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

(DS582, DS584, and DS588)

RESPONSES OF THE UNITED STATES TO THE PANELS' QUESTIONS TO THE THIRD PARTIES AFTER THE FIRST SUBSTANTIVE MEETING

November 24, 2021

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Canada – Pharmaceutical Patents (Panel)	Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, adopted 7 April 2000
EC – Tariff Preferences (AB)	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004
Greek Increase in Bound Duty	GATT Group of Experts Report, *Greek Increase in Bound Duty* (unadopted report, 9 November 1956), L/580
Guatemala – Cement II (Panel)	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products,* WT/DS76/AB/R, adopted 19 March 1999
Korea – Procurement (Panel)	Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000
Russia – Tariff Treatment (Panel)	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, adopted 26 September 2016
US – Wool Shirts and Blouses (India) (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr. 1, adopted 23 May 1997

1. The United States' responses to the Panels' Post-Meeting Questions 15 to 21 relate to the dispute settlement proceedings initiated by the European Union (EU), Japan, and Chinese Taipei, respectively, in *India – Tariff Treatment on Certain Goods in the Information and Communications Technology Sector*.[1]

15. <u>To all third parties</u>. According to India, "the obligations under the ITA-1 are distinguishable and 'separate from' the commitments under the contested sub-headings in the 2007 Schedule"[2] and India's "commitments under the ITA-1 based on HS1996 have not undergone a change as a result of the HS2002 and the HS2007 transpositions."[3] Do you agree with these views?

<u>Response:</u>

2. A participant's commitments under the 1996 *Ministerial Declaration on Trade in Information Technology Products* (ITA-1)[4] are separate from a WTO Member's obligations under the WTO Agreement, including the *General Agreement on Tariffs and Trade 1994* (GATT 1994). However, the United States does not agree with India's arguments on the implications of this distinction for purposes of these disputes, including India's view that it did not intend to undertake what it characterizes as "fresh obligations" in its WTO Schedule.[5]

3. Article 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) provides for panels to examine the matter referred to the Dispute Settlement Body (DSB) in the light of the relevant provisions of the covered agreement(s) cited by the parties to the dispute. Article 11 of the DSU further provides that the function of panels is to "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."

4. Here, as indicated in the complaining parties' panel requests, the legal bases for the complaints are India's WTO commitments under Articles II:1(a) and (b) of the GATT 1994.[6] Articles II:1(a) and (b) make clear that a Member's tariff commitments are reflected in its Schedule annexed to the GATT 1994. Pursuant to Article II:7 of the GATT 1994, WTO Members' Schedules annexed to the GATT 1994 are an integral part of the GATT 1994. Accordingly, the Panels are called to assess whether India is in compliance with its tariff commitments under the GATT 1994, as set forth in its Schedule.

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[1] WT/DS582, WT/DS584, and WT/DS588.

[2] India's response to Panel question No. 1, para. 9.

[3] India's response to Panel question No. 28, para. 82.

[4] WT/MIN(96)/16 (December 13, 1996).

[5] *See* U.S. Third-Party Submission, paras. 21-26; U.S. Responses to the Panel's Advance Questions to the Third Parties, paras. 2-3, 9.

[6] EU's Panel Request (WT/DS582/9) (February 18, 2020); Japan's Panel Request (WT/DS584/9) (March 23, 2020); Chinese Taipei's Panel Request (WT/DS588/7) (March 30, 2020).

5. India and other WTO Members participating in the ITA-1 modified their WTO Schedules to inscribe commitments to reflect the ITA-1, thereby making concessions subject to the disciplines of the GATT 1994.[7] The ITA-1 is an international agreement[8] under which India has undertaken commitments as a participant. However – unlike the GATT 1994, which includes a Member's Schedule – the ITA-1 is not a covered agreement within the meaning of the DSU,[9] and commitments under the ITA-1 do not form part of the matter at issue in these disputes. To the extent that the Panels find it necessary to consider the ITA-1 as context in interpreting the terms of India's WTO Schedule, the United States considers that Attachment A of the ITA-1 is defined based on HS1996 nomenclature.[10]

6. As noted in the U.S. third-party submission, tariff concessions, including those incorporated into a Member's Schedule as a result of the ITA-1, apply to all products – regardless of subsequent technological development – that meet the terms of the concession, interpreted based on its ordinary meaning in context and in light of the agreement's object and purpose. Developments in features or technology are not unique to the information technology sector. The fact that a product has newer features or uses different technologies than what was available on the market at the time the concession was negotiated is not a basis to exclude it from the scope of that concession.[11]

16. <u>To all third parties</u>. India submits that "the commitments in the contested sub-headings in the 2007 Schedule are in error" and "[t]hose errors - which appear in the text of the contested sub-headings in the 2007 Schedule - are based on India's error in relation to the material scope of the commitments under the contested sub-headings at the time the 2007 Schedule was certified."[12] Does the error alleged by India refer to a "fact or a situation" within the meaning of the first paragraph of Article 48? If yes/no, please explain.

<u>Response:</u>

7. The United States considers that Article 48 of the *Vienna Convention on the Law of Treaties* (Vienna Convention) is not applicable in these disputes because it is not a provision of a

[7] In accordance with the requirement in the chapeau of paragraph 2 of the ITA-1 to "bind and eliminate" duties.

[8] The report in *EC – IT Products (Panel)* considered that the ITA-1 at a minimum qualifies as an "instrument" for purposes of Article 31(2)(b) of the Vienna Convention but declined to determine whether the ITA-1 was itself a "treaty" within the meaning of Article 2 of the Vienna Convention. *See EC – IT Products (Panel)*, paras. 7.383-7.384.

[9] *See* U.S. Responses to the Panels' Advance Questions to the Third Parties, paras. 2-3.

[10] *See EC – IT Products (Panel)*, para. 7.393 (noting that the term "classified (or classifiable)" regarding Attachment A of the ITA-1 "expressly relates to the 1996 version of the HS").

[11] This is consistent with the findings in the GATT 1947 dispute *Greek Increase in Bound Duty*, in which the Group of Experts found that later-developed, long-playing gramophone records were covered by the description of "gramophone records" in Greece's schedule of concessions, and that Greece had therefore acted inconsistently with Article II when it imposed higher duties on long-playing records.

[12] India's response to Panel question No. 15, para. 36.

WTO covered agreement within the meaning of Article 1.1 of the DSU, or a customary rule of interpretation of public international law within the meaning of Article 3.2 of the DSU.[13] As panels are limited to examining the consistency of challenged measures with cited provisions of covered agreements,[14] Article 48 is not applicable, and there is no legal basis for the Panels to interpret or apply this provision.

8. Even if the Panels were to consider India's argument, there are undisputed facts on the record that appear to demonstrate that India does not satisfy the conditions of Article 48(2).[15] For instance, the parties appear to agree that India participated in the process for transposition of its Schedule into HS2007 nomenclature in accordance with established WTO procedures, and that India failed to raise any specific concern or objection during that process with respect to the tariff subheadings at issue.[16] Thus, it appears that India has not established that it did not contribute by its own conduct to the alleged error, or that the circumstances were such that India was not on notice of the alleged error.

9. Article 48(2) provides that Article 48(1) "shall not apply" in such circumstances. In the event that the Panels seek to apply Article 48 – which, again, there is no legal basis to do – the Panels therefore need not engage in an interpretation of what it means for an error to refer to a "fact or situation" within the meaning of Article 48(1). In any event, as some Members have suggested, 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."[17] Specifically, India characterizes the error as concerning "the complex nature of the HS2002 to HS2007 transposition" and India's stance 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-1."[18] This characterization would appear to exclusively concern India's understanding of the scope of its international commitments, which are reflected in the text of the treaty.

17. <u>To all third parties</u>. Assuming *arguendo* that the Panel finds that the tariff concessions at issue were made "in error" within the meaning of Article 48 of the Vienna Convention, should the Panel conclude that the sub-headings at issue are "invalid [], with the consequence that the contested sub-headings are rendered

[13] *See* U.S. Third-Party Submission, paras. 41-45; U.S. Responses to Panels' Advance Questions 11 and 12. *See also* Japan's Responses to the Panel's Advance Questions to the Parties (DS584), paras. 37-38; Chinese Taipei's Responses to the Panel's Advance Questions to the Parties (DS588), para. 42.

[14] DSU Articles 3.2, 7.1.

[15] *See* Chinese Taipei's First Written Submission (DS588), paras. 3.8-3.21.

[16] *See* India's Responses to the Panel's Advance Questions to the Parties (DS582), paras. 59-61; *see also* Exhibits IND-49 and IND-50 (DS584).

[17] *See* EU's Third-Party Oral Statement (DS584, DS588), para. 8; Japan's Third-Party Oral Statement (DS582, DS588), para. 23; Korea's Third-Party Submission, para. 13; UK's Third-Party Oral Statement, para. 14.

[18] *See* India's First Written Submission (DS584), para. 40.

unbound", as argued by India[19]? What would be the legal basis in the DSU for the Panel to do so?

Response:

10. No, there would be no legal basis in the DSU for the Panels to find that the sub-headings at issue are invalid or rendered unbound. As Chinese Taipei has observed,[20] any such finding would raise concerns with altering the balance of rights and obligations agreed to by Members. Article 3.2 of the DSU makes clear that "[r]ecommendations and rulings of the DSB *cannot add to or diminish the rights and obligations* provided in the covered agreements", and DSU Article 19.2 further provides that "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body *cannot add to or diminish the rights and obligations* provided in the covered agreements".[21] Any such finding would also appear to fall outside the Panels' terms of reference and the function of panels as provided in DSU Articles 7 and 11.

11. This question highlights why it would be problematic for the Panels to make any finding that the tariff subheadings at issue were made "in error" under Article 48 of the Vienna Convention. By suggesting that the Panels find that the subheadings at issue are invalid or unbound, India appears to be seeking a modification to provisions of a covered agreement, namely, its Schedule. There is no basis in the DSU or in any other WTO agreement for a panel to make modifications to treaty text, including a Schedule. In contrast, there are provisions in the WTO agreements and in the 1980 GATT Council *Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions* (1980 Procedures)[22] for Members to agree to modifications to Schedules.[23]

18. <u>To all third parties</u>. Please comment on the allocation of burden of proof with respect to paragraphs 1 and 2 of Article 48 of the Vienna Convention. In particular, with respect to the second paragraph of Article 48, does the party seeking to invoke Article 48 bear the burden of demonstrating that it did *not* contribute by its own conduct to the error, or that the circumstances were *not* such as to put it on notice of a possible error? If so, would this amount to a requirement to "prove a negative"[24]?

Response:

[19] India's first written submission, para. 91 in DS582; 74 in DS584; and 91 in DS588.

[20] Chinese Taipei's Responses to the Panel's Advance Questions to the Parties (DS588), para. 44.

[21] Emphasis added.

[22] *Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions* (1980 Procedures), Decision of 26 March 1980, L/4962.

[23] *See* U.S. Third-Party Submission, paras. 36-39.

[24] Appellate Body Report, *Japan – Agricultural Products II*, para. 137. See also Panel Reports, *Guatemala – Cement II*, para. 8.196; and *Canada – Pharmaceutical Patents*, para. 7.60.

12. The United States refers to its prior explanations that Article 48 of the Vienna Convention is not applicable in these disputes.[25]

13. Nonetheless, the standard allocation of burden of proof in WTO dispute settlement proceedings applies in these disputes, including with respect to India's Article 48 argument. As a general matter, the burden of proof in a WTO dispute rests with the party asserting a particular claim or defense.[26] Once a WTO Member establishes a *prima facie* case with sufficient evidence to raise a presumption in favor of its claim, the responding party must rebut that presumption with any defense it may present.

14. Prior reports have recognized that under the general allocation of the burden of proof, it is normally the respondent that not only must *raise* the defense but also *prove* that the requirements of the defense being offered are met.[27] The amount and type of evidence would vary depending on the provisions and measures at issue. However, the reports cited in the Panels' question with respect to "proving a negative" do not support deviation from the standard allocation in the context of India's Article 48 argument. As those reports recognize, it may be sufficient for the party bearing the burden regarding a lack of information or affirmative evidence to put forward *some* evidence sufficient to raise a presumption.[28]

15. Here, the complaining parties have brought claims against India under Article II:1 of the GATT 1994. India may raise any defense it considers will justify a *prima facie* case of breach established by the complainants in their respective disputes. Following the usual course, the Panels would examine whether there has been a breach of WTO obligations and then consider whether India has met its burden to establish that a defense applies and that it satisfies the elements of that defense. In this regard, the United States notes that, in its first written submission, India sought to establish that there is an error under Article 48(1) and it meets the conditions of Article 48(2), namely that it did *not* contribute by its own conduct to the error, and that the circumstances were *not* such as to put India on notice of a possible error. However, as

[25] *See* U.S. Third-Party Submission, paras. 41-45; U.S. Third-Party Answers to the Panels' Questions to Third Parties, paras. 24-28.

[26] *See, e.g.*, *US – Wool Shirts and Blouses (India) (AB)*, page 14 ("the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense").

[27] *See, e.g.*, *EC – Tariff Preferences (AB)*, paras. 87, 104.

[28] *Japan – Agricultural Products II (AB)*, para. 137 (rejecting complainant's argument that it would be required to prove a negative based on affirmative evidence in the context of Article 2.2 of the SPS Agreement; the report considered it "would have been sufficient…to raise a presumption" on the lack of affirmative evidence); *Guatemala – Cement II (Panel)*, para. 8.196 (considering that while the complainant asserting the claim could not "prove" or "establish definitively" that it was *not* informed of something, there was record evidence sufficient to "suggest strongly" the complainant had raised a presumption); *Canada – Pharmaceutical Patents (Panel)*, para. 7.60 (considering the order of analysis for evaluating the respondent's claim of exception under Article 30 of the TRIPS Agreement, where a condition of the exception involved proving a negative, "without disturbing the ultimate burden of proof").

noted above, there are undisputed facts on the record that appear to demonstrate that India does not satisfy the conditions of Article 48(2).[29]

19. <u>To all third parties</u>. In view of the fact that India's 2018 rectification request was not certified, what would be the legal basis in the DSU 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"[30]?

20. <u>To all third parties</u>. If the Panel were to find that India's "Draft Rectification was of a purely formal character" and the complainant's objections were "unfounded", as requested by India[31], what would be the legal consequence for the complainant's claims under Articles II:1(a) and (b) of the GATT 1994 in the circumstances of this dispute?

<u>Combined Response:</u>

16. There is no legal basis in the DSU for the Panels to determine that India's draft Rectification request "was of a purely formal character" and that objections to that request were unfounded. Further, the DSU does not provide the Panels authority to declare that India is not bound by its tariff concessions as India's draft Rectification suggests.

17. Consistent with the standard terms of reference provided in Article 7.1 of the DSU, the Panels' terms of reference are "[t]o 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 [complaining Party 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*." DSU Article 11 also contemplates that panels are to make findings that "will assist the DSB in making the recommendations or in giving the rulings provided for *in the covered agreements*." Although the 1980 Procedures were agreed by WTO Members, they are not a "covered agreement" within the meaning of Article 1.1 of the DSU. Accordingly, the DSU does not contemplate that a panel would make findings with respect to Members' actions under the 1980 Procedures, including draft rectification requests and related reservations.

18. Further, Article 19.2 of the DSU states that panels in their findings "cannot add to or diminish the rights and obligations provided in the covered agreements." A finding with respect to India's draft Rectification request could raise questions on altering the balance of rights and obligations struck with respect to India's WTO Schedule, which is an integral part of the GATT 1994.[32]

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[29] *See* Chinese Taipei's First Written Submission (DS588), paras. 3.8-3.21.

[30] India's first written submission, paras. 53-54 in D582; 36-37 in D584; and 54-55 in DS588. (fns omitted)

[31] India's first written submission, paras. 53-54 in D582; 36-37 in D584; and 54-55 in DS588. (fns omitted)

[32] Pursuant to Article II:7 of the GATT 1994, WTO Members' Schedules annexed to the GATT 1994 are an integral part of the GATT 1994.

19. In addition, the 1980 Procedures themselves do not contemplate recourse to WTO dispute settlement where an objection has been made. The report in *Russia – Tariff Treatment (Panel)* correctly considered that there would be no basis on which an alleged error in a Member's Schedule could be altered under the 1980 Procedures where Members raised objections to the proposed rectification.[33]

20. As the United States explained in its third-party submission, India's proposal would have substantively altered its WTO commitments with respect to 15 tariff lines from duty-free to unbound. Several Members, including the United States, timely objected to India's draft Rectification.[34] Therefore, India's draft Rectification was *not* approved and certified, and the authentic text of India's Schedule remains unaltered pending any resolution of the objections raised by other WTO Members.[35]

21. <u>To all third parties</u>. What was the legal or technical basis for the WTO Secretariat's participation in the process of transposing Members' Schedules from HS2002 to HS2007?

<u>Response:</u>

21. The WTO Secretariat participates in the process for Harmonized System (HS) transposition in WTO Schedules of Concessions as provided by the procedures approved by decision of the WTO General Council, *i.e.*, by consensus of all WTO Members pursuant to Article IX:1 of the *Marrakesh Agreement Establishing the World Trade Organization*.[36]

22. The procedures for transposing Members' Schedules from HS2002 to HS2007 nomenclature are set out in *A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database* (HS2007 Procedures).[37] The HS2007 Procedures were approved by the Council for Trade in

[33] *Russia – Tariff Treatment (Panel)*, paras. 7.50-7.56. The panel also considered that an alleged error could not be corrected under Article 79 of the Vienna Convention where objections were raised.

[34] Market Access Committee Meeting Minutes, G/MA/M/69, 9 October 2018, paras. 130-144; *see also* Secretariat Note on Situation of Member Schedules, G/MA/W/23/Rev.17, 14 April 2021, p.54.

[35] *See* Secretariat Note on Situation of Member Schedules, G/MA/W/23/Rev.17, 14 April 2021, p.54.

[36] Article IX:1 provides that "[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947… At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote…"

[37] WTO General Council Decision of 15 December 2006, WT/L/673. *See also* Minutes of Committee on Market Access Meeting of 3 November 2006, G/MA/M/42/Add.2 (where Members agreed to forward the draft procedures to the Council for Trade in Goods).

Goods[38] and subsequently adopted by the General Council on December 15, 2006.[39] India did not raise any concerns with the draft procedures and joined a consensus to adopt them.[40]

23. The HS2007 Procedures establish a clear and transparent process for the Secretariat to undertake the transposition of the Schedules of developing Members (unless a developing Member decides to undertake its own), subject to the review of that Member and subsequent multilateral approval and certification.[41] Specifically, paragraph 2 provides that "[t]he Secretariat shall transpose the schedules of developing country Members, except for those who undertake to prepare their own transposition…."

24. Where the Secretariat undertakes transposition, the HS2007 Procedures provide that the Secretariat must follow specified technical procedures, and send the draft changes ("draft HS07 file") to the developing Member for review, with the possibility to seek any clarifications and propose changes.[42] Further, paragraph 8 states that "Members for whom the Secretariat has prepared a draft HS07 file are expected to examine their file and provide the Secretariat with a written communication that either approves the file (case 1), or provides specific comments on its case (case 2)" no later than 60 days from receipt of the draft.

25. As outlined in the HS2007 Procedures, the Secretariat prepared a draft HS07 file for India's review. While India sought clarification and proposed changes on its draft HS07 file that were resolved, as India has acknowledged, it did *not* seek any clarification or change with respect to the tariff subheadings at issue in these disputes.[43] India's draft HS07 file was released for approval under the multilateral review process,[44] and was later approved and certified by WTO Members.[45]

[38] Minutes of WTO Council for Trade in Goods 20 November 2006, G/C/M/86, paras. 3.6 and 3.7.

[39] Minutes of WTO General Council Meeting 14-15 December 2006, WT/GC/M/106, paras. 134-136.

[40] Minutes of WTO General Council Meeting 14-15 December 2006, WT/GC/M/106, paras. 134-136.

[41] The HS2007 Procedures also provide for the Secretariat to review the draft HS07 files prepared by Members themselves before their release for multilateral review. *See* para. 9.

[42] HS2007 Procedures, paras. 5 and 6.

[43] *See* India's Responses to the Panel's Advance Questions to the Parties (DS582), paras. 60 and 61. *See also* Exhibits IND-50 and IND-51 (DS582) (communications between India and the Secretariat making clear that India did not raise any issue with respect to the tariff subheadings at issue in these disputes).

[44] *See* HS2007 Procedures, paras. 16 and 17.

[45] WT/LET/1072 (September 9, 2015); Certification of Modifications and Rectifications to Schedule XII – India, WLI/100 (Sept. 9, 2015).