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

(DS582, DS584, and DS588)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE JOINT THIRD-PARTY SESSION

October 13, 2021

TABLE OF EXHIBITS

Exhibit No.	Description
USA-1	Presentation by Mr. Magnus Nordéus, Chair of DIGITALEUROPE's Export Control and Customs Working Group and Corporate Head of Trade Compliance, Ericsson Group: "How the ITA has Contributed to Resilience in the COVID-19 Pandemic, and How to Go Forward," ITA Symposium (September 16, 2021)
USA-2	Presentation by Ms. Julia Jasinska, Head of International Relations and Trade Policy, Nokia: "How the ITA is Key in Allowing 5G+ Technologies to Create New Value for Industries in a post-COVID World," ITA Symposium (September 16, 2021)

Mr. Chairperson, Members of the Panels,

1. The United States appreciates the opportunity to appear before you today to provide our views as a third party in these disputes.

2. Last month, the WTO hosted a symposium[1] marking the 25th anniversary of the Information Technology Agreement (ITA-1),[2] and several presenters called for Members to ensure the tariff treatment envisioned in the ITA-1.[3] Participating Members modified their WTO Schedules to inscribe commitments to reflect the ITA-1, thereby making concessions subject to the disciplines of the *General Agreement on Tariffs and Trade 1994* (GATT 1994). India's compliance with its tariff commitments under the GATT 1994 is the central issue in these disputes.

3. Today, we will briefly address two issues: first, what may be considered as relevant context in interpreting the terms of India's WTO concessions under Article 31 of the *Vienna Convention on the Law of Treaties* (Vienna Convention); and second, the relevance of the preferential agreement between India and Japan in evaluating Japan's claims under Article II:1 of the GATT 1994.

[1] ITA Symposium: 25 Years of the Information Technology Agreement (September 16-17, 2021).
[2] *Ministerial Declaration on Trade in Information Technology Products*, WT/MIN(96)/16 (December 13, 1996).
[3] *See, e.g.*, Presentation by Mr. Magnus Nordéus at 17 (USA-1) (emphasizing the value in complying with WTO commitments resulting from implementing the ITA-1); Presentation by Ms. Julia Jasinska at 11 (USA-2) (calling for the appropriate implementation of existing WTO commitments resulting from implementing the ITA-1).

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

4. The Panels have addressed questions to the third parties with respect to what may be considered as relevant context in these disputes under Article 31 of the Vienna Convention, in particular with respect to the ITA-1 and the Harmonized System.[4]

5. With respect to the **ITA-1,** most parties and third parties appear to agree that the ITA-1 is *not* a covered agreement under the DSU and further that it *may* in theory qualify as "context" within the meaning of Article 31(2).[5] However, there is disagreement as to whether the ITA-1 may be *relevant* context in the interpretative exercise called for in these disputes. Several parties and third parties suggest that the relevance of the ITA-1 may depend on whether the text of the concession at issue explicitly references the ITA-1. In particular, some Members distinguish the factual circumstances in *EC – IT Products,* where the relevant concession involved an explicit reference to Attachment B of the ITA-1, from the present dispute, where the relevant concessions in India's Schedule derive from the list of tariff headings in Attachment A of the ITA-1 (HS1996) and make no explicit reference to the ITA-1.[6]

6. 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) of the Vienna Convention. Article 31(1) provides that "[a] treaty shall be interpreted in good faith

[4] Harmonized Commodity Description and Coding System (HS).
[5] *See* United States' Responses to the Panel's Advance Questions to Third Parties, paras. 9-12.
[6] *See* Brazil's Responses to the Panel's Advance Questions to Third Parties, paras. 12-13; Chinese Taipei's Responses to the Panel's Advance Questions to the Parties (DS588), paras. 12-17; Korea's Responses to the Panel's Advance Questions to Third Parties p.1; Japan's Responses to the Panel's Advance Questions to the Parties (DS584), paras. 10-11; EU's Responses to the Panel's Advance Questions to the Parties (DS582), paras. 13-16; India's Responses to the Panel's Advance Questions to the Parties (DS584), paras. 22-27.

in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." In turn, Article 31(2) specifies what may be considered as "context."

7. While Article 31 does not use the term "relevant," we agree that context should be considered to the extent it may shed light on the meaning of the treaty terms at issue.[7] For example, examining a claim under one provision of the WTO Agreement would not require examining the "context" provided by every other provision of the WTO Agreement. Rather, an adjudicator may limit its consideration of context to those provisions that appear relevant for understanding the provision at issue. Accordingly, the ITA-1 should only be considered to the extent that it is relevant to interpreting the terms of India's concessions. In this regard, we note that 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.

8. Turning to the **Harmonized System**, again there appears to be agreement among the parties and third parties 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 India argues that the Panels are limited to examining the HS1996 and its Explanatory Notes,[8] the complainants appear to argue that only the HS2007 and its Explanatory

[7] *See* Chinese Taipei's Answers to the Panel's Advance Questions to the Parties (DS588), para. 16 (*citing China – Auto Parts (AB)*, para. 151).
[8] India's Responses to the Panel's Advance Questions to the Parties (DS584), paras. 2-8.

Notes would be relevant.[9] Canada as a third party submits that all versions of the nomenclature through which India's commitments have been transposed since the commitments were undertaken – that is, HS1996, HS2002, and HS2007 – may be relevant context, because they reflect the transposition process.[10]

9. While we agree with Canada 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, as the complainants have observed, 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)

10. Next, the United States would like to further address India's argument in the dispute brought by Japan[11] regarding the preferential agreement between India and Japan, namely the Comprehensive Economic Partnership Agreement (CEPA). We understand India's view to be that Japan cannot succeed on its claims under Article II:1 of the GATT 1994 because the

[9] EU's Responses to the Panel's Advance Questions to the Parties (DS582), paras. 18-20; Japan's Responses to the Panel's Advance Questions to the Parties (DS584), paras. 18-21; Chinese Taipei's Responses to the Panel's Advance Questions to the Parties (DS588), paras. 19-22.
[10] Canada's Responses to the Panel's Advance Questions to Third Parties, paras.8-9.
[11] WT/DS584.

measures imposed by India do not result in applied duties on goods of Japan in excess of India's bound rates.[12]

11. 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.[13] 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.[14] Also, it may be necessary to consider whether a preferential measure covers all products within the scope of the challenged measures.

12. As the United States explained in its third-party submission, 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

[12] India's First Written Submission, paras. 206-246.
[13] *See* Japan's Responses to the Panel's Advance Questions to the Parties (DS584), para. 60.
[14] India Customs Notification No. 69/2011 (Exhibit IND-41) (DS584).

others, or that goods from some Members may qualify for the treatment provided in its Schedule, but not others.[15]

III. Conclusion

13. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of our views.

[15] United States' Third-Party Submission, para. 54.