WORLD TRADE ORGANIZATION

WT/DS582/16

14 December 2023

(23-8561)

Page: 1/11

Original: English

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

NOTIFICATION OF AN APPEAL BY INDIA UNDER ARTICLE 16.4 AND ARTICLE 17.1 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 8 December 2023, from the delegation of India, is being circulated to Members.

---

1. Pursuant to Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), India hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal to the Appellate Body ("AB") regarding certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *India – Tariff Treatment on Certain Goods in the Information and Communications Technology Sector* (WT/DS582/R).

2. Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, India simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to India's ability to rely on other paragraphs of the Panel Report in its appeal.

4. India seeks review by the Appellate Body of the errors of law and legal interpretation by the Panel in its Report and requests findings by the Appellate Body as noted below. Non-appeal of an issue does not signify agreement therewith.

5. For the reasons to be further elaborated in its submissions to the Appellate Body, India appeals, and requests the Appellate Body to reverse, modify, or declare moot and of no legal effect, the findings, conclusions, rulings and recommendations of the Panel, with respect to the following errors of law or legal interpretations contained in the Panel Report:

I. COMPOSITION OF THE PANEL

6. The Panel has committed legal errors in Sections 2.2 and 3.2 of its Decision dated 7 July 2021. The Panel erred in its interpretation and application of Articles 8.6 and 8.7 of the DSU, in so far as the Panel found that its composition was not in violation of the said Articles of the DSU. In particular, the Panel erred because, *inter alia*:

a) the Panel did not afford an opportunity to India to adequately pursue its claims and establish the facts in the proceedings in the substantive meetings, thereby violating India's due process rights in the proceedings.

b) Article 8 of the DSU contains a hierarchy of procedure, whereby a party can request the Director-General ("DG") to compose a Panel under Article 8.7 only when the

parties to the dispute, having first followed the steps outlined in Article 8.6, are unable to agree on the composition of the Panel. As the Panel has noted, "the main responsibility for the composition of a panel rests with the parties and, in certain circumstances, with the Director-General".[1] Such responsibility for composition of parties can only be fulfilled by the Parties via procedures under Article 8.6 of the DSU. It is only when the parties are unable to do so through Article 8.6, that recourse to the composition of the Panel through Article 8.7 may be taken.

c) Article 8.6 places a "positive obligation" on the Secretariat to propose nominations for a panel to the parties, as reflected in the use of the term "shall" in that provision.[2] However, the Secretariat did not propose the names of potential panellists despite India's requests.

d) Article 3.10 of the DSU provides that the "Members will engage in these proceedings in good faith in an effort to resolve the dispute". The EU has not acted in good faith by altogether bypassing any attempt at a mutual selection of the Panellists, and by directly approaching the DG for the composition of Panel.

e) the Panel has erroneously concluded that it has no basis in Article 8.7 or generally in the DSU that would allow it, in this case, to review the propriety of the Panel's composition, as determined by the DG by virtue of the discretionary authority conferred by Article 8.7.[3] Article 1.1 of the DSU provides that the DSU is applicable to disputes brought pursuant to dispute settlement provisions of the covered agreements. Appendix 1 of the DSU lists the DSU itself as a covered agreement. Article 3.2 entrusts the Panel 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." Thus, Article 1.1 of the DSU read with Article 3.2 of the DSU provides the Panel with the basis to interpret Article 8.7 of the DSU.

Further, the reports cited by the Panel in support of its position are not applicable to the facts of the case. The Panels were faced "with an objection to the *propriety of their composition* – determined by the Director-General under Article 8.7…".[4] As opposed to previous Panels, where the propriety of the Panel was challenged on grounds such as the nationality of Panelists, the objectivity and independence of the Panel, and the application of DSU provisions by the DG[5] — all of which relate to *how* the discretion by the DG has been exercised. Rather, the issue in the case is whether the procedure under the DSU has been followed *before* the discretion was exercised by the DG. A ruling by the Panel regarding the procedural aspects of the dispute would be in consonance with Article 1.1 of the DSU.[6]

f) the Panel has inherent powers to determine its jurisdiction. The principle of *competence de la competence* is a well-established principle in the WTO.[7] The Panel

[1] Panel Report, *India – Tariff Treatment of ICT Goods (European Union)*, Annex E-2, Para. 3.17 (hereinafter "Preliminary Ruling"); Panel Report, *Guatemala – Cement II,* Para. 8.11.

[2] Panel Report, *Korea-Radionuclides,* Paras. 7.426-7.433; Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steel")*, Paras. 57 and 59.

[3] Preliminary Ruling, Para. 3.14.

[4] Preliminary Ruling, Para. 3.13.

[5] Panel Reports of *Guatemala — Cement II*, Para. 8.10 (Guatemala challenged the composition of the Panel as it "consider[ed] that the presence on this Panel of a member who served on a previous panel relating to the same matter […] detracts from the objectivity and independence that a panel should have when reviewing a matter brought before it"; *US — Upland Cotton (Article 21.5 — Brazil)*, Para. 8.28 ("The Panel considers that it is not within its authority under the DSU to make a "finding or ruling" on an issue that has not been raised by any of the parties to the dispute and which concerns the application by the WTO Director-General of the DSU provisions regarding panel composition"); and *US — Zeroing (EC) (Article 21.5 – EC)*, Paras. 8.10-8.17 (EU challenged the propriety of the Panel on the basis that the US cannot unilaterally revoke Article 8.3 of the DSU, and the Panel should have included Members of the original Panel, who included citizens of the Members who are parties to the dispute.).

[6] Panel Report, *Argentina — Poultry Anti-Dumping Duties*, Para. 7.12.

[7] Appellate Body Report, *Mexico – Taxes on Soft Drinks,* Para. 45; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US),* Para. 53; Appellate Body Report, *US – 1916 Act*, Para. 54.

dismisses India's argument, stating that it cannot be assumed that deficiencies in the Panel composition process under Articles 8.6 or 8.7, would bear on whether the Panel has "validly established jurisdiction".

Further, the Panel has dismissed India's reliance on *Mexico — Corn Syrup (Article 21.5 – US)* and *US — 1916 Act*, on the basis that the "need for panels to verify the validity of their jurisdiction were not made in the context of allegations of deficiencies in the panel composition process".[8] The Panel erred because the competence/ability of the Panel to decide its jurisdiction encompasses the competence/ability of the Panel to decide whether its composition was valid.

7. India, therefore, requests the Appellate Body to reverse or set aside the Panel's conclusions as well as the Panel's legal interpretations contained in paragraphs 2.4 to 2.11 and 3.10 to 3.19 of its Decision dated 7 July 2021 enclosed as Annex E-2 to the Panel Report. Consequently, India also requests the Appellate Body to declare moot and of no legal effect the Panel's conclusions and findings contained in Section 8 of the Panel Report.

II. THE ITA IS RELEVANT AND LIMITS/MODIFIES THE SCOPE OF THE TARIFF COMMITMENTS SET FORTH IN INDIA'S WTO SCHEDULE.

8. The Panel has committed legal errors in Section 7.3.2.2.3, Paras. 7.13 and 7.61 of the Panel Report. The Panel erred in its interpretation of the relationship of the Information Technology Agreement ("ITA-1" or "the ITA") with India's WTO Schedule and/or failed to make an objective assessment pursuant to Article 11 of the DSU, because the Panel found that there is "no textual link in the GATT 1994 indicating that Members' legal obligations, for the purposes of applying Articles II:1(a) and (b), could be contained in the ITA".[9] The Panel erred because the inscriptions in Columns G and H of the worksheet titled "Part I Section II" of India's Combined Tariff Schedule (CTS) explicitly refer to WT/Let/181[10] through which India incorporated its commitment under the ITA-1 in its WTO Schedule and accordingly, WT/Let/181 must be interpreted according to the ITA.[11]

9. The Panel has committed legal errors in Section 7.3.2.3.3 of the Panel Report. The Panel erred in its interpretation of the relationship of the ITA with India's WTO Schedule and/or failed to make an objective assessment pursuant to Article 11 of the DSU, in so far as the Panel found that the ITA does not limit the scope of tariff commitments set forth in India's WTO Schedule. At the outset, it is submitted that the Panel has erred in Section 7.3.2.3.3 by applying the interpretative tools for interpretation of ITA to directly interpret India's WTO Schedule. The Panel overlooks the inscriptions in Columns G and H of the worksheet titled "Part I Section II" of India's Combined Tariff Schedule (CTS) which explicitly refer to WT/Let/181[12] through which India incorporated its commitment under the ITA-1 in its WTO Schedule. Further, the Panel erred because, *inter alia*:

a) the Panel's interpretation in Para 7.68 is at odds with its interpretation in Para 7.45 as India's Combined Tariff Schedule (CTS) explicitly refer to WT/Let/181 through which India incorporated its commitment under the ITA-1 in its WTO Schedule.

b) the Panel incorrectly noted, in Para. 7.69 of its Report, that India's interpretation is at odds with the multilateral principles of reciprocity and mutually advantageous arrangements underpinning the multilateral trading system.

Contrary to the Panel's interpretation, it is precisely because of the principles of reciprocity and mutually advantageous arrangements that India's interpretation is correct. The ordinary meaning of the term "reciprocal" is "[o]f the nature of a return made for something; given, felt, shown, etc., in return", and "[e]xisting on both sides; mutual; (of two or more things) done, made, etc., in exchange".[13] The products which, as the EU alleges, should be given tariff-free treatment were never covered under the ITA and hence were not negotiated. Even if the products were covered under the ITA,

[8] Preliminary Ruling, fn. 49.
[9] Panel Report, *India – Tariff on ICT Goods*, Para. 7.38 (hereinafter "Panel Report").
[10] Combined Tariff Schedule of India, Part I Section II, Rows 5427, 5526 to 5541, 5554 and 5808.
[11] India Second Written Submissions, paras. 34 to 42.
[12] Combined Tariff Schedule of India, Part I Section II, Rows 5427, 5526 to 5541, 5554 and 5808.
[13] Panel Report, *EU – Poultry (China)*, para. 7.297.

the ITA was a *sui generis* agreement with broad and generalised coverage, as opposed to a request-offer negotiation. Further, the concessions under the ITA were available to all WTO Members, and not only to the ITA participants. Accordingly, ITA does not follow the multilateral principles of reciprocity and mutually advantageous arrangements, and India has not received any reciprocal benefits in exchange for the alleged concessions.

c) the Panel erred in its interpretation and application of the ITA and/or failed to make an objective assessment pursuant to Article 11 of the DSU, in Para. 7.70-7.72 of its Report by mischaracterising India's arguments and incorrectly interpreting the product scope of the ITA. It is not India's case that "products coming into existence after the conclusion of the ITA […] would be excluded from the coverage of Members' existing WTO commitments."[14] India submits:

- that the language in the Annex to the ITA[15] providing for a meeting of the parties for modification of the product scope in light of technological development clearly shows that the product scope of the ITA is static.

- that the parties to the ITA have given special meaning to the terms of the ITA (and consequent to WT/Let/181) under Article 31(4) of the VCLT, limiting the product scope to HS1996 and its explanatory notes.[16]

- that for the purposes of Article 31(4), the universe of parties is limited to ITA participants. Therefore, HS 1996 and its explanatory notes constitute special meaning given by "all parties to a treaty", i.e. all parties to the ITA.

- that as communicated by India to the Panel, the term "new product" in India's submissions refers to products not covered by the HS1996 and its explanatory notes, and not to products which came into existence after the conclusion of the ITA as characterised by the Panel.[17]

Accordingly, the meaning ascribed by the ITA and WT/Let/181 should continue to govern India's WTO Schedule.

d) it erred in its interpretation in Para. 7.75 of its Report and has mischaracterised India's arguments, as India has used the ITA Expansion to confirm the product scope of the ITA and WT/Let/181, and not India's WTO Schedule. Thus, ITA Expansion is a subsequent practice of some Members of the ITA-1, which confirms the product scope of the ITA-1 and WT/Let/181.[18]

e) it erred in its interpretation in Para. 7.76 of its Report as ITA-1 and WT/Let/181 remain relevant to interpret India's WTO Schedule which is evident from the inscriptions in Columns G and H of the worksheet titled "Part I Section II" of India's Combined Tariff Schedule (CTS).[19] Accordingly, the statements/practices cited by India[20] are relevant as subsequent practice for the interpretation of the ITA-1 and WT/Let/181 under Article 31(3)(b) of the VCLT.

f) it erred in its interpretation and/or failed to make an objective assessment pursuant to Article 11 of the DSU, in Para 7.77 to 7.78 of its Report as none of the products at issue have been identified in G/IT/SPEC/15 with a notation that such products at issue

[14] Panel Report, Para. 7.70.
[15] Ministerial Declaration on Trade in Information Technology Products (13 December 1996) WT/MIN (96)/16, Annex Para. 3 (hereinafter "ITA-1").
[16] ITA-1, Para. 2(a).
[17] India's Response to Panel's Question No. 62; India's Second Written Submissions, Paras. 57 to 59.
[18] M.E. Villiger, Commentary *on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009) Pages. 445-446
[19] Combined Tariff Schedule of India, Part I Section II, Rows 5427, 5526 to 5541, 5554 and 5808.
[20] India's First Written Submissions, Paras. 103 to 123, 137 to 148; India's Second Written Submissions, Paras. 49 to 70.

were part of the ITA-1.[21] In addition, G/IT/SPEC/15 cannot be preparatory material of ITA Expansion because preparatory material is the material which was generated during the negotiating process of ITA Expansion.

10. India, therefore, requests the Appellate Body to reverse or set aside the Panel's conclusions and the Panel's legal interpretations contained in Paras. 7.36 to 7.46, 7.60 to 7.81, 7.253, 7.278, 7.292, 7.319, 7.333 and 7.366, and complete the analysis regarding the applicability of Article 48 of the VCLT. Consequently, India also requests the Appellate Body to declare moot and of no legal effect the Panel's conclusions and findings contained in Section 8, paragraphs 8.1(a)(i), 8.1(b), 8.2 and 8.3 of the Panel Report.

III. ORDER OF ANALYSIS OF ARTICLE 48 OF THE VIENNA CONVENTION ON LAW OF TREATIES ("VCLT").

11. The Panel has committed legal errors in Section 7.3.3.1 of the Panel Report. The Panel erred in its interpretation and application of the legal standard for Article 48, in so far as the Panel found that "it would only be necessary for us to take a position on this issue if it is the case that the substantive requirements of Article 48 are indeed satisfied."[22] In particular, the Panel erred because the order of analysis conducted by the Panel is not correct. The analysis does not support the "fundamental structure and logic"[23] of the provision, as the analysis of the requirements of Article 48 cannot be undertaken without deciding the applicability of the provision. Specifically, the analysis by the Panel is not in accordance with the standard set by the Appellate Body in *China – Publications and Audiovisual Products* and *US – Large Civil Aircraft (2nd complaint)*.[24] Further, in the event that Appellate Body disagrees with the Panel's findings, and as requested by India, reverses the findings of the Panel with respect to substantive requirements of Article 48 of the VCLT, there would be no finding by the Panel on the applicability of Article 48 in the present dispute.[25]

12. India, therefore, requests the Appellate Body to reverse or set aside the Panel's conclusions and the Panel's legal interpretations contained in paragraph 7.89 and complete the analysis regarding the applicability of Article 48 of the VCLT. Consequently, India also requests the Appellate Body to declare moot and of no legal effect the Panel's conclusions and findings contained in paragraph 7.213 and Section 8, paragraphs 8.1(a)(ii), 8.1(b), 8.2 and 8.3 of the Panel Report.

IV. APPLICATION OF ARTICLE 48(1) OF VCLT.

A. The Panel erred in its analysis on the requirement of existence of India's assumption that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings.

13. The Panel has committed legal errors in Section 7.3.3.2.3.2 of the Panel Report. The Panel failed to make an objective assessment pursuant to Article 11 of the DSU, in so far as the Panel observed that India's statements do not indicate that India assumed that the transposition of its Schedule would not expand the scope of its WTO tariff commitments beyond the scope of its ITA undertakings. Contrary to Panel's reasoning, the statements are unequivocal evidence of India's well-known position against the expansion of the commitments under the ITA.

14. India, therefore, requests the Appellate Body to reverse or set aside the Panel's conclusions contained in paragraphs 7.108 to 7.112.

B. The Panel erred in its analysis of the requirement of India's Assumption forming an essential basis of India's consent to be bound by its WTO Schedule.

15. The Panel has committed legal errors in Section 7.3.3.2.3.4 of the Panel Report. The Panel erred in its interpretation and application of Article 48(1) of the VCLT and/or failed to make an objective assessment pursuant to Article 11 of the DSU, in so far as the Panel found that India's

[21] India's Second Written Submission, Paras. 80 to 82.
[22] Panel Report, Para. 7.89.
[23] Appellate Body Report, *US – Shrimp*, Para. 119; Appellate Body Report, *Canada – Autos*, Para. 151.
[24] Appellate Body Report, *China – Publications and Audiovisual Products*, Para. 213; Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, Para. 739.
[25] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, Para. 741.

assumption (i.e. that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings) did not constitute an essential basis for its consent to be bound by its HS2007 Schedule. In particular, the Panel erred because, *inter alia*:

a) it failed to make an objective assessment of the matter before it in Paras. 7.131 and 7.132 by failing to evaluate the correct meaning of India's statements and observed that India was on notice that there was a difference of opinion among ITA participants regarding certain classification issues. Contrary to Panel's reasoning, the statements are unequivocal evidence of India's well-known position against the expansion of the commitments under the ITA. The statements do not demonstrate that India was aware that the transposition could have led to an expansion of tariff commitments beyond obligations under the ITA.

b) it incorrectly interpreted and applied Article 48(1) of the VCLT in Para. 7.134, in finding that India should have made it obvious that it would not be willing to be bound by its Schedule if it was broader than the scope of its obligations in the ITA. Article 48(1) only requires that the mistakenly assumed fact or situation form an essential basis of consent to be bound by the treaty. This assessment needs to be undertaken from the perspective of the erring State.[26] Since the requirement cannot be based on a subjective appreciation of the concerned State, assessment of the same must be tested against an objective yardstick – whether a third State in a similar situation would also have refrained from giving its consent had it known the real fact or situation.[27] There can be no doubt that no State would agree to a transposition which adds unnegotiated concessions to its schedule of concession, with no reciprocal benefit.

c) the application by the Panel of the legal standard under Article 48(1) in Para. 7.134 of its Report is inherently contradictory, and not based in law. India submitted that it had assumed that "the HS2007 transposition did not expand India's tariff commitments beyond India's obligations under the ITA",[28] which was accepted by the Panel in Paragraph 7.116 of its Report. The Panel while assessing the condition of whether this assumption formed an essential basis of the State's consent to be bound by the treaty, noted in Paragraph 7.134 of its report that India should have made it obvious that it would not be willing to be bound by its Schedule if it's broader than the scope of its obligations in the ITA. If India had known of the fact that the HS 2007 transposition would make the Schedule broader than the static commitments under the ITA, it would not have agreed to *certify* it. Essentially, while the Panel accepts India's assumption of error on one hand, the legal standard adopted by the Panel expects India to have made this assumption obvious to the Member States *before* the error even occurred.

d) the application by the Panel of the legal standard under Article 48(1) is erroneous because Article 48(1) of the VCLT does not require that "assumption" must be precisely communicated to the Parties to the treaty before such error relating to the said assumption has *occurred*. The Panel has inserted this additional criterion, not supported in text or the State practice.

16. India, therefore, requests the Appellate Body to reverse or set aside the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.123 to 7.137. Consequently, India also requests the Appellate Body to declare moot and of no legal effect the Panel's conclusions and findings contained in Paras. 7.155 to 7.156, 7.212 to 7.213, 7.206, 7.253, 7.278, 7.319, 7.333 and 7.366 and Section 8, paragraphs 8.1(a)(i), (ii), 8.1(b), 8.2 and 8.3 of the Panel Report.

C. The Panel erred in its analysis of requirement of India's Assumption being in error.

17. The Panel has committed legal errors in Section 7.3.3.2.3.5 of the Panel Report. The Panel erred in its interpretation and application of Article 48(1) of the VCLT and/or failed to make an

[26] Rensmann, 'Article 48' in Oliver Dörr, Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (2nd edn., Springer, 2018), Page 892.

[27] *Id.*

[28] India's First Written Submission, Para. 27, Panel Report, Para. 7.105.

objective assessment pursuant to Article 11 of the DSU, in so far as the Panel found that India's assumption (i.e. that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings) was not in error. In particular, the Panel erred because, *inter alia*:

a) it erred in its interpretation of the relevance of the ITA in Para. 7.141. While the implication of the statement "[w]e recall that the ITA is not a covered agreement"[29] is ambiguous, it seems that the Panel has implied that it cannot interpret the ITA for assessing whether India's assumption is in error. The Panel has erred in making such an inference as the defence in a dispute does not need to be limited to a covered agreement. The limitations of Article 1.1 of the DSU are applicable only upon the "disputes pursuant to the consultation and dispute settlement provisions of the [covered agreements]". India is relying on the ITA as a defence, and thus the Panel may not refuse to interpret the ITA for the sole reason of it not being a covered Agreement.[30]

b) the Panel erred in its interpretation of and/or failed to make an objective assessment of the transposition process in Para. 7.142 of its report. Whether the correlation tables were followed in the transposition process is immaterial to the question of India's error. What is relevant is whether the complex technical transposition was flagged in accordance with the transposition procedure.[31]

c) the Panel erred in the legal standard applied by it in Paras. 7.142-7.143 of its report. The Panel has stated that since India has not argued that the transpositions conducted by the WTO Secretariat were inconsistent with the correlation tables communicated by the WCO. While the Panel does not form a definitive conclusion on the fourth element,[32] the Panel's 'observations' seem to imply that the requirements for this element have not been met. The Panel seem to imply that since the correlation tables have been followed, there is no error in the treaty. However, the WCO corelation tables do not ascribe bound rate of "Nil" to a particular heading or sub-heading whose definition itself has undergone a change. In addition, the fact or situation which is *sufficiently proximate to the subject matter of the treaty*[33] need not be explicit in the treaty. An error in terms of Article 48, is an assumed fact or situation, which is subsequently found to have no existence.[34] India's consent was based on the assumption that the HS2007 transposition would not expand India's obligations under India's WTO Schedule, beyond the ITA. This error is an assumed fact, which is subsequently found to have no existence and has been the basis of India's consent.

d) it has summarily dismissed India's nuanced arguments on error committed in the transposition of its 2007 Schedule. In Para. 7.143, the Panel has simply stated that the Panel "ha[s] already concluded above that India is mistaken with respect to the relationship between the ITA and its WTO schedule". India in its submissions to the Panel, has stated multiple times that the relevance of the ITA is twofold: as a comparative benchmark for determination of the error in the 2007 Schedule, and as context to India's WTO Schedule.[35] By making reference to the earlier Section on "[w]hether the ITA limits or modifies the scope of the tariff commitments set forth in India's WTO Schedule", the Panel has committed a grave error in conflating the two grounds. Further, the Panel has misconstrued India's argument on error, by assuming that India requests the Panel to interpret its Schedule differently. Rather, India has argued that a comparison of India's 2007 Schedule with the ITA would make its error apparent. Accordingly, the erred tariff lines should be rendered unbound.

e) it did not use the ITA as a benchmark for determination of the error in transposition of its Schedule to HS2007. India's submission in this regard is two-pronged: that the obligations under the ITA are static, and that the transposition cannot add new

[29] Panel Report, Para. 7.141.
[30] India's Response to Panel Question Nos. 2 and 16; India's Opening Statement FSM, Para. 31.
[31] See Para. 19.
[32] Panel Report, Para. 7.154.
[33] Rensmann, 'Article 48' in Oliver Dörr, Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties (2nd edn., Springer, 2018), p. 884.
[34] *Id.*, at 33.
[35] India's Opening Statement FSM, Para. 28, India's Response to Panel Question No. 65.

obligations for India. In wrongfully and summarily rejecting India's submissions, the Panel has not made an analysis of various interpretative aids used by India for the interpretation of the ITA, which the Panel had rejected in Section 7.3.2.3., on the ground that the interpretative aids relying on *some* Members is being used for interpretation of treaty applicable to all Members. In the present section, the interpretative aids are unequivocally being used for the interpretation of the ITA as a comparative benchmark, and hence cannot be rejected on the earlier ground.

f) it erred in its interpretation and/or failed to make an objective assessment pursuant to Article 11 of the DSU, in Para 7.150 to 7.154 of its Report as the definition of "transmission apparatus" falling under tariff item/sub-heading 8525.20 under HS1996 Explanatory Notes is not an inclusive but an exhaustive definition. The HS1996 Explanatory Notes use the phrase "transmission of signals representing speech, messages or still pictures" as opposed to providing an indicative or inclusive definition of signals.

g) it erred in its interpretation and/or failed to make an objective assessment pursuant to Article 11 of the DSU, in Paras. 7.151, 7.153 to 7.154 of its Report as the amendments in HS1996 Explanatory Notes occurred subsequent to the ITA-1 or WT/Let/181 and even if Panel's interpretation is accepted, only those mobile phones which were transmitting signals (representing speech, messages or still pictures) could be covered in tariff item/sub-heading 8525.20.

18. India, therefore, requests the Appellate Body to reverse or set aside the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.138 to 7.154. Consequently, India also requests the Appellate Body to declare moot and of no legal effect the Panel's conclusions and findings contained in paragraphs 7.155 to 7.156, 7.212 to 7.213, 7.253, 7.278, 7.319, 7.333 and 7.366 and Section 8, paragraphs 8.1(a)(i), (ii), 8.1(b), 8.2 and 8.3 of the Panel Report.

V. APPLICATION OF ARTICLE 48(2) OF THE VCLT.

19. The Panel has committed legal errors in Section 7.3.3.3.3.2 of the Panel Report. The Panel erred in its interpretation and application of Article 48(2) of the VCLT and/or failed to make an objective assessment pursuant to Article 11 of the DSU, in so far as the Panel found that India was put on notice of the possibility of an "error", as India defines its error, within the meaning of Article 48(2). In particular, the Panel erred because

a) the legal standard formulated and applied by it in Paras. 7.194 to 7.197 regarding India, being on notice of the possibility that such an error could occur, is unfounded and not supported by the text of Article 48(2) of VCLT. India interprets the legal standard under Article 48(2) of VCLT, based on the decisions in the *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, and *Case Concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*. According to India, the appropriate legal standard based on the ICJ cases is that "for a state to be put on notice of a possible error, the circumstances should be such that no interested party should fail to notice the error or be under a misapprehension about it."[36]

Concerning the basis of the legal standard, the Panel notes that neither of the cases cited by India pertain to the application of Article 48 of the Vienna Convention.[37] This is one of the two central reasons for the Panel to disregard India's suggested legal standard. However, the Panel ignores that the two ICJ cases referred above influenced the formation of Article 48 of the VCLT[38] and are crucial to recognition of 'error' as a ground for invalidating consent.[39] As such, the Panel's reasoning to disregard the ICJ

[36] Panel Report, Para. 7.194; India's Response to Panel question No. 90(a), Para. 11; See also India's Second Written Submission, Para. 29.

[37] Panel Report, Para. 7.196.

[38] India's Second Written Submission, Exhibit IND-79, at 49.

[39] Rensmann, 'Article 48' in Oliver Dörr, Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties (2nd edn., Springer, 2018), p. 881, 7.

cases is literal and based only on the fact that the cases pre-date formulation of the VCLT.

Further, the interpretation suggested by India is in consonance with the overall objective of Article 48 of the VCLT. The drafters of the VCLT had expressly rejected the 'strict standard of care' which requires a State to exercise due diligence in avoiding an error.[40] The provision does not prescribe any duty of care on the State. In the same breath, the State cannot be deprived of relying on the exception of error in consenting to a treaty simply because it was on notice of 'possibility' that such an error could occur. This standard, as proposed by the Panel, is strict and all States are likelier to be on notice of 'possibility' of an error.

b) it proceeded to examine the contents of document G/MA/283 and the Secretariat's Transposition Note despite agreement between the parties that the WTO Secretariat did not flag the relevant tariff items.

Specifically, the complainant in this and parallel proceedings (WT/DS584 and WT/DS588) unequivocally agreed with India's position that the contested sub-headings were not flagged.[41] As such, it is undisputed between Parties that all tariff lines that faced a change in scope of a concession were not clearly flagged. Indeed, the Panel itself notes the European Union's submission that "[t]herefore, there was nothing to be 'flagged' by the Secretariat".[42] As such, the Secretariat's Transposition Note and document G/MA/283 did not notify India by clearly flagging all structural changes to India's Schedule as it 'held the pen' over the drafting of the HS2007 file for India[43] and must have been irrelevant to the Panel's determination.

Yet, the panel incorrectly examined otherwise irrelevant documents i.e. the Secretariat's Transposition Note and the document G/MA/283 towards deciding that "*India was on notice, prior to and during the transposition process, that the HS2007 transposition process could have substantial implications for the classification differences among ITA participants regarding their ITA undertakings*".[44]

c) it failed to make an objective assessment of the contents of the Secretariat's Transposition Note which was exhaustive in relation to entries that were sought to be 'clearly flagged' for the exercise of transposition, in Paras. 7.178 to 7.191.

The Panel's understanding that the Secretariat's Transposition Note was not exhaustive is incorrect. In believing and deciding so, the Panel ignored the clear terms of the Methodology Note which states "*[i]n preparing the HS2007 transposition, to the extent possible, the scope of the concessions and other commitments shall remain unchanged. Any tariff line for which a change in the scope of a concession may have occurred due to the complex technical nature of the transposition shall be clearly flagged*"[45] In the WTO Secretariat's own terms, it proposed to share an exhaustive list of all changes in the transposition process.

The WTO Secretariat took upon itself the absolute onus of flagging any changes in the scope of concession of a tariff line. In this regard, the Panel need not have traversed beyond the WTO Secretariat's clear word that it shall clearly flag the changes for the exercise of transposition. Accordingly, the Panel holds an incorrect view in having decided that the onus with respect to reviewing all complex changes and to assess whether they considered that "*the scope of a concession has been modified as a result*

[40] Rensmann, 'Article 48' in Oliver Dörr, Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties (2nd edn., Springer, 2018), p. 892.

[41] India's Response to Panel Question No. 90; Panel Report, *India – Tariff on ICT Goods (Chinese Taipei)*, Para. 7.195.

[42] Panel Report, Para. 7.192.

[43] India's Second Written Submission, Exhibit IND-79, at 39.

[44] Panel Report, Para. 7.193.

[45] A Procedure for the Introduction of Harmonized System 2007 changes to Schedules of Concessions using the Consolidated Tariff Schedules (CTS) database (18 December 2006) WT/L/673 Para. 4.

of the transposition in a way that impairs the value of the concession" on the members.[46]

Had the changes been clearly flagged, there would have been no possibility of an error. For instance, the WTO Secretariat in Attachment 3 of CTS HS2007 Transposition Note sent an email dated 8 November 2013 which described certain complex changes to India's Schedule,[47] to which India even responded seeking clarifications and commenting on sub-heading 28.52.[48] Under such circumstances, had the WTO Secretariat clearly flagged all changes for the exercise of transposition, India would potentially have been put to notice of error. Such is the case given India was diligent with reviewing and commenting upon the changes clearly flagged by the WTO Secretariat.

Further, the dictionary meaning of clear is "unambiguous, easily understood", "manifest, not confused or doubtful"[49], "easy to understand and not confusing", "obvious and leaving no doubt at all".[50] The fact that the EU and other complaining parties in the parallel disputes (WT/DS584 and WT/DS588) agree with India that the relevant entries were not flagged,[51] is a clear indication of the fact that the entries were in fact, not clearly (obvious and leaving no doubt at all) flagged.

20. The Panel has committed legal errors in Section 7.3.3.3.3.3 of the Panel Report. The Panel erred in its interpretation and application of Article 48(2) of the VCLT and/or failed to make an objective assessment pursuant to Article 11 of the DSU, in so far as the Panel found that India's inaction in the circumstances of its transposition would seem to satisfy the standard of "contributing by its conduct" to the error. In particular, the Panel erred because

a) it formulates and then conflates the legal standard for (i) India being on notice of a possible expansion of its WTO tariff commitments from its ITA undertakings; or (ii) India contributing by its own conduct to the alleged expansion in the scope of its WTO tariff commitments from its ITA undertakings. In doing so, the Panel presumes that India had notice of the changes in tariff lines under the transposition process, such that India 'should have' objected or made comments during the transposition process.

Specifically, the Panel in Para. 7.206 of its Report mentions that "India had both specific and general opportunities to highlight to Members and to the WTO Secretariat any concerns that it may have had regarding the relationship between the ITA and its HS2007 Schedule". However, the Panel disregards that India's prior conduct leading up to the error that it did not intend to commit to any obligations beyond those contained in the ITA-1 regarding ICT Products.[52] Instead, the Panel imagines the several alleged opportunities that India may have had during the transposition process to highlight concerns regarding the process. Indeed, India highlighted its concerns vide email dated 12 February 2014[53] regards the changes that were clearly flagged by the WTO Secretariat.

The Panel's decision proceeds on the basis that India already had notice of expansion of tariff lines under its Schedule, and thereafter India contributed through its inaction during the transposition process. As such, the legal standard to determine whether a member state contributed by its conduct cannot proceed on the basis that it already had notice of the error. These standards are different and the Panel made a legal error

[46] Panel's Report, Para. 7.192.

[47] Email Communication from IDB, WTO, Subject: "HS2007 transposition file: India" dated 8 November 2013, Attachment 3- CTS HS2007 Transposition Note XII - India, Pages 5-6 (Exhibit IND-50)

[48] Email Communication from Alya Belkhodja, Market Access Intelligence Section WTO, Senior Statistical Officer Subject: "RE: HS2007 transposition file . India" dated 12 February 2014 (Exhibit IND-51)

[49] Illustrated Oxford Dictionary (1998), Pg. 156.

[50] *Clear*, Oxford Learner's Dictionary, https://www.oxfordlearnersdictionaries.com/definition/english/clear_1?q=clear.

[51] India's Response to Panel Question No. 90; Panel Report, *India – Tariff on ICT Goods (Chinese Taipei)*, Para. 7.195.

[52] India's First Written Submissions, Para. 75.

[53] Email Communication from Alya Belkhodja, Market Access Intelligence Section WTO, Senior Statistical Officer Subject: "RE: HS2007 transposition file . India" dated 12 February 2014 (Exhibit IND-51).

in presuming that (a) India already had notice of the error and (b) notice is, in fact, essential before contribution through conduct is determined.

b) it incorrectly conflates the legal standard under Article 48(2) with the act of committing the error itself.

21. India, therefore, requests the Appellate Body to reverse or set aside the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.134, 7.170 to 7.210, 7.253, 7.278, 7.319, 7.333 and 7.366. Consequently, India also requests the Appellate Body to declare moot and of no legal effect the Panel's conclusions and findings contained in paragraphs 7.211 to 7.213 and Section 8, paragraphs 8.1(a)(i),(ii), 8.1(b), 8.2 and 8.3 of the Panel Report.

22. Pursuant to Rule 20(2)(c) of the Working Procedures, the service address, telephone and facsimile numbers for India are:

The Permanent Mission of India to the World Trade Organization
Rue du Valais 9,
1202 EVA
Tel:022 906 86 86
Telefax:022 738 45 48

23. India is providing a copy of this Notice of Appeal directly to the complainants as well as to all the third parties.

24. In the event of a cross-appeal by the European Union, India reserves the right, in addressing any such cross-appeal, to disagree with any statement in the Panel Report made in the context of a matter on which India prevailed.

25. There are currently no Appellate Body Members to constitute a division for serving on appeal in this dispute. In these exceptional circumstances, and in the interests of fairness and orderly procedure in the conduct of the appeal, in accordance with Rule 16(1) and (2) of the Working Procedures for Appellate Review, India will await further instructions from the division, when it may eventually be composed, or the Appellate Body, regarding any further steps to be taken by India in this appeal absent which, this document is deemed to also be India's appellant submission.

26. Filing of the Notice of Appeal by India should be without prejudice to its right to re-file or amend them once the division becomes operational. India also reserves its right to supplement its Appellant Submission with additional arguments.