

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

**(DS582, DS584, and DS588)**

**THIRD PARTY SUBMISSION  
OF THE UNITED STATES OF AMERICA**

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## TABLE OF CONTENTS

<b>I.</b>	<b>Introduction.....</b>	<b>1</b>
<b>II.</b>	<b>India’s Claims Regarding Panel Composition Under Articles 8.6 and 8.7 of the DSU .....</b>	<b>1</b>
<b>III.</b>	<b>India’s Request for a Preliminary Ruling Under Article 6.2 of the DSU .....</b>	<b>2</b>
<b>IV.</b>	<b>General Framework Under Article II of the GATT 1994.....</b>	<b>4</b>
	A. India’s View of the Information Technology Agreement (ITA) .....	5
	B. India is Incorrect that the HS Transposition Process or India’s Rectification Request Would Alter the Commitments in India’s WTO Schedule.....	7
	C. India’s Invocation of VCLT Article 48 (Error) Should be Rejected .....	10
	D. Line Telephone Handsets (HS8518.30.00 ex01) .....	11
	E. India’s Argument Regarding the India-Japan CEPA.....	11
<b>V.</b>	<b>Japan’s Claim Under Article II:1(a) of the GATT 1994.....</b>	<b>13</b>
<b>VI.</b>	<b>Conclusion .....</b>	<b>14</b>

## TABLE OF REPORTS

Short Title	Full Case Title and Citation
<i>Argentina – Textiles and Apparel (AB)</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , 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
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
<i>EC – Chicken Cuts (Brazil) (Panel)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil</i> , WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R
<i>EC – Computer Equipment (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998
<i>EC – IT Products (Panel)</i>	Panel Reports, <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010
<i>Greek Increase in Bound Duty</i>	GATT Group of Experts Report, <i>Greek Increase in Bound Duty</i> (unadopted report, 9 November 1956), L/580
<i>Guatemala – Cement II (Panel)</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, adopted 17 November 2000
<i>India – Solar Cells (Panel)</i>	Panel Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/R and Add. 1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996

<i>Russia – Tariff Treatment (Panel)</i>	Panel Report, <i>Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products</i> , WT/DS485/R, adopted 26 September 2016
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Upland Cotton (Article 21.5 – Brazil) (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW
<i>US – Zeroing (EC) (Article 21.5 – EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW

## I. INTRODUCTION

1. The United States welcomes the opportunity to present its views on the proper legal interpretation of Article II of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and Articles 6 and 8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) as relevant to certain issues in these disputes. This submission includes U.S. views with respect to India’s “preliminary objection” and request for a “preliminary ruling,” as to which the Panel invited the third parties to comment in its April 14, 2021, communication.

## II. INDIA’S CLAIMS REGARDING PANEL COMPOSITION UNDER ARTICLES 8.6 AND 8.7 OF THE DSU

2. The U.S. comments in this section apply to India’s “preliminary objection” in *India – Tariffs on ICT Goods (EU)* (DS582) and *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588). At the request of the complaining parties, the Panel was composed by the Director-General (DG) on August 31, 2020.

3. India requests that the Panel decline jurisdiction in these two disputes due to alleged violations of Articles 8.6 and 8.7 of the DSU in the panel composition process. India raises several concerns, including that the European Union (EU) and Chinese Taipei failed to sufficiently engage in the panel composition process and prematurely sought DG composition, and that the Secretariat failed to meet an obligation under Article 8.6 to propose nominations for the panel members to the parties.<sup>1</sup>

4. As a third party, the United States was not involved in the panel composition process. It is regrettable if any disputing party did not fully engage in seeking to compose the Panel by agreement. The aim of composing panels by agreement is to buttress support for the WTO dispute settlement system, and lack of engagement undermines support and confidence in that system. Nonetheless, India has not presented facts, or a legal interpretation, that could lead this Panel to “decline jurisdiction” under the terms of reference established by the DSB.

5. DSU Article 8 (Composition of Panels) governs the selection of panel members in WTO dispute settlement proceedings. Articles 8.6 and 8.7 of the DSU provide in relevant part:

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the

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<sup>1</sup> India’s First Written Submission (DS582), paras. 1-21; India’s First Written Submission (DS588), paras. 1-21.

covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. [...]

6. Article 8 of the DSU envisions that the parties will engage in the panel composition process with a view to composing a panel by agreement. Accordingly, Article 8.6 contemplates that the parties will consider nominations for the panel proposed by the Secretariat. Article 8.7 allows the DG to compose the panel, at the request of either party, “[i]f there is no agreement on the panelists within 20 days” after panel establishment.

7. Under Article 8.6, regardless of the engagement by the parties or the Secretariat in panel selection, there is no basis for the Panel to *not* consider the matter referred to it by the DSB. There is simply no text in Article 8.6 that relates to establishment of the panel. India appears to allege that the parties requested the DG to compose the panel prematurely. However, it appears that the parties had *not* reached agreement on panel composition in DS582 or DS588 prior to the expiration of the 20-day period in Article 8.7.<sup>2</sup> Accordingly, even setting aside that the action by the DG under Article 8.7 is not a matter for the Panel to review or within the Panel’s terms of reference, India has not brought forward facts that would support a concern that the disputing parties and the DG acted prematurely under Article 8.7.

8. Further, it is evident from the text of Article 8 that panels do not have a role in the composition process. For this reason, prior panels have declined to make findings on the propriety or consistency of their own composition when faced with claims under Article 8.<sup>3</sup> Therefore, there is no basis for the Panel to make findings on the consistency of the composition process with Articles 8.6 and 8.7 of the DSU, or to decline to exercise jurisdiction on that basis.

### III. INDIA’S REQUEST FOR A PRELIMINARY RULING UNDER ARTICLE 6.2 OF THE DSU

9. India argues that the panel requests by the EU, Japan, and Chinese Taipei do not satisfy Article 6.2 of the DSU because the requests do not sufficiently identify some or all of the information and communication technology (ICT) products covered by the measures at issue.

10. DSU Article 6.2 provides that a panel request shall “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” The text of Article 6.2 does not expressly require that a panel request identify specific products to which the measures at issue apply.<sup>4</sup>

11. In the context of challenges under Articles II:1(a) and (b) of the GATT 1994, prior panels and the Appellate Body have considered identification of specific products required only to the

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<sup>2</sup> In DS582, the 20-day period expired July 19, 2020, and the EU’s DG request was made August 19, 2020. In DS588, the 20-day period expired August 18, 2020, and Chinese Taipei’s DG request was made August 20, 2020. The DG composed the panels on August 31, 2020.

<sup>3</sup> See *Guatemala – Cement II (Panel)*, para. 8.11; *US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 8.28; *US – Zeroing (Article 21.5 – EC) (Panel)*, paras. 8.14-8.17.

<sup>4</sup> See *EC – Computer Equipment (AB)*, para. 67; *EC – Chicken Cuts (AB)*, para. 165; *Russia – Tariff Treatment (Panel)*, Preliminary Ruling of the Panel (Annex A-1), para. 2.17.

extent necessary to identify the measures at issue.<sup>5</sup> For instance, panels have considered product identification may be necessary to distinguish amongst challenged measures consisting of a series of individual classification decisions by customs authorities. Where the challenged measures are generally applicable legal instruments, the measures themselves may define the products at issue,<sup>6</sup> but the requirement of Article 6.2 is identification of the measure at issue, not the product affected by that measure.<sup>7</sup> As the *EC – Chicken Cuts (AB)* report explained:

Article 6.2 contemplates that the identification of the products at issue must flow from the specific measures identified in the panel request. Therefore, the identification of the product at issue is generally not a separate and distinct element of a panel’s terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue. In other words, it is the *measure* at issue that generally will define the *product* at issue.<sup>8</sup>

12. Here, the complainants’ panel requests differ in their identification of the measures at issue. The requests for the establishment of a panel by the EU and Chinese Taipei frame the measures at issue as India’s duties on certain ICT products within the scope of enumerated tariff subheadings in India’s WTO Schedule. For each of these subheadings, the requests list India’s applicable domestic legal instruments.<sup>9</sup> Japan’s panel request frames the measures at issue as India’s duties on four enumerated products or product categories. For each product or product category, Japan includes India’s relevant national tariff lines and domestic legal instruments.<sup>10</sup>

13. Accordingly, in considering India’s request for a preliminary ruling, the Panel must address whether identification of specific products would be required to identify the measures at issue in each panel request, or whether the products at issue flow from the identified measures. The United States notes in that regard that each panel request makes the claim that, through certain instruments listed in the request, India imposes duties on goods within the scope of India’s bindings for certain tariff lines in excess of the bindings on those goods set forth in India’s Schedule.

14. India suggests that its argument for product identification is supported by its views on alleged errors in the Harmonized System (HS) transposition process and the proper classification of products under the contested tariff subheadings.<sup>11</sup> However, the Panel’s examination of the

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<sup>5</sup> *EC – Chicken Cuts (AB)*, para. 166 (citing *EC – Computer Equipment (AB)*, para. 67).

<sup>6</sup> *EC – Chicken Cuts (AB)*, para. 165.

<sup>7</sup> *Russia – Tariff Treatment (Panel)*, Annex A-1, para. 2.16 (“[W] recall that the requirement imposed by Article 6.2 is to identify the specific measure at issue, and not the products governed or affected by that measure.”).

<sup>8</sup> *EC – Chicken Cuts (AB)*, para. 165 (emphasis in original).

<sup>9</sup> WT/DS582/9 and WT/DS588/7.

<sup>10</sup> WT/DS584/9.

<sup>11</sup> India’s First Written Submission (DS582), para. 43.

sufficiency of the panel requests under Article 6.2 does not require consideration of substantive arguments or disputed facts that may be explored during the panel proceedings.<sup>12</sup>

15. Finally, India raises concerns that the complainants' *submissions* are not sufficiently precise as to specific products.<sup>13</sup> This argument, however, goes to the merits of the claims, and not to the identification of measures in the panel requests. An Article 6.2 evaluation is a separate inquiry from whether a complaining party has established a *prima facie* case under Articles II:1(a) and (b).<sup>14</sup>

#### IV. GENERAL FRAMEWORK UNDER ARTICLE II OF THE GATT 1994

16. The complainants claim that the measures at issue are inconsistent with Articles II:1(a) and (b) of the GATT 1994.

17. Article II (Schedules of Concessions) imposes an obligation on an importing Member to accord to products of other Members treatment no less favorable than that provided for in its Schedule. Articles II:1(a) and (b) provide in relevant part:

1. (a) Each contracting party shall accord to the commerce of the other contracting parties 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 contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

18. Article II:1(b) makes clear that a Member's tariff bindings as set out in its Schedule of Concessions are a ceiling. The first sentence of Article II:1(b) sets forth a specific kind of "treatment" that would be inconsistent with paragraph (a) in providing that the products listed in Part I of a Member's Schedule shall, on their import, "be exempt from ordinary customs duties in excess of those set forth and provided therein."<sup>15</sup> Accordingly, should a breach of Article II:1(b) be established, it would follow that a breach of Article II:1(a) has also occurred.

19. In summary, to the extent that a Member imposes ordinary customs duties in excess of those provided in Part I of its Schedule, it is in breach of its obligations in Articles II:1(a) and (b) of the GATT 1994.

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<sup>12</sup> *Russia – Tariff Treatment (Panel)*, Annex A-1, para. 2.19.

<sup>13</sup> India's First Written Submission (DS582), para. 47; India's First Written Submission (DS588), para. 48; India's First Written Submission (DS584), para. 30.

<sup>14</sup> *US – Carbon Steel (AB)*, paras. 126-127.

<sup>15</sup> *Argentina – Textiles and Apparel (AB)*, para. 45; see also *EC – IT Products (Panel)*, paras. 7.99-7.100.

20. India largely does not defend its measures based on arguments under Article II. Rather, India’s defense is focused on several flawed arguments concerning the 1996 *Ministerial Declaration on Trade in Information Technology Products* (ITA), the process for HS transposition in WTO Schedules of Concessions, Article 48 of the *Vienna Convention on the Law of Treaties* (VCLT), and the India-Japan Comprehensive Economic Partnership Agreement (CEPA). The United States addresses these arguments below.

#### A. India’s View of the Information Technology Agreement (ITA)

21. India states that “[a]t the heart of this dispute is whether products identified by [the complainants] are covered under [the ITA]”.<sup>16</sup> India appears to suggest that the ITA is the relevant legal instrument to consult in examining India’s tariff commitments.

22. The ITA is not the agreement at issue in these disputes. The agreement and text at issue is the GATT 1994. As is evident from the panel requests, the complainants claim that the measures at issue are inconsistent with Articles II:1(a) and (b) of the GATT 1994. Article II:1 refers to the tariff treatment set forth in a Member’s Schedule of Concessions for goods, which is annexed to the Marrakesh Protocol of the GATT 1994. Pursuant to Article II:7 of the GATT 1994, WTO Members’ Schedules annexed to the GATT 1994 are an integral part of the GATT 1994.<sup>17</sup>

23. As a WTO Member, India committed to bind tariffs as reflected in Schedule XII – India (India’s Schedule).<sup>18</sup> The tariff headings in India’s Schedule establish the scope of India’s concessions.<sup>19</sup> Accordingly, the relevant question before the Panel is whether the measures at issue would impose duties in excess of the bindings in India’s Schedule.

24. Articles 11 and 3.2 of the DSU provide that adjudicators are to interpret and apply relevant provisions of WTO covered agreements in accordance with customary rules of interpretation of public international law. Those rules are reflected in Articles 31 through 33 of the VCLT. Therefore, pursuant to Articles 11 and 3.2, the Panel should consider India’s commitments under Article II:1 to provide the tariff treatment in its Schedule based on the ordinary meaning of the text in context and in light of the object and purpose of the GATT 1994. While the ITA may be considered as relevant context within the meaning of Article 31 for purposes of interpreting the terms of the concessions at issue, the ITA is not the WTO agreement under which the Panel should assess the complainants’ claims.<sup>20</sup>

25. Although the ITA is not the relevant agreement in these disputes, the United States notes that India makes several flawed arguments concerning the ITA. In particular, India makes misleading arguments with respect to “new technologies” developed since the conclusion of the

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<sup>16</sup> India’s First Written Submission (DS582), para. 24; India’s First Written Submission (DS588), para. 25.

<sup>17</sup> See *EC – IT Products (Panel)*, para. 7.16; *EC – Computer Equipment (AB)*, paras. 84, 109.

<sup>18</sup> Schedule XII – India, WT/LET/1072 (September 9, 2015).

<sup>19</sup> *Argentina – Textiles and Apparel (AB)*, para. 46.

<sup>20</sup> See *EC – IT Products (Panel)*, para. 7.65.

ITA and the relevance of the *Declaration on the Expansion of Trade in Information Technology Products* (ITA Expansion).<sup>21</sup>

26. As an initial matter, India’s Schedule reflects its participation in the ITA. After the ITA was concluded in 1996, participants formally modified their WTO Schedules.<sup>22</sup> Participants that were WTO Members at the time of joining the ITA, including India, followed the procedures for the formal rectification and modification of schedules contained in the 1980 GATT Council *Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions* (1980 Procedures),<sup>23</sup> pursuant to paragraph 2 of the Annex to the ITA Ministerial Declaration. India’s Schedule reflecting its ITA commitments was certified effective July 2, 1997.<sup>24</sup>

27. India incorrectly asserts that products constituting “new technologies” developed subsequent to conclusion of the ITA are outside the scope of its WTO duty-free commitments.<sup>25</sup> As explained above, India’s commitments are reflected in its WTO Schedule. India’s commitments do not distinguish between “new technologies” and products existing in 1996 at the time of ITA conclusion.

28. In fact, the ITA that formed the basis for entering into those commitments affirmatively contemplated technological evolution. Article 1 of the ITA provides that Members’ tariff regimes should “evolve” in a manner that “enhances market access for information technology products.” Also, in the Preamble of the ITA, participants expressed a desire to “achieve maximum freedom of world trade in information technology products” and to “encourage the continued technological development of the information technology industry on a world-wide basis.”

29. The United States further notes that virtually all ITA products – including computers, peripherals, cell phones, and digital cameras – incorporate significantly improved features as compared to the products that were available at the time the ITA was concluded. India’s position would undermine the fundamental obligations of Article II:1 of the GATT 1994 by allowing participants to disregard tariff commitments on the basis that a product incorporates or constitutes a perceived new technology.<sup>26</sup>

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<sup>21</sup> *Declaration on the Expansion of Trade in Information Technology Products* (ITA Expansion), WT/L/956 (July 28, 2015).

<sup>22</sup> In accordance with the requirement in the chapeau of paragraph 2 of the ITA to “bind and eliminate” duties.

<sup>23</sup> *Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions* (1980 Procedures), Decision of 26 March 1980, L/4962.

<sup>24</sup> See Certification of Modifications to Schedule XII – India, W/Let/181 (Oct. 2, 1997). Pursuant to that Schedule, India was to phase out duties on all of the ITA products by 2005.

<sup>25</sup> India’s First Written Submission, para. 28.

<sup>26</sup> The United States notes further that the possibility of technological development with respect to tariff concessions is not limited to the information technology sector. The mere fact that a product has newer features or uses different technologies than what was available on the market at the time the concession

30. Next, India argues that the inclusion of products in ITA Expansion, to which India is not a participant, leads to the conclusion that those products are outside the scope of the ITA and therefore India’s WTO commitments.<sup>27</sup> As with the ITA, participants in ITA Expansion agreed to record commitments in their WTO Schedules.<sup>28</sup>

31. Contrary to India’s argument, the inclusion of a product in ITA Expansion does not necessarily signal that it falls outside the scope of the ITA. For instance, there may be overlap in product coverage between the ITA (defined based on HS1996 nomenclature) and ITA Expansion (defined based on HS2007 nomenclature).<sup>29</sup> ITA Expansion negotiators considered the possibility that several products proposed for inclusion in ITA Expansion may in fact have been part of the ITA.<sup>30</sup> Therefore, product coverage between the ITA and ITA Expansion is not necessarily mutually exclusive.

32. In summary, the Panel is called to assess whether India is meeting its existing 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 (that is, the text of the concession) in context and in light of the object and purpose of the GATT 1994. India’s defense premised on its mistaken understanding of the ITA sidesteps the claims presented in these disputes and, in any case, does not reflect a correct reading of the ITA.

#### **B. India is Incorrect that the HS Transposition Process or India’s Rectification Request Would Alter the Commitments in India’s WTO Schedule**

33. India argues further that it is not bound by the challenged tariff subheadings in its WTO Schedule because of alleged errors in the transposition of HS nomenclature from HS2002 to HS2007 in its WTO Schedule. India’s arguments do not reflect an accurate understanding of the HS transposition process or the legal status of its rectification request.

34. Like most WTO Members, India is a party to the *International Convention on the Harmonized Commodity Description and Coding System* (HS Convention) of the World Customs

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was negotiated, is not a basis to exclude it from the scope of that concession. Tariff concessions, including those incorporated into a Member’s Schedule as a result of the ITA, apply to all products – regardless of technological development – that meet the terms of the concession, interpreted based on its ordinary meaning in context and light of the agreement’s object and purpose. 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.

<sup>27</sup> India’s First Written Submission (DS582), para. 28, paras. 140-148.

<sup>28</sup> ITA Expansion, paras. 3-6; WT/MIN(15)/25 (December 16, 2015).

<sup>29</sup> The ITA and ITA Expansion use HS nomenclature for enumerated subheadings in Annex A of those agreements. Annex B contains a list of covered products not defined by HS nomenclature.

<sup>30</sup> See Proposed Additions to Product Coverage: Compilation of Participants’ Submissions: Note by the Secretariat, G/IT/SPEC/15 (February 24, 1998) (indicating notation that certain products are “already covered by the ITA”).

Organization (WCO), which harmonizes tariff nomenclature at the six-digit code level.<sup>31</sup> Members' WTO Schedules describe the tariff treatment Members must accord to products using HS terminology. However, the HS Convention does not contain obligations with respect to tariff treatment.<sup>32</sup> Rather, as explained above, a WTO Member's tariff obligations are contained in its Schedule.

35. The WCO periodically reviews the HS nomenclature to take account of changes in technology and patterns in international trade, and recommends amendments to it.<sup>33</sup> WTO Members then transpose HS updates in their WTO Schedules.<sup>34</sup> As part of this transposition exercise, the WTO General Council decides on specific procedures to introduce and certify HS changes to Members' Schedules, including certification under the 1980 Procedures.<sup>35</sup> Therefore, the HS transposition process reflects the continuation of tariff commitments, not substantive modifications.<sup>36</sup>

36. The 1980 Procedures also establish specific procedures to address perceived errors in a Schedule, provided that those errors do not modify the scope of a concession. In particular, the 1980 Procedures provide, "Changes in the authentic texts of Schedules shall be made when amendments or rearrangements *which do not alter the scope of a concession* are introduced in national customs tariffs in respect of bound items. *Such changes and other rectifications of a purely formal character* shall be made by means of Certifications."<sup>37</sup> For example, Members have made successful requests for technical rectifications to correct typographical errors in HS codes<sup>38</sup> and to delete duplicate headings.<sup>39</sup>

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<sup>31</sup> Contracting parties to the HS Convention may create subdivisions beyond the six-digit level in the HS, "provided that any such subdivision is added and coded at a level beyond that of the six-digit numerical code". HS Convention, Article 3.3.

<sup>32</sup> *International Convention on the Harmonized Commodity Description and Coding System* (HS Convention), Article 9.

<sup>33</sup> HS Convention, Article 7.1(a).

<sup>34</sup> HS contracting parties are required to use HS headings and subheadings without modifications. HS Convention, Article 3.1(a)(i). See *EC – IT Products (Panel)*, para. 7.35.

<sup>35</sup> 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.

<sup>36</sup> 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.

<sup>37</sup> 1980 Procedures, para. 2 (emphasis added).

<sup>38</sup> Rectifications and Modifications of Schedules: Schedule XLII – Israel, G/MA/TAR/RS/612, 11 August 2020.

<sup>39</sup> Rectifications and Modifications of Schedules Annexed to the Marrakesh Protocol: Schedule XIV – Norway, G/RS/2, 3 August 1994.

37. As explained above in subsection IV.A, India’s tariff commitments are contained in India’s Schedule, most recently certified in 2015 reflecting HS2007 nomenclature.<sup>40</sup> In September 2018, citing the 1980 Procedures, India submitted to the Committee on Market Access a draft Rectification under the category “other rectifications.”<sup>41</sup> The draft Rectification included all tariff subheadings at issue in these disputes except HS8504.40 and HS8518.30. According to India, the listed subheadings are unbound because they are “new products” not covered by the ITA and were mistakenly included in India’s Schedule in the HS2002 to HS2007 transposition process.

38. India’s proposal would have substantively altered its WTO commitments with respect to 15 tariff lines from duty-free to unbound. Several Members, including the United States, objected to India’s draft Rectification within the three-month period provided by the 1980 Procedures.<sup>42</sup> Therefore, India’s draft Rectification was *not* approved and certified, and India’s Schedule as previously certified is unaltered.<sup>43</sup> The United States notes that, in *Russia – Tariff Treatment*, the panel 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.<sup>44</sup>

39. The United States also notes that there are procedures available to WTO Members seeking to modify or withdraw their tariff commitments, as provided in GATT 1994 Article XXVIII (Modification of Schedules). The 1980 Procedures and the General Council procedures for HS2007 nomenclature updates explicitly refer to Article XXVIII as a distinct action for modifying the scope of tariff concessions.<sup>45</sup> Were India to seek to modify its Schedule, it would need to enter into negotiations with affected Members and offer substantially equivalent concessions, or potentially face compensatory adjustments by those affected Members. India has not availed itself of the Article XXVIII procedures with respect to the tariff lines at issue.

40. In summary, the HS transposition process does not alter the tariff commitments in Members’ WTO Schedules. India’s draft Rectification request was not approved and certified according to established procedures and, therefore, India’s Schedule as certified sets forth its tariff commitments.

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<sup>40</sup> WT/LET/1072 (September 9, 2015); Certification of Modifications and Rectifications to Schedule XII – India, WLI/100 (Sept. 9, 2015).

<sup>41</sup> G/MA/TAR/RS/572 (September 25, 2018).

<sup>42</sup> 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.

<sup>43</sup> *See* Secretariat Note on Situation of Member Schedules, G/MA/W/23/Rev.17, 14 April 2021, p.54.

<sup>44</sup> *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 VCLT where objections were raised.

<sup>45</sup> *See* 1980 Procedures, para. 1; *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 para. 15; Annex 2, para. 5.

### C. India’s Invocation of VCLT Article 48 (Error) Should be Rejected

41. India purports to invoke Article 48 (Error) of the VCLT on the basis that the disputed tariff lines are invalid because of the HS2007 transposition. According to India, this invocation invalidates its consent to be bound by the relevant lines in its WTO Schedule.<sup>46</sup>

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

43. One aspect of the VCLT is expressly referred to in the DSU. Article 3.2 of the DSU provides that the dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with *customary rules of interpretation* of public international law.”<sup>47</sup> Therefore, panels are to interpret and apply relevant provisions of WTO covered agreements in accordance with customary rules of interpretation of public international law. Those rules are reflected in Articles 31 through 33 of the VCLT.<sup>48</sup> As explained above, WTO Members’ Schedules annexed to the GATT 1994 are an integral part of that agreement, pursuant to Article II:7. As constituent text to the WTO Agreement, a Schedule should therefore be interpreted in accordance with customary rules of interpretation reflected in Articles 31 through 33.<sup>49</sup> The express reference to customary rules of interpretation of public international law in DSU Article 3.2 is further reason to conclude that VCLT Article 48 is not applicable to this dispute.

44. Moreover, from the argument presented, it would not appear that India has established the factual basis for its claim. As discussed above in subsection IV.B, WTO Members have agreed to follow specific procedures for transposition of HS nomenclature in Members’ Schedules. Further, India is a member of the WCO and HS Convention. India would have been able to follow the WCO process for HS updates for the disputed tariff subheadings as later

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<sup>46</sup> India’s First Written Submission (DS582), paras. 55-91.

<sup>47</sup> Emphasis added.

<sup>48</sup> 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.

<sup>49</sup> *EC – Computer Equipment (AB)*, para. 84 (“the concessions provided for in [a Member’s] Schedule are part of the terms of the [GATT 1994]” and, “[a]s 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*.”); see also *EC – IT Products (Panel)*, paras. 7.65, 7.101.

transposed in WTO Member Schedules.<sup>50</sup> Therefore, India’s involvement in these processes would appear to undermine its claim of error.

45. In short, Article 48 of the VCLT is not applicable in these disputes because it is not a customary rule of interpretation within the meaning of Article 3.2 of the DSU. And, in any event, India has not established the factual basis for its claim of alleged error.

#### **D. Line Telephone Handsets (HS8518.30.00 ex01)**

46. The U.S. comments in this section apply to claims raised by the EU and Chinese Taipei in *India – Tariffs on ICT Goods (EU)* (DS582) and *India – Tariffs on ICT Goods (Chinese Taipei)* (DS588).

47. Specifically, the EU and Chinese Taipei claim that India is imposing duties on line telephone handsets, which are bound duty-free under HS8518.30.00 ex01 in India’s Schedule.<sup>51</sup> In response, India argues that it classifies “line telephone handsets” under two different lines in its national schedule (8517.11 and 8517.18), subject to duty-free treatment, and therefore India is fulfilling its ITA commitments.<sup>52</sup>

48. Although this is a factual question to be resolved by the Panel, the United States notes that India’s WTO Schedule reflects a duty-free commitment for HS8518.30.00 ex01 “—Line Telephone Handsets”.<sup>53</sup> Therefore, to the extent that India’s measures impose duties on products within the scope of HS8518.30.00 ex01, India would not be providing the duty-free treatment required by its Schedule.

49. Even according to India’s reading of its commitments (that is, that the ITA is the agreement that sets forth those commitments), there have been no HS nomenclature updates to HS8518.30 since ITA conclusion. The nomenclature for this subheading was not updated from HS1996 to HS2002, or from HS2002 to HS2007. Therefore, notwithstanding intervening transpositions, HS8518.30.00 ex01 in India’s Schedule should reflect the version of India’s schedule that was certified in the wake of the ITA.<sup>54</sup>

#### **E. India’s Argument Regarding the India-Japan CEPA**

50. As noted above, the Panel in this dispute is tasked with assessing whether India is meeting its existing 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 in context and in light of the object and purpose of the GATT 1994. However, having asserted that the ITA is the agreement

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<sup>50</sup> See Chinese Taipei’s First Written Submission, paras. 3.8-3.21.

<sup>51</sup> EU’s First Written Submission (DS582), paras. 155-163; Chinese Taipei’s First Written Submission (DS588), paras. 4.78-4.88.

<sup>52</sup> India’s First Written Submission (DS582), paras. 222-230, 239.

<sup>53</sup> WT/LET/1072 (September 9, 2015).

<sup>54</sup> W/LET/181.

at issue, India offers its only interpretive arguments with respect to Article II of the GATT 1994 in response to Japan’s claims that India’s measures violate Articles II:1(a) and II:1(b).

51. In particular, India argues that Article II includes a concept of origin that is not provided for in a Member’s Schedule,<sup>55</sup> and appears to argue further that because India provides duty-free treatment to originating goods of Japan under domestic rules implementing a preferential arrangement with Japan (CEPA), it does not impose duties in excess of the commitments set forth in its Schedule.<sup>56</sup>

52. The United States understands the complainants in this dispute, including Japan, to argue that the measures at issue themselves result in a breach of India’s tariff commitments under Article II:1.<sup>57</sup> To establish a breach of Article II:1(b), therefore, the complainants must show that the measures necessarily lead India to impose duties on one or more products subject to its commitments to provide duty-free treatment.<sup>58</sup> A complainant is not required to show that the challenged measures impose customs duties specifically on goods of that complaining Member (for example, Japan). India’s argument would appear to go to whether Japan suffers actual nullification or impairment, an issue that may become relevant at a later stage of the dispute.

53. Nor does the United States consider that, even if goods of Japan are entitled to duty-free treatment under India’s preferential measures, this establishes a defense to a breach of Article II:1(b). As acknowledged by the panel in *EC – IT Products*, “the issue before [the panel] is whether the scope of the . . . duty-free concessions include some products with characteristics that, by virtue of the . . . measures, are excluded from duty-free treatment. If the obligations do include such products, and if the effect of the . . . measures is necessarily to deny such products duty-free treatment, then we would consider that an ‘as such’ breach of the . . . commitments will have been established.”<sup>59</sup>

54. As such, the United States does not consider India’s argument that Article II does not itself impose a substantive requirement with respect to the determination of origin or its discussion of what it characterizes as negotiating history of Article II<sup>60</sup> to be relevant to this dispute. However, the United States notes that it does not follow from India’s argument that a Member may determine for purposes of the tariff treatment provided for in its WTO Schedule that *some* goods of a Member will be afforded that treatment (such as goods that meet a preferential rule of origin under the terms of a non-WTO agreement), but not others, or that

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<sup>55</sup> India’s First Written Submission (DS584), paras. 223, 231, 240.

<sup>56</sup> India’s First Written Submission (DS584), paras. 241, 243, 245.

<sup>57</sup> See, e.g., EU’s First Written Submission, paras. 68, 73; Japan’s First Written Submission, paras. 13, 31, 112; Chinese Taipei’s First Written Submission, paras. 3.29, 5.5.

<sup>58</sup> See, e.g., *China – Auto Parts (US) (Panel)*, para. 7.540; *EC – IT Products (Panel)*, para. 7.116.

<sup>59</sup> *EC – IT Products (Panel)*, para. 7.113.

<sup>60</sup> India’s First Written Submission (DS584), paras. 218-240.

goods from *some* Members may qualify for the treatment provided in its Schedule, but not others.

## V. JAPAN’S CLAIM UNDER ARTICLE II:1(A) OF THE GATT 1994

55. Japan also challenges India’s measures under Article II:1(a) of the GATT 1994 on the basis of “the potential of deleterious effects on competition arising from these exemptions,” even to the extent that India provides tariff exemptions that are not subject to any terms or conditions.<sup>61</sup> Japan asserts that the exemptions do not provide any information regarding the basis on which they might be granted, modified, or terminated, and may be modified at any time during the year, creating unpredictability.<sup>62</sup> In response, India argues that its duty exemptions do not have a limited period of validity, and that because Article II does not require a WTO Member to implement its tariff commitments in any particular way, the manner in which it administers tariffs cannot create uncertainty or unpredictability.<sup>63</sup>

56. As explained above in section IV, the language of Article II makes clear that the bindings set forth in a Member’s Schedule act as a ceiling, such that a tariff imposed in excess of those bindings constitutes “less favourable” treatment than that provided for in its Schedule. As the complainants note,<sup>64</sup> prior reports have therefore found that a measure that imposes duties “in excess of” the bound rate established in a Member’s Schedule, inconsistent with Article II:1(b), also results in duty treatment “less favourable” than that provided in the Schedule for purposes of Article II:1(a).<sup>65</sup> As such, if the Panel finds that the measures at issue impose duties in excess of the bound rates set forth in India’s Schedule, then it should also find those measures inconsistent with Article II:1(a) on that basis, and need not reach Japan’s other claim.

57. That said, although the United States agrees that Article II:1(a) does not require a Member to implement its tariff commitments in a specific manner, the United States notes that, as described by the complainants, the determination of the availability of an exemption with respect to a particular product appears quite complex. The United States also understands that it is incumbent on an importer to claim the benefit of an exemption from India’s customs tariffs.<sup>66</sup> As such, even if India’s argument that exemptions are available for the product at issue is correct, it is not clear to what extent importers are able to identify and claim the applicable exemptions and in turn benefit from the tariff treatment set forth in those exemptions. The United States understands that importers bear certain responsibilities in import transactions; the ability to exercise those responsibilities would seem to depend on the availability of information

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<sup>61</sup> Japan’s First Written Submission, para. 133.

<sup>62</sup> Japan’s First Written Submission, paras. 135-137.

<sup>63</sup> India’s First Written Submission, paras. 253-261.

<sup>64</sup> EU’s First Written Submission, para. 71; Japan’s First Written Submission, para. 129; Chinese Taipei’s First Written Submission, para. 5.3.

<sup>65</sup> See, e.g., *Argentina – Textiles and Apparel (AB)*, para. 45; *EC – ITA (Panel)*, para. 7.747; *EC – Chicken Cuts (Panel)*, para. 7.73.

<sup>66</sup> See, e.g., India’s First Written Submission (DS582), para. 229 (“an importer/exporter can choose to import their goods under either of the notifications”); EU’s First Written Submission, paras. 51-53.

regarding applicable requirements. Regardless of how a WTO Member chooses to implement its tariff commitments, Article II:1(a) obligates it to provide treatment “no less favourable” than that set forth in its Schedule.

## **VI. CONCLUSION**

58. The United States appreciates the opportunity to submit its views in connection with these disputes on the proper interpretation of relevant provisions of the GATT 1994 and the DSU.