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

(DS582, DS584, and DS588)

RESPONSES OF THE UNITED STATES TO THE PANEL'S ADVANCE QUESTIONS TO THE THIRD PARTIES

September 20, 2021

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Argentina – Textiles and Apparel (AB)	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
China – Auto Parts (AB)	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
China – Auto Parts (Panel)	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R
EC – Chicken Cuts (AB)	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
EC – Chicken Cuts (Brazil) (Panel)	Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil*, WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R
EC – Computer Equipment (AB)	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
EC – IT Products (Panel)	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
Greek Increase in Bound Duty	GATT Group of Experts Report, *Greek Increase in Bound Duty* (unadopted report, 9 November 1956), L/580
India – Solar Cells (Panel)	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
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996

Russia – Tariff Treatment (Panel)	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, adopted 26 September 2016
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

1. The United States' responses to the Panel's Advance Questions 1 to 12 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] The United States' responses to the Panel's Advance Questions 13 and 14 concern the dispute initiated by Japan.[2]

INDIA'S WTO SCHEDULE AND THE INFORMATION TECHNOLOGY AGREEMENT

1. <u>To all third parties</u>. Is the ITA-1 a "covered agreement" within the meaning of Article 1.1 of the DSU? If not, what is the basis for the Panel's authority to interpret the ITA-1 in accordance with the rules of the Vienna Convention on the Law of Treaties (1969) (Vienna Convention)?

<u>Response:</u>

2. No, the 1996 *Ministerial Declaration on Trade in Information Technology Products* (ITA-1)[3] is not a "covered agreement" within the meaning of Article 1.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). DSU Article 1.1 provides that "[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements')." The ITA-1 is not an agreement listed in Appendix 1 of the DSU and, therefore, is not a covered agreement under the DSU.

3. The Panel is not tasked with interpreting the ITA-1 in this dispute. Pursuant to Article 7.1 of the DSU, the Panel's terms of reference are "[t]o examine, in 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*".[4] The covered agreement cited by each complaining Party in its panel request is the *General Agreement on Tariffs and Trade 1994* (GATT 1994), including India's Schedule of Concessions (Schedule) annexed to the GATT 1994.[5] Articles 11 and 3.2 of the DSU further provide that panels are to interpret and apply relevant provisions of the WTO "covered agreements."

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

[2] WT/DS584.

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

[4] Emphasis added. DSB Notice of Panel Constitution, WT/DS582/10 (September 1, 2020); WT/DS584/10 (October 9, 2020); WT/DS588/8 (September 1, 2020).

[5] 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).

Accordingly, the Panel is tasked with interpreting the relevant provisions of the GATT 1994, including the tariff concessions in India's Schedule, rather than the ITA-1.[6]

2. <u>To all third parties</u>. What is the relevance of the ITA-1 for the interpretation of the tariff concessions at issue in this dispute?

3. <u>To all third parties</u>. The panel in *EC – IT Products* stated that the ITA-1 may "serve as context within the meaning of Article 31(2)(b) of the Vienna Convention".[7] What is the relevance of this statement for the purpose of interpreting the tariff concessions at issue in this dispute?

<u>Combined Response:</u>

4. In accordance with Articles 3.2 and 11 of the DSU, the Panel may consider the ITA-1 as relevant context within the meaning of Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT) for purposes of interpreting the terms of India's tariff concessions in accordance with the customary rules of interpretation of public international law.

5. Specifically, the Panel may consider the ITA-1 as relevant context for interpreting India's concessions within the meaning of VCLT Article 31(2)(b), as an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." First, the ITA qualifies as an "instrument which was made by one or more parties in connection with the conclusion of the treaty." After participating Members agreed to the ITA-1, they modified their GATT 1994 Schedules in accordance with the process established in the ITA-1 Annex to record the agreed concessions. Thus, the ITA-1 is an instrument made in connection with conclusion of the treaty.[8]

6. Second, the ITA was "accepted by the other parties as an instrument related to the treaty."[9] WTO Members acknowledged the relationship between the ITA-1 and the GATT 1994 in several ways, including by formally accepting the modifications to participating Members' Schedules after the conclusion of ITA-1.[10] In addition, in the Singapore Ministerial Declaration, Members took note of the ITA-1 and welcomed the agreement on tariff elimination for trade in information technology products on an MFN basis.[11]

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[6] As explained in the U.S. Third-Party Submission, Article II:1 refers to the tariff treatment set forth in a Member's Schedule of Concessions for goods, which is annexed to the Marrakesh Protocol of the GATT 1994. Pursuant to Article II:7 of the GATT 1994, WTO Members' Schedules annexed to the GATT 1994 are an integral part of the GATT 1994. *See* para. 22.

[7] Panel Reports, *EC – IT Products*, para. 7.383.

[8] *See EC– IT Products (Panel)*, para. 7.378.

[9] *EC– IT Products (Panel)*, para. 7.383.

[10] India's Schedule reflecting its ITA-1 commitments was certified effective July 2, 1997. *See* Certification of Modifications to Schedule XII – India, WT/Let/181 (October 2, 1997).

[11] WT/MIN(96)/DEC (December 18, 1996), para. 18.

7. Accordingly, the ITA-1 is an instrument related to the GATT 1994 and, therefore, the Panel may look to the ITA-1 as relevant context in interpreting India's tariff concessions in its Schedule in accordance with the ordinary meaning of the terms of the concessions. In this regard, the United States agrees with the statement in the *EC – IT Products (Panel)* report referenced by the Panel's question. In that dispute, we note that the panel considered the ITA-1 as a whole, examining the main provisions as well as the Preamble, Annex, and Attachments.[12]

4. <u>To all third parties</u>. Does the transposition of India's tariff concessions from HS1996 to HS2002 and from HS2002 to HS2007 (through WT/Let/886 and WT/Let/1072, respectively) have an impact on the relevance, if any, of the ITA-1?

<u>Response:</u>

8. No. The International Convention on the Harmonized Commodity Description and Coding System (HS Convention) does not contain obligations with respect to tariff treatment.[13] A Member's Schedule describes the tariff treatment that Member must accord to products and normally uses Harmonized Commodity Description and Coding System (HS) terminology. As explained in the U.S. third-party submission,[14] the HS transposition process involves the continuation of tariff commitments, not substantive modifications.[15] This is equally true for the concessions Members incorporated into their Schedules following the ITA-1, which reflects HS1996 nomenclature. That is, a Member's tariff commitments are set forth in the terms of its Schedule, and therefore the Schedule – not the HS – dictates the nature and extent of those commitments. Therefore, the transposition of tariff concessions does not have an impact on the relevance of the ITA-1.

5. <u>To all third parties</u>. Please provide your views on India's position that the commitments under the ITA-1 must be interpreted in light of the "context" of the 1996 version of the HS and its Explanatory Notes.[16] As a general proposition, what is the relevance of the HS1996 and its Explanatory Notes to the Panel's interpretation of the tariff concessions at issue in this dispute?

<u>Response:</u>

9. First, India is mistaken that its commitments are "under the ITA-1." As the United States and other WTO Members have explained, India's tariff commitments – including commitments

[12] *EC– IT Products (Panel)*, para. 7.385.

[13] International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, art. 9, 1035 U.N.T.S. 3 (HS Convention) ("The Contracting Parties do not assume by this Convention any obligation in relation to rates of Customs duty.").

[14] U.S. Third-Party Submission, paras. 33-40.

[15] *See, e.g.*, *A Procedure for the Introduction of Harmonized System 2007 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database*, Decision of 15 December 2006, WT/L/673, at paras. 2, 15; Annex 2, para. 5.

[16] India's first written submission, paras. 128-130 in DS582; 110-112 in DS584; and 129-131 in DS588.

recorded after the conclusion of the ITA-1 – are reflected in India's Schedule.[17] Accordingly, the Panel is called to assess whether India is meeting its commitments under Article II:1 of the GATT 1994 to provide the tariff treatment in its Schedule based on the ordinary meaning of the text of the concessions, in context and in light of the object and purpose of the GATT 1994.

10. As a general matter, panels may consider the HS and its Explanatory Notes as additional relevant context for the purpose of interpreting the HS-derived language of a particular tariff line in a Member's Schedule.[18] However, the tariff commitment is contained in the Schedule, and the HS may not add to or diminish from that obligation.[19] The report in *EC – IT Products (Panel)* explained that "while the HS would always qualify as context for interpreting concessions in a Member's schedule that are based on that nomenclature, or that explicitly or implicitly make reference to it, the relevance of the HS will depend on the interpretative question at issue."[20]

11. Here, India argues that the Panel should look only to HS1996 nomenclature and Explanatory Notes as relevant context because ITA-1 product coverage was defined in part based on HS1996 nomenclature, supposedly limiting the scope of India's commitments.[21] Again, India approaches the interpretation of its commitments from the wrong starting point; it is the tariff headings in India's Schedule that establish the scope of India's concessions, not the ITA-1.[22] Tariff concessions, including those incorporated into a Member's Schedule as a result of the ITA-1, apply to all products that meet the terms of the concession.[23]

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

[17] Schedule XII – India, WT/LET/1072 (September 9, 2015). India's Schedule reflecting its ITA commitments was certified effective July 2, 1997. *See* Certification of Modifications to Schedule XII – India, W/Let/181 (October 2, 1997).

[18] *See, e.g.*, *EC – Computer Equipment (AB)*, para. 90; *EC– Chicken Cuts (AB)*, para. 199; *China – Auto Parts (AB)*, para. 149.

[19] *See, e.g.*, *EC–Computer Equipment (AB)*, para. 90; *EC–Chicken Cuts (AB)*, para. 199; *China – Auto Parts (AB)*, para. 149.

[20] *EC – IT Products (Panel)*, para. 7.443.

[21] India's first written submission (DS584), para. 118.

[22] *Argentina – Textiles and Apparel (AB)*, para. 46.

[23] The United States understands that the concessions at issue were recorded pursuant to Attachment A of the ITA-1 and reflected in HS nomenclature in India's Schedule. The United States notes that Attachment B concessions are not drafted using HS nomenclature, and the HS is not relevant to interpret them.

[24] *See, e.g., EC – Chicken Cuts (Panel)*, para. 7.99.

reflecting the agreement of WTO Members regarding the relationship between the HS2007 and India's Schedule.[25]

6. <u>To all third parties</u>. Please explain whether, or to what extent, the development of new technologies and new products modifies the scope of tariff concessions in a Member's WTO Schedules. Please also indicate whether the response to this question would differ with respect to (a) products in general, (b) products falling within the scope of the ITA-1, and (c) products falling within the scope of the ITA Expansion.

<u>Response:</u>

13. The tariff concessions in a WTO Member's Schedule apply to all products – regardless of technological development – that meet the terms of the concession, interpreted based on its ordinary meaning in context and in light of the GATT 1994's object and purpose. This is consistent with the findings in the GATT 1947 dispute *Greek Increase in Bound Duty*, in which the Group of Experts found that later-developed, long-playing gramophone records were covered by the description of "gramophone records" in Greece's schedule of concessions, and that Greece had therefore acted inconsistently with Article II when it imposed higher duties on long-playing records.[26]

14. In fact, virtually all ITA-1 products – including computers, peripherals, cell phones, and digital cameras – incorporate significantly improved features as compared to the devices that were available at the time the agreement was concluded. Further, the acquisition of new features is not unique to information technology products; automobiles, light bulbs, and any number of other goods covered by WTO Members' Schedules advance over time. India's position would undermine the fundamental obligations of Article II:1 of the GATT 1994 by allowing Members to disregard tariff commitments on the basis that a product incorporates or constitutes a perceived new technology. Perhaps for this reason, in ITA-1 participating Members recognized that by undertaking tariff commitments on information technology products, their trade regimes would "evolve in a manner that enhances market access opportunities for information technology products."[27]

15. The U.S. response does not differ with respect to (a) products in general, (b) products within the scope of ITA-1, and (c) products within the scope of the *Declaration on the Expansion of Trade in Information Technology Products* (ITA Expansion).[28] If a product falls

[25] Schedule XII – India, WT/LET/1072 (September 9, 2015).

[26] *Greek Increase in Bound Duty*, pgs. 168-70.

[27] ITA-1, para. 1.

[28] *Declaration on the Expansion of Trade in Information Technology Products* (ITA Expansion), WT/L/956 (July 28, 2015).

within the description contained in the text of a tariff concession, the product is subject to that concession, regardless of technological development.

7. <u>To all third parties</u>. With respect to the interpretation of the concessions at issue in this dispute, what is the relevance of the approach taken in *EC – IT Products* regarding the issue of the state of technology at the time of the ITA-1 negotiations, in which the panel stated *inter alia* that "[t]he determination of the scope of coverage comes from the meaning of the terms of that commitment"[29]?

<u>Response:</u>

16. As the United States explained in its statement to the Dispute Settlement Body on adoption of the report, the approach in the *EC – IT Products (Panel)* report is consistent with the customary rules of treaty interpretation, according to which the terms of a tariff concession must be interpreted based on their ordinary meaning, in context and in light of the GATT 1994's object and purpose. Importantly, this report affirmed that the product coverage of a tariff concession is not circumscribed by the state of technology at the time the concession was made.[30]

17. Applying this approach in the present dispute, India's concessions must be interpreted to cover products meeting the descriptions in India's Schedule, whether or not products or particular features existed at the time the concession was made. India's proposed approach would interpret tariff commitments not according to their text but according to the technology available at the time. This approach has no foundation in, and is contrary to, the customary rules of interpretation.

8. <u>To all third parties</u>. What is the relevance of the Declaration on the Expansion of Trade in Information Technology Products (ITA Expansion) to the Panel's interpretation of the tariff concessions at issue in this dispute?

<u>Response:</u>

18. The ITA Expansion is not relevant to the Panel's interpretation of India's concessions under the customary rules of interpretation reflected in the VCLT. Like the ITA-1, the ITA Expansion is not a covered agreement within the meaning of the DSU.

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

[29] Panel Reports, *EC – IT Products*, para. 7.598.

[30] DSB Meeting Minutes (September 21, 2010), WT/DSB/M/287, para. 62.

9. <u>To all third parties</u>. India observes that several products relevant to this dispute are covered under Attachment A of the ITA Expansion (WT/MIN(15)/25), and argues that "the mere existence of these products in the product scope of ITA [Expansion] implies that these products are 'new' and were not accounted for in the ITA-1."[31] Please comment on this argument.

<u>Response:</u>

20. In response to the Panel's Advance Question 8, the United States explained that the ITA Expansion is not relevant to interpreting the scope of India's tariff concessions in this dispute.

21. In any event, India is mistaken that the coverage of a product under the ITA Expansion necessarily excludes the product from the scope of the ITA-1 (and India's existing WTO commitments). In fact, ITA Expansion negotiators recognized that several products proposed for inclusion in the ITA Expansion may already have been covered under the ITA-1.[32] The report in *EC – IT Products (Panel)* also recognized that a proposal to include a product in the ITA Expansion may have reflected a desire to clarify the product was already covered by the ITA-1.[33]

10. <u>To all third parties</u>. India observes that various participants to the ITA Expansion are also participants to the ITA-1. India further observes that, under the WTO Schedules of those participants, the existing duties for the subheadings covered by the ITA Expansion (i.e. the "base rate") were in the range of 0-35% for various subheadings at issue in this dispute. According to India, "[t]his is sufficient to establish that the agreed interpretation between the Participants was to not include the products at issue into the scope of the ITA-1."[34] Please comment on this argument.

<u>Response:</u>

22. As a general matter, panels may look to the Schedules of other WTO Members as context where relevant to interpreting the terms of a WTO Member's concessions.[35] In this dispute, the Schedules of ITA Expansion participating Members are not relevant to interpreting the terms of India's concessions for the reasons provided in the U.S. responses to the Panel's Advance Questions 8 and 9. Further, the United States does not consider that there was an "agreed

[31] India's First Written Submission, paras. 142-143 in DS582; 124-125 in DS584; and 143-144 in DS588.

[32] *See* Proposed Additions to Product Coverage: Compilation of Participants' Submissions: Note by the Secretariat, G/IT/SPEC/15, pgs. 23-24 (February 24, 1998) (providing notations next to product descriptions indicating that certain products are "already covered by the ITA").

[33] *EC – IT Products (Panel)*, fn. 796 to para. 7.588.

[34] India's First Written Submission, paras. 144-148 in DS582; 126-128 in DS584; and 145-147 in DS588.

[35] *See, e.g.*, *EC – IT Products (Panel)*, paras. 7.425, 7.528. The Panel in that dispute looked to the Schedules of other ITA-1 participants as context in interpreting the narrative description of the commitments at issue incorporated after conclusion of the ITA-1.

interpretation" between ITA Expansion participants that certain products were outside the scope of ITA-1.

23. In sum, the product coverage of India's concessions is a question that can be answered by reviewing the ordinary meaning of the text of the concessions, in context and in light of the object and purpose of the GATT 1994.

INDIA'S PROPOSED RECTIFICATION OF ITS WTO SCHEDULE AND THE NOTION OF "ERROR"

11. To all third parties. In your view, is Article 48 of the Vienna Convention applicable in this dispute? If so, what would be the legal basis for applying it?

Response:

24. No. As explained in the U.S. third-party submission, Article 48 of the VCLT is not applicable because it is not a provision of a WTO covered agreement or a customary rule of interpretation of public international law within the meaning of Article 3.2 of the DSU.[36]

12. To all third parties. What is the relationship, if any, between Article XXVIII of the GATT 1994 and the 1980 Procedures, on the one hand, and Articles 48 and 79 of the Vienna Convention, on the other hand? In responding to this question, please address Korea's argument that "[a]s *lex specialis*, Article XXVIII and the 1980 Procedures would pre-empt the application of Article 48 in this case."[37]

Response:

25. As an initial matter, Article 48 (Error) and Article 79 (Correction of errors in texts or in certified copies of treaties) of the VCLT are not applicable in this dispute because they are not provisions of a WTO covered agreement within the meaning of the DSU, and have not been incorporated into a covered agreement, including the DSU.[38] As panels are limited to examining the consistency of challenged measures with cited provisions of covered agreements,[39] Articles 48 and 79 are not applicable and there is no legal basis for the Panel to interpret or apply these provisions. The United States notes that Korea appears to agree, and that its argument on *lex*

[36] *See* U.S. Third-Party Submission, paras. 41-45.

[37] Korea's Third-Party Submission, para. 12.

[38] One aspect of the VCLT is expressly referred to in the DSU: customary rules of interpretation of public international law. DSU Article 3.2 ("The dispute settlement system of the WTO… serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law…"). Those rules are reflected in Articles 31 through 33 of the VCLT. *See India – Solar Cells (Panel)*, para. 6.33; *EC – Chicken Cuts (Panel)*, para. 7.88; *Japan – Alcoholic Beverages II (AB)*, p. 10; *US – Gasoline (AB)*, pg. 17.

[39] DSU Articles 3.2, 7.1.

specialis is made in the alternative.[40] Further, although India references Article 79, we are not aware that India has "invoked" this provision, or explained how it would apply in the WTO context.[41]

26. Article XXVIII of the GATT 1994 – a provision of a covered agreement – and the 1980 GATT Council *Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions* (1980 Procedures)[42] – agreed by WTO Members to apply in circumstances where a Member seeks to make "changes" or "rectifications of a purely formal character" to its Schedule annexed to the GATT 1994[43] – are applicable in this dispute.

27. Notably, the rectification provision in paragraph 2 of the 1980 Procedures is not the proper vehicle where a Member seeks to increase the bound duty rates reflected in its Schedule, or reflect that it is no longer bound by certain commitments.[44] Thus, the United States understands that a Member could, for example, use the rectification provision to change its Schedule in order to reflect "amendments or rearrangements which do not alter the scope of a concession."[45] The 1980 Procedures provide the technical mechanism by which a Member may rectify its Schedule, but the Procedures do not provide an independent basis through which a Member may alter the substance of its commitments. Indeed, India's proposed "rectification" impacting certain tariff lines at issue in this dispute was rejected for this very reason.[46]

28. On the other hand, where a Member seeks to increase the bound duty rates in its Schedule, or reflect that it is no longer bound, the Member is seeking to alter the substance of its commitments and must therefore follow the procedures set forth in Article XXVIII, subject to the negotiation requirements of that provision. In addition, the United States understands that where a Member makes modifications to its Schedule pursuant to Article XXVIII, a Member would also need to follow the 1980 Procedures to modify formally its Schedule annexed to the GATT 1994.[47]

INDIA-JAPAN CEPA (DS584)

13. <u>To all third parties</u>. India asserts that pursuant to the Comprehensive Economic Partnership Agreement between Japan and the Republic of India (India–Japan CEPA),

[40] Korea Third-Party Submission, paras. 10-12.

[41] India First Written Submission, para. 33 and fn. 57 (citing *Russia – Tariff Treatment (Panel)*, para. 7.55 (finding it was not necessary to address whether VCLT Article 79 could be applied cumulatively with the 1980 Procedures).

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

[43] L/4962, para. 2.

[44] L/4962, para. 2.

[45] L/4962, para. 2.

[46] *See* U.S. Third-Party Submission, paras. 37-38.

[47] *See* L/4962, para. 1.

India has issued Notification 69/2011-Customs, which, according to India, "provides for NIL rate of duty to 'products of Japan'", including those covered under heading 8517 and all its subheadings.[48] India thus argues that it does not apply duties on goods of Japan when imported into India in excess of that provided for in Part I of 2007 Schedule.[49]

What is the relevance of tariff concessions granted pursuant to a preferential trade agreement for the purpose of assessing claims under Article II:1 of the GATT 1994?

14. <u>To all third parties</u>. India argues that to establish a violation of the first sentence of Article II:1(b), "Japan must establish that India *actually* applies upon products 'of' territory of Japan, ordinary customs duties in excess of those provided for in 2007 Schedule on their importation into India".[50] Please comment on this argument.

<u>Combined Response:</u>

29. The United States understands Japan to argue that the measures at issue themselves result in a breach of India's tariff commitments under Article II:1.[51] Thus, Japan is not required to demonstrate that India "actually applies" duties in excess of the commitments in India's Schedule to establish a breach in this dispute. India's argument does not reflect the proper interpretive approach for evaluating an "as such" claim that a Member has breached Article II:1 of the GATT 1994.

30. As an initial matter, the burden of proof falls on the complainant to establish a *prima facie* case. Where a measure is challenged on its face (or "as such"), the starting point of the analysis is the text of the measure.[52] Other evidence, such as that involving the application of the measure, may also be examined.[53]

31. Article II:1(b) of the GATT 1994 imposes an obligation on Members not to impose duties in excess of those provided for in the Member's Schedule. It follows that where a measure necessarily denies the treatment set out in a Member's Schedule, a breach of Article II has been established. While evidence relating to the application of the measure – for example, to particular shipments – may be supplied, such evidence is not necessary.

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[48] India's first written submission, paras. 204-205. See also Ibid. para. 13.

[49] India's first written submission, para. 206.

[50] India's first written submission, para. 213. (emphasis added)

[51] *See, e.g.*, Japan's First Written Submission, paras. 13, 31, 112.

[52] *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 168 ("When a measure is challenged 'as such', the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required.")

[53] *See, e.g.*, *US – Carbon Steel (AB)*, para. 157.

32. Prior reports have applied this reasoning. For example, the *China – Auto Parts (Panel)* report states that the panel's inquiry under Article II:1 was "limited to [the] very narrow question [of] whether any aspect of the criteria set out in the measures will necessarily lead to a breach of China's obligations under its Schedule and consequently Article II:1(a) and (b) of the GATT 1994."[54] The report in *EC – IT Products (Panel)* similarly found that if a complainant is "able to establish that the measures operate in such a way as to necessarily deny" the treatment to which the Member has committed, then "a breach of Article II has been established."[55]

33. Therefore, to establish a breach of Article II:1(b) in this dispute, the complainants must show that the measures at issue necessarily lead India to impose duties on one or more products subject to its commitments to provide duty-free treatment.[56] A complainant is not required to show that the challenged measures impose customs duties specifically on goods of that complaining Member.

[54] *China – Auto Parts (Panel)*, para. 7.540.

[55] *EC – IT Products (Panel)*, para. 7.116.

[56] *See, e.g., China – Auto Parts (US) (Panel)*, para. 7.540; *EC – IT Products (Panel)*, para. 7.116.