India's Proposed Trade & Regulatory Actions Impacting the Information and Communications Technology (ICT) Industry

INTRODUCTION

The Information Technology Industry Council (ITI) and the Telecommunications Industry Association (TIA) represent America's leading technology firms. India is a vital market for our member companies, and we write this letter to highlight specific issues in India's product regulatory environment with the hope that USTR will prioritize their resolution in upcoming bilateral discussions in the context of the upcoming Trade Policy Forum (TPF) and in other bilateral and multilateral engagements.

While the scope of this addendum is limited to priority market access and technical barrier to trade concerns, industry continues to face an increasingly protectionist digital trade environment, as well as discriminatory local content and procurement requirements not captured below. We respectfully request that USTR continue to prioritize India's many barriers to digital trade, which our associations have outlined in detail in our recent submissions to USTR's request for input to the 2022 National Trade Estimate (NTE) Report. As part of TPF engagement, we continue to request the establishment of a dedicated dialogue for the discussion of digital trade matters, the impact of which extends across every economic sector leveraging ICT and doing business across borders.

BARRIERS TO DIGITAL TRADE AND ELECTRONIC COMMERCE

Equalisation Levy

Since the January 6, 2021 release of the USTR Section 301 Report on India's Digital Services Tax, GOI has since implemented an even further expansion of the Equalisation Levy (EL) through Finance Bill 2021-2022. Whereas the April 2020 revision expanded the EL to include a two percent tax on the sale of goods and services to Indian residents by non-Indian e-commerce companies, the April 2021 expansion fundamentally expanded the scope of existing rules to bring offline transactions within scope if any one of the following transaction aspects happens online: acceptance of offer for sale; placing the purchase order; acceptance of the purchase order; payment of consideration; or the supply of goods or provision of services, partly or wholly. Further, the entire amount of consideration received for sale of goods or provision of services is considered in scope, even when the underlying good or service is provided by an unrelated third party and the e-commerce operator's income is only a portion of the gross amount received. The design of the EL explicitly excludes Indian companies from its scope, thereby acting as a trade barrier for U.S. e-commerce companies that are competing against both Indian e-commerce companies as well as Indian brick-and-mortar establishments. While industry maintains concerns with the underlying premise of the measure, the lack of sufficient guidance has continued to raise significant compliance challenges with the April 2020 and April 2021 expansions.

TECHNICAL BARRIERS TO TRADE

Compulsory Registration Order (CRO)

India's Compulsory Registration Order (CRO), which requires manufacturers to submit product

samples from each factory for testing by a "BIS recognized laboratory" located in India, remains a primary concern for the tech industry. Under the CRO, companies are required to retest products to meet international safety requirements in India despite having already passed identical tests in internationally accredited labs. The registration process is incredibly costly to U.S. firms, and fails to improve product safety. To compound concerns, in 2020 MeitY proposed expansion of the CRO to cover additional products and components; however, it failed to perform any risk or regulatory impact assessment to justify these additions. In fact, stakeholder meetings revealed that the emphasis now seems to be on limiting imports of products into India from certain other countries, rather than on product safety and risk to the Indian public.

Adequate transition times also continue to be a challenge for industry seeking to comply with CRO. Phase IV of CRO was announced on April 22, 2020 with an effective date of October 1, 2020. This timeline was incredibly ambitious, and at industry's request, MeitY ultimately extended the effective date to April 1, 2021. Meanwhile, MeitY announced the scope of Phase V of CRO, with an effective date of April 1, 2021, which was eventually extended another six months to October 2021. Although industry appreciates the extension, constantly having to react and negotiate is very disruptive to business.

Recommendation: When engaging with GOI on the above CRO issues, we urge USTR to:

- Encourage authorities to follow global best practices and accept international test reports and certificates when applicable.
- Recommend that MeitY follow good regulatory practice and incorporate a risk-based approach, focusing on the compliance of finished consumer ICT products, regardless of the number of imported products and their origins.
- Recommend that India implement a truly phased approach, implementing one CRO phase at a time instead of introducing two or more phases simultaneously.
- Request that GOI consider setting the effective date as one year from the date on which *all* of the following are complete: product series guidelines and FAQs issued by MeitY, Test Report Format issued by BIS, BIS portal ready to accept applications, and labs accredited by BIS and ready to accept products for testing.

<u>Mandatory Testing & Certification of Telecom Equipment (MTCTE)</u>

India's Telecommunications Engineering Centre (TEC) administers the Mandatory Testing & Certification of Telecom Equipment (MTCTE) for all telecom products regulated under India's Telegraph Rules. MTCTE mandates a wide range of technical requirements from electromagnetic compatibility (EMC) and safety to security testing and IPv6 interoperability, as well as environmental requirements, among others. While the policy was initially intended to become effective October 2018, India's Department of Telecommunications (DoT) subsequently delayed implementation. By October of 2019 the Department of Telecommunications made MTCTE mandatory for 2-wire telecom equipment, modems, G3 fax machines, ISDN CPE, private automatic branch exchange (PABX) systems, and cordless telephones. Since that time, DoT has continued to expand the requirements under "Phase II" of the plan to cover areas including Transmission Terminal Equipment, the PON family of Broadband Equipment, and feedback devices as laid out in TEC/01/2017-TC on June 23, 2020. These requirements were notified to the WTO under G/TBT/N/IND/158, G/TBT/N/IND/159, and G/TBT/N/IND/160 in August of this year. These rules became compulsory as of October 1, 2020.

TEC and the Department of Telecommunications (DoT) have not provided a rationale or details on the

implementation of this broad certification framework, nor have they notified it to the WTO TBT Committee. Moreover, TEC have recently proposed testing requirements for products that already fall under the scope of CRO (i.e., commercial off-the-shelf (COTS) servers). Even though India requires in-country testing for many of the parameters (they have been extending acceptance of international test reports six months at a time), there is not sufficient capacity and infrastructure in the country to meet these demands.

The new requirements impose needless costs on ICT companies, which already conduct such tests in internationally accredited labs in other geographies. Testing fees may cost up to 50 lakhs rupees or $78,000 per product when carried out by government labs, and no price cap has been established for commercial labs. The system of certifications will eventually cover all types of telecom equipment, ranging from simple IoT devices to fully functioning base stations.

Besides the lack of available tests for some of the prescribed parameters, India's current lab capacity is very limited. At the moment, there are only a small number of labs in India that can conduct certain types of testing, including for electromagnetic compatibility (EMC) and electromagnetic interference (EMI), and only four certification bodies exist nationwide to review results and summary reports. Moreover, there is no need for India-based tests, as global vendors already certify products to a high level of international standards in areas such as radio frequency and safety. Requirements to test once again for the Indian market will not improve safety but merely incur needless and unnecessary costs for suppliers. Telecom suppliers worry that intrusive testing could potentially allow for leaks of proprietary information.

Recommendation: We request support from USTR in amplifying our messaging to avoid overlap with CRO. Industry stakeholders are asking TEC/DoT to pare back the initial scope of the MTCTE requirements and clarify a range of outstanding issues. Industry is also urging the authorities to follow global best practices and accept international test reports and certificates when applicable, and to allow for additional consultation with industry and an adequate transition time. Where such tests focus on security issues, India should recognize Common Criteria certifications from countries that are parties to the Common Criteria Recognition Arrangement of which India is one. To the extent that testing continues to be required, the government of India should also give companies the option to either conduct in-country testing in India or submit test reports from an accredited global test lab. This will help the government to ensure quality and safety along the various parameters will be met. We further encourage the Indian government to reference internationally recognized standards to be used in such testing. Such an approach allows for robust security vetting without imposing new fees that will drive up end user costs or needlessly delay time to market for ICT products.

STANDARDS AND TESTING REQUIREMENTS UNIQUE TO INDIA

India has adopted or is considering country-specific product standards that create significant compliance burdens for importers and foreign manufacturers and that impede trade.

<u>Duplicative Security Certification Schemes Being Promoted by the Indian Government</u>

India's Ministry of Electronics and Information Technology (MeitY) requires certification under its "Trusted Electronics Value Chain – Compliance Scheme" (TEVCCS) scheme, rather than the internationally developed Open Trusted Technology Provider Standard (OTTPS). The certification and auditing process under TEVC is both highly burdensome and duplicative and risks divergence from internationally

developed standards. TEVCCS is technically equivalent to IEC/ISO 20243 -1 & 2 (Information Technology - Open Trusted Technology Provider Standard or OTTPS) but stipulates certification by MeitY's Standardisation, Testing and Quality Certification (STQC) Directorate. The draft scheme envisages certifying the processes that apply to commercial, off-the-shelf ICT hardware and software throughout the entire product life cycle encompassing the areas of technology development and supply chain. Currently, the certification scheme is voluntary, but there are significant indications that it may be converted to a mandatory certification requirement. This new requirement will add to the long list of existing certification schemes in India and potentially subject confidential elements of product design and supply chain to additional government audits.

Recommendation*:* In engagements with GOI, we urge USTR to request that MeitY avoid formally or informally mandating the use of the TEVCCS.

Source Code Disclosure Requirements as Part of Security Testing

As part of security testing under the India Telecom Security Assurance Requirements (ITSAR)[1], DoT has asked OEMs to share the source code of equipment used in telecom networks, including servers and mobile phones. This source code constitutes commercially valuable, confidential, and sensitive information. Divulging proprietary information to testing labs and agencies could lead to the leakage of business confidential information to the competition and endanger the privacy and security of individuals and the OEMs.

Recommendation: We request that USTR recommend that GOI remove language requiring source code disclosure in all draft ITSARs.

Country-Specific 5G Standards

India is pushing forward with domestic 5G standards, known as "5Gi", with the goal of supporting its Make in India program and eliminating ICT imports. An effort by India to make 5Gi the exclusive standard in India will have a seriously negative impact on trade and investment in India's telecommunications sector and related sectors. In late 2019, India's TSDSI submitted their own candidate 5G New Radio specifications to the ITU IMT-2020 evaluation process, and they were deemed to be sufficiently detailed by the ITU on November 26, 2020. These specifications use a modulation technique known as π/2 BPSK to address Low-Mobility-Large-Cell (LMLC) scenarios that TSDSI says is important for rural India. These techniques deviate significantly from the Global Core Specification (GCS) developed within 3GPP, and they are not interoperable with mobile phones, chipsets, and RAN vendor gear leveraging globally harmonized standards. If India were to succeed in mandating the use of this standard in India, it would fracture the telecommunications equipment market and dramatically slow the deployment of 5G in India as carriers would be unable to easily iterate on their existing equipment.

India's Telecommunications Engineering Center (TEC) under the Department of Telecommunications has taken positive steps to collect public comment regarding the feasibility of incorporating India 5Gi and 3GPP Release 15 as national standards in the first half of 2021. However, the result of TEC's deliberations with respect to the transcription of 3GPP into a national standard have not yet been announced, and will require further monitoring as India moves closer to widespread deployment.

[1] These source code disclosure requirements are spelled out specifically in ITSAR for E-Node B in Para 3.3 on Page 12, ITSAR for UICC (SIM and USIM) in Para 2.3.2 on Page 22, ITSAR for Packet Data Network Gateway in Para 2.3.3 on Page 21 and ITSAR for Mobile Device at Section 6.17, Page 40.

Recommendation: We request USTR's assistance in urging TEC to transcribe 3GPP Release 15 into a national standard and subsequently allow telecom operators to choose what technologies to deploy in their networks.

On the part of the United States government, we ask that USTR, NTIA, the State Department, and other relevant agencies continue to emphasize the importance of globally harmonized standards for 5G and other emerging technologies in the context of multilateral dialogues such as the Quad Emerging Technology Working Group, in bilateral dialogues, and in other forums as relevant.

Delays in Wireless Planning Commission (WPC) Certifications

Imports of certain electronics and ICT products requires certification from the Bureau of Indian Standards (BIS) and "equipment type approval" from the Wireless Planning & Coordination wing of the Ministry of Communications. The procedure for obtaining these approvals is massively time consuming and opaque, with undefined timelines that often produce inordinate delays. The lack of transparency, predictability, and timeliness creates a significant barrier to imports.

Recommendation: We request that USTR urge GOI to expedite the process to reduce the processing time and make it process more transparent.

ENVIRONMENTAL REGULATIONS

Industry is concerned about India's "Final Draft of Chemicals (Management and Safety) Rules." The concerns are primarily with Rule 12 (2) of the "Articles" provision. We believe that safety instructions for Articles should not require Safety Data Sheets (SDSs) for chemicals for ICT products, which are durable consumer goods designed not to release chemicals. SDSs are normally used for cataloging and identifying potential chemical hazards regarding chemical hazards in an occupational setting, whereas an SDS is not intended to be used for products designed primarily for consumer use. In addition, Chapter 4 requires that a person who has control of an Industrial activity in which a Hazardous Chemical is handled must provide evidence to the concerned authority that steps have been taking to provide people working with the equipment with adequate "training and equipment including antidotes necessary to ensure their safety." For ICT products, in normal usage, providing training and equipment including antidotes is not necessary just because chemicals are in the Article. Our members believe there are more appropriate ways – including ways that would be more understandable for consumers – to provide safety instructions for ICT Articles than through SDSs.

Industry is also concerned about India's treatment of plastic waste. India does not have a single federal mandate, but instead each state has its own independent rules, which leads to inconsistencies and high costs for industry. Industry urges that India find a way to ensure consistency in its plastic waste rules across the country. We further recommend that India ensure that its rules are consistent with treatment of plastic waste in other major economies. More specifically, the ICT sector has serious concerns regarding a revision to the Plastic Waste Management rule promulgated in August 2021. Industry has four primary concerns with the revised rule:

1. It is extremely burdensome for global companies to implement "country-specific" markings on products sold around the world; accordingly, industry is urging India to exempt imported ICT products and small-sized plastic packaging used for components and spare parts from the

marking and labelling requirements (Rule 11);

2. There is no transition period under the new rule; accordingly, industry is urging that India provide a transition period of 12-18 months for the marking and labelling requirements for domestically produced products (Rule 11);
3. Plastic bags are required for the transportation of small parts and other ICT products; accordingly, industry is urging that the ICT sector be exempt from the restrictions on plastic bag requirements that were clearly intended for food, drinks, and pharmaceuticals (Rule 4(1)); and
4. Finally, shrink wraps, adhesive tape & bubble wraps used to protect ICT products during transport are critical; accordingly, industry is urging that India exempt the ICT sector from restrictions under Rule 4(1)(d) & Rule 11.

PROCUREMENT

India has recently issued a series of policies to promote government purchases of locally made ICT products. In January 2017 the Department of Telecommunications issued conditions for a list of telecom products under which they could qualify as domestic and therefore be accorded a preference in government procurement. Under the Public Procurement (Preference to Make in India) Order issued in June 2017 by the Department of Industrial Policy and Promotion, government agencies and companies are requested to accord a 20% price preference to products containing more than 50% local content. In September 2017, the Ministry of Electronics and Information Technology issued a lengthy list of cybersecurity products that will be subject to this order. The agency subsequently updated and re-iterated these requirements in procurement orders issued in 2018, 2019, and 2021.

While this order is applicable to all entities, Indian or foreign, it poses a significant challenge to software and cloud service providers (CSPs). This model does not consider the investments and other contributions made by CSPs that enable the Indian Tech ecosystem and its global competitiveness, such as skilling initiatives, and cloud innovation centers. At a practical level, local content requirements are often difficult to meet. For example, the procurement preference for 50 percent local content is difficult to meet for many switching systems used in telecommunications as well as satellite systems. It is not currently possible to manufacture such systems in India while meeting the necessary technical requirements outlined in tenders.

Like all countries that manufacture ICT products, India's ICT manufacturing base depends on a globally flexible supply chain that is characterized by intense competition and fluctuations in price and supply of different inputs. Market demands are such that it would be impractical for the commercial sector to eliminate the use of global resources or a distributed supply chain model.

Since India is not currently a member of the WTO Government Procurement Agreement (GPA), we acknowledge that this policy is not in conflict with its formal agreements. However, we would submit that the PMA policy does a disservice to the Indian government in limiting access to the most cost-effective and advanced ICT products available, especially at a time when officials are implementing important new programs to promote digital connectivity nationwide. We would urge the Indian government to consider a procurement policy that grants agencies maximum flexibility, allowing them to purchase products based on performance, operational needs, and overall cost, rather than focusing on local content requirements.

Local content mandates have not historically proven effective in promoting the development of local products that are either high quality or cost competitive. Instead of granting domestic preferences in

public procurement, a better way to help local industry would be to focus on enhancing the business environment to foster healthy competition and encourage innovation.

Recommendation: As the Indian government seeks to enhance exports, we request USTR's support in encouraging GOI to take a closer look at the practices reflected in the GPA and consider how they might bring their practices into alignment with it. Ultimately, joining the GPA would expand the access of Indian's own IT industries, including its services sector, to government procurement markets around the world.

IMPORT POLICIES AND DUTIES

When India joined the Information Technology Agreement (ITA) in 1996, it agreed to grant zero-duty treatment to many ICT goods. In a clear breach of this commitments and its WTO bound tariff rates, India has subsequently levied duties on covered products on seven separate occasions. India's most recent increase in tariffs on ICT products occurred in February of this year when it increased tariffs on mobile phone components including camera modules, connectors, printed circuit board assemblies, parts for the manufacture of lithium-ion battery packs, and mobile phone charger inputs. The continuous and unpredictable implication of these tariffs has significantly decreased business certainty and inhibited the ability of U.S. companies to plan their business operations in India and throughout their supply chains connected to India.

***Recommendation*:** We encourage USTR to take further action in the context of the WTO with the goal of getting India to comply with its bound tariff rates on ICT products. The new levies have not only hurt investor confidence, but risk needlessly raising the price of technology products and services for India's own businesses and citizens, which will make it more difficult for the government to achieve the goals of Digital India.

CONCLUSION

To enhance ease of doing business and increase investment in the country, India should consider the possible disincentives that might unintentionally be created for foreign companies seeking to invest in and manufacture in India. The ICT industry seeks to partner with the Government of India to ensure that technology is a resource for Indian economic, environment, and social development. Industry welcomes the opportunity to engage and regulatory objectives that are aligned with good regulatory practice and which do not raise technical barriers to trade.