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

(DS582, DS584, and DS588)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES

December 8, 2021

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. INDIA'S REQUEST FOR A PRELIMINARY RULING

1. India argues that the panel requests do not satisfy Article 6.2 of the DSU because they do not sufficiently identify some or all of the products covered by the measures at issue. The text of Article 6.2 does not expressly require that a panel request identify specific products to which the measures at issue apply. In considering India's preliminary ruling request, the Panels 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 its bindings for certain tariff lines in excess of the bindings on those goods set forth in its Schedule.

II. GENERAL FRAMEWORK UNDER ARTICLE II OF THE GATT 1994

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

3. 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." 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. In sum, 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).

4. 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-1), the process for Harmonized System (HS) transposition in WTO Schedules, Article 48 of the *Vienna Convention on the Law of Treaties* (Vienna Convention), and the India-Japan Comprehensive Economic Partnership Agreement (CEPA).

A. Relevance of the Information Technology Agreement (ITA-1)

5. Contrary to India's assertion, the ITA-1 is not the agreement at issue in these disputes. 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.

6. As a WTO Member, India committed to bind tariffs as reflected in Schedule XII – India (India's Schedule). The tariff headings in India's Schedule establish the scope of India's

concessions. Accordingly, the relevant question before the Panels is whether the measures at issue would impose duties in excess of the bindings in India's Schedule.

7. Although the ITA-1 is not the relevant agreement in these disputes, the United States notes that India makes several flawed arguments concerning the ITA-1. In particular, India makes misleading arguments with respect to "new technologies" developed since the conclusion of the ITA-1 and the relevance of the *Declaration on the Expansion of Trade in Information Technology Products* (ITA Expansion).

8. As an initial matter, India's Schedule reflects its participation in the ITA-1. After the ITA-1 was concluded in 1996, participants formally modified their WTO Schedules. India's Schedule reflecting its ITA-1 commitments was certified effective July 2, 1997.

9. India's commitments in its WTO Schedule do not distinguish between "new technologies" and products existing in 1996 at the time of ITA-1 conclusion. In fact, the ITA-1 that formed the basis for entering into those commitments affirmatively contemplated technological evolution.

10. The United States further notes that virtually all ITA-1 products – including computers, peripherals, cell phones, and digital cameras – incorporate significantly improved features as compared to the products available at the time the ITA-1 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. The United States also notes that the possibility of technological development with respect to tariff concessions is not limited to the information technology sector. 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.

B. Relevance of HS Transposition and India's Rectification Request

11. India's arguments do not reflect an accurate understanding of the HS transposition process or the legal status of its rectification request. 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. Rather, a WTO Member's tariff obligations are contained in its Schedule.

12. The WTO General Council decides on specific procedures to introduce and certify HS changes to Members' Schedules, including certification under the 1980 Procedures. Therefore, the HS transposition process reflects the continuation of tariff commitments, not substantive modifications.

13. 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 September 2018, citing the 1980 Procedures, India submitted to the Committee on Market Access a draft Rectification under the category "other rectifications." 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. Therefore, India's draft Rectification was *not* approved and certified, and India's Schedule as previously certified is unaltered.

14. 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. 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.

C. India's Invocation of Vienna Convention Article 48 (Error) Should be Rejected

15. 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 Vienna Convention is not a "covered agreement" under Appendix 1 of the DSU, and Article 48 is not incorporated into a covered agreement, including the DSU.

16. One aspect of the Vienna Convention 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." 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 Vienna Convention. As constituent text to the WTO Agreement, a Schedule should therefore be interpreted in accordance with Articles 31 through 33.

17. In any event, it would not appear that India has established the factual basis for its claim under Article 48. 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 transposed in WTO Member Schedules. Therefore, India's involvement in these processes would appear to undermine its claim of error.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. What may be considered as relevant context in interpreting the terms of the concessions in India's Schedule under Article 31 of the Vienna Convention

18. Most parties and third parties appear to agree that the ITA-1 is *not* a covered agreement under the DSU and that it *may* in theory qualify as "context" within the meaning of Article 31(2). However, there is disagreement as to whether the ITA-1 may be *relevant* context in the interpretative exercise called for in these disputes. The United States considers that the Panels may consider the ITA-1 as context to the extent it is *relevant* for interpreting India's concessions within the meaning of Article 31(2). Context should be considered to the extent it may shed light on the meaning of the treaty terms at issue. Under the factual circumstances of these disputes, the ITA-1 may be of limited relevance where the tariff headings at issue were originally certified in HS1996 – reflecting Attachment A of the ITA-1 – and therefore the Panels may examine that nomenclature to the extent they consider necessary depending on the heading at issue.

19. Turning to the Harmonized System, again there appears to be agreement that the HS may generally be considered as context. The question is which version of the HS would be *relevant* to consider in light of the circumstances of these disputes. While the United States agrees that in theory the Panels may consider multiple versions of the HS nomenclature through which India's concessions have been transposed since the commitment was undertaken, earlier HS versions, *i.e.*, HS1996 and HS2002, may be of limited relevance for evaluating the ordinary meaning of the terms of India's existing concessions. The HS2007 would appear to be the most relevant version where India's tariff commitments are certified in that version of the nomenclature.

II. India's argument regarding the preferential agreement between India and Japan (CEPA) in the context of Article II:1 of the GATT 1994 (DS584)

20. While panels may consider preferential measures in considering the tariff treatment a Member provides, it would be important to consider the scope of any such measures asserted to be applicable. Preferential agreements generally contain unique rules of origin that may limit preferential treatment to goods meeting certain criteria, as Japan asserts is the case with respect to the CEPA. The customs notification put forward by India appears to refer to rules that may limit products that may be considered of origin of Japan, and therefore may not qualify for the treatment provided therein. Also, it may be necessary to consider whether a preferential measure covers all products within the scope of the challenged measures.

21. With respect to Article II:1 of the GATT 1994, a Member may not 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 goods from some Members may qualify for the treatment provided in its Schedule, but not others.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

22. Response to Question 5: As a general matter, panels may consider the HS and its Explanatory Notes as additional relevant context for the purpose of interpreting the HS-derived

language of a particular tariff line in a Member's Schedule. However, the tariff commitment is contained in the Schedule, and the HS may not add to or diminish from that obligation. As the report in *EC – IT Products (Panel)* explained, "while the HS would always qualify as context for interpreting concessions in a Member's schedule that are based on that nomenclature, or that explicitly or implicitly make reference to it, the relevance of the HS will depend on the interpretative question at issue."

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

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

25. Response to Question 6: The tariff concessions in a WTO Member's Schedule apply to all products – regardless of technological development – that meet the terms of the concession, interpreted based on its ordinary meaning in context and in light of the GATT 1994's object and purpose. This is consistent with the findings in the GATT 1947 dispute *Greek Increase in Bound Duty*, in which the Group of Experts found that later-developed, long-playing gramophone records were covered by the description of "gramophone records" in Greece's schedule of concessions, and that Greece had therefore acted inconsistently with Article II when it imposed higher duties on long-playing records.

26. In fact, virtually all ITA-1 products incorporate significantly improved features as compared to the devices that were available at the time the agreement was concluded. Further, the acquisition of new features is not unique to information technology products; automobiles, light bulbs, and any number of other goods covered by WTO Members' Schedules advance over time. India's position would undermine the fundamental obligations of Article II:1 of the GATT 1994 by allowing Members to disregard tariff commitments on the basis that a product incorporates or constitutes a perceived new technology.

27. Response to Question 8: The ITA Expansion is not relevant to the Panel's interpretation of India's concessions under the customary rules of interpretation reflected in the Vienna Convention. Like the ITA-1, the ITA Expansion is not a covered agreement within the meaning of the DSU.

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

29. Response to Question 12: Notably, the rectification provision in paragraph 2 of the 1980 Procedures is not the proper vehicle by which a Member seeks to increase the bound duty rates reflected in its Schedule, or reflect that it is no longer bound by certain commitments. Thus, the United States understands that a Member could, for example, use the rectification provision to change its Schedule in order to reflect "amendments or rearrangements which do not alter the scope of a concession." The 1980 Procedures provide the technical mechanism by which a Member may rectify its Schedule, but do not provide an independent basis through which a Member may alter the substance of its commitments. Indeed, India's proposed "rectification" impacting certain tariff lines at issue in this dispute was rejected for this very reason.

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

31. Response to Question 16: The United States considers that Article 48 of the Vienna Convention is not applicable in these disputes because it is not a provision of a WTO covered agreement within the meaning of Article 1.1 of the DSU, or a customary rule of interpretation of public international law within the meaning of Article 3.2. As panels are limited to examining the consistency of challenged measures with cited provisions of covered agreements, Article 48 is not applicable, and there is no legal basis for the Panels to interpret or apply this provision.

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

33. Article 48(2) provides that Article 48(1) "shall not apply" in such circumstances. In the event that the Panels seek to apply Article 48 – which, again, there is no legal basis to do – the Panels therefore need not engage in an interpretation of what it means for an error to refer to a "fact or situation" within the meaning of Article 48(1).