



**IMPLICATIONS OF THE WTO PANEL'S DECISION IN INDIA —
TARIFF TREATMENT ON CERTAIN GOODS IN THE
INFORMATION AND COMMUNICATIONS
TECHNOLOGY SECTOR**

IMPLICATIONS OF THE WTO PANEL'S DECISION IN INDIA — TARIFF TREATMENT ON CERTAIN GOODS IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

BACKGROUND

On April 17, 2023 the WTO circulated three panel reports in cases brought by the European Union, Japan and Chinese Taipei ("**Complainants**") against India's tariff treatment on certain Information and Communications Technology ("**ICT**") products.

These rulings have found that India's tariffs ranging from 7.5% to 20% on products, such as mobile phones and components, are not in line with its WTO commitments.

MEASURES AT ISSUE

The Complainants challenged the tariff treatment that India accorded to ICT certain ICT products.¹ Essentially, the complainants argued that India's tariffs on these products exceed their stated commitments at the WTO. The following items were at issue in these disputes:

S. No.	Subheading (HS2007)	Product Description	Bound Rate	Basic Duty ²	Customs
1.	8504.40	--Static converters for automatic data processing machines and units thereof, and telecommunication apparatus	0%	0-20%	
2.	8517.12	--Telephones for cellular networks or for other wireless networks	0%	20%	
3.	8517.61	--Base stations	0%	20%	
4.	8517.62	--Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus	0%	10%	
5.	8517.70	-Parts	0%	10-20%	
6.	8518.30	--Line telephone handsets	0%	15%	
7.	8544.42	-Other electric conductors, for a voltage not exceeding 1,000 V: --Of a kind used for telecommunications	0%	7.5-15%	

LEGAL PROVISIONS AT ISSUE IN THE DISPUTE

According to Articles II:1(a) and (b) of the General Agreement on Tariffs and Trade, 1994 ("**GATT 1994**"), WTO Members are obligated to provide tariff treatment that is in accordance with the commitments set forth in their respective "schedules of concessions" ("**Schedules**"). Through these Schedules, WTO members commit to not raising tariffs beyond a certain ceiling or "bound" rate.

These Schedules are based on an internationally standardized system of names and numbers used to classify traded products known as the Harmonized System of Nomenclature ("**HSN**"). The HSN is issued by the World Customs Organization and updated from time to time. WTO Members' Schedules are also regularly updated to reflect newer versions of the HSN. This process of updating a Member's Schedule is referred to as a "transposition".

¹ Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 2.1; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 2.1; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 2.1

² Applied rate of duties imposed by India (as on the data of composition of Panel).

On 13 December 1996, various WTO Members concluded the Ministerial Declaration on Trade in Information Technology Products ("ITA"). India joined the ITA on 26 March 1997. The ITA participants agreed among themselves to bind and eliminate customs duties and other duties and charges of any kind, with respect to certain ICT products. The Annex to the ITA required participants to "incorporate" such measures into their schedules of concession annexed to the GATT 1994 and required that their Schedules be modified accordingly. Accordingly, India, as a participant in the ITA, modified its WTO Schedule in 1997 and subsequently Members agreed to update their WTO Schedules to align them with the HS Nomenclature 2002 Edition (HS2002) and later the HS Nomenclature 2007 Edition (HS2007), which included the 15 tariff items identified in the present disputes.

India, through the issuance of various customs notifications and the operation of the first schedule of the Indian Customs Tariff Act 1975, continued to maintain customs duties on some these items which have been alleged to breach its bound rates set out in its Schedule.

KEY ARGUMENTS BY THE PARTIES

India defended its tariffs by making two key arguments:

- India submitted that, at the time of the transposition of its WTO Schedule to the HS2007, it had understood that the scope of its tariff concessions would not be expanded from the commitments it had undertaken under the ITA. Pursuant to Article 48 of the Vienna Convention on the Law of Treaties³, aspects of India's WTO Schedule were hence invalid (and the relevant tariff commitments are in fact unbound) as a consequence of an error on the part of India during the transposition of the Schedule from the HS2002 to the HS2007.⁴
- The ITA-1 and its scope of coverage are instrumental as the comparative benchmark in establishing whether the transposition resulted in an expansion in the scope of India's tariff concessions, and therefore, in determining India's plea of error. India maintained that most of the items identified were not covered under the ITA as these did not exist in 1996 and the tariff lines were not included in the pact. Accordingly, India argued that the scope of its tariff concessions does not include new products that come into existence as a result of technological innovation, and which did not exist at the time that the concession in the Schedule was agreed upon.⁵
- With respect to Japan, India further argued that pursuant to the India-Japan Comprehensive Economic Partnership Agreement ("CEPA"), and the implementing notification thereof, India exempts from ordinary customs duties the products at issue when originating from Japan, and therefore accords to products of Japan tariff treatment that is consistent with India's duty-free tariff commitments set forth in its WTO Schedule.

The Complainants on the other hand argued that:

- India's WTO tariff commitments are set forth in India's WTO schedule of concessions and not the ITA.⁶
- There was no error in the transposition of India's Schedule to the HS2007 and, even if there was such an error, India either contributed to or was put on notice of the possibility of that error.⁷

³ Article 48, Vienna Convention on the Law of Treaties: "1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error. 3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

⁴ Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 7.83; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 7.84; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 7.83

⁵ Panel Report, *India — Tariffs on ICT Goods (EU)*, paras. 7.47 – 7.49; Panel Report, *India — Tariffs on ICT Goods (Japan)*, paras. 7.47 – 7.49; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, paras. 7.47 – 7.49

⁶ Panel Report, *India — Tariffs on ICT Goods (EU)*, paras. 7.50 – 7.51; Panel Report, *India — Tariffs on ICT Goods (EU)*, paras. 7.50 – 7.52; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, paras. 7.50 – 7.51

⁷ Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 7.84; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 7.85; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 7.84

- Separately, Japan also claimed that even where India unconditionally exempts certain products from customs duties, India acts inconsistently with Article II:1(a) because India grants those exemptions through customs notifications which are subject to the possibility of repeal at any time, thus creating a lack of foreseeability for traders.

LEGAL ISSUES BEFORE THE PANEL

- Whether India's legal obligations, at issue in this dispute, are set forth in the ITA?***

According to the Panels, the parties appeared to contest whether certain of India's WTO tariff commitments in this dispute are set forth in the ITA, as well as whether the ITA limits the scope of the tariff commitments set forth in India's WTO Schedule and hence examined this issue.

The Panels found that the ITA specifically requires WTO Members who are participants in the ITA to incorporate their ITA undertakings into their WTO Schedules annexed to the GATT 1994. Therefore, any undertakings made under the ITA only become binding WTO obligations under Articles II:1(a) and (b) of the GATT 1994 if they are incorporated into Members' WTO Schedules. Once incorporated into a Member's WTO Schedule, such concession shall be treated no differently to any other concession contained in that Schedule. Consequently, it is the WTO Schedule of each ITA participant that sets forth those legal obligations within the broader WTO legal structure – not the ITA.⁸

Consequently, the Panels held that legal standard under Articles II:1(a) and (b) entails comparing the treatment that India is obligated to provide in its WTO Schedule with the tariff treatment that India accords to the products at issue. This provision does not refer to the ITA, nor does any other provision in the GATT 1994.⁹

- Whether India's commitments under the ITA were static in nature?***

Further, India also argued that its commitments under the ITA are "static" and, therefore, India considers that its WTO tariff commitments exclude new products resulting from technological innovations that occurred after the ITA was concluded.¹⁰

The Panels rejected this argument, finding that as a general rule the product scope of Members' tariff concessions evolves over time to capture products that may come into existence as a result of technological developments. The Panels found that the interpretation advocated by India would essentially read identical tariff commitments of various WTO Members differently, depending on whether they were participants in the ITA and that in its view, the scope and content of the ITA cannot modify the scope and content of India's tariff commitments as set forth in its WTO Schedule.¹¹

- Whether India was entitled to invoke an error under Article 48 of the Vienna Convention?***

India also argued that when India's WTO schedule of concessions was updated from HS2002 to HS2007, an error was committed. India submitted that, at the time of the transposition of its WTO Schedule to the HS2007, it had understood that the scope of its tariff concessions would not be expanded from the commitments it had undertaken under the ITA.¹²

However, the Panels were not convinced. The Panels accepted in good faith India's argument that at the time of the transposition of its HS2002 Schedule into its HS2007 Schedule, India had assumed that the scope of its WTO commitments was limited to the scope of its ITA undertakings and that the scope of those tariff commitments would

⁸ Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 7.81; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 7.82; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 7.81

⁹ Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 7.81; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 7.82; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 7.81

¹⁰ Panel Report, *India — Tariffs on ICT Goods (EU)*, paras. 7.48 – 7.49; Panel Report, *India — Tariffs on ICT Goods (EU)*, paras. 7.48 – 7.49; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, paras. 7.48 – 7.49

¹¹ Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 7.81; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 7.82; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 7.81

¹² Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 7.83; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 7.84; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 7.83

not be expanded through the HS2007 transposition process.¹³ However, the Panels found that India had failed to demonstrate that this assumption constituted an essential basis of India's consent to be bound by the certified Schedule.¹⁴ The Panels also found that India was put on notice of the possibility that its WTO tariff commitments in its HS2007 Schedule may have expanded from those set forth in its HS2002 Schedule, and similarly, that its WTO tariff commitments in its HS2007 Schedule may have expanded from those set forth in the ITA.¹⁵ However, India did not raise any objections thereto. Hence, the circumstances did not satisfy the requirements of Articles 48(1) and (2) of the Vienna Convention.¹⁶

CONCLUSION

Based on the above analysis, the Panels found that India's tariff treatment of products falling under the identified tariff items were inconsistent with Article II:1 of the GATT 1994 because certain such products are subject to ordinary customs duties in excess of those set forth in India's WTO Schedule. With respect to Japan, the Panel rejected India's argument that the CEPA brings India into compliance with its WTO obligations pursuant to Articles II:1(a) and (b) of the GATT 1994 as for products of Japan to access duty free treatment as set forth in India's WTO Schedule, they must satisfy preferential rules of origin which are not set forth in India's schedule of concessions under the GATT. Hence duty-free treatment is not unconditional as required under Articles II:1(a) and (b) of the GATT 1994.

IMPLICATIONS OF THE PANEL'S FINDINGS

The current impasse surrounding the functioning of the Appellate Body makes it unclear as to when and how these reports will be adopted. It is likely that India will appeal the findings of the Panels before the presently defunct Appellate Body. In the interim while India may continue to maintain its existing tariffs on these ICT products, the possibility of unilateral retaliation from the complainants cannot be ruled out.

In case, India were to implement the ruling, it may be seen as a hit India's efforts to promote the domestic manufacturing of ICT products such as mobile phones through tariff protection. That said, there is little economic evidence favouring tariff protection as an effective tool to accelerate domestic manufacturing. Removal of duties would ultimately lower the cost for end consumers and thereby may result in increased consumptions of some of these goods. Indeed, India may consider leveraging the application of zero duties on these products towards building a manufacturing ecosystem in India with greater access to inputs. Finally, India may indeed, also need to explore alternative means to boost domestic manufacturing, that are economically viable and legally sustainable.

In the long term, the findings of the Panel in these cases may play into the greater discussion surrounding whether negotiated commitments ought to be revisited in light of new technological developments and advances through the decades.

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com or write to our authors:

Sanjay Notani, Partner – SanjayNotani@elp-in.com

Parthsarathi Jha, Partner – ParthJha@elp-in.com

Naghm Ghei, Principal Associate – NaghmGhei@elp-in.com

Disclaimer: The information contained in this document is intended for informational purposes only and does not constitute legal opinion or advice

¹³ Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 7.116; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 7.118; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 7.117

¹⁴ Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 7.137; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 7.139; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 7.138

¹⁵ Panel Report, *India — Tariffs on ICT Goods (EU)*, para. 7.198; Panel Report, *India — Tariffs on ICT Goods (Japan)*, para. 7.201; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, para. 7.201

¹⁶ Panel Report, *India — Tariffs on ICT Goods (EU)*, 7.215 – 7.216; Panel Report, *India — Tariffs on ICT Goods (Japan)*, paras. 7.215 – 7.216; Panel Report, *India — Tariffs on ICT Goods (Chinese Taipei)*, paras. 7.215 – 7.216