.226. We recall that India requests us to find that: (i) the European Union violated paragraph 3 of the 1980 Decision by raising an objection "unfounded in law", and (ii) the European Union's objection constituted an "impediment to India's rights to make a formal rectification to its schedule of concessions under the 1980 [Decision]."[622] The parties disagree on whether we have a legal basis under the DSU to address India's request for findings.

7.227. According to India, the 1980 Decision is a covered agreement within the meaning of Article 1.1 of the DSU. Therefore, in India's view, we have the authority to "interpret the Draft Rectification and clarify the rights and obligations of the Members under it" under Article 3.2 of the DSU.[623] India also argues that Article 11 of the DSU imposes an obligation on us to objectively assess the facts of the dispute and examine the conformity of Members' actions with the covered agreements.[624] The European Union disagrees that the 1980 Decision is a covered agreement within the meaning of Article 1.1 of the DSU.[625] The European Union also indicates that because its panel request did not refer to India's draft rectification or the 1980 Decision, we lack jurisdiction to assess India's request and make the requested findings.[626] Additionally, the European Union maintains that India is precluded from making a counter-complaint by Article 3.10 of the DSU.[627]

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[612] Chinese Taipei's third-party response to Panel question No. 19, para. 16.
[613] Chinese Taipei's third-party response to Panel question No. 19, para. 17.
[614] Chinese Taipei's third-party response to Panel question No. 19, para. 18.
[615] Chinese Taipei's third-party response to Panel question No. 20, para. 21.
[616] Chinese Taipei's third-party response to Panel question No. 20, para. 22.
[617] United States' third-party response to Panel question Nos. 19-20, para. 16.
[618] United States' third-party response to Panel question Nos. 19-20, para. 17.
[619] United States' third-party response to Panel question Nos. 19-20, para. 18.
[620] United States' third-party response to Panel question Nos. 19-20, para. 19 (referring to Panel Report, *Russia – Tariff Treatment*, paras. 7.50-7.56).
[621] United States' third-party response to Panel question Nos. 19-20, para. 20.
[622] India's second written submission, para. 160.
[623] India's response to Panel question No. 74, paras. 50-51; second written submission, paras. 161-162 (referring to Panel Report, *US – FSC*, para. 7.63).
[624] India's response to Panel question No. 74, para. 52.
[625] European Union's second written submission, paras. 22-29.
[626] European Union's response to Panel question No. 96, para. 26.
[627] European Union's response to Panel question No. 98, paras. 28-32; European Union's second written submission, paras. 31-32.

7.228. The parties' arguments raise two issues concerning the existence of a legal basis for us to address India's request for findings: (i) whether our terms of reference allow us to assess India's request for findings; and (ii) whether the 1980 Decision is a covered agreement within the meaning of Article 1.1 of the DSU. We consider it logical to first determine whether, pursuant to our terms of reference, we have jurisdiction over India's request for findings. We will only evaluate whether the 1980 Decision is a "covered agreement" within the meaning of Article 1.1 of the DSU if we determine that we have jurisdiction to address India's request.[628] Moreover, if we determine that we lack the legal mandate to address India's request for findings, we would not proceed to address the substance of that request (i.e. whether the rectification request was purely of a formal character and whether the European Union's objection was "unfounded in law").

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

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in [its panel request] and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[629]

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

7.231. We consider that, pursuant to Articles 6.2 and 7.1, our terms of reference as defined by the panel request delimit the scope of the dispute and in turn our jurisdiction.[630] We note that the European Union's panel request identifies the specific measures at issue as "the duties applied by India on imports of certain ICT products in excess of the bindings set forth in its [WTO Schedule]". The panel request then indicates that the legal basis of the European Union's complaint is India's tariff treatment of certain ICT products inconsistently with Articles II:1(a) and (b) of the GATT 1994.[631]

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

7.233. Turning to assessing whether India's request for findings is within those terms of reference, we note that in response to a question from the Panel concerning the effect of the requested findings on the European Union's claims under Articles II:1(a) and (b), India stated that "if it is found that the proposed Draft Rectification is, in fact, of a purely formal character, it would lead to the conclusion that the bound rates assigned to the products at issue were clearly in error and that such concessions were capable of rectification via the 1980 [Decision]."[632] We also note India's argument in its second written submission that "[i]f it is found that the Draft Rectification is, in fact, of a purely formal character, it would be found that the bound rates assigned to the products at issue are a consequence of a formal error and are therefore severally void. Therefore, there can be no violation of Article II:1(a) and Article II:1(b) of the GATT if the contested tariff lines of India's schedule of concessions are void."[633]

7.234. We do not see how findings that the rectification request was "of a purely formal character" and that the European Union's objection was "unfounded in law" would modify India's WTO tariff

[628] See also Panel Report, *EU – Poultry Meat (China)*, fn 39 to para. 7.27.
[629] Constitution Note of the Panel, WT/DS582/10, para. 2.
[630] See e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.11; *US – Countervailing Measures (China)*, para. 4.6; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.
[631] European Union's panel request, pp. 1-2.
[632] India's response to Panel question No. 74, para. 55.
[633] India's second written submission, para. 167.

commitments or otherwise affect our application of Articles II:1(a) and (b) of the GATT 1994. India has clarified that it is not requesting us to certify its rectification request.[634] In any case, we do not read the 1980 Decision to permit a panel to certify a rectification request made under the 1980 Decision. We note that pursuant to paragraph 3 of the 1980 Decision, changes to a Schedule requested through the 1980 Decision "become a Certification provided that no objection has been raised by a [Member] within three months". We recall that WTO Members other than the European Union – including Japan and Chinese Taipei, complainants in the other two disputes in which the same panelists were appointed[635] – objected to India's rectification request. Consequently, even assuming *arguendo* that we determined that India's draft rectification was of a "purely formal character" and that the European Union's objection on the same was "unfounded", our findings would not have any effect *vis-à-vis* India's WTO Schedule. Until *all* objections to India's rectification request are withdrawn (including objections by WTO Members who are not parties to this dispute), and India's proposed changes are certified, India's WTO Schedule, as a legal matter, remains unmodified.[636] Contrary to India's arguments, our findings in this regard would not render its bound rates "severally void" and would not in any way modify India's WTO obligations under Articles II:1(a) and (b) or under its WTO Schedule.

7.235. Indeed, from our review of India's arguments, we understand that India is in fact raising a claim that the European Union acted inconsistently with its own WTO obligations. We note that a "claim" in WTO dispute settlement refers to an allegation that another Member has violated a provision of a covered agreement, thereby nullifying or impairing the benefits accruing to the aggrieved Member.[637] India, in its own words, requests us to find that "the European Union *violated* paragraph 3 of the 1980 [Decision]" and "imped[ed] India's rights … under the 1980 [Decision]".[638] This, in our view, constitutes a claim by India that the European Union has violated, and in effect nullified or impaired the benefits that accrue to India under, the 1980 Decision.[639]

7.236. Therefore, we consider that India's claim does not concern the matter before the Panel, as defined in the European Union's panel request, namely whether the tariff treatment imposed by India on certain ICT products is inconsistent with Articles II:1(a) and (b) of the GATT 1994.[640] Consequently, India's request for findings appears to fall outside our terms of reference, pursuant to Articles 6.2 and 7.1 of the DSU.

7.237. We note India's argument that Article 11 of the DSU requires us to "objectively assess the facts of the dispute and examine the conformity of Members' actions with [the] covered agreements".[641] We agree that Article 11 requires us to make an objective assessment of the facts

[634] India's second written submission, para. 167 ("India clarifies that it does not seek … certification of the Draft Rectification through the dispute settlement mechanism"). See also India's response to Panel question No. 97, para. 36.

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

[636] We note that several third parties agree with this understanding. (See e.g. Canada's third-party response to Panel question No. 19, para. 14, and No. 20, para 16; Japan's third-party response to Panel question No. 20, paras. 31-32; Korea's third-party response to Panel question No. 20, para. 14; Chinese Taipei's third-party response to Panel question No. 20, para. 21; and United States' third-party response to Panel question Nos. 19-20, para. 20). A previous panel took a similar view, stating that "a proposed rectification to correct an alleged error in a Schedule would have no legal effect until such time as the text of the Schedule is changed through certification." (Panel Report, *EU – Poultry Meat (China)*, para. 7.536. See also Panel Report, *Russia – Tariff Treatment*, para. 7.54).

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

[638] India's second written submission, para. 160. (emphasis added)

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

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

(India's second written submission, para. 160)

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

[641] India's second written submission, para. 165.

of the case and the applicability of, and conformity with, the relevant covered agreements. However, we understand that India is not requesting factual or even legal findings that would be relevant for assessing the consistency of the measures challenged by the European Union with the covered agreements. To the contrary, India is requesting legal findings that the European Union acted inconsistently with its own WTO obligations.

7.238. Article 11 requires that "a panel should make an objective assessment *of the matter before it*, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[642] In our view, "the matter" before us (under Article 11) constitutes the "matter referred to the DSB" (under Article 7.1), and is delimited by the complainant's panel request. We have found above that India's request for findings is outside the scope of our terms of reference. We therefore see nothing in Article 11 of the DSU that permits us to make the findings requested by India.

7.239. India also refers to the findings of the Appellate Body in *Mexico – Taxes on Soft Drinks* to support its position that Article 3.2 of the DSU requires us to "interpret the Draft Rectification and clarify the rights and obligations of the Members under it".[643] India quotes the following finding by the Appellate Body:

> A decision by a panel to decline to exercise validly established jurisdiction would seem to 'diminish' the right of a complaining Member to 'seek the redress of a violation of obligations' within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU. We see no reason, therefore, to disagree with the Panel's statement that a WTO panel 'would seem … not to be in a position to choose freely whether or not to exercise its jurisdiction'.[644]

7.240. We note, however, that India is not a complaining party in this dispute. By declining to "interpret the Draft Rectification"[645], we are not diminishing India's rights to bring a dispute pursuant to the DSU. India is not precluded from requesting the establishment of a panel with appropriate terms of reference to determine whether the European Union's actions "violated" the 1980 Decision. Moreover, we note that India has neither entered into consultations with the European Union under Article 4 of the DSU, nor requested the establishment of a panel by the DSB under Article 6 of the DSU. In our view, if we were to assess the substance of India's request for findings, this would in fact diminish the rights of the *complainant* in this dispute, namely its right to seek a positive solution through consultations. The Appellate Body's findings in *Mexico – Taxes on Soft Drinks* therefore do not support India's view that we are required to address India's requests for findings.

7.241. India also refers to certain observations of the panel in *Russia – Traffic in Transit*. According to India, that panel found that: (i) "WTO Members have an obligation to perform treaties in good faith, and if Members' actions are not in conformity with the relevant provisions, the Panel has an obligation to review it"; and (ii) "systemic issues might arise if Members abuse provisions to circumvent obligations".[646] India argues that for these reasons, we have an obligation to "assess if the objection raised by the European Union is in good faith or if it is merely an instrument to force India to grant concessions on products, which it never agreed to."[647]

7.242. In our view, the observations of the panel in *Russia – Traffic in Transit* not only fail to provide a legal basis for us to address India's request, but further reinforce our view on this issue. Regarding the requirement to assess whether Members' actions are in conformity with relevant provisions, we have explained above that this obligation under Article 11 of the DSU is delimited by our terms of reference, and our terms of reference do not extend to the findings requested by India. As to whether systemic issues might arise if Members abuse provisions to circumvent obligations, we strongly agree. Addressing India's claim in the present proceedings would seem to allow India to bring a

[642] Emphasis added.
[643] India's second written submission, para. 164.
[644] India's second written submission, para. 164 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53).
[645] India's second written submission, para. 164.
[646] India's second written submission, para. 165 (referring to Panel Report, *Russia – Traffic in Transit*, paras. 7.132-7.133).
[647] India's second written submission, para. 165.

claim before a panel without following the relevant procedural steps set forth in the DSU. This would not only amount to India circumventing its obligations under the DSU, but could indeed raise significant systemic issues concerning the function of panels and the procedural rights and obligations of Members with respect to WTO dispute settlement.

7.243. We also note the European Union's argument that India's request is a "counter-complaint" within the meaning of Article 3.10, second sentence, of the DSU, which India is precluded, by that provision, from bringing.[648] India disputes that its arguments regarding the draft rectification are a "counter-claim".[649] India argues that if we find that the contested products were not covered by the ITA, that finding would "validate the purely formal character of India's rectification request and reveal the European Union's objections to such rectification request to be unfounded."[650]

7.244. We have found in paragraph 7.235 above that India's request is a claim and not a defence. We have also found that we do not have a legal basis to evaluate whether India's rectification request was of a purely formal character within the meaning of paragraph 2 of the 1980 Decision, or whether the European Union's objection on the same was unfounded. Therefore, we do not consider it necessary to evaluate whether India's request is a "counter-complaint" within the meaning of Article 3.10, second sentence, of the DSU. We also do not express a view on the scope, relevance or application of Article 3.10 of the DSU in this dispute.

7.245. In sum, we conclude that, in accordance with the provisions of the DSU, our terms of reference do not permit us to assess in the present proceedings whether: (i) the European Union violated paragraph 3 of the 1980 Decision by raising an objection unfounded in law; or (ii) the European Union's action was an impediment to India's rights to make a formal rectification to its WTO Schedule under the 1980 Decision. We also note that, even if we did indeed have the legal mandate to make the findings requested by India, doing so would not assist in resolving this dispute.[651] For these reasons, we do not consider it necessary to assess whether the 1980 Decision is a "covered agreement" within the meaning of Article 1.1 of the DSU, or the substance of India's arguments that its rectification request was purely of a formal nature and the European Union's objection was inconsistent with its obligations under the 1980 Decision.[652]

7.3.5 Conclusion

7.246. We have addressed above the parties' arguments concerning the ITA, Article 48 of the Vienna Convention, and India's rectification request under the 1980 Decision. We have concluded that the ITA is not a covered agreement within the meaning of the WTO Agreement and the DSU, and does not set forth the legal obligations at issue in this dispute. Moreover, the ITA does not otherwise limit the scope of India's tariff commitments as set forth in its WTO Schedule. In our view, the circumstances of this case do not satisfy the substantive requirements of Article 48 of the Vienna Convention, and we therefore decline to read aspects of India's WTO Schedule as invalid. Finally, we consider that India's request for findings that the complainant acted inconsistently with the 1980 Decision is not within our terms of reference, and we consequently do not have the legal mandate to make such findings. Moreover, even assuming *arguendo* that we had the legal mandate to address India's request for findings, we do not see how such findings would contribute to a positive resolution of this dispute.

7.247. We therefore proceed with the application of Articles II:1(a) and (b) of the GATT 1994 in this dispute by comparing, on the one hand, India's WTO tariff commitments as set forth in its WTO Schedule[653], and, on the other hand, the tariff treatment applied by India to imported products.

[648] European Union's second written submission, paras. 30-32; response to Panel question No. 98, paras. 28-32.
[649] India's response to Panel question No. 97, paras. 35-36; comments on the European Union's response to Panel question No. 96, para. 14, and No. 98, para. 15.
[650] India's comments on the European Union's response to Panel question No. 96, para. 14.
[651] See para. 7.234 above.
[652] See also Panel Report, *EU – Poultry Meat (China)*, fn 39 to para. 7.27.
[653] Unless otherwise specified, all references in this Report to India's "WTO Schedule" are to the HS2007 version of that Schedule.

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

7.4.1 Overview

7.248. The European Union claims that India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994 by imposing on certain products tariff treatment that is inconsistent with the commitments inscribed in India's WTO Schedule. The European Union specifically challenges the tariff treatment accorded by India to products falling under the following tariff items of India's WTO Schedule: 8504.40 ex02; 8517.12; 8517.61; 8517.62; 8517.70 ex01, ex02, and ex03; 8518.30 ex01 and 8544.42.00 ex01.[654]

7.249. For its part, India contests certain assertions by the European Union regarding the scope and content of its WTO tariff commitments, and considers that the European Union has failed to substantiate its burden of demonstrating that the tariff treatment of certain products is inconsistent with Articles II:1(a) and (b).[655]

7.250. We proceed with our analysis by assessing each tariff item in turn. We recall that where a measure is inconsistent with Article II:1(b), it is also inconsistent with Article II:1(a).[656] We also recall that applying Article II:1(b) in the context of this dispute entails comparing the treatment that India is obligated to provide in its WTO Schedule with the tariff treatment that India accords to the products at issue under the challenged measures.[657] We therefore conduct our assessment of each tariff item by: (i) identifying, as a legal matter, India's WTO tariff commitments; (ii) assessing, as a factual matter, the parties' assertions regarding the tariff treatment accorded by India to certain products; (iii) comparing the challenged tariff treatment to India's WTO tariff commitments; and (iv) on the basis of that comparison, forming a conclusion as to whether India is acting inconsistently with Articles II:1(a) and (b). In addition to these four steps, we also consider it useful to address certain general issues arising with respect to certain of the tariff items. Where necessary, we address these general issues at the outset, before conducting our four-step analysis of whether India is acting inconsistently with Articles II:1(a) and (b).

7.4.2 Tariff item 8504.40 ex02 of India's WTO Schedule

7.4.2.1 India's WTO tariff commitments

7.4.2.1.1 Main arguments of the parties

7.251. The European Union asserts that India's WTO tariff binding for static converters for automatic data processing machines and units thereof, and telecommunication apparatus, set forth at tariff item 8504.40 ex02 of India's WTO Schedule, is 0%.[658] The European Union also clarifies that its claim in relation to this tariff binding is limited to "static converters for cellular mobile phones".[659] According to the European Union, cellular mobile phones are telecommunication apparatus, and therefore India's WTO tariff binding for static converters for cellular mobile phones is 0%.[660]

7.252. India acknowledges that it committed to providing duty-free tariff treatment to products falling under tariff item 8504.40 ex02, i.e. "static converters for … telecommunications apparatus".[661] However, India maintains that "the scope of concessions for the sub-heading has expanded"[662] and that India did not commit to the "liberalization of 'static converters for telephones for cellular network'" under the ITA since "such static converters are specific to the development of telephones for cellular networks".[663] India also submits that while cellular mobile phones were not

[654] See para. 7.1 above.
[655] See para. 7.2 above.
[656] See para. 7.6 above.
[657] See para. 7.7 above.
[658] European Union's first written submission, para. 76.
[659] European Union's response to Panel question No. 81(a), para. 116.
[660] European Union's first written submission, para. 85; response to Panel question No. 81(b), paras. 117-125.
[661] India's first written submission, para. 167.
[662] India's response to Panel question No. 72, para. 40.
[663] India's first written submission, para. 170. See also India's second written submission, para. 146; response to Panel question No. 66, para. 30, and No. 72, para. 45.

covered under the ITA or the HS1996, such products may qualify as telecommunication apparatus under the HS2007.[664] India also contends that its tariff commitments under tariff item 8504.40 ex02 as reflected in its WTO Schedule based on the HS2007 were certified in error.[665]

7.4.2.1.2 Panel's assessment

7.253. We have addressed India's arguments that its WTO Schedule was certified in error above, and held that India's tariff commitments are set forth in India's WTO Schedule.[666] We have also rejected India's arguments that the ITA sets forth, or otherwise limits the scope of, its tariff commitments in its WTO HS2007 Schedule.[667] We also recall that, in our view, the tariff commitments set forth in India's WTO Schedule are not static in nature.[668]

7.254. Therefore, we turn to India's WTO Schedule to assess India's tariff commitments. India's WTO HS2007 Schedule provides, *inter alia*, the following[669]:

	Product description	Bound rate
8504.40	- Static converters	
8504.40 ex02	-- Static converters for automatic data processing machines and units thereof, and telecommunication apparatus	0%

7.255. We observe that the product description attached to India's tariff item 8504.40 ex02 is "static converters for… telecommunication apparatus". We also note that India confirms that cellular mobile phones are "telecommunication apparatus" under the HS2007.[670] Hence, there is no disagreement that static converters for cellular mobile phones are static converters for telecommunication apparatus within the meaning of the HS2007. We consider, therefore, that static converters for cellular mobile phones are covered under tariff item 8504.40 ex02 of India's WTO Schedule. Having found that India's WTO Schedule, which is based on the HS2007, sets forth India's WTO tariff commitments, we conclude that India's tariff commitments regarding "static converters for cellular mobile phones" are set out in tariff item 8504.40 ex02 of its WTO Schedule.

7.256. Given that the relevant tariff binding for static converters for cellular mobile phones set forth in India's WTO Schedule is 0%, and given that the WTO Schedule indicates no terms, conditions, or qualifications attached to that bound duty rate, we conclude that India is obligated to provide unconditional duty-free treatment to static converters for cellular mobile phones falling under tariff item 8504.40 ex02 of its WTO Schedule.

7.4.2.2 India's tariff treatment

7.4.2.2.1 Main arguments of the parties

7.257. The European Union submits that India's First Schedule imposes a standard duty rate of 20% on imports classified under tariff item 8504.40 of that Schedule, namely "[s]tatic converters".[671] The European Union considers that static converters for telecommunication apparatus imported into India are classified under tariff item 8504.40.90 of the First Schedule, which is a residual category described as "other".[672] According to the European Union, static converters for

[664] India's second written submission, para. 147; response to Panel question No. 72, paras. 40-45, and No. 127, para. 81.
[665] India's response to Panel question No. 18, para. 58, and No. 66, paras. 28 and 30. India argues that "[i]t is irrelevant that the sub-headings were not included in the Draft Rectification to India's 2007 Schedule." (India's response to Panel question No. 18, para. 58).
[666] See para. 7.213 above.
[667] See para. 7.81 above.
[668] See para. 7.245 above.
[669] WT/Let/1072.
[670] India's second written submission, para. 147; response to Panel question No. 127, para. 81.
[671] European Union's first written submission, para. 77 (referring to First Schedule of the Customs Tariff Act, as amended by Finance Act 2020, (Exhibit EU-28)).
[672] European Union's first written submission, paras. 77-78; response to Panel question No. 29, paras. 74-77.

cellular mobile phones, to which its claim is limited[673], are classified under this tariff item.[674] The European Union submits that Notification No. 25/2005, as amended by Notification No. 67/2017, exempts "static converters for … telecommunication apparatus, other than static converters for cellular mobile phones" from imposition of customs duties.[675] The European Union also notes that Notification No. 57/2017, as amended by subsequent notifications, reduces the duty rate applicable to "[a]ll goods other than charger or power adapter" to 10%.[676] Therefore, according to the European Union, India subjects static converters for cellular mobile phones to a 10% or 20% duty rate.[677]

7.258. India submits that "[s]tatic converters for automatic data processing machines and units thereof and telecommunication apparatus are classifiable under sub-heading 8504.40" in its domestic classification.[678] In response to questioning from the Panel before the first substantive meeting, India states that it imposes a 20% duty on static converters for cellular mobile phones.[679] In its second written submission, India submits that static converters for cellular mobile phones are subject to a "10% or 20%" duty rate.[680] Subsequently, asked by the Panel to clarify the tariff treatment accorded to these products, India submits that static converters for cellular mobile phones are subject to a 20% duty rate.[681]

7.4.2.2.2 Panel's assessment

7.259. It is uncontested that "static converters for … telecommunication apparatus" are classified under tariff item 8504.40.90 of India's First Schedule.[682] It is also uncontested that India's First Schedule sets the standard duty rate leviable on static converters classified under tariff item 8504.40.90 at 20%.[683] Our review of the First Schedule, as amended by the Finance Act 2020, confirms that India set the standard duty rate for static converters falling under tariff item 8504.40.90 of that Schedule at 20%.[684]

7.260. We recall that the duty rate applied by India to certain products may be different from that set forth in the First Schedule, depending on any relevant customs notifications. In this respect, the European Union submits that India applies a "10% or 20%" duty rate on static converters for cellular mobile phones.[685] India clarifies that such products are subject to a 20% duty rate.[686]

7.261. Based on the evidence on the record, we observe that the duty rate applied to products classified under tariff item 8504.40.90 of the First Schedule is subject to various customs notifications. Pursuant to Notification No. 25/2005, India exempted static converters for automatic data processing machines and units thereof, and telecommunication apparatus from the customs duties leviable under the First Schedule.[687] Notification No. 25/2005 was subsequently amended by Notification No. 67/2017, to exclude "static converters for cellular mobile phones" from that exemption.[688] Therefore, we understand that static converters for cellular mobile phones, the products at issue in this dispute, are not eligible for the duty-free treatment available under

[673] European Union's response to Panel question No. 81(a), para. 116.
[674] European Union's first written submission, paras. 78-85. See also response to Panel question No. 29, paras. 74-77.
[675] European Union's first written submission, paras. 79-81 (referring to Notification No. 25/2005, (Exhibit EU-10), as amended by Notification No. 67/2017, (Exhibit EU-11)).
[676] European Union's first written submission, paras. 83-84 (referring to Notification No. 57/2017, (Exhibit EU-12), as amended by Notification No. 22/2018, (Exhibit EU-13), and Notification No. 02/2020, (Exhibit EU-31)).
[677] European Union's first written submission, para. 86.
[678] India's second written submission, para. 137; response to Panel question No. 78, para. 65.
[679] India's response to Panel question No. 30, para. 84.
[680] India's second written submission, para. 139.
[681] India's response to Panel question No. 128, para. 85.
[682] European Union's response to Panel question No. 29, paras. 74-77. India does not dispute the European Union's assertion in this respect.
[683] European Union's first written submission, para. 78; India's first written submission, para. 166.
[684] First Schedule as of 2016/2017, (Exhibit EU-59), p. 750, as amended by Finance Act 2020, (Exhibit EU-28), p. 100.
[685] European Union's first written submission, para. 86.
[686] India's response to Panel question No. 128, para. 85.
[687] Serial No. 4 of Notification No. 25/2005, (Exhibit IND-40).
[688] Notification No. 67/2017, (Exhibit EU-11).

Notification No. 25/2005, as amended by Notification No. 67/2017. The parties agree with this understanding.[689]

7.262. We also note that the parties refer to Notification No. 57/2017, as amended by Notification Nos. 22/2018, 02/2020, and 03/2021, which accords a reduced duty rate of 10% to all goods classified under tariff item 8504.40, other than (a) charger or power adapters, and (b) solar inverters.[690] India has clarified that static converters for cellular mobile phones, the products at issue here, are not covered by any exemption notifications, and are therefore subject to the 20% duty rate stipulated in the First Schedule.[691] Therefore, absent any custom notifications exempting such products from the duty rate set out in the First Schedule either in whole or in part[692], such products are subject to that standard duty rate of 20%.

7.263. In light of the foregoing, we conclude that static converters for cellular mobile phones are subject to the standard duty rate of 20%.[693]

7.4.2.3 Comparison of India's tariff treatment to its WTO tariff commitments

7.4.2.3.1 Main arguments of the parties

7.264. The European Union considers that static converters for cellular mobile phones falling within the scope of tariff item 8504.40.90 of India's First Schedule are covered by India's tariff commitments inscribed under tariff item 8504.40 ex02 of India's WTO Schedule.[694] The European Union submits that India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994 because it imposes customs duties on these products in excess of those set forth in its WTO Schedule.[695]

7.265. India submits that it provides duty-free treatment to all static converters for automatic data processing machines and units thereof, and telecommunication apparatus except cellular mobile phones, in accordance with its ITA commitments. This is because according to India, cellular mobile phones are not covered under the ITA. Therefore, in its view, by providing duty-free treatment to all static converters for telecommunication apparatus except static converters for cellular mobile phones, India "has not breached its commitments under the ITA[]".[696]

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[689] European Union's first written submission, paras. 81-82; India's response to Panel question No. 126, para. 80.

[690] Notification No. 57/2017 as amended by Notification Nos. 22/2018 and 02/2020, (Exhibit IND-42), and Notification No. 03/2021, (Exhibit IND-54).

[691] India's response to Panel question No. 30, para. 84. See also India's response to Panel question No. 128, para. 85. We note that India submits that "[s]tatic converters for automatic data processing machines and units thereof and telecommunication apparatus are classifiable under sub-heading 8504.40. Serial No. 4 of Notification No. 25/2005 dated March 1, 2005, provides a complete exemption to 'Static converters for automatic data processing machines and units thereof, and telecommunication apparatus, other than static converters for cellular mobile phones,' while Serial No. 13 of Notification No. 57/2017 dated June 30, 2017, exempts all goods classifiable under sub-heading 8504.40 (except charger, power adapter and solar adapter) from any duty above 10% (to simplify, 10% duty is applicable on such products). Therefore, even though 'Static converters for automatic data processing machines and units thereof' are classifiable under sub-heading 8504.40, the importer may choose the more beneficial exemption notification upon importation, i.e., Notification No. 25/2005. … Therefore, an importer/exporter can choose to import their goods under either of the notifications to reap the benefit intended to be handed out to 'Static converters for automatic data processing machines and units thereof, and telecommunication apparatus.'" (India's second written submission, paras. 137-138). We note that in other submissions, India clarifies that static converters for cellular telephones are not covered in any exemption notification and are therefore subject to the standard duty rate set out in the First Schedule. (India's response to Panel question No. 30, para. 84).

[692] See paras. 2.11-2.13 above.

[693] We also consider that, since it is clear that static converters for cellular mobile phones are subject to duties in excess of the duty rate set forth in India's WTO Schedule, the question of whether such products may be subject to a 10% or 20% duty rate does not concern India's WTO-consistency, but rather the *degree* to which India is acting inconsistently with its WTO obligations. In our view, it is unnecessary to delimit the precise extent to which India may be acting inconsistently.

[694] European Union's first written submission, para. 85.

[695] European Union's first written submission, paras. 86-87.

[696] India's response to Panel question No. 126, para. 80.

7.4.2.3.2 Panel's assessment

7.266. We recall that, pursuant to its WTO Schedule, India is obligated to accord unconditional duty-free treatment to static converters for telecommunication apparatus falling under tariff item 8504.04 ex02 of that Schedule.[697] We also consider that, as India's Schedule is based on the HS2007, and given that under the HS2007 "telecommunication apparatus" includes "cellular mobile phones", India is obligated to accord unconditional duty-free treatment to static converters for cellular mobile phones.[698]

7.267. In our view, these tariff commitments apply to static converters for cellular mobile phones imported into India and classified under tariff item 8504.40.90 of India's First Schedule. We recall that such static converters for cellular mobile phones imported into India are subject to a 20% duty rate.

7.268. A comparison between India's WTO tariff commitments and India's tariff treatment indicates that India is imposing ordinary customs duties on static converters for cellular mobile phones imported into India in excess of the bound rate set forth in India's WTO Schedule.

7.4.2.4 Conclusion

7.269. Based on the foregoing, we find that India's tariff treatment of static converters for cellular mobile phones, falling within the scope of tariff item 8504.40 ex02 of India's WTO Schedule, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, because such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule.

7.270. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that India's tariff treatment of such products is less favourable than that provided in its WTO Schedule, and India is therefore acting inconsistently with Article II:1(a) of the GATT 1994.

7.4.3 Tariff item 8517.12 of India's WTO Schedule

7.4.3.1 General issues

7.4.3.1.1 Main arguments of the parties

7.271. The European Union challenges the tariff treatment accorded by India to products falling under tariff item 8517.12 of India's WTO Schedule, covering telephones for cellular networks or for other wireless networks.[699] The European Union argues that at the time of the Panel's establishment, India classified such products under tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of its First Schedule.[700] The European Union submits that pursuant to India's amendment of its First Schedule to reflect the HS2022, "India now classifies these products under two new tariff lines in its domestic customs system, namely 8517.13 and 8517.14".[701] In response to an argument by India that the measure challenged by the European Union has ceased to exist, the European Union argues that "the measures which are the subject of the European Union's claims in the present case have not disappeared or have been changed: India continues to impose customs duties on the same products (previously classified under a different tariff line number), and in doing so is acting inconsistently with its obligations under Article II of the GATT 1994 and its certified schedule of concessions".[702]

7.272. India argues that the measure identified by the European Union has ceased to exist, as its First Schedule was amended to align it with the HS2022, and therefore the Panel cannot issue rulings

[697] See para. 7.254 above.
[698] We recall that it is uncontested that, under the HS2007, telecommunication apparatus includes cellular mobile phones. (See para. 7.255 above).
[699] European Union's first written submission, paras. 13 and 15.
[700] European Union's first written submission, paras. 88-90.
[701] European Union's response to Panel question No. 106, para. 63.
[702] European Union's response to Panel question No. 106, para. 64.

or recommendations on the measures pertaining to tariff item 8517.12.[703] According to India, "if a product is to be classified under a tariff entry, then the heading and description both must be examined to determine the commitments prescribed in the schedule."[704] In this regard, India argues that the scopes and descriptions of tariff items 8517.13 and 8517.14 are different from those of tariff item 8517.12.[705] India also submits that "the term 'smartphones' does not appear in the ITA[] or in the 2007 Schedule. Accordingly, no commitments exist with respect to such smartphones. Further, there exists no certified schedule with respect to sub-headings 8517.13 and 8517.14."[706] India asserts that "[t]he 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. However, the complainant [has] not made any such claims with regard to smartphones."[707] India also submits that "[w]ith regard to 'other telephones for cellular networks' classified under sub-heading 8517.14, … such phones would have been classified under 8517.12.11 or 8517.12.19 of the HS2007 and India's other legal arguments would continue to apply."[708]

7.4.3.1.2 Panel's assessment

7.273. Before turning to assess the merits of the parties' arguments with respect to the European Union's claim concerning products classified under tariff item 8517.12 of India's WTO Schedule, we consider it useful to briefly address certain threshold issues concerning our terms of reference.

7.274. We recall that the measure challenged by the European Union is the imposition of customs duties on products falling within the scope of tariff item 8517.12 of India's WTO Schedule.[709] India argues that: (i) the measure as challenged by the European Union has ceased to exist, as a result of certain amendments to India's First Schedule; and (ii) the European Union has failed to demonstrate that "smartphones" fall within the scope of tariff item 8517.12 of India's WTO Schedule. We note that these arguments, on their face, appear to raise threshold issues concerning the scope of the European Union's claim and our terms of reference. Nevertheless, in our view, it is not possible to address the merits of these arguments without assessing: (i) as a factual matter, the effect, if any, of India's amendments to its First Schedule on the measure as challenged by the European Union; and (ii) as a legal matter, whether smartphones are products covered by tariff item 8517.12 of India's WTO Schedule, such that the tariff treatment of such products is part of the measure as challenged by the European Union.

7.275. We therefore consider it appropriate to proceed with our analysis by first identifying India's WTO tariff commitments with respect to products classified under tariff item 8517.12 of its WTO Schedule. We then address, as a factual matter, the parties' arguments concerning the tariff treatment applied by India to certain products, including smartphones. In our view, this factual assessment is essential to our determination of whether, as alleged by India, the measure at issue has ceased to exist. Finally, we will compare our factual findings concerning India's tariff treatment to India's WTO tariff commitments for purposes of determining whether India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994. In that context, we will also assess whether the European Union has demonstrated that smartphones are classified under tariff item 8517.12 of India's WTO Schedule, such that the tariff treatment of such products constitutes part of the measure challenged by the European Union and thereby falls within our terms of reference; and whether the measure challenged by the European Union has ceased to exist or has otherwise been amended.

[703] India's second written submission, para. 151.
[704] India's response to Panel question No. 102, para. 46.
[705] India's response to Panel question No. 102, para. 46.
[706] India's second written submission, para. 151. See also India's response to Panel question No. 102, para. 46.
[707] India's response to Panel question No. 108, para. 60.
[708] India's response to Panel question No. 108, para. 59.
[709] European Union's panel request, p. 1.

7.4.3.2 India's WTO tariff commitments

7.4.3.2.1 Main arguments of the parties

7.276. The European Union asserts that India's bound duty rate for products falling under tariff item 8517.12 of India's WTO Schedule, covering telephones for cellular networks or for other wireless networks, is 0%.[710]

7.277. India contends that the tariff commitments under tariff item 8517.12 as reflected in its WTO Schedule based on the HS2007 were certified in error.[711] India maintains that it did not intend to make commitments on telephones for cellular networks, which in its view were not covered under the ITA or the HS1996.[712] According to India, the commitments under tariff item 8517.12 were undertaken in error, are void pursuant to Article 48 of the Vienna Convention, and are therefore rendered unbound.[713]

7.4.3.2.2 Panel's assessment

7.278. We have addressed India's arguments that its WTO Schedule was certified in error above, and held that India's tariff commitments are set forth in India's WTO Schedule.[714] We have also rejected India's arguments that the ITA sets forth, or otherwise limits the scope of, its tariff commitments in its WTO HS2007 Schedule.[715] Moreover, we have declined to make the findings requested by India regarding its request to rectify its WTO Schedule pursuant to the 1980 Decision.[716]

7.279. Therefore, we turn to India's WTO Schedule to assess India's tariff commitments. India's WTO HS2007 Schedule provides, *inter alia*, the following [717]:

	Product description	Bound rate
8517	Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28.	
8517.1	- Telephone sets, including telephones for cellular networks or for other wireless networks:	
8517.12.00	-- Telephones for cellular networks or for other wireless networks	0%

7.280. Given that the relevant tariff binding for "[t]elephones for cellular networks or for other wireless networks" set forth in India's WTO Schedule is 0%, and given that the WTO Schedule indicates no terms, conditions, or qualifications attached to that bound duty rate, we observe that India is obligated to provide unconditional duty-free treatment to telephones for cellular networks or for other wireless networks falling under tariff item 8517.12 of its WTO Schedule.

7.4.3.3 India's tariff treatment

7.4.3.3.1 Main arguments of the parties

7.281. The European Union submits that, at the time of the Panel's establishment, India's First Schedule set a standard duty rate of 20% on imports of telephones for cellular networks and telephones for other wireless networks, which were classified under tariff items 8517.12.11,

[710] European Union's first written submission, para. 88.
[711] India's first written submission, paras. 57-91.
[712] India's first written submission, paras. 150-164.
[713] India's first written submission, paras. 90-91.
[714] See para. 7.213 above.
[715] See para. 7.81 above.
[716] See para. 7.245 above.
[717] WT/Let/1072.

8517.12.19 and 8517.12.90 of that Schedule.[718] The European Union also notes that Notification No. 57/2017 exempted from customs duties "[t]elephones for other wireless networks, *other* than cellular networks", classified under tariff item 8517.12.90 of India's First Schedule.[719] The European Union clarifies that its claim does not include telephones for other wireless networks, because such products are exempted from customs duties.[720] The European Union submits that telephones for cellular networks were subject to a 20% duty rate, as such products were not exempted from customs duties.[721] The European Union acknowledges that during these proceedings tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of India's First Schedule were replaced with tariff items 8517.13.00 and 8517.14.00. The European Union submits that, following these amendments, India's First Schedule set a standard duty rate of 20% on imports of such products, namely smartphones and other telephones for cellular networks or other wireless networks.[722] The European Union also notes that Notification No. 57/2017, as amended by Notification No. 57/2021, exempts "other telephones for other wireless networks", presently classified under tariff item 8517.14.00, from customs duties.[723]

7.282. India does not dispute that at the time of the Panel's establishment, it imposed a 20% duty rate on telephones for cellular networks, and exempted telephones for other wireless networks from customs duties.[724] India also does not dispute that, following its amendments to the First Schedule, India imposes a 20% duty rate on products classified under tariff item 8517.13.00 (smartphones) and certain products classified under tariff item 8517.14.00 (namely other telephones for cellular networks).[725] India submits that Notification No. 57/2017, as amended by Notification No. 57/2021, exempts certain products classified under tariff item 8517.14.00 (namely other telephones for other wireless networks) from customs duties.[726]

7.4.3.3.2 Panel's assessment

7.283. We proceed with our assessment by examining the tariff treatment accorded to products that, at the time of the Panel's establishment, fell under tariff item 8517.12 of India's First Schedule. We then assess the effects of India's amendment of the First Schedule during these proceedings.

7.284. It is uncontested that at the time of the Panel's establishment, India's First Schedule imposed a standard duty rate of 20% on products classified under tariff item 8517.12, covering "[t]elephones for cellular networks or for other wireless networks".[727] It is also uncontested that, through Notification No. 57/2017, India exempted "[t]elephones for other wireless networks, other than cellular networks" from customs duties.[728] Therefore, at the time of the Panel's establishment, India's tariff treatment of products under tariff item 8517.12 of its First Schedule was as follows:

Tariff item	Product description	Applied duty rate
8517.12	-- Telephones for cellular networks or for other wireless networks: --- Telephones for cellular networks	
8517.12.11	---- Mobile phones, other than push button type	20%
8517.12.19	---- Mobile phones, push button type	20%
8517.12.90	--- Telephones for other wireless networks	0%

[718] European Union's first written submission, para. 94 (referring to First Schedule as amended by Finance Act 2019, (Exhibit EU-19)).
[719] European Union's first written submission, para. 104 (referring to Notification No. 57/2017, (Exhibit EU-12)). (emphasis original)
[720] European Union's response to Panel question No. 107, para. 66.
[721] European Union's first written submission, para. 106.
[722] European Union's response to Panel question No. 111, para. 74.
[723] European Union's communication (12 July 2022).
[724] India's first written submission, para. 149.
[725] India's response to Panel question No. 110, para. 64.
[726] India's response to Panel question No. 108(a), para. 58 (referring to Notification No. 57/2017 as amended by Notification No. 57/2021, (Exhibit IND-89)).
[727] European Union's first written submission, para. 94; India's first written submission, para. 149. See also First Schedule as of 2016/2017, (Exhibit EU-59), as amended by Finance Act 2019, (Exhibit EU-19).
[728] Notification No. 57/2017, (Exhibit EU-12). See also European Union's first written submission, para. 104; and India's response to Panel question No. 108(a), para. 58.

7.285. During the Panel proceedings, India amended its First Schedule through the Finance Act 2021 to align it with the HS2022. The Finance Act 2021 came into effect on 1 January 2022. The amendments to the First Schedule include changes to tariff item 8517.12. The Finance Act 2021 provides that the words "including telephones" occurring against heading 8517 be substituted with the words "including smartphones and other telephones". The Finance Act 2021 also amended the First Schedule, as follows: "for sub-heading 8517 12, tariff items 8517 12 11 to 8517 12 90 and the entries relating thereto" were substituted with tariff item 8517.13.00, relating to "smartphones", and tariff item 8517.14.00, relating to "other telephones for other cellular networks or other wireless networks".[729] As amended, India's First Schedule imposed a standard duty rate of 20% on products classified under tariff items 8517.13.00 and 8517.14.00.[730]

7.286. We also observe that pursuant to India's Notification No. 57/2017, as amended by Notification No. 57/2021, India exempts certain products covered by tariff item 8517.14.00, namely "telephones for other wireless networks, other than cellular networks", from customs duties.[731] It is uncontested that all other products covered by tariff items 8517.13.00 and 8517.14.00, (i.e. "smartphones" and "other telephones for cellular networks") are subject to a tariff treatment of 20%.[732] Therefore, pursuant to Notification No. 57/2017 (as amended) as well as the First Schedule, India's tariff treatment of products classified under tariff items 8517.13.00 and 8517.14.00 of its First Schedule is presently as follows:

Tariff item	Product description	Applied duty rate
8517.13.00	-- Smartphones	20%
8517.14.00	-- Other telephones for cellular networks	20%
8517.14.00	-- Other telephones for other wireless networks	0%

7.4.3.4 Comparison of India's tariff treatment to its WTO tariff commitments

7.4.3.4.1 Preliminary issues

7.287. As indicated above, India argues that the measure as challenged by the European Union has ceased to exist, as a consequence of the amendments to India's First Schedule to reflect the HS2022. India also argues that the European Union has failed to demonstrate that smartphones are products classified under tariff item 8517.12 of India's WTO Schedule. We proceed with our comparison of India's tariff treatment to its WTO tariff commitments by first assessing these preliminary issues.

7.288. In our view, it is useful to first address India's arguments concerning the European Union's alleged failure to demonstrate that smartphones are classified under tariff item 8517.12 of India's WTO Schedule. This is because the measure at issue, as defined by the European Union, only extends to the tariff treatment of products falling under that tariff item. To the extent that a product (such as smartphones) falls outside the scope of that tariff commitment, it would also fall outside our terms of reference. Since this assessment will define the scope of the measure as challenged by the European Union, we consider it useful to first assess this issue, before turning to assess whether the measure, as challenged, has ceased to exist.

7.4.3.4.1.1 Whether the measure at issue includes the tariff treatment of "smartphones"

Main arguments of the parties

7.289. The European Union asserts that "smartphones" are "telephones for cellular networks" and are covered by India's commitments under tariff item 8517.12 of India's WTO Schedule. The European Union notes that smartphones have additional functions other than "pure telephone calls", but maintains that the main function remains telecommunication via a cellular network by a SIM card.[733] The European Union considers that because, in its view, the principal function of

[729] Finance Act 2021, (Exhibit IND-66), p. 176.
[730] Finance Act 2021, (Exhibit IND-66), p. 176.
[731] Notification No. 57/2017 as amended by Notification No. 57/2021, (Exhibit IND-89). See also India's response to Panel question No. 108(a), para. 58 (referring to Notification No. 57/2017 as amended by Notification No. 57/2021, (Exhibit IND-89)); and European Union's communication (12 July 2022).
[732] European Union's response to Panel question No. 111, para. 74; India's response to Panel question No. 110, para. 64.
[733] European Union's response to Panel question No. 109, para. 67.

smartphones is telecommunication via a cellular network, tariff item 8517.12 is the appropriate classification for such products.[734] The European Union submits that Note 3 to Section XVI of the HS Nomenclature provides that "[u]nless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function."[735] The European Union argues that applying this Note, the WCO adopted a Classification Opinion in 2018 confirming that smartphones are classified under tariff item 8517.12 of the HS2007.[736] The European Union also contends that the manner in which a specific tariff item for smartphones was created in the HS2022 and adopted by India confirms that prior to the change, smartphones were categorized under tariff item 8517.12 in the HS2007.[737]

7.290. India maintains that "the term 'smartphones' does not appear in the ITA[] or in the [HS] 2007 Schedule."[738] 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", while tariff item 8517.13.00 in the HS2022 "is based on functionality of the phone and the type of network."[739] In India's view, smartphones could not have been classified under tariff item 8517.12, which "solely used the 'type of network'" to classify telephones.[740] Relying on Chapter Note 5 to Chapter 85 in the HS2022, India considers that "smartphones are multifunctional devices, and the principal function of these devices is not that of telephones".[741] India also submits that "since 'smartphones' were not granted a dedicated tariff sub-heading in HS2007, they were classifiable under different tariff items, depending on the functionality of the smartphones".[742] India also notes that tablet computers were classified under HS2007 subheading 8471.30, and while "not tak[ing] a definitive position on the issue", considers that "tablets too could potentially be classifiable as 'smartphones' (within the meaning of HS2022), being capable of making calls over a cellular network."[743] India argues that "smartphones could have been classified under various tariff lines under HS2007 (on the basis of the primary functionality of the machine) and not just under sub-heading 8517.12."[744]

Panel's assessment

7.291. We recall that the product description of subheading 8517.12 of India's WTO Schedule is "telephones for cellular networks or for other wireless networks".[745] The European Union submits that "smartphones" are "telephones for cellular networks", and are therefore classified under this

[734] European Union's response to Panel question No. 109, para. 70.
[735] European Union's response to Panel question No. 109, para. 69 (quoting HS2007 Section Notes to Section XVI, (Exhibit EU-56), Note 3). (underlining original)
[736] European Union's response to Panel question No. 109, para. 68 (referring to WCO, Classification Opinion on "smartphones" (2018), (Exhibit EU-55)).
[737] European Union's response to Panel question No. 109, paras. 71-72 (referring to Finance Act 2021, (Exhibit IND-66), pp. 173 and 176).
[738] India's second written submission, para. 151.
[739] India's response to Panel question No. 108, para. 60, and No. 109, para. 63.
[740] India notes that tablets were defined in a WCO Classification Opinion as "machines which are 'designed to be primarily operated by using its touch screen. It can process data, execute programs, and connect to the Internet via a wireless network in order to, for example, exchange and manage e-mails, exchange or download files, download software applications, conduct video or VoIP ('Voice over Internet Protocol') communications, etc." (India's comments on the European Union's response to Panel question No. 109, para. 31 (quoting WCO, HS Committee, 49th Session, "Classification of the Machines Commercially Referred to as 'Tablet Computers'" (13 February 2012) document NC1730E1a; and WCO, HS Committee, 50th Session, "Possible Amendments to the Compendium of Classification Opinions and Explanatory Notes arising from the Decisions taken by the Committee at its 49th Session" (19 July 2012) document NC1775E1a, (Exhibit IND-88))).
[741] India's response to Panel question No. 108, para. 60 (referring to Chapter 85 of the HS2022, (Exhibit IND-87), Note 5). Chapter Note 5 to Chapter 85 in the HS2022 reads: "[f]or the purposes of heading 85.17, the term 'smartphones' means telephones for cellular networks, equipped with a mobile operating system designed to perform the functions of an automatic data processing machine such as downloading and running multiple applications simultaneously, including third-party applications, and whether or not integrating other features such as digital cameras and navigational aid systems."
[742] India's response to Panel question No. 108, paras. 60 and 62.
[743] India's comments on the European Union's response to Panel question No. 109, para. 31.
[744] India's comments on the European Union's response to Panel question No. 109, para. 31.
[745] See para. 7.279 above.

subheading.[746] India maintains that smartphones could have been classified under other subheadings of its WTO Schedule depending on their primary functionality, and not just under subheading 8517.12.[747] We note that, to the extent that smartphones are not classified under subheading 8517.12, they would fall outside the scope of the measure as challenged by the European Union. We therefore proceed to address whether "smartphones" are classified under subheading 8517.12 of India's WTO Schedule.

7.292. We recall India's argument that the term "smartphones" does not appear in the ITA or in the HS2007 Schedule.[748] We have rejected India's arguments that the ITA limits the scope of its tariff commitments in its WTO HS2007 Schedule.[749] Therefore, we consider that the absence of the term "smartphones" from the ITA is not determinative of the scope of India's WTO tariff commitments. Further, the absence of the term "smartphones" in the HS2007 Schedule is not determinative of this issue either because tariff concessions in Members' WTO Schedules apply to all products falling within the terms of the concession, when interpreted in accordance with customary rules of interpretation.[750] We will therefore assess whether "smartphones" are covered by subheading 8517.12 of India's WTO Schedule by interpreting the relevant terms in such Schedule in accordance with customary rules of interpretation.

7.293. The terms of the treaty at issue as reflected in subheading 8517.12 of India's WTO Schedule are "telephones for cellular networks". We note that the phrase "telephones for cellular network" is not defined in India's WTO Schedule.

7.294. We consider, however, that the HS2007 Explanatory Notes may serve as relevant context when interpreting India's WTO Schedule, which is based on the HS2007.[751] In this regard, we observe that the HS2007 Explanatory Notes provide that the product description "[t]elephones for cellular networks or for other wireless networks" covers "telephones for use on any wireless networks", and indicate that "[s]uch telephones receive and emit radio waves which are received and retransmitted, e.g. by base stations or satellites", including, *inter alia*,"[c]ellular phones or mobile phones" and "[s]atellite phones".[752] The key point of disagreement between the parties is whether "smartphones" are "cellular phones or mobile phones".

7.295. The dictionary meaning of "smartphone" is "a mobile phone capable of running general-purpose computer applications, now typically with a touch-screen interface, camera, and internet access".[753] Other dictionaries define "smartphone" as a "cell phone that includes additional software functions (such as email or an Internet browser)"[754] and "a mobile telephone with computer features that may enable it to interact with computerized systems and access the web".[755] The foregoing suggests that "smartphones" are indeed "telephones for cellular networks", to the extent that they have the same functions as (and indeed are *defined* as) "mobile phones" and "cell phones".

7.296. However, the dictionary definitions described above indicate that "smartphones" have functions *additional* to those of "telephones", such as "computer features". Given that smartphones have various functions, the parties disagree on whether such products would necessarily be classified under subheading 8517.12.[756] In this regard, we observe that, pursuant to the General Rules for the Interpretation of the HS, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. These Rules further provide that classification of goods

[746] European Union's response to Panel question No. 109, paras. 67-73.
[747] India's comments on the European Union's response to Panel question No. 109, para. 31.
[748] India's second written submission, para. 151.
[749] See para. 7.81 above.
[750] See para. 7.65 above.
[751] Appellate Body Report, *EC – Computer Equipment*, para. 89.
[752] HS2007 Explanatory Notes to Heading 8517, (Exhibit IND-8).
[753] Oxford English Dictionary online, definition of "smartphone" https://www.oed.com/view/Entry/381083?redirectedFrom=smartphones#eid (accessed 17 October 2022).
[754] Merriam-Webster Dictionary online, definition of "smartphone" https://www.merriam-webster.com/dictionary/smartphone (accessed 17 October 2022).
[755] Collins Dictionary online, definition of "smartphone" https://www.collinsdictionary.com/dictionary/english/smartphone (accessed 17 October 2022).
[756] For India, because of these additional functions, "the principal function no longer appears to be that of a telephone." Therefore, according to India, smartphones "were classifiable under different tariff items, depending on the functionality of the smartphones." (India's response to Panel question No. 108(a), para. 60).

shall be determined according to the terms of those subheadings and any related Subheading Notes.[757]

7.297. We note that Chapter Note 3 to Section XVI provides as follows regarding Chapter 85, the relevant Chapter relating to the products at issue:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component *or as being that machine which performs the principal function*.[758]

7.298. Therefore, for composite machines falling under Chapter 85, including subheading 8517.12, the general rule is to classify such products "as being that machine which performs the *principal function*". We observe that the definitions of "smartphone" set out above indicate that the principal function of a smartphone is that of a "cell phone" or a "mobile phone". The other functionalities, which indeed differ among smartphones, are *additional* functions or capabilities. In this light, we understand that the General Rules for the Interpretation of the HS and the Chapter Note to Section XVI of the HS2007 suggest that smartphones are classified under tariff item 8517.12 of India's WTO Schedule.

7.299. We also note that the WCO, applying the General Rules for the Interpretation referred to above, issued a Classification Opinion in which it classified "smartphones" under subheading 8517.12.[759] Classification Opinions, which are issued by the Harmonized System Committee of the WCO, are not binding upon parties to the WCO. However, pursuant to Article 7(1)(b) of the HS Convention, such Classification Opinions serve as guides to interpreting the HS. In this regard, we agree with a previous panel which considered WCO decisions to be "a very useful source of information on the subsequent practice of WTO Members, a large proportion of whom are signatories to the HS Convention and, therefore, are members of the HS Committee".[760] We therefore consider it relevant to our interpretative exercise that this WCO Classification Opinion indicates that smartphones are "telephones for cellular networks", and are appropriately classified under subheading 8517.12 of India's WTO Schedule.[761]

7.300. We understand that the term "smartphones" was introduced into the HS nomenclature through the HS2022 amendment. We consider that the HS2022 may constitute relevant context to verify our understanding of where such products were classified in the HS2007. In this regard, we note that Chapter Note 5 to Chapter 85 of the HS2022 provides that for the purposes of heading 8517, the term "smartphones" means "*telephones for cellular networks*, equipped with a mobile operating system designed to perform the functions of an automatic data processing machine such as downloading and running multiple applications simultaneously, including third-party applications, and whether or not integrating other features such as digital cameras and navigational aid systems."[762] This definition is consistent with the dictionary definitions we have referred to above. Moreover, it supports our assessment that the principal function of smartphones is that of telephones for cellular networks, with their additional capabilities being ancillary functions. Indeed, as this definition indicates, some of the additional functions that India refers to, such as "photography and videography"[763] are not core functions of smartphones.[764]

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[757] General Rules for the Interpretation of the Harmonized System, (Exhibit EU-54), paras. 1 and 6.

[758] HS2007 Section Notes to Section XVI, (Exhibit EU-56), Note 3. (emphasis added)

[759] WCO, Classification Opinion on "smartphones" (2018), (Exhibit EU-55).

[760] Panel Reports, *EC – Chicken Cuts*, para. 7.298. See also Appellate Body Report, *EC – Computer Equipment*, para. 90.

[761] We note that this Classification Opinion was issued in 2018, with regard to the HS2017. We also observe that subheading 8517.12 remains unchanged between HS2007 and HS2017. Therefore, this Classification Opinion is relevant to our interpretation of India's WTO Schedule, which is based on the HS2007.

[762] Chapter 85 of the HS2022, (Exhibit IND-87), Note 5. (emphasis added)

[763] India's response to Panel question No. 109(b), para. 63. See also India's response to Panel question No. 108(a), para. 60.

[764] We emphasize that the definition of a smartphone includes the language "*whether or not* integrating other features such as digital cameras". (Chapter 85 of the HS2022, (Exhibit IND-87), Chapter Note 5). (emphasis added)

7.301. The structure and content of the HS2022 further supports this interpretation. The relevant sections of the HS2022 read as follows[765]:

	Product description
8517	Telephone sets, *including smartphones and other telephones for cellular networks* or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28.
	- Telephone sets, *including smartphones and other telephones for cellular networks* or for other wireless networks:
8517.11	-- Line telephone sets with cordless handsets
8517.13	-- Smartphones
8517.14	-- Other telephones for cellular networks or for other wireless networks

7.302. We observe that the product descriptions of heading 8517 of HS2022 and the single-hyphen entry immediately following it read "[t]elephone sets, including *smartphones and other telephones for cellular networks* or for other wireless networks."[766] Subheading 8517.14, in turn, refers to "[o]ther telephones for cellular networks or for other wireless networks". The use of the word "other"[767] preceding the term "telephones for cellular networks" in heading 8517 and in subheading 8517.14 indicates that products in addition to smartphones are also telephones for cellular networks. Thus, the HS2022 indicates that "smartphones" are "telephones for cellular networks". The fact that the HS2022 further splits the classification of "telephones for cellular networks" into two subheadings (namely smartphones, and a residual category, comprising "other telephones for cellular networks") confirms this conclusion.

7.303. Finally, we note that the manner in which India amended its First Schedule indicates that, in India's domestic customs regime, smartphones are telephones for cellular networks. We understand that the product description attached to heading 8517 of India's First Schedule as of 1 January 2022 reads "including smartphones and *other telephones for other cellular networks*".[768] Moreover, the product description attached to tariff item 8517.14.00 of the First Schedule is "*[o]ther telephones for cellular networks*". These product descriptions suggest that smartphones are a type of telephone for cellular networks. We further note that the Finance Act 2021 itself clarifies that "[f]or the purposes of heading 8517, *the term 'smartphones' means telephones for cellular networks*."[769]

7.304. While India argues that "smartphones could have been classified under various tariff lines under HS2007 (on the basis of the principal functionality of the machine)", India does not demonstrate under which subheading of its WTO Schedule it considers such products should have been classified. We note that India suggests that tablet computers, which are defined as "machines which are 'designed to be primarily operated by using its touch screen" because they "can process data, execute programs, and connect to the Internet via a wireless network in order to, for example, exchange and manage e-mails, exchange or download files, download software applications, conduct video or VoIP ('Voice over Internet Protocol') communications, etc" could "potentially be classifiable as 'smartphones' (within the meaning of HS2022), being capable of making calls over a cellular network."[770] India also submits that it "does not take a definitive position on the issue".[771] We do not consider it necessary to discuss whether tablet computers could potentially be classifiable as smartphones. Notwithstanding that India does not take a firm view on the issue, the question before us is not whether tablets are classified as smartphones in India's WTO Schedule (indeed, the term

[765] Emphasis added.
[766] Chapter 85 of the HS2022, (Exhibit IND-87). (emphasis added)
[767] The word "other" means "[s]eparate or distinct from that or those already specified or implied; different; (hence) further, additional." (Oxford English Dictionary online, definition of "other" https://www.oed.com/view/Entry/133219?rskey=Z7lVMl&result=1&isAdvanced=false#eid (accessed 17 October 2022)).
[768] Emphasis added. We recall that the description of heading 8517 in the First Schedule at the time of Panel establishment read "including telephones for other cellular networks". India's Finance Act 2021 provides that the words "'including telephones'" in the description attached to heading 8517 be substituted with the words "including smartphones and other telephones". (Finance Act 2021, p. 176).
[769] Finance Act 2021, (Exhibit IND-66), p. 44. (emphasis added)
[770] India's comments on the European Union's response to Panel question No. 109(a), para. 31.
[771] India's comments on the European Union's response to Panel question No. 109(a), para. 31.

"smartphone" does not appear in that Schedule), but rather whether smartphones are classified as "telephones for cellular networks" within the meaning of India's WTO Schedule.

7.305. In light of the foregoing, we conclude that smartphones are cellular mobile phones within the meaning of subheading 8517.12 of India's WTO Schedule.

7.4.3.4.1.2 Whether the challenged measure has ceased to exist

Main arguments of the parties

7.306. India argues that, following the "amendments" to its First Schedule, "subheading 8517.12 has ceased to exist", and therefore the measure challenged by the European Union has ceased to exist. India also submits that "[s]martphones and [t]elephones for cellular networks are now classified under sub-headings 8517.13 and 8517.14, respectively." India observes that "[t]he description of sub-headings 8517.13 and 8517.14 is different from the description of the erstwhile sub-heading 8517.12." According to India, "if a product is to be classified under a tariff entry, then the heading and description both would have to be seen together to determine the commitments prescribed in the schedule." India maintains that "the term 'smartphones' does not appear in the ITA[] or in the 2007 Schedule. Accordingly, no commitments exist with respect to such smartphones." Further, according to India, "there exists no certified schedule with respect to sub-headings 8517.13 and 8517.14." Therefore, "India submits that the measure identified by the European Union has ceased to exist, and the Panel cannot issue any rulings or recommendation on the measures pertaining to sub-heading 8517.12."[772]

7.307. The European Union submits that the measure at issue is "the imposition of certain tariff duties on certain products", which the European Union "identified by reference to India's schedule of concessions (based on HS2007), and by their descriptions".[773] The European Union asserts that, subsequent to the amendments to India's First Schedule its measure has "not disappeared or … been changed: India continues to impose customs duties on the same products (previously classified under a different tariff line number)".[774]

Panel's assessment

7.308. We observe that in its panel request, the European Union challenged "the duties applied by India on imports of certain ICT products" in excess of the bindings set forth in India's WTO Schedule. The panel request also states that "[t]he ICT products concerned fall within the scope of the bindings included in India's WTO Schedule with respect to the following tariff lines (based on the HS 2007)": *inter alia*, 8517.12.[775] Therefore, the measure at issue is the imposition of customs duties by India on products falling within the scope of tariff item 8517.12 of India's WTO Schedule.

7.309. We recall that the product description attached to tariff item 8517.12 of India's WTO Schedule is "[t]elephones for cellular networks or for other wireless networks".[776] At the time of the Panel's establishment, India classified these products under tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of its First Schedule.[777] India's First Schedule as of 1 January 2022 *substituted* tariff items 8517.12.11, 8517.12.19 and 8517.12.90 with tariff items 8517.13.00 and 8517.14.00.[778] Therefore, as India argues, tariff item 8517.12 does not exist in its First Schedule subsequent to the amendments. We also observe that, as India argues, the product descriptions attached to tariff items 8517.13.00 and 8517.14.00 differ from those attached to tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of the First Schedule at the time of the Panel's establishment.

7.310. However, these facts are not dispositive of whether the measure challenged by the European Union has ceased to exist. As we have observed above, the European Union challenges the imposition

[772] India's second written submission, para. 151.
[773] European Union's response to Panel question No. 106, para. 62.
[774] European Union's response to Panel question No. 106, para. 64.
[775] European Union's panel request, p. 1.
[776] WT/Let/1072.
[777] India's First Schedule as of 2016/2017, (Exhibit EU-59), as amended by Finance Act 2019, (Exhibit EU-19), p. 139.
[778] Finance Act 2021, (Exhibit IND-66), p. 176.

of customs duties on products falling under tariff item 8517.12 of India's *WTO Schedule*. India's WTO Schedule has not been amended.[779] It is uncontested that products falling under tariff item 8517.12 of India's WTO Schedule were previously classified under tariff items 8517.12.11, 8517.12.19 and 8517.12.90 of India's First Schedule. We also recall India's submission that "'other telephones for cellular networks' classified under sub-heading 8517.14 [of India's First Schedule as of 1 January 2022] … would have been classified under 8517.12.11 or 8517.12.19 of the HS2007".[780] Therefore, it is uncontested that "other telephones for cellular networks" classified under subheading 8517.14 of India's First Schedule as of 1 January 2022 fall within the scope of tariff item 8517.12 of India's WTO Schedule. Moreover, given our finding above that "smartphones" are classified under tariff item 8517.13 of India's First Schedule as of 1 January 2022 are telephones for cellular networks, such products also fall within the scope of tariff item 8517.12 of India's WTO Schedule.

7.311. We recall that the measure as challenged by the European Union is the tariff treatment accorded to products classified under tariff item 8517.12 of India's WTO Schedule, namely "telephones for cellular networks or for other wireless networks". We have concluded above that "smartphones" and "other telephones for cellular networks" constitute "telephones for cellular networks or for other wireless networks", which fall within the scope of tariff item 8517.12 of India's WTO Schedule.[781] We also note that, since 1 January 2022, India continues to impose customs duties on these products. We therefore conclude that the measure as challenged by the European Union has not ceased to exist.

7.4.3.4.2 Comparison of applied and bound duty rates

7.312. We recall that pursuant to its WTO Schedule, India is obligated to accord unconditional duty-free treatment to telephones for cellular networks or for other wireless networks. We also recall that, effective 1 January 2022, such products are classified under tariff items 8517.13.00 and 8517.14.00 of India's First Schedule.

7.313. We have also found that India applies a 20% duty rate on smartphones covered under tariff item 8517.13.00, and other telephones for cellular networks covered under tariff item 8517.14.00. India exempts "other telephones for other wireless networks" covered under tariff item 8517.14.00 from customs duties.

7.314. Therefore, with regard to smartphones and other telephones for other cellular networks, India imposes a duty rate that is in excess of the bound duty rate set forth in India's WTO Schedule. India exempts "other telephones for other wireless networks" from customs duties, and therefore accords to such products unconditional duty-free treatment, in accordance with the terms of its WTO Schedule.

7.4.3.5 Conclusion

7.315. Based on the foregoing, we find that India's tariff treatment of certain products falling within the scope of tariff item 8517.12 of India's WTO Schedule, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, because certain such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule.

7.316. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that India's tariff treatment of certain such products is less favourable than that provided in its WTO Schedule, and India is therefore acting inconsistently with Article II:1(a) of the GATT 1994.

[779] Indeed, India notes that "there exists no certified schedule with respect to sub-headings 8517.13 and 8517.14". (India's second written submission, para. 151).
[780] India's response to Panel question No. 108(a), para. 59.
[781] See para. 7.286 above.

7.4.4 Tariff item 8517.61 of India's WTO Schedule

7.4.4.1 India's WTO tariff commitments

7.4.4.1.1 Main arguments of the parties

7.317. The European Union asserts that India's bound duty rate for products falling under tariff item 8517.61 of India's WTO Schedule, base stations, is 0%.[782]

7.318. India contends that the tariff commitments under tariff item 8517.61 as reflected in its WTO Schedule based on the HS2007 were certified in error.[783] India maintains that it did not intend to make commitments on base stations, which in its view were not covered under the ITA or the HS1996, and were introduced to the HS Nomenclature in the 2007 edition.[784] According to India, the commitments under tariff item 8517.61 were undertaken in error, are void pursuant to Article 48 of the Vienna Convention, and are therefore rendered unbound.[785]

7.4.4.1.2 Panel's assessment

7.319. We have addressed India's arguments that its WTO Schedule was certified in error above, and held that India's tariff commitments are set forth in India's WTO Schedule.[786] We have also rejected India's arguments that the ITA sets forth, or otherwise limits the scope of, its tariff commitments in its WTO HS2007 Schedule.[787] Moreover, we have declined to make the findings requested by India regarding its request to rectify its WTO Schedule pursuant to the 1980 Decision.[788]

7.320. Therefore, we turn to India's WTO Schedule to assess India's tariff commitments. India's WTO HS2007 Schedule provides, *inter alia*, the following[789]:

	Product description	Bound rate
8517.61	-- Base stations	0%

7.321. A review of India's WTO Schedule shows that India committed to a bound duty rate of 0% for products falling under tariff item 8517.61, namely "[b]ase stations".[790] We also note that India's WTO Schedule does not indicate any terms, qualifications or conditions that must be met in order for products under tariff item 8517.61 to receive the 0% bound duty rate.[791] Therefore, in accordance with its WTO Schedule, India is obligated to provide unconditional duty-free treatment to base stations falling under tariff item 8517.61 of its WTO Schedule.

7.4.4.2 India's tariff treatment

7.4.4.2.1 Main arguments of the parties

7.322. The European Union argues that India's First Schedule imposes a standard duty rate of 20% on imports of base stations, which India classifies under tariff item 8517.61 of its First Schedule.[792] The European Union also submits that pursuant to Serial No. 425 of Notification No. 50/2017, India exempts base station controllers, base transreceiver stations, and antenna systems from customs duties, subject to the condition that they are imported by a person licenced by the Department of

[782] European Union's first written submission, para. 108.
[783] India's first written submission, paras. 55-91.
[784] India's first written submission, paras. 174-184.
[785] India's first written submission, paras. 90-91.
[786] See para. 7.213 above.
[787] See para. 7.81 above.
[788] See para. 7.245 above.
[789] WT/Let/1072.
[790] WT/Let/1072.
[791] WT/Let/1072.
[792] European Union's first written submission, paras. 110 and 117.

Telecommunications of India for the purpose of providing Public Mobile Trunked Service.[793] The European Union maintains that this condition is "provided for in Notifications issued by the Government of India on statutory customs duties" and relates to "the payment of customs duties and not the importation of such products as such".[794]

7.323. India does not dispute that the applied duty rate on base stations is 20%.[795] India also does not dispute that certain products are exempt from customs duties if they meet the condition set out in Serial No. 425. However, India maintains that "the licensing requirement is applicable for the possession of the specified wireless apparatus in the country – whether it is procured domestically or imported."[796] According to India, there is no requirement to record such "procedural and documentary formalities for the importation of goods" in its WTO Schedule.[797] India also submits that Serial No. 425 was omitted from Notification No. 50/2017 through Notification No. 02/2022.[798] Finally, India maintains that the products covered by Serial No. 425 (base station controllers, base transreceiver stations, and antenna systems) are "sub-systems and not complete base stations", and are therefore not covered by tariff item 8517.61.00 of India's First Schedule.[799]

7.4.4.2.2 Panel's assessment

7.324. India's First Schedule imposes a standard duty rate of 20% on products falling under tariff item 8517.61.[800]

7.325. At the time of the Panel's establishment, Serial No. 425 of Notification No. 50/2017 exempted from customs duties base station controllers, base transreceiver stations, and antenna systems if imported by a person licenced by the Department of Telecommunications for the purpose of providing Public Mobile Radio Trunked Service.[801] Notification No. 02/2022 amended Notification No. 50/2017 and omitted Serial No. 425 from that Notification with effect from 1 February 2022.[802] Therefore, with effect from 1 February 2022, the three products at issue are not eligible for exemption, even assuming that such products are classified under tariff item 8517.61 of the First Schedule.[803]

7.326. In sum, we find that India imposes a duty rate of 20% on products falling under tariff item 8517.61.

7.4.4.3 Comparison between India's WTO tariff commitments and its tariff treatment

7.327. We recall our finding above that pursuant to its WTO Schedule, India is obligated to provide unconditional duty-free treatment to base stations, under tariff item 8517.61 of that Schedule.

7.328. We have found that India imposes a 20% customs duty on products falling under tariff item 8517.61 of its First Schedule. We consider that such products are covered by India's WTO tariff commitments with respect to base stations, falling under tariff item 8517.61 of India's WTO Schedule. A comparison between India's bound duty rate and India's tariff treatment indicates

[793] European Union's response to Panel question No. 83, para. 126, No. 112, para. 75, and No. 113, para. 76 (referring to Notification No. 50/2017, (Exhibit EU-34)). See also European Union's response to Panel question No. 134, para. 4.
[794] European Union's response to Panel question No. 104, para. 54.
[795] India's first written submission, para. 173.
[796] India's response to Panel question No. 103, para. 48 (referring to Circular No. 04/2022 (27 February 2022), (Exhibit IND-81); Indian Wireless Telegraphy Act 1933, (Exhibit IND-82); and Notification No. 71 (25 September 1953), (Exhibit IND-83)).
[797] India's response to Panel question No. 103, para. 49.
[798] India's response to Panel question No. 134.
[799] India's response to Panel question No. 134.
[800] First Schedule as of 2016/2017, (Exhibit EU-59).
[801] Serial No. 425 of Notification No. 50/2017, (Exhibit IND-41).
[802] Notification No. 02/2022, (Exhibit IND-90).
[803] We note India's arguments that base station controllers, base transreceiver stations, and antenna systems are "sub-systems and not complete base stations", and are therefore not necessarily classified under tariff item 8517.61.00 of India's First Schedule. (India's response to Panel question No. 134). Given that Serial No. 425 is no longer in effect, we do not consider it necessary for the resolution of this dispute to address the classification of these products.

that India is imposing ordinary customs duties on those products in excess of the bound duty rate set forth in India's WTO Schedule.

7.4.4.4 Conclusion

7.329. Based on the foregoing, we find that India's tariff treatment of base stations, falling within the scope of tariff item 8517.61 of India's WTO Schedule, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, because such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule.

7.330. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, or subject to terms, conditions or qualifications not set forth in the Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that India's tariff treatment of such products is less favourable than that provided in its WTO Schedule, and India is therefore acting inconsistently with Article II:1(a) of the GATT 1994.

7.4.5 Tariff item 8517.62 of India's WTO Schedule

7.4.5.1 India's WTO tariff commitments

7.4.5.1.1 Main arguments of the parties

7.331. The European Union asserts that India's bound duty rate for products falling under tariff item 8517.62 of India's WTO Schedule, machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus, is 0%.[804]

7.332. India contends that the tariff commitments under tariff item 8517.62 as reflected in its WTO Schedule based on the HS2007 were certified in error.[805] India maintains that it did not make commitments on machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus, which in its view were not covered under the ITA or the HS1996.[806] India also submits that the commitments under tariff item 8517.62 were undertaken in error, are void pursuant to Article 48 of the Vienna Convention, and are therefore rendered unbound.[807]

7.4.5.1.2 Panel's assessment

7.333. We have addressed India's arguments that its WTO Schedule was certified in error above, and held that India's tariff commitments are set forth in India's WTO Schedule.[808] We have also rejected India's arguments that the ITA sets forth, or otherwise limits the scope of, its tariff commitments in its WTO HS2007 Schedule.[809] We have also considered that the fact that a product is covered by the ITA Expansion does not necessarily imply that such product did not already fall within the scope of tariff concessions set forth in relevant Members' WTO Schedules.[810] Moreover, we have declined to make the findings requested by India regarding its request to rectify its WTO Schedule pursuant to the 1980 Decision.[811]

7.334. Therefore, we turn to India's WTO Schedule to assess India's tariff commitments. India's WTO HS2007 Schedule provides, *inter alia*, the following[812]:

[804] European Union's first written submission, para. 119.
[805] India's first written submission, paras. 57-91.
[806] India's first written submission, paras. 196-201; second written submission, paras. 117-131.
[807] India's first written submission, paras. 90-91.
[808] See para. 7.213 above.
[809] See para. 7.81 above.
[810] See para. 7.77 above.
[811] See para. 7.245 above.
[812] WT/Let/1072.

	Product description	Bound rate
8517.62	--Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus	0%

7.335. A review of India's WTO Schedule shows that India committed to a bound duty rate of 0% for products falling under tariff item 8517.62, namely "[m]achines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus".[813] We also note that India's WTO Schedule does not indicate any terms, qualifications or conditions that must be met in order for products falling under tariff item 8517.62 to receive the 0% bound duty rate.[814] Therefore, in accordance with its WTO Schedule, India is obligated to provide unconditional duty-free treatment to machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus falling under tariff item 8517.62 of India's WTO Schedule.

7.4.5.2 India's tariff treatment

7.4.5.2.1 Main arguments of the parties

7.336. The European Union argues that India's First Schedule sets a standard duty rate of 20% on imports of certain products which India classifies under tariff item 8517.62.90 of its First Schedule, namely certain machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus.[815] The European Union submits that Notification No. 24/2005 initially exempted "all goods" under tariff item 8517 from tariff duties, but Notification No. 58/2017 subsequently limited the scope of the exemption to certain products which did not include those covered by tariff item 8517.62.90.[816] The European Union also submits that Notification No. 57/2017, as amended by Notification No. 02/2019, reduced the duty rate applicable to certain products falling under tariff item 8517.62.90 to 10%.[817] The European Union further notes that Notification No. 36/2019 exempts "routers" from customs duties.[818] Thus, according to the European Union, India imposes a duty rate of 10% or 20% to products falling under tariff item 8517.62.90[819], except for routers which are exempted from customs duties.[820]

7.337. India submits that the applied duty rate on products classified under tariff item 8517.62.90 of the First Schedule is 10% or 20%.[821] India notes that Notification No. 57/2017 which reduces the applicable duty rate to 10% for certain products covered by tariff item 8517.62.90 applies to products covered by tariff items "8517.62.90 or 8517.69.90".[822] India submits that the products described in that Notification "may not be classified under tariff item 8517.62.90".[823] India argues that the European Union has failed to demonstrate that these products listed in Notification No. 57/2017 fall within the scope of tariff item 8517.62.90 of India's First Schedule.[824] Thus, according

[813] WT/Let/1072.
[814] WT/Let/1072.
[815] European Union's first written submission, paras. 121-123 (referring to First Schedule as amended by the Finance Act 2018, (Exhibit EU-15)).
[816] European Union's first written submission, paras. 124-127 (referring to Notification No. 24/2005, (Exhibit EU-9); Notification No. 58/2017, (Exhibit EU-9)).
[817] European Union's first written submission, para. 129 (referring to Notification No. 57/2017 as amended by Notification No. 02/2019, (Exhibit EU-16)). See also European Union's response to Panel question No. 36, para. 86.
[818] European Union's response to Panel question No. 84, para. 127 (referring to Notification No. 36/2019, (Exhibit EU-49)).
[819] European Union's first written submission, para. 131.
[820] European Union's response to Panel question No. 84, para. 127 (referring to Notification No. 36/2019, (Exhibit EU-49)).
[821] India's first written submission, para. 185; second written submission, para. 109.
[822] India's first written submission, paras. 186-187; second written submission, paras. 112-113 (referring to Notification No. 57/2017), (Exhibit IND-42)).
[823] India's first written submission, para. 188.
[824] India's second written submission, para. 113; response to Panel question No. 105, para. 53.

to India, those goods "fall outside the scope of the dispute to the extent they are appropriately classified under sub-heading 8517.69".[825]

7.4.5.2.2 Panel's assessment

7.338. We observe that India's First Schedule provides as follows with regard to tariff item 8517.62[826]:

Tariff item	Product description	Standard duty rate
8517.62	-- Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus	
8517.62.10	--- PLCC equipment	0%
8517.62.20	--- Voice frequency telegraphy	0%
8517.62.30	--- Modems (modulators-demodulators)	0%
8517.62.40	--- High bit rate digital subscriber line system (HSDL)	0%
8517.62.50	--- Digital loop carrier system (DLC)	0%
8517.62.60	--- Synchronous digital hierarchy system (SDH)	0%
8517.62.70	--- Multiplexers, statistical multiplexers	0%
8517.62.90	--- Other	20%

7.339. India's First Schedule thus imposes a standard duty rate of 20% on products falling under tariff item 8517.62.90, covering "other" machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus. The European Union's claim and arguments relate exclusively to the tariff treatment accorded to products classified under this residual category, i.e. tariff item 8517.62.90. The European Union does not dispute that the First Schedule exempts all other products falling under tariff item 8517.62 of that Schedule from customs duties.[827]

7.340. The applied duty rate for products classified under tariff item 8517.62.90 is subject to several customs notifications. We observe that Notification No. 36/2019 presently exempts routers, falling under tariff item 8517.62.90, from customs duties. Thus, India accords unconditional duty-free treatment to such products.[828]

7.341. Additionally, Notification No. 57/2017, as amended by Notification No. 22/2018, subjects all other goods falling under tariff item 8517.62.90 of the First Schedule "other than wrist wearable devices (commonly known as smart watches)" to a reduced duty rate of 10%.[829] Thus, while smart watches classified under tariff item 8517.62.90 remained subject to the standard duty rate of 20%, as set forth in the First Schedule, all other products classified under tariff item 8517.62.90 (other than routers[830]) became subject to a duty rate of 10%.

7.342. Subsequently, Notification No. 57/2017 was amended by Notification No. 75/2018 to expand the list of goods subject to the standard duty rate of 20%, as follows[831]:

S. No.	Tariff item	Description
20	8517.62.90	(a) Wrist wearable devices (commonly known as smart watches) (b) Optical transport equipment (c) Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS)

[825] India's second written submission, para. 114. See also India's response to Panel question No. 105, para. 53.
[826] First Schedule as of 2016/2017, (Exhibit EU-59), as amended by the Finance Act 2018, (Exhibit EU-15).
[827] European Union's first written submission, paras. 121-123.
[828] Notification No. 36/2019, (Exhibit EU-49). The European Union agrees with this position. (European Union's response to Panel question No. 84, para. 127).
[829] Notification No. 57/2017 as amended by Notification No. 22/2018, (Exhibit IND-42).
[830] We recall that in India's customs regime, two or more customs notifications may apply simultaneously, such that an importer can benefit from the most beneficial tariff treatment available under any applicable notification. (See para. 2.13 above).
[831] Notification No. 57/2017 as amended by Notification No. 75/2018, (Exhibit IND-42).

S. No.	Tariff item	Description
		(d) Optical Transport Network (OTN) products (e) IP Radios
21	8517.69.90	(a) Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers (b) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products (c) Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) products

7.343. All other goods falling under tariff item 8517.62.90 that were not listed under Serial No. 20 remained subject to a reduced duty rate of 10% (except for routers, which, as indicated above, are subject to unconditional duty-free treatment).

7.344. Finally, Notification No. 57/2017 was amended by Notification No. 02/2019, which merged Serial Nos. 20 and 21 as follows[832]:

S. No.	Tariff item	Description
20	8517.62.90 or 8517.69.90	(a) Wrist wearable devices (commonly known as smart watches) (b) Optical transport equipment (c) Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS) (d) Optical Transport Network (OTN) products (e) IP Radios (f) Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers (g) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products (h) Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) products

7.345. Thus, taking into account all evidence before us, we understand that:

a. Pursuant to Notification No. 36/2019, routers, classified under tariff item 8517.62.90 of India's First Schedule, are unconditionally exempted from all customs duties; and

b. All other goods falling under tariff item 8517.62.90 are subject to a reduced duty rate of 10%, except for those products listed under Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, which are subject to the standard duty rate of 20%.

7.346. We note that the parties disagree on whether the products listed under Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, are classified under tariff item 8517.62.90 or 8517.69.90 of India's First Schedule. The European Union submits that they are covered by tariff item 8517.62.90[833], while India maintains that the European Union has failed to demonstrate that they are classified under that tariff item. For India, to the extent that these products are appropriately classified under tariff item 8517.69, "such products are … outside the scope of the present [p]anel request".[834]

7.347. At this stage of our analysis, we do not consider it necessary to address whether the tariff treatment of certain products falls outside the scope of the European Union's claim. We simply note, as a factual matter, the tariff treatment described above. We address below, in the context of our comparison of that tariff treatment to India's WTO legal obligations, the question of whether certain tariff treatment falls outside the scope of the European Union's claim.

[832] Notification No. 57/2017 as amended by Notification No. 02/2019, (Exhibit IND-42).
[833] European Union's response to Panel question No. 114, paras. 79-88.
[834] India's response to Panel question No. 105, para. 53.

7.4.5.3 Comparison between India's WTO tariff commitments and its tariff treatment

7.4.5.3.1 Main arguments of the parties

7.348. The European Union argues that products falling under tariff item 8517.62.90 of India's First Schedule are classified under tariff item 8517.62 of India's WTO Schedule, which are therefore required to be subject to duty-free treatment.[835] In response to India's argument that the products listed in Notification No. 02/2019 and subject to a 20% duty rate may be classified under tariff item 8517.62.90 or 8517.69.90, the European Union submits that such products are "properly to be categorized under tariff line 8517.62" and are therefore within the scope of the European Union's claim.[836]

7.349. India argues that the European Union is required to identify the specific products at issue and their correct classification in order to demonstrate that there has been a violation of Articles II:1(a) and (b) of the GATT 1994.[837] According to India, the European Union has not provided any evidence to show that the products described in Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, are classified under tariff item 8517.62.90 of the First Schedule and not tariff item 8517.69.90.[838] India further argues that, because the European Union's claim is limited to products classified under tariff item 8517.62, "to the extent that the products described [in Notification No. 57/2017] are appropriately classified under sub-heading 8517.69, such products are outside the scope of the present [p]anel request."[839]

7.4.5.3.2 Panel's assessment

7.350. We recall our finding above that pursuant to its WTO Schedule India is obligated to provide unconditional duty-free treatment to machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus, classified under tariff item 8517.62 of that Schedule. We note that tariff item 8517.62 of India's First Schedule covers machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus. It is uncontested that products falling under tariff item 8517.62 of India's First Schedule are products covered by tariff item 8517.62 of India's WTO Schedule. We therefore understand that all products falling under tariff item 8517.62 of India's First Schedule are required to be subject to unconditional duty-free treatment.

7.351. We recall that routers classified under tariff item 8517.62.90 of India's First Schedule are unconditionally exempted from all customs duties. These products therefore receive tariff treatment in accordance with India's WTO tariff commitments. We further recall that *all* other products classified under tariff item 8517.62.90 of India's First Schedule are either subject to a duty rate of 10% or, if they fall within the scope of Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, the standard duty rate of 20%.

7.352. We note that the parties disagree over whether Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, covers products falling within the scope of the European Union's claim. In this respect, we recall that the European Union's claim concerns products falling within the scope of tariff item 8517.62 of India's WTO Schedule.[840] In order for the European Union to prevail in its claim, it needs to demonstrate that at least some products falling under tariff item 8517.62 of India's WTO Schedule are subject to tariff treatment that is inconsistent with India's WTO obligations.[841]

7.353. The European Union claims and has demonstrated that products falling under tariff item 8517.62.90 (which necessarily fall under tariff item 8517.62) of India's First Schedule are classified under tariff item 8517.62 of India's WTO Schedule.[842] The European Union is not claiming that

[835] European Union's first written submission, paras. 119-121.
[836] European Union's response to Panel question No. 114, para. 79.
[837] India's response to Panel question No. 105, para. 52.
[838] India's second written submission, para. 113; response to Panel question No. 105, para. 53.
[839] India's first written submission, para. 188. See also India's second written submission, para. 114; response to Panel question No. 105, para. 53.
[840] European Union's first written submission, para. 13; panel request, p. 1.
[841] See also fn 175 to para. 7.7 above; and Panel Reports, *EC – IT Products*, para. 7.116.
[842] See para. 7.350 above.

products classified under *other* tariff items of India's First Schedule (such as 8517.69.90) fall under the scope of India's WTO tariff commitments inscribed at tariff item 8517.62 of its WTO Schedule.[843]

7.354. The European Union has also established that India's First Schedule imposes a 20% duty rate on products classified under tariff item 8517.62.90.[844] Moreover, it is uncontested that India's customs notifications modify the tariff treatment accorded to certain products classified under tariff item 8517.62.90 (namely routers) by exempting them from customs duties in whole, or by exempting certain other products from customs duties in part (subjecting such products to a reduced duty rate of 10%).[845] In addition, we have found that India's exemptions do not extend to products listed under Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, (which may be classified under tariff item 8517.62.90[846]) and that those products are subject to the 20% duty rate set forth in India's First Schedule. We therefore consider that the European Union has established that *some* of the products classified under tariff item 8517.62 of India's WTO Schedule are subject to a duty rate of 10% or 20%, and are therefore taxed in excess of the bound duty rate. In light of the foregoing, we do not consider it necessary to identify which of the products listed under Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, are classified under tariff item 8517.62.90.[847] This, in our view, suffices for the purposes of assessing whether India is acting inconsistently with Articles II:1(a) and (b) of the GATT 1994.

[843] Moreover, since the product description of tariff item 8517.62 of India's First Schedule perfectly matches the product description of tariff item 8517.62 of India's WTO Schedule, it follows that products not classified under tariff item 8517.62 of India's First Schedule are also not covered by tariff item 8517.62 of India's WTO Schedule. Since the European Union's claim specifically concerns the tariff treatment of products covered by tariff item 8517.62 of India's WTO Schedule, it follows that products not classified under tariff item 8517.62 of India's First Schedule are not within the scope of the European Union's claim and fall outside our terms of reference.

[844] See para. 7.338 above.

[845] See para. 7.351 above.

[846] Indeed, Notification No. 02/2019 relates to products classified under tariff items "8517.62.90 *or* 8517.69.90". (emphasis added) This wording indicates that at least some of the products listed therein may be classified under tariff item 8517.62.90. If no products described therein fell within the scope of that tariff item, there would be no reason for the Notification to refer to that tariff item in the first place.

[847] Nevertheless, for the purpose of providing clarity, we consider it useful to note that the evolution of Notification No. 57/2017, as amended by Notification No. 02/2019, suggests that certain of the products described in Serial No. 20 can be classified under tariff item 8517.62.90. Specifically, Notification No. 22/2018 amended the duty rate applied to smart watches falling under tariff item 8517.62.90. (See para. 7.341 above). Similarly, Notification No. 75/2018 amended the duty rate applied to optical transport equipment, combination of one or more of Packet Optical Transport Product or Switch, Optical Transport Network products, and IP radios falling under tariff item 8517.62.90. (See para. 7.342 above). This suggests that certain of the products described in Serial No. 20 are classified under tariff item 8517.62.90 of India's First Schedule. We also note that the European Union considers that all the products listed in Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, are classified under tariff item 8517.62. The European Union submits that the core function of smartwatches is to "allow the connection and transmission of data to and from a device worn around a person's wrist", and therefore such products fall within the scope of tariff item 8517.62. (European Union's response to Panel question No. 114, para. 81). The European Union also relies on WCO Classification Opinions on smart watches to support this assertion. (European Union's response to Panel question No. 114, para. 81 (referring to World Customs Organization, Classification Opinions on subheading 8517.62 (2015), (Exhibit EU-60), Nos. 21-24). We note that India has not adduced any arguments or evidence to rebut the European Union's assertion in this regard. Regarding the products listed under (b-h) in paragraph 7.344 above, the European Union submits that the HS2007 Explanatory Notes "to tariff line 8517.62" refer to the "functions and working methods of the products concerned" and that the contested products are classified under tariff item 8517.62 on that basis. (European Union's response to Panel question No. 114, paras. 82-83 (referring to HS2017 Explanatory Notes to Heading 8517, (Exhibit IND-59), p. 6)). For its part, India argues that the section of the Explanatory Note relied upon pertains to "Other Communication Apparatus" whereas the description of tariff item 8517.69 is "Other", suggesting that this Explanatory Note does not necessarily relate to tariff item 8517.62. (India's comments on the European Union's response to Panel question No. 114, para. 38). India is correct that this Explanatory Note does not distinguish between tariff items 8517.62 and 8517.69, but relates to a residual category of "other communication apparatus" which, based on the structure of that Note, could apply to tariff item 8517.62 or 8517.69. Thus, this Explanatory Note would appear to only indicate that the listed products, and those with characteristics such as those stipulated therein, are classified under heading 8517, without definitively identifying the relevant tariff item. In any case, as we have stated above, we do not consider it necessary to determine which of the products listed under Serial No. 20 of Notification No. 57/2017, as amended by Notification No. 02/2019, are classified under tariff item 8517.62.90.

7.4.5.4 Conclusion

7.355. Based on the foregoing, we find that India's tariff treatment of machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus, falling within the scope of tariff item 8517.62 of India's WTO Schedule, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, because certain such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule.

7.356. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that India's tariff treatment of certain such products is less favourable than that provided in its WTO Schedule, and India is therefore acting inconsistently with Article II:1(a) of the GATT 1994.

7.4.6 Tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule

7.4.6.1 General issues

7.4.6.1.1 Main arguments of the parties

7.357. The European Union challenges the tariff treatment accorded by India to products falling under tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule, covering parts and accessories of the machines of heading 84.71.[848] In order to identify the tariff treatment applied by India to such products, the European Union initially referred to the tariff treatment accorded to products classified under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule.[849] In response to a question from the Panel following the second substantive meeting, the European Union clarified that, following certain amendments to India's First Schedule, pursuant to the Finance Act 2021, the relevant products are presently covered by tariff items 8517.71.00, 8517.79.10, and 8517.79.90.[850] The European Union argues that the "alteration of India's domestic customs legislation … does not change the fact that India *does* impose customs duties on the products covered by its bindings, namely on those products which are within the scope of its certified schedule of concessions under tariff lines 8517.70.10 and 8517.70.90".[851] According to the European Union, "this change in India's domestic customs legislation, which does not alter the inconsistency of this legislation with India's international legal obligations, cannot prevent a finding of inconsistency and an indication that India should bring its domestic legislation into compliance with its international obligations".[852] In response to an argument by India that the European Union had failed to meet its burden of proof by being unable to identify the exact products at issue and the duty applicable on such products, the European Union argues that "India's argument is based on an incorrect understanding of the requirement to identify specific products falling into the scope of a tariff line". The European Union elaborates that since the European Union explained "the particulars of the exemptions available for certain products … it has identified with sufficient clarity the measure at issue".[853]

7.358. India notes that "as opposed to the replacement of tariff line 8517.12 with tariff lines 8517.13 and 8517.14, the replacement of tariff lines 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions" and therefore "India has not raised any defense concerning the replacement of HS2007 tariff lines 8517.70.10 and 8517.70.90 with HS2022 tariff lines 8517.79.10 and 8517.79.90".[854] India nevertheless argues that "all submissions made by it with regard to sub-heading 8517.70, including that the complainant has failed to identify the products at issue under HS2007 tariff lines 8517.70.10 and 8517.70.90, extend to sub-heading

[848] European Union's first written submission, para. 13.
[849] See e.g. European Union's first written submission, paras. 133-154.
[850] European Union's response to Panel question No. 117, paras. 91-94.
[851] European Union's response to Panel question No. 117, para. 93. (emphasis original)
[852] European Union's response to Panel question No. 117, para. 94.
[853] European Union's response to Panel question No. 37, para. 93.
[854] India's response to Panel question No. 117, para. 71. India also states that "the change in domestic customs legislation pursuant to the introduction of HS2022 has not resulted in any substantial change in the applied duty of products covered under HS2007 tariff lines 8517.70.10 and 8517.70.90." (India's comments on the European Union's response to Panel question No. 117, para. 40).

8517.79.10 and 8517.79.90, respectively".[855] In this respect, India argues, *inter alia*, that the burden is on the complainant to "identify the specific products at issue and their correct classification in order to demonstrate that there has been a violation of Articles II:1(a) and (b) of the GATT 1994."[856] With respect to tariff item 8517.70.10 of the First Schedule (as it existed at the time of the Panel's establishment), India argues that the European Union "has been unable to identify the exact products at issue and the duty applicable on such products".[857] As to tariff item 8517.70.90 of the First Schedule (as it existed at the time of the Panel's establishment), India considers that the European Union failed to demonstrate that any products mentioned in the European Union's panel request and first written submission, other than parts of cellular mobiles and inputs for such parts, were classified under tariff item 8517.70.90 of India's First Schedule.[858] India submits that such products "must be held to be outside the scope of the present dispute"[859] and that the European Union's "failure to explicitly confirm the classification of the products at issue must lead to the rejection of its claim."[860]

7.4.6.1.2 Panel's assessment

7.359. Before turning to assess the merits of the parties' arguments with respect to the European Union's claims concerning products classified under tariff item 8517.70 ex01, ex02, and ex03 of India's WTO Schedule, we consider it useful to address two general issues. First, we address the impact, on our assessment, of India's amendment of the First Schedule during these proceedings. Second, we address the complainant's burden of proof under Articles II:1(a) and (b) of the GATT 1994 with respect to the domestic tariff classification of the products at issue.

7.360. First, regarding India's amendments to the First Schedule during these proceedings, we recall that India's Finance Act 2021 came into effect on 1 January 2022, resulting in certain amendments to India's First Schedule.[861] Specifically, products previously classified under tariff items 8517.70.10 and 8517.70.90 of the First Schedule are presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90.[862] India has clarified that "the replacement of tariff lines 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions"[863] and that these changes have "not resulted in any substantial change in the applied duty of products covered under HS2007 tariff lines 8517.70.10 and 8517.70.90".[864]

7.361. We note that the European Union does not request us to make distinct assessments of India's WTO-consistency with respect to the situation before and after India's amendment of its First Schedule.[865] We also note that India does not consider that its amendments to the First Schedule have changed the product descriptions or the tariff treatment accorded by India to the products at issue.[866] We therefore proceed with our analysis by observing the evolution of India's tariff treatment during these proceedings, and assessing the WTO-consistency of the measure at issue based on the most up-to-date information available to the Panel (i.e. based on the situation as it stands following India's amendment of the First Schedule on 1 January 2022).

7.362. Turning to the second issue, we note India's argument that the Panel should reject the European Union's claim on the grounds that the burden is on the European Union to demonstrate India's domestic classification of the products at issue, that the European Union has failed to confirm the domestic classification of those products, and that they consequently fall "outside the scope of the present dispute".[867] We agree with India that the burden of demonstrating India's inconsistency with Articles II:1(a) and (b) of the GATT 1994 falls on the complainant. We note, however, that there is a distinction between the burden of demonstrating a violation of a WTO provision, and the

[855] India's response to Panel question No. 117, para. 71.
[856] India's response to Panel question No. 105, para. 52.
[857] India's first written submission, para. 205.
[858] India's first written submission, para. 212.
[859] India's first written submission, para. 212.
[860] India's response to Panel question No. 105, para. 55.
[861] See para. 7.285 above.
[862] European Union's response to Panel question No. 117, paras. 91-94; India's response to Panel question No. 117, para. 71.
[863] India's response to Panel question No. 117, para. 71.
[864] India's comments on the European Union's response to Panel question No. 117, para. 40.
[865] See European Union's responses to Panel question Nos. 102 and 106.
[866] India's comments on the European Union's response to Panel question No. 117, para. 40.
[867] India's first written submission, para. 212.

burden of demonstrating a particular factual assertion.[868] In this respect, "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof".[869]

7.363. We recall that the European Union's claim concerns products falling within the scope of tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule.[870] In order to apply the legal standard under Articles II:1(a) and (b) of the GATT 1994, we will first identify India's WTO tariff commitments with respect to such products. We will then turn to assess the parties' respective factual assertions regarding the tariff treatment applied by India to certain products under its domestic customs regime. In that context, we will assess whether the European Union's factual assertions are supported by sufficient evidence to raise a presumption that such assertions are correct and, if so, whether India has adduced sufficient evidence to rebut that presumption. As a final step, we will compare our factual findings concerning India's tariff treatment to India's WTO tariff commitments. In that context, we will assess, *inter alia*, whether the challenged tariff treatment concerns products falling within the scope of India's WTO tariff commitments concerning tariff items 8517.70 ex01, ex02, and ex03 of its WTO Schedule.

7.4.6.2 India's WTO tariff commitments

7.4.6.2.1 Main arguments of the parties

7.364. The European Union argues that the bound duty rate for tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule, covering parts and accessories of the machines of heading 84.71, is 0%.[871]

7.365. India contends that the tariff commitments under tariff item 8517.70 as reflected in its WTO Schedule based on the HS2007 were certified in error.[872] India maintains that it did not intend to make commitments on printed circuit assemblies for telephones for cellular networks, or on parts of telephones for cellular networks, which in its view were not covered under the ITA or the HS1996, and were introduced to the HS Nomenclature in the 2007 edition.[873] According to India, the commitments under tariff item 8517.70 were undertaken in error, are void pursuant to Article 48 of the Vienna Convention, and are therefore rendered unbound.[874]

7.4.6.2.2 Panel's assessment

7.366. We have addressed India's arguments that its WTO Schedule was certified in error above, and held that India's tariff commitments are set forth in India's WTO Schedule.[875] We have also rejected India's arguments that the ITA sets forth, or otherwise limits the scope of, its tariff commitments in its WTO HS2007 Schedule.[876] Moreover, we have declined to make the findings requested by India regarding its request to rectify its WTO Schedule pursuant to the 1980 Decision.[877]

7.367. Therefore, we turn to India's WTO Schedule to assess India's tariff commitments. A review of India's WTO HS2007 Schedule shows that India committed to a bound duty rate of 0% for products

[868] As the Appellate Body stated in *Japan – Apples*, "[i]t is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof. In fact, the two principles are distinct." (Appellate Body Report, *Japan – Apples*, para. 157). (footnotes omitted)

[869] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at p. 335. The Appellate Body also observed that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." (Ibid.).

[870] European Union's first written submission, para. 13; panel request, p. 1.

[871] European Union's first written submission, paras. 133-134.

[872] India's first written submission, paras. 55-91.

[873] India's first written submission, paras. 204-221.

[874] India's first written submission, para. 91.

[875] See para. 7.213 above.

[876] See para. 7.81 above.

[877] See para. 7.245 above.

falling under tariff items 8517.70 ex01, ex02, and ex03.[878] Such tariff items collectively cover "parts" (tariff item 8517.70.00) of "telephone sets, including telephones for cellular networks or for other wireless networks" and "other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28" (hereafter we refer to these products as "parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data")[879]:

	Product description	Bound rate
8517	Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28	
8517.70.00	- Parts	
8517.70.00 ex01	-- Parts and accessories of the machines of heading 84.71: For populated PCBs	0%
8517.70.00 ex02	-- Parts and accessories of the machines of heading 84.71: Other	0%
8517.70.00 ex03	-- Other	0%

7.368. India's WTO Schedule does not indicate any terms, qualifications or conditions that must be met in order for such products to receive the 0% bound duty rate. Therefore, in accordance with its WTO Schedule, India is obligated to provide unconditional duty-free treatment to parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data falling under tariff items 8517.70 ex01, ex02, and ex03 of its WTO Schedule.

7.4.6.3 India's tariff treatment

7.4.6.3.1 Main arguments of the parties

7.369. The European Union's arguments focus on the tariff treatment that was, at the time of the Panel's establishment, accorded by India to products falling under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule.[880] With respect to the tariff treatment of products falling under tariff item 8517.70.10 of the First Schedule, the European Union argues that, under the First Schedule, as amended by the Finance Act 2020, the duty rate applied to such products was 20%, unless exempted from that duty rate pursuant to a notification.[881] The European Union submits that Notification No. 24/2005 initially exempted "all goods" of tariff item 8517.70.10 from tariff duties, but Notification No. 38/2018 subsequently limited the scope of the exemption to "all goods other than Printed Circuit Board Assembly (PCBA) for cellular phones".[882] The European Union argues that "Notification 76/2018 further limits the exemption and makes it subject to certain conditions".[883] The European Union notes that Notification No. 50/2017 set the applicable duty rate to 0% for certain products, if those products are "used in the manufacture of static converters for automatic data processing machines and units thereof" and if "the importer follows procedures set out in specific customs rules".[884] The European Union also argues that, although Notification No. 57/2017,

[878] WT/Let/1072.

[879] WT/Let/1072. With respect to tariff items 8517.70 ex01 and 8517.70 ex02 we note that "machines of heading 84.71" of the HS2007 are "[a]utomatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included". (Ibid.).

[880] European Union's first written submission, paras. 135-154.

[881] European Union's first written submission, para. 138 (referring to Finance Act 2020, (Exhibit EU-28), pp. 69 and 100). The European Union also notes that Notification No. 36/2018 had previously set the duty rate applied to such products at 10%. (Ibid. (referring to Notification No. 36/2018, (Exhibit EU-35)).

[882] European Union's first written submission, para. 142 (referring to Notification No. 24/2005, (Exhibit EU-9), and Notification No. 38/2018, (Exhibit EU-29)).

[883] European Union's first written submission, para. 143 (referring to Notification No. 76/2018, (Exhibit EU-30)).

[884] European Union's first written submission, paras. 145-146 (referring to Notification No. 50/2017, (Exhibit EU-34), p. 30).

as amended by Notification No. 02/2020, set the duty rate for certain goods falling under tariff item 8517.70.10 at 10%, that reduced rate was only available until 31 March 2020.[885]

7.370. With respect to products falling under tariff item 8517.70.90 of India's First Schedule, the European Union submits that "the Finance Act 2018 fixed the applicable tariff rate for tariff line 8517.70.90 at 15%."[886] The European Union acknowledges that Notification No. 57/2017 exempts certain products from that duty rate but submits that those exemptions "do not cover all products of that [tariff line], and are subject to conditions" not set forth in India's WTO Schedule.[887]

7.371. The European Union acknowledges that, as of 1 January 2022, tariff items 8517.70.10 and 8517.70.90 of India's First Schedule were replaced with tariff items 8517.71, 8517.79.10, and 8517.79.90.[888] The European Union highlights, however, that the "products covered by these tariff lines are currently subject to the following tariff duties, namely 20 % (8517.71.00), 20 % (8517.79.[1]0) and 15 % (8517.79.90)."[889] The European Union submits that the "alteration of India's domestic customs legislation therefore does not change the fact that India does impose customs duties on the products covered by its bindings".[890]

7.372. With respect to tariff item 8517.70.10 of the First Schedule at the time of the Panel's establishment, India argues that the European Union "has been unable to identify the exact products at issue and the duty applicable on such products". According to India, the European Union "has merely stated that the basic customs duty on imports of products under tariff item 8517.70.10 is 20% and that 'all goods other than Printed Circuit Board Assembly for cellular phones' are exempt from such duty." India further submits that, although the European Union argued that certain duty exemptions are "limited", the European Union was "unable to demonstrate the manner in which the scope of these exemptions [was] limited".[891] With respect to tariff item 8517.70.90 of the First Schedule, India does not contest that "'connectors for use in manufacture of cellular mobile phones' and certain limited camera modules such as those used in the manufacture of cellular mobile phones" are subject to a 10% duty rate.[892]

7.373. With respect to the tariff treatment accorded after 1 January 2022, India states that "the change in domestic customs legislation pursuant to the introduction of HS2022 has not resulted in any substantial change in the applied duty of products covered under HS2007 tariff lines 8517.70.10 and 8517.70.90."[893]

7.4.6.3.2 Panel's assessment

7.374. We proceed with our assessment by examining the tariff treatment accorded to products that, at the time of the Panel's establishment, fell under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule. We then turn to assess the effects of India's amendment of the First Schedule during these proceedings.

7.4.6.3.2.1 Tariff treatment at the time of the Panel's establishment

7.375. It is uncontested that, at the time of the Panel's establishment, India's First Schedule imposed: (i) a standard duty rate of 20% on products falling under tariff item 8517.70.10, covering "[p]opulated, loaded or stuffed printed circuit boards" constituting parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data; and (ii) a standard duty

[885] European Union's first written submission, para. 148 (referring to Notification No. 57/2017, (Exhibit EU-12), and Notification No. 02/2020, (Exhibit EU-31)). See also European Union's response to Panel question No. 119, para. 106.
[886] European Union's first written submission, para. 135.
[887] European Union's first written submission, para. 150. See also European Union's response to Panel question No. 118, paras. 95-105.
[888] European Union's response to Panel question No. 117, para. 91.
[889] European Union's response to Panel question No. 117, para. 92. In its response to the Panel's question, the European Union referred to tariff item 8517.79.90 twice. We understand that this was a typographical error and that the first reference to this tariff item was intended to refer to tariff item 8517.79.10.
[890] European Union's response to Panel question No. 117, para. 93. (emphasis omitted)
[891] India's first written submission, para. 205.
[892] India's first written submission, para. 212.
[893] India's comments on the European Union's response to Panel question No. 117, para. 40.

rate of 15% on products falling under tariff item 8517.70.90, covering "[o]ther" parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data[894]:

Tariff item	Product description	Standard duty rate
8517	Telephone sets, including telephones for cellular networks or for other wireless networks: other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528	
	- Parts	
8517.70.10	-- Populated, loaded or stuffed printed circuit boards	20%
8517.70.90	-- Other	15%

7.376. It is further uncontested that the duty rate applied to certain products falling within the scope of these tariff items was subject to several customs notifications. We have examined the assertions and evidence adduced by the parties and certain third parties[895] regarding the content of relevant customs notifications, in order to determine, as a factual matter, the tariff treatment accorded to products falling under these tariff items.[896] Based on our examination of the evidence, we consider the following factual findings to be adequately supported by the evidence on the record.

7.377. Turning, first, to products falling under tariff item 8517.70.10 of India's First Schedule, we note that this tariff item covered populated, loaded or stuffed printed circuit boards constituting parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data.[897] As indicated above, the standard duty rate applicable to such products under the First Schedule was 20%.[898] However, the applied duty rate is subject to customs notifications, as follows:

a. Pursuant to Serial No. 22 of Notification No. 57/2017, as amended by Notification No. 02/2020, PCBAs for certain specified products[899], falling under this tariff item, became unconditionally subject to a 10% duty rate.[900]

b. Pursuant to Serial No. 13S of Notification No. 24/2005, as amended by Notification No. 76/2018, products falling under this tariff item *other than* PCBAs for cellular mobile phones and the products identified in footnote 899 above were eligible for duty-free treatment if they satisfied certain conditions.[901] Specifically, in order for the product to receive such duty-free treatment: (i) the importer had to follow the procedures set out in the Customs Rules 2017; and (ii) at the time of importation, the importer had to furnish an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of the Customs, as the case may be, to the effect that imported goods would not be used in the manufacture of certain specified goods[902] and in the event of failure to comply with that

[894] First Schedule as of 2016/2017, (Exhibit EU-59), pp. 788; Finance Act 2020 (Exhibit EU-28), pp. 69 and 100.
[895] Specifically, Japan and Chinese Taipei.
[896] We recall that the burden of demonstrating a factual assertion falls on the party making that factual assertion. (See para. 7.362 above).
[897] See para. 7.375 above.
[898] See para. 7.375 above.
[899] Specifically PCBAs for: base stations; optical transport equipment; combination of one or more of Packet Optical Transport Product or Switch; Optical Transport Network products; IP radios; soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; carrier ethernet switches, Packet Transport Node products, and Multiprotocol Label Switching-Transport Profile products; and Multiple Input/Multiple Output and Long Term Evolution products. (See fn 900 to para. 7.377 below).
[900] Serial No. 22 of Notification No. 57/2017 as amended by Notification No. 02/2020, (Exhibit IND-42).
[901] Serial No. 13S of Notification No. 24/2005 as amended by Notification Nos. 132/2006, 58/2017, 38/2018, and 76/2018, (Exhibit IND-39).
[902] Specifically, the imported goods were not to be used in the manufacture of: cellular mobile phones; base stations; optical transport equipment; combination of one or more of Packet Optical Transport Product or Switch; Optical Transport Network products; IP radios; soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; carrier ethernet switches, Packet Transport Node products, and Multiprotocol Label Switching-Transport Profile products; and Multiple Input/Multiple Output and Long Term Evolution products.

condition the importer would be liable to pay an amount equal to the difference between the duty leviable on the imported goods but for the exemption under this notification and that already paid at the time of importation.[903]

c. Pursuant to Serial No. 402 of Notification No. 50/2017, *all* populated printed circuit boards falling under tariff item 8517.70.10 of India's First Schedule were eligible for duty-free treatment if they were used in the manufacture of static converters for automatic data processing machines and units thereof of tariff items 8443.31.00, 8443.32.00, 8471, 8517.62, 8528.42.00, 8528.49.00, 8528.52.00 or 8528.62.00 of India's First Schedule.[904]

7.378. Any products falling under tariff item 8517.70.10 that did not benefit from the tariff treatment available under these customs notifications (for instance PCBAs for cellular mobile phones[905]) remained subject to the 20% standard duty rate set forth in the First Schedule.

7.379. We recall that Article II:1(b) does not require Members to inscribe general conditions for importation in their WTO Schedules. However, where conditions are tied to tariff treatment, such that a product must satisfy those conditions in order to be eligible for the tariff treatment set forth in a Member's WTO Schedule, Article II:1(b) requires that such conditions must be inscribed in the Member's WTO Schedule.

7.380. In our view, the conditions attached to the duty-free treatment available under Serial No. 13S of Notification No. 57/2012 and Serial No. 402 of Notification No. 50/2017 are not general conditions for importation. Regarding the condition that the importer follow the procedures set out in the Customs Rules 2017, we note that India argues that this condition "merely requires the intimation of intent to avail concessional rates of duties and registration of bills of entry" and that "[t]hese processes have been automated, where all details can be uploaded on a common portal."[906] In support of its assertion, India submits Circular No. 04/2022 as an exhibit.[907] We note that Circular No. 04/2022 makes certain amendments to the Customs Rules 2017.[908] Circular No. 04/2022 indicates that these amendments are "aimed at simplifying the procedures with a focus on automation and making the entire process contact-less".[909] We also note that Circular No. 04/2022 provides the procedure to be followed by "[a]n importer *who intends to import goods at a concessional rate of duty*."[910] On the basis of the procedures set out in Circular No. 04/2022, the "Deputy Commissioner or Assistant Commissioner of Customs at the port of importation *shall allow the benefit of exemption notification*."[911] The language in Circular No. 04/2022 therefore indicates that the conditions therein relate to the tariff treatment accorded to the goods at issue, and not to importation *per se*. The foregoing indicates that the requirement that the importer follow the procedure set out in the Customs Rules 2017 is a condition that an importer must meet in order to be eligible for exemption from customs duties. There is no indication that a failure to comply with such conditions would prevent the importer from importing the products. We therefore do not see anything on the record to suggest that these are general conditions for importation of goods.

7.381. As to the requirement that the importer undertake not to use the products in the manufacture of certain specified goods, this condition makes clear on its face that failure to comply will lead to the application of the "duty leviable … but for the exemption".[912] This, on its face, is a

(Serial No. 13S of Notification No. 24/2005 as amended by Notification Nos. 132/2006, 58/2017, 38/2018, and 76/2018, (Exhibit IND-39)).

[903] Serial No. 13S of Notification No. 24/2005 as amended by Notification Nos. 132/2006, 58/2017, 38/2018, and 76/2018, (Exhibit IND-39).

[904] Serial No. 402 of Notification No. 50/2017, (Exhibit IND-41).

[905] Pursuant to Serial No. 21 of Notification No. 57/2017, PCBAs for cellular mobile phones were subject to a duty rate of 10%, without being subject to any conditions, until 31 March 2020 when this partial exemption expired. (Notification No. 57/2017 as amended by Notification No. 02/2020, (Exhibit IND-42)). PCBAs for cellular mobile phones do not appear to fall within the scope of any of the exemptions applicable to products falling under tariff item 8517.70.10 of India's First Schedule.

[906] India's response to Panel question No. 103, para. 48 (referring to Circular No. 04/2022 (27 February 2022), (Exhibit IND-81)).

[907] Circular No. 04/2022 (27 February 2022), (Exhibit IND-81), p. 1.

[908] Circular No. 04/2022 (27 February 2022), (Exhibit IND-81), p. 1.

[909] Circular No. 04/2022 (27 February 2022), (Exhibit IND-81), p. 1.

[910] Circular No. 04/2022 (27 February 2022), (Exhibit IND-81), para. 4.1. (emphasis added)

[911] Circular No. 04/2022 (27 February 2022), (Exhibit IND-81), para. 4.8. (emphasis added)

[912] Serial No. 13S of Notification No. 24/2005 as amended by Notification Nos. 132/2006, 58/2017, 38/2018, and 76/2018, (Exhibit IND-39).

condition for beneficial tariff treatment. As to the condition that certain products be used in the manufacture of other specified products, we understand that failure to comply with this condition would not prevent the products from being imported – rather, they would be imported subject to the 20% standard duty rate. Indeed, with respect to all relevant conditions described above, we understand that failure to comply with those conditions would not prevent the products from being imported, but rather would result in importation subject to the 20% standard duty rate set forth in the First Schedule. Thus, these conditions are conditions for tariff treatment and not general conditions for importation.

7.382. Turning to products falling under tariff item 8517.70.90 of India's First Schedule, at the time of the Panel's establishment this tariff item covered "other" parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data, (namely "other" than populated, loaded or stuffed printed circuit boards).[913] The standard duty rate applicable to such products under the First Schedule was 15%.[914] However, the applied duty rate was subject to customs notifications, as follows:

a. Pursuant to Serial Nos. 468, 506-508, and 513 of Notification No. 50/2017, as amended by Notification Nos. 37/2019 and 01/2020, certain products falling under tariff item 8517.70.90 of the First Schedule: (i) were unconditionally eligible for duty-free treatment[915]; or (ii) were eligible for duty-free treatment subject to the condition that the importer followed the procedures set out in the Customs Rules 2017.[916]

[913] See para. 7.375 above.

[914] See para. 7.375 above.

[915] Pursuant to Serial No. 468 of Notification No. 50/2017, the following products falling under Chapter 84 or 85 of the First Schedule (i.e. including products falling under tariff item 8517.70.90) of the First Schedule were unconditionally eligible for duty-free treatment: (i) micro ATMs as per standards version 1.5.1; (ii) fingerprint readers/scanners other than fingerprint readers/scanners for use in manufacturing of cellular mobile phones; (iii) iris scanners; (iv) miniaturized POS card readers for mPOS (other than mobile phones or tablet computers). (Notification No. 50/2017 as amended by Notification No. 01/2020, (Exhibit IND-41)).

[916] The following products falling under tariff item 8517.70.90 of the First Schedule, subject to the condition that the importer follow the procedures set out in the Customs Rules 2017, were eligible for duty-free treatment under Notification No. 50/2017: **(1)** pursuant to Serial No. 468, parts and components for use in the manufacture of: (i) micro ATMs as per standards version 1.5.1; (ii) fingerprint readers/scanners other than fingerprint readers/scanners for use in manufacturing of cellular mobile phones; (iii) iris scanners; and (iv) miniaturized POS card readers for mPOS (other than mobile phones or tablet computers); **(2)** pursuant to Serial Nos. 506, 507, and 508: (i) parts, components and accessories for use in manufacture of broadband modem falling under tariff item 8517.62.30 of the First Schedule, other than populated printed circuit boards, chargers and power adapters; (ii) parts, components and accessories for use in the manufacture of routers falling under tariff item 8517.62.90 of the First Schedule, other than populated printed circuit boards, chargers, and power adapters; (iii) parts, components and accessories for use in the manufacture of set-top boxes for gaining access to internet falling under tariff item 8517.69.60 of the First Schedule, other than populated printed circuit boards, chargers, and power adapters; and (iv) sub-parts for use in the manufacture of items covered in (i) through (iii) above; and **(3)** pursuant to Serial No. 513: (i) parts or components for use in the manufacture of populated printed circuit boards of; (a) broadband modems falling under tariff item 8517.62.30 of the First Schedule; (b) routers falling under tariff item 8517.62.90 of the First Schedule; and (c) set-top boxes for gaining access to internet falling under tariff item 8517.69.60 of the First Schedule; and (ii) sub-parts for use in the manufacture of the parts or components in item (i) above. (Notification No. 50/2017 as amended by Notification Nos. 37/2019 and 01/2020, (Exhibit IND-41)). In making these factual findings, we observe that other Serial Nos. of Notification No. 50/2017 set forth conditional exemptions for other products, over and above the products we have identified above. Since no party or third-party has argued or asserted that the exemptions for those other products are relevant to the European Union's claims concerning products falling under tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule, we consider it uncontested that the exemptions for those products are not relevant. We also note that pursuant to Serial No. 425 of Notification No. 50/2017, parts for manufacture of base station controllers, base transreceiver stations, and antenna system equipment, required for the manufacture of Public Radio Mobile Trunked Service, were eligible for exemptions from customs duties subject to the condition that the importer followed the procedures set out in the Customs Rules 2017. We further note that India contends that such products were not "always classified under tariff item 8517.70.90 of India's First Schedule" and that they must be examined individually to ascertain their correct classification. (India's response to Panel question No. 134). The European Union submits that it cannot "conclude with certainty" that such products were classified under tariff item 8517.70.90 of India's First Schedule. (European Union's response to Panel question No. 134). As noted in paragraph 7.325 above, Serial No. 425 was repealed by Notification No. 02/2022 and is no longer in effect, as from 1 February 2022. (Notification No. 02/2022, (Exhibit IND-90)). Hence, we do not consider it necessary for the resolution of this dispute to make further factual findings regarding the tariff treatment accorded under Serial No. 425 of Notification No. 50/2017 at the time of the Panel's establishment.

b. Similarly, pursuant to Serial Nos. 5 to 8 of Notification No. 57/2017, as amended by Notification Nos. 22/2018, 37/2018, 02/2019, 24/2019, 01/2020, and 02/2020, certain products falling under tariff item 8517.70.90 of the First Schedule: (i) were unconditionally eligible for duty-free treatment[917]; (ii) were eligible for duty-free treatment subject to the condition that the importer followed the procedures set out in the Customs Rules 2017[918]; or (iii) became eligible for a 10% duty rate (rather than the 15% standard duty rate set forth in the First Schedule) subject to the condition that the importer followed the procedures set out in the Customs Rules 2017.[919]

7.383. Regarding the conditional nature of the tariff treatment accorded to certain products falling under tariff item 8517.70.90, we recall our finding that the condition that an importer follow the procedures set out in the Customs Rules 2017 in order to receive beneficial tariff treatment constitutes a condition for tariff treatment and not a general condition for importation.[920] We understand that if the relevant products failed to satisfy such conditions they could be imported into India, but at the standard duty rate set forth in the First Schedule instead of the beneficial tariff treatment available under these Notifications.

7.4.6.3.2.2 Tariff treatment as of 1 January 2022

7.384. Having addressed the tariff treatment applicable to products falling under tariff items 8517.70.10 and 8517.70.90 at the time of the Panel's establishment, we recall that on 1 January

[917] Pursuant to Serial No. 5 of Notification No. 57/2017, the following products falling under tariff item 8517.70.90, without being subject to any conditions, were eligible for duty-free treatment: (i) all goods other than parts of cellular mobile phones; and (ii) inputs or sub-parts for use in manufacture of parts mentioned at (i) above. (Notification No. 57/2017, (Exhibit IND-42)).

[918] The following products falling under tariff item 8517.70.90 of the First Schedule, subject to the condition that the importer follow the procedures set out in the Customs Rules 2017, were eligible for duty-free treatment under Notification No. 57/2017: **(1)** pursuant to Serial Nos. 5C, 5D, and 5E: (i) inputs or sub-parts for use in the manufacture of vibrator motors/ringers for use in the manufacture of cellular mobile phones, display assemblies for use in the manufacture of cellular mobile phones, or touch panels/cover glass assemblies for use in manufacture of cellular mobile phones; and (ii) inputs or sub-parts for use in the manufacture of parts mentioned at (i) above; **(2)** pursuant to Serial Nos. 6A, 6B, and 6C: i. (a) inputs or parts for use in manufacture of PCBA of cellular mobile phones and (b) inputs or sub-parts for use in manufacture of PCBAs of cellular mobile phones, provided that both of these categories exclude the following goods; (i) connectors; (ii) microphones; (iii) receivers; (iv) speakers; and (v) SIM sockets; ii. (a) inputs or parts for use in manufacture of camera modules of cellular mobile phones and (b) inputs or sub-parts for use in manufacture of camera modules of cellular mobile phones; and iii. (a) inputs or parts for use in manufacture of connectors of cellular mobile phones and (b) inputs or sub-parts for use in manufacture of connectors of cellular mobile phones; **(3)** pursuant to Serial No. 7: (i) wired headsets; (ii) battery covers; (iii) front covers; (iv) front covers (with zinc casting); (v) middle covers; (vi) GSM antennae/antennae of any technology; (vii) side keys; (viii) main lenses; (ix) camera lenses; (x) screws; (xi) microphone rubber cases; (xii) sensor rubber cases/sealing gaskets including sealing gaskets/cases from rubbers like SBR, EPDM, CR, CS, silicone and all other individual rubbers or combination/combination of rubbers; (xiii) PU cases/sealing gasket – other articles of polyurethane foam like sealing gaskets/case; (xiv) sealing gaskets/cases from PE, PP, EPS, PC and all other individual polymers or combination/combination of polymers; (xv) SIM sockets/other mechanical items (Metal); (xvi) SIM sockets/other mechanical items (plastic); (xvii) back covers; (xviii) conductive cloths; (xix) heat dissipation sticker battery covers; (xx) sticker-battery slot; (xxi) protective film for main lens; (xxii) mylar for LCD FPC; (xxiii) LCD conductive foam; (xxiv) film-front flash; (xxv) LCD foam; (xxvi) BT foam; (xxvii) microphones and receivers; (xxviii) key pads; (xxix) USB cables; and (xxx) fingerprint readers/scanner; **(4)** pursuant to Serial No. 7A: inputs and raw material, other than PCBAs (falling under tariff item 8504.90.90 of the First Schedule) and moulded plastics (falling under tariff items 3926.90.99 or 8504.90.90 of the First Schedule) for use in the manufacture of chargers or adapters for cellular mobile phones; and **(5)** pursuant to Serial No. 8: inputs or raw material for use in manufacture of the following goods: (i) base stations; (ii) all goods falling under tariff item 8517.62.90 of the First Schedule; and (iii) all goods falling under tariff item 8517.69.90 of the First Schedule. (Notification No. 57/2017 as amended by Notification Nos. 22/2018, 37/2018, 02/2019, 24/2019, and 02/2020, (Exhibit IND-42)).

[919] The following products falling under tariff item 8517.70.90 of the First Schedule, subject to the condition that the importer follow the procedure set out in the Customs Rules 2017, were eligible to be exempted from the portion of customs duty exceeding 10% under Notification No. 57/2017: **(1)** pursuant to Serial Nos. 5A and 5B: (i) camera modules for use in manufacture of cellular mobile phones; and (ii) connectors for use in manufacture of cellular mobile phones; and **(2)** pursuant to Serial Nos. 5C, 5D, and 5E: (i) vibrator motors/ringers for use in manufacture of cellular mobile phones; (ii) display assemblies for use in manufacture of cellular mobile phones; and (iii) touch panels/cover glass assemblies for use in manufacture of cellular mobile phones. (Notification No. 57/2017 as amended by Notification Nos. 37/2018 and 02/2020, (Exhibit IND-42)).

[920] See para. 7.332 above.

2022 the First Schedule was amended, such that "tariff items 8517 70 10 and 8517 70 90 and the entries relating thereto" were substituted with the following entries[921]:

Tariff item	Product description	Standard duty rate
	- Parts	
8517.71.00	-- Aerials and aerial reflectors of all kinds; parts suitable for use therewith	20%
8517.79	-- *Other:*	
8517.79.10	--- Populated, loaded or stuffed printed circuit boards	20%
8517.79.90	--- Other	15%

7.385. Following the second substantive meeting with the parties, the Panel asked the parties to confirm its understanding that no party had identified any customs notifications on the Panel's record setting forth any exemptions pertaining to products falling under tariff items 8517.71.00, 8517.79.10, or 8517.79.90. The European Union confirmed that this understanding was correct and stated that the products covered by those tariff items are currently subject to duty rates of 20%, 20%, and 15%, respectively.[922] India did not dispute the Panel's understanding. India stated that the "the replacement of tariff lines 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions" and that "the change in domestic customs legislation pursuant to the introduction of HS2022 has not resulted in any substantial change in the applied duty of products covered under HS2007 tariff lines 8517.70.10 and 8517.70.90."[923]

7.386. Subsequently, India submitted onto the Panel record Notification No. 02/2022.[924] We note that through Notification No. 02/2022, Notification No. 50/2017 was amended to "omit" Serial No. 402.[925] Thus, based on the most up-to-date evidence submitted to us, the conditional duty-free treatment that was available for products falling under tariff item 8517.70.10 of the First Schedule, as it existed at the time of the Panel's establishment, pursuant to Serial No. 402 of Notification No. 50/2017[926], is *not* presently available for products falling under tariff item 8517.79.10 of India's First Schedule.

7.387. We note that, in the context of responding to certain questions from the Panel regarding the European Union's claim pertaining to products falling under tariff item 8517.12 of India's WTO Schedule, India refers to Notification No. 57/2021.[927] Notwithstanding that neither party refers to this Notification in the context of the European Union's claim concerning products falling under tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule, our review of this exhibit suggests that it is indeed relevant for products presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of India's First Schedule. Specifically, we understand that Notification No. 57/2021 amended Notification Nos. 24/2005 and 57/2017 such that certain exemptions set forth in those Notifications may continue to apply to products presently classified under those tariff items.

7.388. Having reviewed this evidence, we understand that, in light of the amendments to various customs notifications introduced by Notification No. 57/2021:

a. With respect to products classified under tariff item 8517.71.00 of the First Schedule, pursuant to Serial No. 5 of Notification No. 57/2017, goods other than parts of cellular

[921] Finance Act 2021, (Exhibit IND-66), p. 176.
[922] European Union's response to Panel question No. 117, paras. 91-92. See also fn 889 to para. 7.370 above.
[923] India's comments on the European Union's response to Panel question No. 117, para. 40. India also argues that "all submissions made by [India] with regard to sub-heading 8517.70, including that the complainant has failed to identify the products at issue under HS2007 tariff lines 8517.70.10 and 8517.70.90, extend to sub-heading 8517.79.10 and 8517.79.90, respectively". (See India's response to Panel question No. 117, para. 71).
[924] India's response to Panel question No. 135.
[925] Notification No. 02/2022, (Exhibit IND-90).
[926] See para. 7.377c above.
[927] India's responses to Panel question No. 108, para. 58, and No. 110, para. 64. At the request of the Panel, India subsequently submitted Notification No. 57/2021 as Exhibit IND-89 on 5 July 2022.

mobile phones, as well as the inputs or sub-parts for use in the manufacture of goods other than parts of cellular mobile phones, are eligible for duty-free treatment[928];

b. With respect to products classified under tariff item 8517.79.10 of the First Schedule:

i. Pursuant to Serial No. 13S of Notification No. 24/2005, all products other than PCBAs for cellular mobile phones and the products identified in footnote 899 above are eligible for duty-free treatment if they satisfy certain conditions – specifically, in order for the product to receive such duty-free treatment: (i) the importer must follow the procedures set out in the Customs Rules 2017; and (ii) at the time of importation, the importer must furnish an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of the Customs, as the case may be, to the effect that imported goods would not be used in the manufacture of certain specified goods[929] and in the event of failure to comply with that condition the importer is liable to pay an amount equal to the difference between the duty leviable on the imported goods but for the exemption under this notification and that already paid at the time of importation[930];

ii. Pursuant to Serial No. 22 of Notification No. 57/2017, PCBAs for certain specified products[931] are unconditionally subject to a 10% duty rate; and

c. With respect to products classified under tariff item 8517.79.90 of the First Schedule:

i. Pursuant to Serial No. 5 of Notification No. 57/2017, goods other than parts of cellular mobile phones, as well as the inputs or sub-parts for use in the manufacture of goods other than parts of cellular mobile phones, are eligible for duty-free treatment[932];

ii. Pursuant to Serial Nos. 5A and 5B of Notification No. 57/2017, camera modules for use in the manufacture of cellular mobile phones and connectors for use in the manufacture of cellular mobile phones are eligible to receive a 10% duty rate, subject to the condition that the importer follow the procedure set out in the Customs Rules 2017.[933]

7.389. We recognize that India may amend its customs notifications such that other exemptions applying to products falling under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule at the time of the Panel's establishment may continue to apply to products presently falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule. In such a case, our analysis of the tariff treatment accorded by India to products falling under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule at the time of the Panel's establishment would be equally

[928] See Notification No. 57/2017, (Exhibit IND-42), as amended by Notification No. 57/2021, (Exhibit IND-89).

[929] Specifically, the imported goods are not to be used in the manufacture of: cellular mobile phones; base stations; optical transport equipment; combination of one or more of Packet Optical Transport Product or Switch; Optical Transport Network products; IP radios; soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; carrier ethernet switches, Packet Transport Node products, and Multiprotocol Label Switching-Transport Profile products; and Multiple Input/Multiple Output and Long Term Evolution products. (Serial No. 13S of Notification No. 24/2005 as amended by Notification Nos. 132/2006, 58/2017, 38/2018, and 76/2018, (Exhibit IND-39)).

[930] Serial No. 13S of Notification No. 24/2005 as amended by Notification Nos. 132/2006, 58/2017, 38/2018, 76/2018, (Exhibit IND-39), and No. 57/2021, (Exhibit IND-89). We note that these conditions are attached to the tariff treatment and are not general conditions for importation. (See para. 7.379 above).

[931] Specifically PCBAs for: base stations; optical transport equipment; combination of one or more of Packet Optical Transport Product or Switch; Optical Transport Network products; IP radios; soft switches and Voice over Internet Protocol equipment, namely, Voice over Internet Protocol phones, media gateways, gateway controllers and session border controllers; carrier ethernet switches, Packet Transport Node products, and Multiprotocol Label Switching-Transport Profile products; and Multiple Input/Multiple Output and Long Term Evolution products. (Serial No. 22 of Notification No. 57/2017 as amended by Notification No. 02/2020, (Exhibit IND-42), and Notification No. 57/2021, (Exhibit IND-89)).

[932] See Notification No. 57/2017 (Exhibit IND-42), as amended by Notification No. 57/2021, (Exhibit IND-89).

[933] Notification No. 57/2017 as amended by Notification Nos. 37/2018 and 02/2020, (Exhibit IND-42), and Notification No. 57/2021, (Exhibit IND-89).

applicable to the tariff treatment accorded by India to products presently falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule. We note in this regard India's argument that its "submissions" with regard to tariff items 8517.70.10 and 8517.70.90 continue to apply to tariff items 8517.79.10 and 8517.79.90[934] and that "the change in domestic customs legislation pursuant to the introduction of HS2022 has not resulted in any substantial change in the applied duty of products covered under HS2007 tariff items 8517.70.10 and 8517.70.90."[935] We therefore do not preclude the possibility that such Notifications may continue to apply to the products presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90. However, nothing on the record of this dispute allows us to make a determination in this regard.

7.390. To summarize, at the time of the Panel's establishment certain specified products falling under tariff item 8517.70.10 of India's First Schedule were unconditionally subject to a 10% duty rate.[936] Certain other products falling under this tariff item were eligible for duty-free treatment if they satisfied certain conditions.[937] All other products classified under this tariff item, as well as products that failed to satisfy the conditions for duty-free treatment, were subject to the 20% duty rate set forth in the First Schedule. As for products falling under tariff item 8517.70.90 of India's First Schedule, certain such products were eligible for unconditional duty-free treatment.[938] Subject to certain conditions, certain other products were eligible for either duty-free treatment or a 10% duty rate.[939] All other products classified under this tariff item, as well as products that failed to satisfy the conditions for the duty-free treatment or the 10% duty rate, were subject to the 15% duty rate set forth in the First Schedule.

7.391. Regarding the tariff treatment as of 1 January 2022, we note, based on the evidence before us, that: (i) with respect to products falling under tariff item 8517.71.00 of the First Schedule, certain specified products are unconditionally subject to duty-free treatment, while all other products are subject to the 20% duty rate set forth in the First Schedule[940]; (ii) with respect to products falling under tariff item 8517.79.10 of the First Schedule, certain specified products are eligible for duty-free treatment if they satisfy certain conditions, other specified products are unconditionally subject to a 10% duty rate, and all other products are subject to the 20% duty rate set forth in the First Schedule[941]; and (iii) with respect to products falling under tariff item 8517.79.90 of the First Schedule, certain specified products are unconditionally subject to duty-free treatment, other specified products are subject to a 10% duty rate subject to certain conditions, and all other products are subject to the 15% duty rate set forth in the First Schedule.[942]

7.4.6.4 Comparison of India's tariff treatment to its WTO tariff commitments

7.4.6.4.1 Main arguments of the parties

7.392. The European Union argues that, at the time of the Panel's establishment, the products classified under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule were products falling within the scope of India's WTO tariff commitments as set forth at tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule.[943] The European Union argues that the duty rates for such products as set forth in India's First Schedule were in excess of the 0% bound duty rate set forth in India's WTO Schedule.[944] The European Union further considers that the various customs notifications pertaining to products falling under these tariff items did not provide "for an unconditional freedom from any tariffs" for products classified under tariff items 8517.70 ex01, ex02, and ex03, and consequently India acted inconsistently with Articles II:1(a) and (b) of the GATT 1994.[945] Regarding India's amendment of the First Schedule, the European Union considers that the "alteration of India's domestic customs legislation… does not change the fact that India does

[934] India's response to Panel question No. 117, para. 71.
[935] India's comments on the European Union's response to Panel question No. 117, para. 40.
[936] See para. 7.377a above.
[937] See paras. 7.377b-7.377c above.
[938] See paras. 7.382a-7.382b above.
[939] See paras. 7.382a-7.382b above.
[940] See para. 7.388a above.
[941] See para. 7.388b above.
[942] See para. 7.388c above.
[943] European Union's first written submission, paras. 133-140.
[944] European Union's first written submission, para. 140.
[945] European Union's first written submission, paras. 153-154. See also European Union's response to Panel question No. 115, paras. 89-90.

impose customs duties on the products covered by its bindings".[946] According to the European Union, "this change in India's domestic customs legislation, which does not alter the inconsistency of this legislation with India's international legal obligations, cannot prevent a finding of inconsistency and an indication that India should bring its domestic legislation into compliance with its international obligations."[947]

7.393. India notes that a Section Note to Section XVI of the HS2007 indicates that "[p]arts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 84.09, 84.31, 84.48, 84.66, 84.73, 84.87, 85.03, 85.22, 85.29, 85.38 and 85.48) are in all cases to be classified in their respective headings", and "[o]ther parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 84.79 or 85.43) are to be classified with the machines of that kind".[948] India submits that "[g]iven that the Section Notes make a nuanced distinction on the kinds of goods that may be covered as 'Parts' (classifiable under 8517.70) and those 'Parts which are goods' (classifiable under the appropriate heading of Chapter 84 or Chapter 85), the complainant's failure to explicitly confirm the classification of the products at issue must lead to the rejection of its claim."[949] Specifically with respect to tariff item 8517.70.10 of the First Schedule (as it existed at the time of the Panel's establishment), India argues that the European Union "has been unable to identify the exact products at issue and the duty applicable on such products".[950] As to tariff item 8517.70.90 of the First Schedule (as it existed at the time of the Panel's establishment), India argues that "'[a]ll goods other than the parts of cellular mobile phones' and 'Inputs for all goods other than the parts of cellular mobile phones' falling under tariff item 8517.70.90 of the Customs Tariff Act are exempt from duties", and submits that "[f]or all other products mentioned in the EU's Panel Request and first written submissions", the European Union has failed to demonstrate that such products are classified under this tariff item.[951] According to India, such products "must be held to be outside the scope of the present dispute".[952] India also notes "the replacement of tariff lines 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions" and therefore "India has not raised any defense concerning the replacement of HS2007 tariff lines 8517.70.10 and 8517.70.90 with HS2022 tariff lines 8517.79.10 and 8517.79.90".[953] India nevertheless argues that "all submissions made by it with regard to sub-heading 8517.70, including that the complainant has failed to identify the products at issue under HS2007 tariff lines 8517.70.10 and 8517.70.90, extend to sub-heading 8517.79.10 and 8517.79.90, respectively".[954]

7.4.6.4.2 Panel's assessment

7.394. We recall that tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule indicate that India is obligated to accord unconditional duty-free treatment to parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data.[955]

7.395. We note that, at the time of the Panel's establishment, tariff item 8517.70.10 of India's First Schedule covered populated, loaded or stuffed printed circuit boards constituting parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data. Tariff item 8517.70.90 of India's First Schedule covered "other" parts of telephone sets or other certain apparatus for transmission or reception of voice, images, or data. It is uncontested that the products that, at the time of the Panel's establishment, were classified under tariff items 8517.70.10 and 8517.70.90 of India's First Schedule fell within the scope of India's WTO tariff commitments under tariff items 8517.70 ex01, ex02, and ex03 of its WTO Schedule.

[946] European Union's response to Panel question No. 117, para. 93. (emphasis omitted)
[947] European Union's response to Panel question No. 117, para. 94.
[948] India's response to Panel question No. 105, para. 54 and No. 116, para. 69; second written submission, para. 134 (quoting HS2007 Section Notes to Section XVI, (Exhibit IND-9)).
[949] India's response to Panel question No. 105, para. 55 and No. 116, para. 70; second written submission, para. 135.
[950] India's first written submission, para. 205.
[951] India's first written submission, para. 212.
[952] India's first written submission, para. 212.
[953] India's response to Panel question No. 117, para. 71.
[954] India's response to Panel question No. 117, para. 71.
[955] See para. 7.368 above.

7.396. Following India's amendment of its First Schedule, the products previously covered by tariff items 8517.70.10 and 8517.70.90 became classified under tariff items 8517.71.00[956], 8517.79.10[957], and 8517.79.90[958] of the First Schedule. Since the products previously classified under tariff items 8517.70.10 and 8517.70.90 fell within the scope of India's WTO tariff commitments under tariff items 8517.70 ex01, ex02, and ex03 of its WTO Schedule, it logically follows that the products presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 also fall within the scope of those WTO tariff commitments. We understand that India does not dispute this.[959] We find therefore that, as of 1 January 2022, these tariff items of India's First Schedule cover parts of telephone sets and "other" certain apparatus for transmission or reception of voice, images, or data, which are products covered by India's WTO tariff commitments under tariff items 8517.70 ex01, ex02, and ex03 of its WTO Schedule.[960]

7.397. Regarding India's argument that aspects of the European Union's claims must fail because the European Union allegedly failed to "identify the specific products at issue and their correct classification"[961], we recall that the European Union's claim under Articles II:1(a) and (b) of the GATT 1994 concerns the tariff treatment accorded by India to products falling within the scope of tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule.[962] We have concluded above that India's WTO tariff commitments with respect to these tariff items extend to products that: (i) at the time of the Panel's establishment were classified under tariff items 8517.70.10 and 8517.70.90 of the First Schedule; and (ii) which, as of 1 January 2022, are classified under tariff items 8517.71.00, 8517.79.10 and 8517.79.90 of the First Schedule. Based on the arguments and evidence adduced by the parties, we have made factual findings regarding the tariff treatment accorded by India to such products. In our view, this tariff treatment concerns products that properly fall within the scope of the European Union's claim. We proceed therefore to compare such tariff treatment to the relevant tariff commitments set forth in India's WTO Schedule. We emphasize that this comparison is limited to the tariff treatment of products that are classified under tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule, and which therefore fall within the scope of the European Union's claim.[963]

7.398. For the reasons explained above, India is obligated to accord unconditional duty-free treatment to products falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule. We recall that, as of 1 January 2022: (i) with respect to products falling under tariff item 8517.71.00 of the First Schedule, certain specified products are unconditionally subject to duty-free

[956] Aerials and aerial reflectors of all kinds, and parts suitable for use therewith, constituting parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data. (See para. 7.384 above).

[957] Populated, loaded or stuffed printed circuit boards constituting parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data. (See para. 7.384 above).

[958] Other parts of telephone sets and other certain apparatus for transmission or reception of voice, images, or data. (See para. 7.384 above).

[959] India explained that "as opposed to the replacement of tariff line 8517.12 with tariff lines 8517.13 and 8517.14, the replacement of tariff lines 8517.70.10 and 8517.70.90 has only resulted in a change in headings, and not the descriptions". (India's response to Panel question No. 117, para. 71).

[960] See fns 956, 957, and 958 to para. 7.396 above.

[961] India's response to Panel question No. 105, para. 52.

[962] Specifically, the European Union challenges the tariff treatment applied by India to products classified under tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule. (European Union's first written submission, para. 13; panel request, p. 1).

[963] We note that certain of the tariff treatment described in section 7.4.6.3.2 above, in addition to being available for some specified products that fall within the scope of the European Union's claim, may also have been available for other products (i.e. products presently classified under tariff items of India's First Schedule *other than* 8517.71.00, 8517.79.10, or 8517.79.90). This is because those exemptions are available for a wide number of products, including some products that fall within the scope of the European Union's claim *and others which do not*. We wish therefore to clarify that our factual and legal findings in section 7.4.6 of this Report do not concern products which do not fall within the scope of tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule. In our view, the tariff treatment, in India's domestic customs regime, of the products challenged by the European Union is clear. In this respect, we also consider India's references to the Section Note of Section XVI of the HS2007 to be inapposite. (See para. 7.393 above). The tariff treatment identified by the European Union is that applied to products classified under certain tariff items of India's First Schedule. We have concluded that the products falling under those tariff items fall within the scope of tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule. It is not necessary for us (or for the European Union) to independently identify each individual product falling under the relevant tariff items (8517.71.00, 8517.79.10, and 8517.79.90) of the First Schedule, since all products falling under those tariff items are covered by India's WTO legal obligations and, as indicated, the tariff treatment of those products is clear.

treatment, while all other products are subject to the 20% duty rate set forth in the First Schedule[964]; (ii) with respect to products falling under tariff item 8517.79.10 of the First Schedule, certain specified products are eligible for duty-free treatment if they satisfy certain conditions, other specified products are unconditionally subject to a 10% duty rate, and all other products are subject to the 20% duty rate set forth in the First Schedule[965]; and (iii) with respect to products falling under tariff item 8517.79.90 of the First Schedule, certain specified products are unconditionally subject to duty-free treatment, other specified products are subject to a 10% duty rate subject to certain conditions, and all other products are subject to the 15% duty rate set forth in the First Schedule.[966] We understand that the unconditional duty-free treatment accorded to certain products is consistent with India's WTO Schedule. The 10%, 15%, and 20% duty rates applied to certain products falling under these tariff items is in excess of the bound duty of 0% set forth in India's WTO Schedule. Finally, the requirement that certain products must satisfy conditions[967] that are not set forth in India's WTO Schedule in order to receive unconditional duty-free treatment is inconsistent with India's WTO tariff commitment, as contained in its WTO Schedule, to provide unconditional duty-free treatment to such products.

7.399. We also recall that, at the time of the Panel's establishment, India either partially or completely exempted certain products falling under tariff items 8517.70.10 and 8517.70.90 of the First Schedule from the standard duty rates set forth in that First Schedule, through a number of customs notifications. Several such exemptions have been amended to cover products that, after 1 January 2022, fall under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of India's First Schedule.

7.400. We do not preclude the possibility that other exemptions may also, through relevant amendments, continue to apply to the products presently classified under tariff items 8517.71.00, 8517.79.10, and 8517.79.90. However, nothing on the record of this dispute allows us to make a determination in this regard. Nevertheless, for the sake of facilitating the resolution of this dispute, we proceed to compare the duty rate that may be applicable pursuant to customs notifications on the assumption that customs notifications that applied prior to 1 January 2022 may, through relevant amendments, continue to apply to the products at issue.[968]

7.401. In this respect, we recall that certain products that, at the time of the Panel's establishment, fell under tariff item 8517.70.10 of India's First Schedule were unconditionally subject to a 10% duty rate.[969] Other products falling under this tariff item were eligible for duty-free treatment if they satisfied certain conditions.[970] All other products classified under this tariff item, as well as products that failed to satisfy the conditions for duty-free treatment, were subject to the 20% duty rate set forth in the First Schedule. As for products falling under tariff item 8517.70.90 of India's First Schedule, certain such products were eligible for unconditional duty-free treatment.[971] Subject to certain conditions, other products were eligible for either duty-free treatment or a 10% duty rate.[972] All other products classified under this tariff item, as well as products that failed to satisfy the conditions for the duty-free treatment or the 10% duty rate, were subject to the 15% duty rate set forth in the First Schedule.

7.402. In comparing the tariff treatment applied pursuant to these Notifications to India's WTO tariff commitments, we note at the outset that only certain products classified under tariff items 8517.70.10 and 8517.70.90 were eligible for the beneficial tariff treatment set forth in those Notifications. Thus, at least some products falling under those tariff items remained subject to the

[964] See para. 7.388a above.
[965] See para. 7.388b above.
[966] See para. 7.388c above.
[967] See para. 7.388b.i above.
[968] We note that this approach is different to our approach to tariff item 8517.12. In this respect, we recall that at the time of the Panel's establishment certain products falling under tariff item 8517.12 of India's First Schedule (namely, telephones for other wireless networks) were exempted from customs duties through Notification No. 57/2017. The evidence on the record indicates that, following India's amendment of its First Schedule, Notification No. 57/2017 was amended by Notification No. 57/2021, such that the exemptions available under Notification No. 57/2017 continued to be available to the same products. (See section 7.4.3.3.2 above).
[969] See para. 7.377a above.
[970] See paras. 7.377b-7.377c above.
[971] See paras. 7.382a-7.382b above.
[972] See paras. 7.382a-7.382b above.

standard duty rates set forth in the First Schedule. Those standard duty rates of 20% and 15%, respectively, were in excess of the bound duty rate of 0%. If the relevant customs notifications are amended to refer to products presently falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule, those exemptions would continue to apply to a specific subset of products falling under those tariff items. All other products would be subject to the standard duty rates of 20% or 15% set forth in the First Schedule. Such applied duty rate is in excess of the bound duty rate of 0%.

7.403. With respect to those specified products that were eligible for unconditional duty-free treatment, we consider that the tariff treatment accorded to these products was consistent with India's WTO tariff commitments. However, with respect to those specified products that were eligible for duty-free treatment subject to satisfying certain conditions, we note that those conditions for duty-free treatment[973] are not set forth in India's WTO Schedule. To the extent that the relevant customs notifications are amended to refer to products falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule: (i) the unconditional duty-free treatment accorded to certain specified products is consistent with India's WTO tariff commitments; and (ii) the conditional duty-free treatment accorded to certain specified products is subject to conditions that are not set forth in India's WTO Schedule.

7.404. Finally, with respect to those specified products that were eligible for a partial exemption from the duty rates imposed under the First Schedule, such that they were subject to a 10% duty rate, we note that such applied duty rate was in excess of the bound duty rate of 0%. Among those specified products, certain products were unconditionally subject to the 10% duty rate while for other such products the reduced 10% duty rate was only applicable if the importer followed the procedures set out in the Customs Rules 2017. This is not a condition set out in India's WTO Schedule. To the extent that the relevant customs notifications are amended to refer to products falling under tariff items 8517.71.00, 8517.79.10, and 8517.79.90 of the First Schedule: (i) the unconditional tariff treatment accorded to certain specified products continues to be in excess of the bound duty rate; and (ii) the conditional tariff treatment accorded to certain specified products continues to be in excess of the bound duty rate and subject to a condition that is not set forth in India's WTO Schedule.

7.4.6.5 Conclusion

7.405. Based on the foregoing, we find that India's tariff treatment of certain parts of telephone sets and other apparatus for transmission or reception of voice, images, or data, falling within the scope of tariff items 8517.70 ex01, ex02, and ex03 of India's WTO Schedule, is inconsistent with Article II:1(b), first sentence, of the GATT 1994, because (i) certain such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule; and (ii) certain such products are subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule unless they satisfy certain conditions not set forth in that WTO Schedule.

7.406. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, or subject to terms, conditions or qualifications not set forth in the Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that India's tariff treatment of such products is less favourable than that provided in its WTO Schedule, and India is therefore acting inconsistently with Article II:1(a) of the GATT 1994.

[973] The relevant conditions for duty-free treatment are: (i) that the importer follow the procedures set out in the Customs Rules 2017; (ii) the importer furnish an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of the Customs, as the case may be, to the effect that imported goods would not be used in the manufacture of certain specified goods and in the event of failure to comply with that condition the importer would be liable to pay an amount equal to the difference between the duty leviable on the imported goods but for the exemption under this notification and that already paid at the time of importation; or (iii) that the imported product be used in the manufacture of static converters for automatic data processing machines and units thereof of tariff items 8443.31.00, 8443.32.00, 8471, 8517.62, 8528.42.00, 8528.49.00, 8528.52.00 or 8528.62.00 of India's First Schedule (as it existed at the time of the Panel's establishment). (See paras. 7.377-7.383 above).

7.4.7 Tariff item 8518.30 ex01 of India's WTO Schedule

7.4.7.1 India's WTO tariff commitments

7.4.7.1.1 Main arguments of the parties

7.407. The European Union asserts that India's WTO tariff binding for line telephone handsets, set forth at tariff item 8518.30 ex01 of India's WTO Schedule, is 0%.[974]

7.408. India does not contest that the relevant bound duty rate for imports falling under tariff item 8518.30 ex01 of its WTO Schedule is 0%.[975]

7.4.7.1.2 Panel's assessment

7.409. We understand that India does not contest that its WTO tariff commitments with respect to line telephone handsets are set forth in its WTO Schedule, under tariff item 8518.30 ex01. In particular, India does not argue that the ITA limits the scope of its commitment under this tariff item, or that this commitment was undertaken in error and is invalid pursuant to Article 48 of the Vienna Convention.[976]

7.410. It is therefore uncontested that, pursuant to Articles II:1(a) and (b) of the GATT 1994, India is obligated to provide the tariff treatment set forth in its WTO Schedule for line telephone handsets. In this respect, India's WTO HS2007 Schedule provides that[977]:

	Product description	Bound rate
8518	Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones, earphones and combined microphone/speaker sets; audio-frequency electric amplifiers; electric sound amplifier sets.	
8518.30	- Headphones, earphones and combined microphone/speaker sets	
ex 8518.30	-- Line telephone handsets	0%

7.411. Given that the tariff binding for line telephone handsets set forth in India's WTO Schedule is 0%, and given that the WTO Schedule indicates no terms, conditions, or qualifications attached to that bound duty rate, we observe that India is obligated to provide unconditional duty-free treatment to line telephone handsets falling under tariff item 8518.30 ex01 of its WTO Schedule.

7.4.7.2 India's tariff treatment

7.4.7.2.1 Main arguments of the parties

7.412. In its first written submission, the European Union argued that India's First Schedule imposes a standard duty rate of 15% on imports classified under tariff item 8518.30.00 of that Schedule, namely "[h]eadphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers."[978] The European Union considered that line telephone handsets imported into India are classified under that tariff item of the First Schedule. The European Union subsequently submitted that India itself had acknowledged that tariff item 8518.30 may cover "certain types of handsets".[979] According to the European Union, Notification No. 25/2005 initially exempted line telephone handsets from the standard 15% duty rate set forth in

[974] European Union's first written submission, paras. 155-156.
[975] India's response to Panel question No. 66, paras. 28-29. According to India, it is "already providing concessions to the products in accordance with its commitments." (Ibid. para. 29).
[976] We also note that India did not attempt to modify this tariff item in its draft rectification under the 1980 Decision. According to India, line telephone handsets "are covered by the scope of India's commitments" under the ITA. (India's response to Panel question No. 39, para. 92).
[977] WT/Let/1072 and WT/Let/181.
[978] European Union's first written submission, para. 157 (referring to First Schedule of the Customs Tariff Act as amended by Finance Act 2018, (Exhibit EU-15)).
[979] European Union's response to Panel question No. 86, para. 131 (referring to India's response to Panel question No. 41). See also European Union's second written submission, para. 75.

the First Schedule.[980] However, Notification No. 23/2019, which amended Notification No. 25/2005, changed the product description relevant to that exemption from "line telephone handsets" to "parts of line telephone handsets". Thus, according to the European Union, complete line telephone handsets are excluded from the exemption available under Notification No. 25/2005.[981]

7.413. In its first written submission, India argued that "'Line Telephone Handsets' form a part of 'Line Telephone Sets'" and consequently are classified under tariff item 8517.11 of India's First Schedule, thereby receiving duty-free treatment.[982] India also argued that "India has never intended on imposing a duty on 'Line Telephone Handsets.'"[983] Subsequently, in response to questions from the Panel, India provided text from the HS2017 Explanatory Notes to headings 8517 and 8518 and stated that "[a] combined reading of the two explanatory notes gives an impression to India that sub-heading 8518.30 intends to cover only certain types of handsets, i.e., *which are combined microphone/speaker sets for telephony and which are generally used by telephone operators*."[984] India argued, however, that, even "if the Panel finds that Line Telephone Handsets are parts and, accordingly, classifiable under tariff heading 8518.30, they would still be exempt from customs duty under Serial No. 39 of the Notification No. 24/2005 dated March 1, 2005".[985]

7.414. Following India's initial arguments, the European Union indicated that it would withdraw its claim regarding this tariff item if India confirmed that *all* imported line telephone handsets are accorded duty-free treatment under headings 8517.11 and 8517.18.[986] Subsequently, however, the European Union considered that India had clarified that certain types of line telephone handsets do fall within the scope of tariff item 8518.30 and consequently the European Union maintained its claim.[987] The European Union also argued that, even if line telephone handsets receive duty-free treatment pursuant to Serial No. 39 of Notification No. 24/2005, India is nevertheless acting inconsistently with Articles II:1(a) and (b) because the conditions for such treatment are not in its WTO Schedule.[988]

7.415. At the second substantive meeting of the Panel, India clarified that, pursuant to Notification No. 15/2022, issued on 1 February 2022, "line telephone handsets are subject to duty free treatment under sub-heading 8518.30 as well as sub-heading 8517.11".[989] India also argued that, since the measure has been withdrawn, the Panel may not make any recommendations concerning tariff item 8518.30.[990]

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[980] European Union's first written submission, para. 159 (referring to Notification No. 25/2005, (Exhibit EU-10)).

[981] European Union's first written submission, paras. 160-161 (referring to Notification No. 23/2019, (Exhibit EU-14)). (underlining added)

[982] India's first written submission, para. 223. (underlining added)

[983] India's first written submission, para. 223. Following the first substantive meeting, India elaborated that it "has not imposed any duty on 'Line Telephone Handsets'", that it "never intended on imposing a duty on 'Line Telephone Handsets'", and that "the amendments introduced by India should not be construed as an imposition of duty on 'Line Telephone Handsets.'" (India's response to Panel question No. 85, para. 73 (emphasis omitted)).

[984] India's response to Panel question No. 41, para. 98. (emphasis and underlining original)

[985] India's response to Panel question No. 41, para. 98.

[986] European Union's response to Panel question No. 38, para. 97.

[987] Specifically, the European Union pointed to India's statement that:

> A combined reading of the two explanatory notes gives an impression to India that sub-heading 8518.30 intends to cover only certain types of handsets, i.e., *which are combined microphone/speaker sets for telephony and which are generally used by telephone operators*. Therefore, the exclusion contained in the explanatory note to sub-heading 8517.11 may have a limited effect due to the added condition contained in explanatory notes to sub-heading 8518.30 relating to the usage of line telephone handsets covered therein.

(European Union's response to Panel question No. 86, para. 131 (quoting India's response to Panel question No. 41, para. 98))

[988] European Union's response to Panel question No. 86, paras. 134-135.

[989] India's response to Panel question No. 120, para. 72. In its second written submission, India stated that "no duties are being imposed on products at issue classified under sub-headings 8518.30 and 8544.42/8544.49". (India's second written submission, para 4 (referring to Notification No. 15/2022, (Exhibit IND-73)).

[990] India's response to Panel question No. 120, para. 72; comments on the European Union's response to Panel question No. 124, paras. 44-47 (referring to Appellate Body Report, *US – Certain EC Products*, para. 81; and Panel Reports, *US – Large Civil Aircraft (2nd Complaint)*, para 8.6 and fn 4266 thereto; *EC – Approval and Marketing of Biotech Products*, para. 7.1316).

7.416. Following India's clarification regarding Notification No. 15/2022, the European Union agreed that, as a result of the amendment introduced by this Notification, India "accords duty free treatment for all the products covered by the concession included in its GATT schedule with regard to tariff line 8518.30 ex01".[991] The European Union nevertheless requests the Panel to find that prior to the entry into force of that amendment, "India was in breach of its obligations pursuant to Article II:1 (a) and (b) of the GATT 1994", and "following the entry into force of the above mentioned amendment, India ceased to be in breach of those obligations."[992]

7.4.7.2.2 Panel's assessment

7.417. The European Union and India agree that pursuant to Notification No. 15/2022, which was introduced by India while these dispute settlement proceedings were ongoing, India presently accords duty-free treatment to line telephone handsets, and is therefore acting in accordance with Articles II:1(a) and (b) of the GATT 1994.[993] Nevertheless, the European Union requests us to find that India was acting inconsistently with Articles II:1(a) and (b) prior to the introduction of Notification No. 15/2022, and that this Notification brought India into consistency with its obligations. India, for its part, argues that the Panel may not make any recommendations regarding the tariff treatment accorded by India to line telephone handsets.

7.418. In our view, the European Union's request for *findings* and India's argument that we may not make *recommendations* are not in tension with each other. To the extent that India was acting inconsistently with its WTO obligations at the time of the Panel's establishment, and India resolved that inconsistency during these proceedings, we can both: (i) make legal and factual findings to that effect; and (ii) refrain from making any recommendations that India bring itself into consistency with its WTO obligations. Given the parties' disagreement as to whether India was, at the time of the Panel's establishment, acting inconsistently with its WTO obligations, we consider it useful for the purposes of resolving the parties' dispute to address this issue.[994] We therefore proceed to assess the tariff treatment accorded by India to line telephone handsets both at the time of the Panel's establishment and following India's amendments that took place during these proceedings.

7.419. We start our analysis by considering India's classification of line telephone handsets in its domestic customs regime. The European Union considers that line telephone handsets are classified under tariff item 8518.30.00 of India's First Schedule, which covers "[h]eadphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers".[995] India argues that Notification No. 25/2005, as amended by Notification No. 26/2007, indicates that line telephone handsets falling under tariff items "8517.11 or 8517.18" can receive duty-free treatment.[996] India considers that "'Line Telephone Handsets' form a part of 'Line Telephone Sets'" and therefore India "classifies them under sub-heading 8517.11" of the First Schedule.[997] India also notes that Notification No. 25/2005, as amended by Notification No. 23/2019, accorded duty-free treatment to parts of line telephone handsets falling under tariff item 8518.30.00, and, in India's view, this indicates that tariff item 8518.30.00 covers "parts of" line telephone handsets and not complete line telephone handsets.[998]

7.420. We note that the product descriptions attached to tariff items 8517.11, 8517.18, and 8518.30.00 in India's First Schedule are as follows[999]:

[991] European Union's response to Panel question No. 124, para. 120.
[992] European Union's response to Panel question No. 124, para. 121.
[993] We note that the parties share the same understanding with respect to the European Union's claim concerning electric conductors for a voltage not exceeding 1,000 V, fitted with connectors, of a kind used for telecommunications. (See section 7.4.8.2 below).
[994] We also note that, unlike its claims regarding products falling under tariff items 8517.12 and 8517.70 of India's WTO Schedule, the European Union considers that the tariff treatment accorded by India to products falling under tariff item 8518.30 ex01 of India's WTO Schedule has changed during these proceedings.
[995] European Union's first written submission, paras. 157-158.
[996] India's first written submission, para. 225 (referring to Notification No. 25/2005 as amended by Notification No. 26/2007, (Exhibit IND-40)).
[997] India's first written submission, para. 223.
[998] India's first written submission, para. 227.
[999] First Schedule as of 2016/2017, (Exhibit EU-59), pp. 755-756.

Tariff item	Product description	Standard duty rate
8517	Telephone sets, including telephones for cellular networks or for other wireless networks: other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528	
	- Telephone sets, including telephones for cellular networks or for other wireless networks:	
8517 11	*-- Line telephone sets with cordless handsets:*	
8517 11 10	--- Push button type	0%
8517 11 90	--- Other	0%
8517 18	*-- Other:*	
8517 18 10	--- Push button type	0%
8517 18 90	--- Other	0%
8518	Microphones and stands therefor: loudspeakers, whether or not mounted in their enclosures: headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers: audio-frequency electric amplifiers: electric sound amplifier sets	
	- Loudspeakers, whether or not mounted in their enclosures:	
8518 30 00	- Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers	15%

7.421. The product descriptions contained in India's First Schedule with respect to heading 8518 and tariff item 8518.30.00 are substantially identical to heading 8518 and tariff item 8518.30 of India's WTO Schedule.[1000] Specifically, tariff items 8518.30.00 of the First Schedule, and 8518.30 of India's WTO Schedule, both cover "[h]eadphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers", which are a sub-category of products falling under heading 8518 (which, again, is identical in both Schedules). We further note that India's WTO Schedule specifically indicates that "line telephone handsets", classified under tariff item 8518.30 ex01, are a subcategory of products falling under the broader category of "[h]eadphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers" covered by tariff item 8518.30.[1001] Thus, India's WTO Schedule strongly suggests that "line telephone handsets" are products falling within the broader category of "[h]eadphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers". We also note that, under India's First Schedule, these products are classified under tariff item 8518.30.00.

7.422. This interpretation of India's First Schedule is supported by the Explanatory Notes to the HS2017.[1002] The Explanatory Note to tariff item 8517.11 of the HS2017 defines "Line telephone sets" as "communication apparatus that convert voice into signals for transmission to another device", and which consist of various components.[1003] The Explanatory Notes indicate that "[w]hen separately presented, microphones and receivers (whether or not combined as hand-sets), and loudspeakers

[1000] See WT/Let/181; and para. 7.410 above.

[1001] Indeed, India's WTO Schedule indicates that *other than line telephone handsets*, India has undertaken no tariff commitment with respect to *other* "[h]eadphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers" falling under tariff item 8518.30. (See WT/Let/181; and para. 7.410 above). Thus, India's tariff commitment with respect to such products, other than line telephone handsets, is unbound.

[1002] The parties agree that the Explanatory Notes to the HS may constitute a relevant aid in interpreting India's First Schedule. (See India's response to Panel question No. 99, paras. 37-39; and European Union's response to Panel question No. 99, para. 34). India explains, however, that its domestic legal framework is dualist, such that "Parliament must legislate a specific enabling law to give effect to India's commitments under a treaty …[and] there is no domestic legislation which mirrors the HS Convention and the HS Explanatory Notes". (Ibid. para. 39). Thus, in India's view, "the HS Convention and the HS Explanatory Notes remain relevant aids but have no binding legal force under the Indian legal order." (Ibid.).

[1003] HS2017 Explanatory Notes to Heading 8517, (Exhibit IND-59), p. 1. (emphasis added)

are classified in heading 85.18".[1004] The Explanatory Note to tariff item 8518 further explains that this heading "covers microphones, loudspeakers, headphones, earphones and audio-frequency electric amplifiers of all kinds presented separately, regardless of the particular purpose for which such apparatus may be designed (e.g., telephone microphones, headphones and earphones, and radio receiver loudspeakers)".[1005] Specifically regarding tariff item 8518.30, the Explanatory Note elaborates that this heading covers, *inter alia*, "line telephone handsets which are combined microphone/speaker sets for telephony and which are generally used by telephone operators".[1006] The HS Explanatory Notes therefore indicate that "line telephone handsets" are distinct from "line telephone sets", in that the former are a component product that may (or may not) be included in the latter. As to where they should be classified, the Explanatory Notes indicate that line telephone handsets fall within tariff item 8518.30, at least to the extent that they "are combined microphone/speaker sets for telephony and which are generally used by telephone operators". In its responses to questions from the Panel, India acknowledges that this language "gives an impression" that such line telephone handsets are intended to be covered by tariff item 8518.30.[1007]

7.423. We therefore understand that line telephone handsets should, in principle, be classified under tariff item 8518.30 of India's First Schedule. We recall, however, India's argument that Notification No. 25/2005, as amended by Notification Nos. 26/2007 and 23/2019, suggests that line telephone handsets are classified under tariff item 8517.11, and tariff item 8518.30.00 covers only "parts" of line telephone handsets. We note that entry 9 of Notification No. 25/2005 exempts certain products from customs duties. When Notification No. 25/2005 was initially published in 2005, the exemption was available for "[l]ine telephone handsets" falling under tariff item 8518.30.00 of the First Schedule.[1008] In 2007, the exemption was amended to cover "[l]ine telephone handsets" falling under tariff items "8517.11 or 8517.17". In 2019, the exemption was further amended to cover "[p]arts of line telephone handsets" falling under tariff item 8518.30.00.[1009] In 2022, the exemption was amended back to the way it existed in 2005, by covering "[l]ine telephone handsets" falling under tariff item 8518.30.00.[1010]

7.424. Notification No. 25/2005 and its subsequent amendments do not change our view that, in principle, line telephone handsets should be classified under tariff item 8518.30.00 of India's First Schedule. We note that the most recent amendment to Notification No. 25/2005 supports that interpretation. In any event, India has not explained why and how this Notification and its amendments indicate (or have modified) India's classification practice with respect to line telephone handsets. We also note that neither this Notification, nor any other evidence adduced by India, indicates that India's customs authorities are legally required to classify line telephone handsets under a different tariff item to tariff item 8518.30.00 of India's First Schedule. For the reasons described above, we understand that tariff item 8518.30.00 is the correct classification for these products.

7.425. Having concluded that line telephone handsets should be classified under tariff item 8518.30.00 of India's First Schedule, we turn to assess the precise tariff treatment accorded to products falling under this tariff item. We first observe that India's First Schedule imposes a standard duty rate of 15% on products falling under tariff item 8518.30.00 of the First Schedule. As published in 2005, Notification No. 25/2005 provided an exemption from that duty rate for line telephone handsets falling under that tariff item. That exemption, however, was amended several times and, as of the date of the Panel's establishment, Notification No. 25/2005 exempted only "parts" of line telephone handsets falling under that tariff item.[1011] Thus, complete line telephone handsets were not covered by the exemption available under Notification No. 25/2005. Subsequently, however, Notification No. 25/2005 was further amended by Notification No. 15/2022 and, as of February 2022, the exemption was available for line telephone handsets falling under tariff item 8518.30.00 of the First Schedule.[1012]

[1004] HS2017 Explanatory Notes to Heading 8517, (Exhibit IND-59), p. 2.
[1005] HS2017 Explanatory Notes to Heading 8518, (Exhibit IND-57), p. 1.
[1006] HS2017 Explanatory Notes to Heading 8518, (Exhibit IND-57), p. 3. (emphasis added)
[1007] India's response to Panel question No. 41, para. 98.
[1008] Notification No. 25/2005, (Exhibit IND-40), p. 1.
[1009] Notification No. 25/2005 as amended by Notification Nos. 26/2007 and 23/2019, (Exhibit IND-40).
[1010] Notification No. 25/2005, (Exhibit IND-40), as amended by Notification No. 15/2022, (Exhibit IND-73).
[1011] Notification No. 25/2005 as amended by Notification Nos. 26/2007 and 23/2019, (Exhibit IND-40).
[1012] Notification No. 15/2022, (Exhibit IND-73).

7.426. We also note that Serial No. 39 of Notification No. 24/2005 provides a possible exemption for a considerable number of products. Specifically, Serial No. 39 exempts from all duties all goods except "solar tempered glass or solar tempered (anti-reflective coated) glass", falling under all Chapters except Chapter 74 of the First Schedule, if the product is used for the manufacture of goods covered by Serial Nos. 1 to 38 of Notification No. 24/2005, provided that the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 (Customs Rules 1996).[1013] The European Union does not contest that line telephone handsets can be used in the production of certain of the products identified in Serial Nos. 1 to 38 of Notification No. 24/2005.[1014] We therefore understand that line telephone handsets imported into India are eligible for duty-free treatment under Serial No. 39 of Notification No. 24/2005 if: (i) they are used in the production of certain specified products; and (ii) the importer follows the procedures set out in the Customs Rules 1996.

7.427. We recall that Article II:1(b) does not require Members to inscribe general conditions for importation in their WTO Schedules. However, where conditions are tied to tariff treatment, such that a product must satisfy those conditions in order to be eligible for the tariff treatment set forth in a Member's WTO Schedule, Article II:1(b) requires that such conditions must be inscribed in the Member's WTO Schedule. In our view, the conditions attached to the exemption under Serial No. 39 of Notification No. 24/2005 are, on their face, conditions for tariff treatment and not general conditions for importation. Regarding the requirement that such products be used in the production of other products, we understand that line telephone handsets *not* used in the production of those products could still be imported into India, but subject to the standard duty rate of 15% instead of the duty-free treatment available under the exemption. India has provided no evidence to indicate otherwise. Similarly, we understand that failure to comply with the procedural requirements stipulated in the Customs Rules 1996 would not preclude the importation of line telephone handsets into India. There is no indication in the evidence on the record that compliance with such procedural requirements is a general condition for importation – to the contrary, Notification No. 24/2005 explicitly ties both conditions to eligibility for exemption from customs duties. Indeed, we consider that Notification No. 25/2005 clearly indicates that these conditions are attached to the exemption from customs duties, not entry into India.

7.428. To summarize, we consider that line telephone handsets should be classified under tariff item 8518.30.00 of India's First Schedule, and there is no evidence suggesting that India classifies such products differently. At the time of the Panel's establishment, line telephone handsets were subject to a 15% duty rate under the First Schedule, but were also eligible to receive duty-free treatment, pursuant to Notification No. 24/2005, if they satisfied certain conditions. Specifically, such products were eligible for duty-free treatment under Serial No. 39 of Notification No. 24/2005 if: (i) they were used in the production of certain specified products; and (ii) the importer followed the procedures set out in the Customs Rules 1996. Those conditions are not general conditions for importation, but rather conditions to receive duty-free treatment. During the course of these proceedings, however, line telephone handsets became eligible for unconditional duty-free treatment, pursuant to Notification No. 25/2005, as amended by Notification No. 15/2022.

7.4.7.3 Comparison of India's tariff treatment to its WTO tariff commitments

7.4.7.3.1 Main arguments of the parties

7.429. The European Union considers that line telephone handsets falling within the scope of tariff item 8518.30.00 of India's First Schedule are covered by India's tariff commitments inscribed under tariff item 8518.30 ex01 of India's WTO Schedule.[1015] The European Union agrees that India is presently acting consistently with Articles II:1(a) and (b) of the GATT 1994. However, the European Union considers that at the time of the Panel's establishment India was acting inconsistently with its WTO obligations because the duty-free treatment available under Serial No. 39 of Notification No. 24/2005 was subject to conditions that are not inscribed in India's WTO Schedule.[1016]

[1013] Notification No. 24/2005 as amended by Notification Nos. 132/2006, 32/2016, 19/2016, and 06/2020, (Exhibit IND-39).
[1014] European Union's response to Panel question No. 86, para. 134.
[1015] European Union's first written submission, para. 158.
[1016] European Union's responses to Panel question No. 120, para. 110, and No. 124, para. 120.

7.430. India argues that, at the time of the Panel's establishment, Serial No. 39 of Notification No. 24/2005 ensured duty-free treatment for all line telephone handsets, in accordance with Articles II:1(a) and (b) of the GATT 1994.[1017]

7.4.7.3.2 Panel's assessment

7.431. We recall that, pursuant to its WTO Schedule, India is obligated to accord unconditional duty-free treatment to line telephone handsets falling under tariff item 8518.30 ex01 of that Schedule. In our view, these tariff commitments apply to line telephone handsets imported into India and classified under tariff item 8518.30.00 of India's First Schedule. We also recall that, at the time of the Panel's establishment, such line telephone handsets imported into India were subject to a 15% duty rate, pursuant to India's First Schedule, but were eligible for duty-free treatment pursuant to Serial No. 39 of Notification No. 24/2005, subject to two conditions: (i) the line telephone handsets had to be used in the production of certain specified products; and (ii) the importer was required to comply with certain procedural requirements specified in the Customs Rules 1996. Both of these conditions are conditions that must be satisfied in order for the line telephone handset to receive duty-free treatment.

7.432. At the time of the Panel's establishment, although line telephone handsets were eligible for duty-free treatment subject to conditions, neither of those conditions was inscribed in India's WTO Schedule. If an imported line telephone handset failed to satisfy one of those conditions, it would have been subject to a 15% duty rate. We consider, therefore, that at the time of the Panel's establishment, India's tariff treatment of line telephone handsets was inconsistent with its WTO tariff commitments as contained in its WTO Schedule.

7.433. As of 1 February 2022, India amended Notification No. 25/2005, such that line telephone handsets became subject to unconditional duty-free treatment. We therefore consider that, as of 1 February 2022, India brought its tariff treatment of line telephone handsets into consistency with its WTO tariff commitments concerning those products.

7.4.7.4 Conclusion

7.434. Based on the foregoing, we find that, at the time of the Panel's establishment, India's tariff treatment of line telephone handsets, falling within the scope of tariff item 8518.30 ex01 of India's WTO Schedule, was inconsistent with Article II:1(b), first sentence, of the GATT 1994, because such products were subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule, unless they satisfied certain conditions not set forth in that WTO Schedule.

7.435. We recall that the application of ordinary customs duties in excess of those provided for in a Member's WTO Schedule, or subject to terms, conditions or qualifications not set forth in that Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that, at the time of the Panel's establishment, India's tariff treatment of such products was less favourable than that provided in its WTO Schedule, and India was therefore acting inconsistently with Article II:1(a) of the GATT 1994.

7.436. We also find that, as of 1 February 2022, India accords unconditional duty-free treatment to line telephone handsets, in accordance with the terms of its WTO Schedule, and is therefore acting consistently with Article II:1(b), first sentence, of the GATT 1994. Furthermore, by according to the commerce of the European Union treatment no less favourable than that provided for in its WTO Schedule, India's tariff treatment of such products is consistent with Article II:1(a) of the GATT 1994.

[1017] India's first written submission, para. 228; response to Panel question No. 40, para. 94.

7.4.8 Tariff item 8544.42.00 ex01 of India's WTO Schedule

7.4.8.1 India's WTO tariff commitments

7.4.8.1.1 Main arguments of the parties

7.437. The European Union argues that the bound duty rate for tariff item 8544.42.00 ex01 of India's WTO Schedule, covering electric conductors "for a voltage not exceeding 1,000 V", "[f]itted with connectors", "of a kind used for telecommunications", is 0%.[1018]

7.438. India does not contest that the relevant bound duty rate for such products falling under tariff item 8544.42.00 ex01 of its WTO Schedule is 0%.[1019]

7.4.8.1.2 Panel's assessment

7.439. We understand that India does not contest that its WTO tariff commitments with respect to electric conductors, for a voltage not exceeding 1,000 V that are fitted with connectors and of a kind used for telecommunications are set forth in its WTO Schedule. In particular, India does not argue that the ITA limits the scope of its commitment under this tariff item, or that this commitment was undertaken in error and is invalid pursuant to Article 48 of the Vienna Convention.[1020]

7.440. It is therefore uncontested that, pursuant to Articles II:1(a) and (b) of the GATT 1994, India is obligated to provide the tariff treatment set forth in its WTO HS2007 Schedule for products falling under tariff item 8544.42.00 ex01 of that Schedule. In this respect, India's WTO Schedule provides as follows[1021]:

	Ex	Product description	Bound rate
8544		Insulated (including enamelled or anodised) wire, cable (including co-axial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fibre cables, made up of individually sheathed fibres, whether or not assembled with electric conductors or fitted with connectors.	
8544.4		- Other electric conductors, for a voltage not exceeding 1,000 V:	
8544.42.00	00	-- Fitted with connectors	
8544.42.00	01	-- Of a kind used for telecommunications	0%
8544.42.00	02	-- Other	40%

7.441. We note that, electric conductors for a voltage not exceeding 1,000 V that are fitted with connectors and of a kind used for telecommunications are classified under tariff item 8544.42.00 ex01 of India's WTO Schedule, which indicates a bound duty rate of 0%, with no terms, conditions, or qualifications attached thereto. Thus, India is obligated to provide unconditional duty-free treatment to such products falling under tariff item 8544.42.00 ex01 of its WTO Schedule.

7.4.8.2 India's tariff treatment

7.4.8.2.1 Main arguments of the parties

7.442. In its first written submission, the European Union argued that India's First Schedule imposes a 15% standard duty rate on products falling under tariff items 8544.42.91, 8544.42.92, and 8544.42.93.[1022] The European Union submitted that Notification No. 25/2005 initially exempted imports of products falling under tariff items 8544.41, 8544.49 and 8544.51 of India's First Schedule from that 15% standard duty rate, and considers that this exemption "ensured compliance with the

[1018] European Union's first written submission, para. 165.
[1019] India's response to Panel question No. 66, para. 29.
[1020] We also note that India did not attempt to modify this tariff item in its draft rectification under the 1980 Decision. According to India, it is "already providing concessions to these products in accordance with its commitments." (India's response to Panel question No. 66, para. 29).
[1021] WT/Let/181.
[1022] European Union's first written submission, para. 166 (referring to First Schedule of the Customs Tariff Act as amended by Finance Act 2018 (Exhibit EU-15)).

tariff binding under consideration".[1023] The European Union submitted that Notification No. 25/2005 was amended by Notification No. 133/2006, such that electric conductors for a voltage not exceeding 80 V, fitted with connectors, of a kind used for telecommunications, fell outside the scope of the exemption.[1024] The European Union further submitted that Notification No. 50/2017, as amended by Notification No. 6/2018, imposed a duty of 7.5% on "Insulated electric conductors; for a voltage not exceeding 1000 V, fitted with connectors, of a kind used for telecommunications", except for "USB Cable for cellular mobile phone".[1025] The European Union therefore considered that "electric conductors, for a voltage not exceeding 80 Volts, fitted with connector, of the kind used for telecommunications" were subject to a duty rate of either 7.5% or 15%.[1026] Following the second substantive meeting, however, the European Union noted that India had issued Notification No. 15/2022, which amends Notification No. 25/2005 such that the exemption once again covers all relevant electric conductors. Thus, according to the European Union, India presently accords duty-free treatment for all products covered by its concessions in its WTO Schedule concerning tariff item 8544.42.00 ex01.[1027] The European Union nevertheless requests the Panel to find that prior to the entry into force of that amendment, India was acting inconsistently with Articles II:1(a) and (b) of the GATT 1994.

7.443. India argues that, pursuant to Notification No. 15/2022, electric conductors for a voltage not exceeding 80 V, of a kind used for telecommunications, other than USB cables for cellular mobile phones, whether or not they are fitted with connectors, are subject to duty-free treatment.[1028] India considers that the Panel "is not empowered to make any recommendations on measures which have been withdrawn by the Respondent."[1029] Prior to the introduction of this amendment, India had argued that Serial No. 39 of Notification No. 24/2005 in any case exempted all relevant products from duties.[1030]

7.4.8.2.2 Panel's assessment

7.444. The European Union and India agree that pursuant to Notification No. 15/2022, which was introduced by India while these dispute settlement proceedings were ongoing, India presently accords duty-free treatment to all relevant products covered by tariff item 8544.42.00 ex01 of India's WTO Schedule, and is therefore acting in accordance with Articles II:1(a) and (b) of the GATT 1994.[1031] Nevertheless, the European Union requests us to find that India was acting inconsistently with Articles II:1(a) and (b) prior to the introduction of Notification No. 15/2022, and that this Notification brought India into consistency with its obligations. India considers that the Panel may not make any recommendations regarding the measure at issue since it has been withdrawn.

7.445. For the reasons articulated above[1032], we see no tension between the European Union's request for *findings* regarding the measure as it existed prior to the introduction of Notification No. 15/2022, and India's argument that the Panel may not make *recommendations* if the measure has been brought into consistency with its WTO obligations. Moreover, given the parties' disagreement as to whether India was, at the time of the Panel's establishment, acting inconsistently with its WTO obligations, we consider it useful for the purposes of resolving the parties' dispute to address this issue.[1033] We therefore proceed to assess the tariff treatment accorded by India to electric conductors for a voltage not exceeding 1,000 V, fitted with connectors, of a kind used for

[1023] European Union's first written submission, para. 169.
[1024] European Union's first written submission, para. 170 (referring to Notification No. 25/2005, (Exhibit EU-10); Notification No. 50/2017, (Exhibit EU-34)).
[1025] European Union's first written submission, para. 172.
[1026] European Union's first written submission, para. 173.
[1027] European Union's response to Panel question No. 130, paras. 127-128.
[1028] India's response to Panel question No. 132, para. 92.
[1029] India's comments on the European Union's responses to Panel question Nos. 129-131, para. 55.
[1030] India's first written submission, para. 237.
[1031] We note that the parties share the same understanding with respect to the European Union's claim concerning line telephone handsets. (See para. 7.417 above).
[1032] See para. 7.418 above.
[1033] We also note that, unlike its claims regarding products falling under tariff items 8517.12 and 8517.70 of India's WTO Schedule, the European Union considers that the tariff treatment accorded by India to products falling under tariff item 844.42.00 ex01 of India's WTO Schedule has changed during these proceedings.

telecommunications, both at the time of the Panel's establishment and following India's amendments that took place during these proceedings.

7.446. It is uncontested, and the evidence demonstrates, that India's First Schedule establishes a standard duty rate of 15% for tariff items 8544.42.91, 8544.42.92, and 8544.42.93.[1034] These tariff items cover insulated electric conductors (other than "winding wire" and "co-axial cable and other co-axial electric conductors"), for a voltage not exceeding 1,000 V, of a kind used in telecommunications, fitted with connectors: tariff item 8544.42.91 covers such electric conductors that are paper insulated; tariff item 8544.42.92 covers such electric conductors that are plastic insulated; and tariff item 8544.42.93 covers such electric conductors that are rubber insulated.[1035]

7.447. It is also uncontested, and the evidence demonstrates, that Serial Nos. 28 and 29 of Notification No. 25/2005, as originally published in 2005, unconditionally exempted all such products from customs duties.[1036] Specifically, pursuant to Serial No. 28, "[e]lectric conductors, for a voltage not exceeding 80 V, of a kind used for telecommunications", (whether or not fitted with connectors), falling under tariff items 8544.41 and 8544.49 of the First Schedule, were exempted from all customs duties. Pursuant to Serial No. 29, "[e]lectric conductors, for a voltage exceeding 80 V, but not exceeding 1000 V, fitted with connectors, of a kind used for telecommunications"[1037], falling under tariff item 8544.51 of the First Schedule, were exempted from all customs duties. Together, the exemptions available under Serial Nos. 28 and 29 applied unconditional duty-free treatment to all electric conductors, for a voltage not exceeding 1,000 V, of a kind used for telecommunications, fitted with connectors.

7.448. Notification No. 25/2005 was subsequently amended by Notification No. 133/2006. While the product descriptions attached to Serial Nos. 28 and 29 remained the same, the tariff items attached to those exemptions were amended, such that: (i) Serial No. 28 referred exclusively to electric conductors, for a voltage not exceeding 80 V, of a kind used for telecommunications, falling under tariff item 8544.49 of the First Schedule; and (ii) Serial No. 29 referred to electric conductors, for a voltage exceeding 80 V but not exceeding 1,000 V, fitted with connectors, of a kind used for telecommunications, falling under tariff item 8544.42 of the First Schedule.[1038] It is uncontested that tariff item 8544.42 of India's First Schedule covers electric conductors, for a voltage not exceeding 1,000 V, of a kind used for telecommunications, fitted with connectors, while tariff item 8544.49 covers such products that are not fitted with connectors.[1039] Thus, Notification No. 25/2005 as amended by Notification No. 133/2006 no longer applied duty-free treatment to electric conductors, for a voltage not exceeding 80 V, of a kind used for telecommunications, that were fitted with connectors.[1040] This understanding is confirmed by India.[1041]

7.449. Thus, in the absence of any other Notifications, such products (electric conductors, for a voltage not exceeding 80 V, of a kind used for telecommunications, fitted with connectors) would have been subject to the 15% duty rate set forth in India's First Schedule. We note, however, that

[1034] Finance Act 2018, (Exhibit EU-15).
[1035] First Schedule 2016/2017, (Exhibit EU-59), pp. 771-772.
[1036] Serial Nos. 28-29 of Notification No. 25/2005, (Exhibit IND-40).
[1037] Underlining added.
[1038] European Union's first written submission, para. 169; Notification No. 25/2005 as amended by Notification No. 133/2006, (Exhibit IND-40), para. 1.
[1039] See European Union's response to Panel question No. 44(b), paras. 102-103; and India's response to Panel question No. 132, paras. 89-90.
[1040] Underlining added. We understand that prior to the amendments introduced by Notification No. 133/2006, such products were eligible for the exemption under Serial No. 28 of Notification No. 25/2005. By excluding products falling under tariff item 8544.42 from the scope of that exemption, Notification No. 133/2006 limited the exemption to products falling under tariff item 8544.49 (i.e. products not fitted with connectors). Thus, following the amendment, the only exemption available for electric conductors of a kind used for telecommunications when fitted with connectors, was set forth in Serial No. 29, which was specifically limited to such products for a voltage exceeding 80 V and not exceeding 1,000 V. Such products for a voltage not exceeding 80 V were essentially carved out from the scope of the exemptions available under Notification No. 25/2005. (See Notification No. 25/2005 as amended by Notification No. 133/2006, (Exhibit IND-40); and India's response to Panel question No. 132).
[1041] India explains that Notification No. 25/2005, as amended by Notification No. 133/2006, "granted concession to electric conductors for a voltage between 80V-1000V of a kind used for telecommunications fitted with connectors. The Notification did not grant concession to electric conductors for a voltage <80V fitted with connectors." (See India's response to Panel question No. 132, para. 89). We note that India's arguments on this point evolved over the course of the proceedings. (See e.g. India's first written submission, para. 235).

Serial No. 491 of Notification No. 50/2017, as amended by Notification No. 6/2018, provides for a 7.5% duty rate to be applied to all goods falling under heading 8544 of the First Schedule, except for USB cables for cellular mobile phones.[1042] It is uncontested that in India's customs regime, two or more customs notifications may apply simultaneously, such that an "importer can claim the most beneficial notification".[1043] Thus, in light of Notification No. 50/2017, products falling outside the scope of the exemption under Notification No. 25/2005 (such as electric conductors for a voltage not exceeding 80 V, of a kind used for telecommunications, fitted with connectors) became subject to a 7.5% duty rate instead of the 15% duty rate set out in India's First Schedule. With respect to the carve-out for USB cables for cellular mobile phones, we note the European Union's explanation that "'USB Cable for cellular mobile phone' is not covered by [its] claim because it is not a product 'of a kind used in telecommunications'".[1044]

7.450. We also recall that Serial No. 39 of Notification No. 24/2005 exempts from all duties all goods except "solar tempered glass or solar tempered (anti-reflective coated) glass", falling under all Chapters except Chapter 74 of India's First Schedule, if the product is used for the manufacture of goods covered by Serial Nos. 1 to 38 of Notification No. 24/2005, provided that the importer follows the procedure set out in the Customs Rules 1996.[1045] The European Union does not contest that electric conductors, for a voltage not exceeding 80 V, of a kind used in telecommunication, fitted with connectors, can be used in the production of certain of the products identified in Serial Nos. 1 to 38 of Notification No. 24/2005.[1046] We recall that such products are eligible for duty-free treatment under Serial No. 39 of Notification No. 24/2005 if: (i) they are used in the production of certain specified products; and (ii) the importer follows the procedures set out in the Customs Rules 1996. In this respect, we also recall that Article II:1(b) does not require Members to inscribe general conditions for importation in their WTO Schedules. However, where conditions are tied to tariff treatment, such that a product must satisfy those conditions in order to be eligible for the tariff treatment set forth in a Member's WTO Schedule, Article II:1(b) requires that such conditions must be inscribed in the Member's WTO Schedule. As we have found above, neither of the conditions for the duty-free treatment available under Serial No. 39 of Notification No. 24/2005 constitutes a general condition for importation, and both conditions are tied to eligibility for exemption from customs duties.[1047]

7.451. Finally, Notification No. 15/2022 (which was introduced during these dispute settlement proceedings) amended the exemption under Serial No. 28 of Notification No. 25/2005 to refer to electric conductors, for a voltage not exceeding 80 V, of a kind used for telecommunications (whether or not fitted with connectors), other than USB cables for cellular mobile phones or wrist wearable devices (commonly known as smart watches)[1048], falling under tariff items 8544.42 *and* 8544.49 of the First Schedule.[1049] Thus, Serial Nos. 28 and 29 of Notification No. 25/2005, together, presently unconditionally exempt from all customs duties all electric conductors (other than the USB cables described above), for a voltage not exceeding 1,000 V, of a kind used in telecommunication, fitted with connectors.

7.452. To summarize, we find that, pursuant to Notification Nos. 24/2005, 25/2005, and 50/2017, at the time of the Panel's establishment electric conductors, for a voltage not exceeding 80 V, of a kind used in telecommunication, fitted with connectors, classified under tariff item 8544.42 of India's First Schedule, were subject to a 7.5% duty rate, unless they satisfied the conditions for duty-free treatment available under Serial No. 39 of Notification No. 24/2005. Specifically, such products were eligible for duty-free treatment under Serial No. 39 of Notification No. 24/2005 if: (i) they were used

[1042] Serial No. 491 of Notification No. 50/2017, (Exhibit EU-34), as amended by Notification No. 6/2018, (Exhibit EU-42).

[1043] European Union's first written submission, para. 52 (referring to Hon'ble Supreme Court in the case of *Share Medical Care v. Union of India and ORS*, 2007 (209) ELT 321 (S.C.), (Exhibit EU-5)); India's first written submission, para. 235.

[1044] European Union's response to Panel question No. 87, para. 138. We note that the European Union's arguments on this point evolved over the course of the proceedings. (See e.g. European Union's response to Panel question No. 108, para. 108; and European Union's first written submission, para. 172).

[1045] Notification No. 24/2005 as amended by Notification Nos. 132/2006, 32/2016, 19/2016, and 06/2020, (Exhibit IND-39).

[1046] See e.g. European Union's response to Panel question No. 49, para. 109; and second written submission, paras. 76-77.

[1047] See para. 7.427 above.

[1048] Between 1 February and 1 April 2022, the exception was limited to "mobile phones". (See Serial No. 3 of Notification No. 15/2022, item (iii), (Exhibit IND-73)).

[1049] Notification No. 15/2022, (Exhibit IND-73).

in the production of certain specified products; and (ii) the importer followed the procedures set out in the Customs Rules 1996. Those conditions are not general conditions for importation, but rather conditions to receive duty-free treatment. During the course of these proceedings, however, such products became eligible for unconditional duty-free treatment, pursuant to Notification No. 25/2005, as amended by Notification No. 15/2022.

7.4.8.3 Comparison of India's tariff treatment to its WTO tariff commitments

7.4.8.3.1 Main arguments of the parties

7.453. The European Union considers that the products covered by tariff items 8544.42.91, 85.44.42.92 and 85.44.42.93 of India's First Schedule fall within the scope of India's WTO tariff commitment for tariff item 8544.42 of India's WTO Schedule.[1050] While the European Union agrees that India is presently acting consistently with Articles II:1(a) and (b), the European Union considers that at the time of the Panel's establishment India was acting inconsistently with its WTO commitments.[1051] In the context of its arguments concerning India's tariff treatment of line telephone handsets, the European Union submits that the conditions for duty-free treatment available under Serial No. 39 of Notification No. 24/2005, which also apply to the products at issue here (namely, electric conductors, for a voltage not exceeding 80 V, of a kind used in telecommunication, fitted with connectors), are not set forth in India's WTO Schedule.[1052]

7.454. India argues that, at the time of the Panel's establishment, Serial No. 39 of Notification No. 24/2005 brought it into consistency with its obligations under Articles II:1(a) and (b).[1053]

7.4.8.3.2 Panel's assessment

7.455. We recall that tariff item 8544.42.00 ex01 of India's WTO Schedule indicates that India is obligated to accord unconditional duty-free treatment to electric conductors, for a voltage not exceeding 1,000 V, of a kind used for telecommunications, fitted with connectors.[1054] Such products are classified in India's First Schedule under tariff items 8544.42.91, 8544.42.92, and 8544.42.93.[1055] At the time of the Panel's establishment, a subset of such products (namely electric conductors, for a voltage not exceeding 80 V, of a kind used in telecommunication, fitted with connectors) were subject to a duty rate of 7.5% unless they satisfied the conditions for duty-free treatment established in Serial No. 39 of Notification No. 24/2005.[1056] Specifically, in order to receive such duty-free treatment: (i) the products had to be used in the production of certain specified products; and (ii) the importer had to follow the procedures set out in the Customs Rules 1996.[1057] Both of these conditions are conditions that must be satisfied in order for electric conductors, for a voltage not exceeding 80 V, of a kind used in telecommunication, fitted with connectors, to receive duty-free treatment.

7.456. At the time of the Panel's establishment, although such products were eligible for duty-free treatment subject to conditions, neither of those conditions was inscribed in India's WTO Schedule. If an imported electric conductor, for a voltage not exceeding 80 V, of a kind used for telecommunications, fitted with connectors, failed to satisfy one of those conditions, it would have been subject to a 7.5% duty rate. In our view, therefore, India's tariff treatment of such products was inconsistent with its WTO tariff commitments as contained in its WTO Schedule.

7.457. We further understand that, as of 1 February 2022, India amended Notification No. 25/2005, such that these products became subject to unconditional duty-free treatment. We therefore consider that, as of 1 February 2022, India brought its tariff treatment of such products into consistency with its WTO tariff commitments concerning those products.

[1050] European Union's first written submission, para. 167.
[1051] European Union's response to Panel question No. 130, para. 130.
[1052] European Union's responses to Panel question No. 86, paras. 134-136; responses to Panel question No. 120, para. 110; response to Panel question No. 124, para. 120.
[1053] India's first written submission, para. 237; response to Panel question No. 48(b), para. 103.
[1054] See para. 7.441 above.
[1055] See para. 7.446 above.
[1056] See para. 7.374 above.
[1057] See para. 7.374 above.

7.4.8.4 Conclusion

7.458. Based on the foregoing, we find that, at the time of the Panel's establishment, India's tariff treatment of electric conductors, for a voltage not exceeding 80 V, of a kind used for telecommunications, fitted with connectors, falling within the scope of tariff item 8544.42.00 ex01 of India's WTO Schedule, was inconsistent with Article II:1(b), first sentence, of the GATT 1994, because such products were subject to ordinary customs duties in excess of those set forth and provided in India's WTO Schedule, unless they satisfied certain conditions not set forth in that WTO Schedule.

7.459. We recall that the application of ordinary customs duties in excess of those provided for in a Member's Schedule, or subject to terms, conditions or qualifications not set forth in the Schedule, inconsistent with the first sentence of Article II:1(b), also constitutes "less favourable" treatment within the meaning of Article II:1(a). Consequently, we find that, at the time of the Panel's establishment, India's tariff treatment of such products was less favourable than that provided in its WTO Schedule, and India was therefore acting inconsistently with Article II:1(a) of the GATT 1994.

7.460. We also find that, as of 1 February 2022, India accords unconditional duty-free treatment to such products, in accordance with the terms of its WTO Schedule, and is therefore acting consistently with Article II:1(b), first sentence, of the GATT 1994. Furthermore, by according to the commerce of the European Union treatment no less favourable than that provided for in its WTO Schedule, India's tariff treatment of such products is consistent with Article II:1(a) of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATIONS

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

a. With respect to 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 the European Union 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. With respect to the European Union'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:

   i. India's tariff treatment of certain products classified under tariff items 8504.40 ex02, 8517.12, 8517.61, 8517.62 and 8517.70 ex01, ex02, and ex03 of India's WTO Schedule is inconsistent with Articles II:1(a) and (b) of the GATT 1994;

   ii. At the time of the Panel's establishment, India's tariff treatment of certain products classified under tariff items 8518.30 ex01 and 8544.42.00 ex01 of India's WTO Schedule was inconsistent with Articles II:1(a) and (b) of the GATT 1994; and

   iii. As of 1 February 2022, India's tariff treatment of certain products classified under tariff items 8518.30 ex01 and 8544.42.00 ex01 of India's WTO Schedule is consistent with 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 the European Union under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, to the extent that India's tariff treatment of certain products classified under tariff items 8504.40 ex02, 8517.12, 8517.61, 8517.62, 8517.70 ex01, ex02, and ex03 of India's WTO Schedule continues to be inconsistent with Articles II:1(a) and (b) of the GATT 1994, we recommend that India bring such measures into conformity with its obligations under the GATT 1994.