



Coalition of Service Industries

December 12, 2008

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: USTR Section 1377 Request for Comments Concerning Compliance
with Telecommunications Trade Agreements.

Dear Ms. Blue:

The Coalition of Service Industries (“CSI”) appreciates the opportunity to submit this statement in response to the request of the United States Trade Representative (“USTR”) for comments pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. Section 3106, concerning the operation, effectiveness, implementation of, and compliance with the World Trade Organization (“WTO”) Agreement and other agreements regarding telecommunications products and services of the United States.¹

CSI strongly supports USTR’s efforts to ensure compliance with telecommunications trade agreements. Telecommunications networks and services are the building blocks enabling the knowledge based economy of the 21st century to function and are the backbone of the Internet and electronic commerce. Expert studies amply demonstrate that the development of competitive foreign telecommunications markets brings lower prices and fosters new and innovative services that not only benefit U.S. consumers and all U.S. industries competing in the global marketplace, but also encourage greater growth in the world economy.²

CSI therefore emphasizes the importance of continued new telecommunications trade commitments by U.S. trading partners to provide further market liberalization, and remove remaining market access barriers that are not addressed by existing trade commitments. Although considerable progress has been made in opening formerly closed foreign telecommunications markets as the result of the WTO Agreement and U.S. Free Trade Agreements, significant barriers to telecommunications trade and investment remain in both developed and developing countries. To remove these barriers, countries should allow full market access for all services, with 100% foreign capital investment and control, and adhere to the regulatory principles listed in the WTO Reference Paper. A significant concern, as described below, is the need to expand trade commitments to address continuing constraints on foreign

¹ Office of the United States Trade Representative, *Request for Comments Concerning Compliance With Telecommunications Trade Agreements*, 73 Fed. Reg. 71707 (2008).

² See, e.g., World Bank, *Information and Communications for Development 2006: Global Trends and Policies*; World Economic Forum, *The Global Information Technology Report 2006-2007*

investment in telecommunications that continue to limit competition, investment and growth in many countries.

CSI encourages USTR to use all available avenues to address these barriers, and is particularly concerned that we not lose the opportunity presented by the Doha Round to liberalize international trade and investment in telecommunications.³ CSI strongly supports USTR's efforts to encourage WTO members to come forward with improved offers addressing continuing market access barriers in telecommunications and to bring these important negotiations to a successful conclusion.

CSI's comments below highlight a series of market access restrictions, foreign investment limitations, and other instances of discriminatory treatment of U.S. telecommunications companies in a range of developed and developing countries, including Canada, China, El Salvador, India, Jamaica, Germany, Mexico, Singapore, South Africa, Thailand, and Tonga. CSI also draws attention to the potential barriers to cross-border trade in telecommunications services posed by current efforts by some developing countries to add "network externality" surcharges to cross-border termination rates.

CANADA

Canada maintains foreign ownership restrictions in telecommunications, prohibiting U.S. and other foreign investors from controlling facilities-based telecommunications carriers and thus preventing open competition and directly discriminating against innovation and price competition to the detriment of Canadian businesses and consumers. Canada continues to limit foreign investment in a facilities-based carrier to a maximum of 46.6% for all services except fixed satellite and submarine cable service.

Canada's Competition Policy Review Panel recently delivered a broad rebuttal of Canada's ongoing discriminatory policies in telecommunications in its June, 2008 Report, "*Compete to Win*". Sixty-Five specific policy recommendations to the Government of Canada focused in every case on the anti-competitive results of Canada's protectionist law and policy, including the specific recommendation that:

"...the federal government should adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry, In the first phase, the Minister of Industry should seek an amendment to the Telecommunications Act to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10 percent of the telecommunications market in Canada. In the second phase, following a review of broadcasting and cultural policies including foreign investment, telecommunications and broadcasting foreign investment restrictions should be liberalized in a manner that is competitively neutral for telecommunications and broadcasting companies"

The Panel had the benefit of substantial resources, processes and input, as well as the guidance of leading Canadians advising the Government. These recommendations were entirely consistent with both the earlier 2006 recommendations of the Telecommunications Policy Review Panel Final Report and the April, 2003 recommendations of the Standing Committee on Industry, Science and Technology entitled "Opening Canadian Communications to the World".

³ See *Coalition of Service Industries, Making the Most of the Doha Opportunity: Benefits from Services Liberalization*, Jul. 2006.

These consistent and numerous advisories to the Canadian Government each acknowledged that Canada, a leading U.S. trading partner, retains one of the most restrictive and inflexible set of rules limiting foreign investment in the telecom sector among all OECD member countries and recognized the drawbacks of this policy. In June, 2006 Canada's Minister of Industry issued a proposed policy directive consistent with relaxation of regulation in favor of general 'market forces' criterion; however the conclusion of the Telecom Policy Review Panel earlier that foreign ownership restrictions should also be relaxed or eliminated over time was not addressed by the Minister and this inconsistency remains. Although the Minister formally called for changes in telecom regulation, there was no request for removal of foreign ownership restrictions.

The Canadian Prime Minister responded informally in October, 2008 to the modest recommendations of the Competition Policy Review Panel by indicating that his government was not yet ready (and unspecified conditions not yet appropriate) to act on the overwhelming economic evidence against protectionism in telecommunications, despite signals that the Government would move to eliminate similar rules in the uranium mining sector.

As a consequence of these foreign ownership restrictions, U.S. firms' presence in the Canadian market as wholly U.S.-owned operators continues to be limited to that of a reseller, dependent on Canadian facilities-based operators for critical services and component parts. These restrictions limit global telecommunications service providers' options for providing high-quality, end-to-end telecommunications services as they cannot own or operate their own telecommunications transmission facilities. The removal or relaxation of these foreign investment restrictions would increase telecommunications market entry and investment in Canada, open broad access for Canadian carriers to international capital markets, and encourage sustainable facilities-based competition in the Canadian telecommunications industry and broader economic growth. Canada's recent measures undertaking additional and de-facto substantive deregulation of its facilities-based telecom market further highlights the need for U.S. and other foreign telecom suppliers and other non-Canadian investors to have opportunities for 100% facilities-based telecom ownership in this important market. Of concern, Canada is now moving to deregulate several competitive safeguards that apply to facilities-based Canadian carriers, but is not moving to allow foreign owned carriers to build their own facilities. This disparity distorts the availability of market-based responses if the price or quality of network inputs substantially changes in a deregulated market.

We urge USTR to emphasize to the Canadian Government that the recommendations to remove these restrictions should be implemented in full as soon as possible.⁴

CHINA

Since its accession to the World Trade organization (WTO) in 2001, China has conducted a comprehensive reform of its services trade policy, which has opened key services sectors to foreign participation, improved its policy predictability, and made China subject to the global WTO trade regime.

⁴ Other countries also maintain foreign ownership restrictions in their telecom trade commitments impeding market entry, competition and economic growth, including China, India, Indonesia, Korea (subject to implementation of revisions agreed in the Korea-US Free Trade Agreement), Malaysia, Mexico, South Africa, Thailand and Turkey and Vietnam. CSI urges USTR to use all potential opportunities to press for the removal of these continuing telecom barriers to provide broad economic benefits to customers, service providers and carriers in all countries, including in particular through the Doha Round negotiations.

Important progress has been made in revising existing laws and passing new laws and regulations to open service sectors to foreign competition. China also has greatly benefited from more open services markets resulting from its WTO membership. According to the World Bank, Chinese global cross-border services exports grew from \$5.7 billion in 1990 to \$121.7 billion in 2007. The U.S. services trade surplus with China was \$5.4 billion in 2007, based on strong U.S. exports in business, professional, educational, financial, and telecommunications services. The level of foreign direct investment in China has also been growing steadily, from \$46.9 billion in 2001 to \$85.4 billion in 2007. These developments demonstrate that China's bold decision to open its economy to foreign capital has benefited both China and its trading partners. Nevertheless, China's WTO compliance record in services is hurt by incomplete implementation of its accession commitments and by remaining services trade barriers, including those in telecommunications, where China's narrow interpretation of value added services, high capitalization requirements for basic telecommunications services, lack of an independent regulator, and restrictions on the provision of VoIP and Internet services by non-Chinese companies remain key outstanding issues.

Market entry opportunities for U.S. telecommunications providers in China are limited by several factors, including China's overly narrow definition of value-added services (VAS) for value added network service licensing. China has adopted a conservative approach with the concept of basic versus value added services since WTO accession, shuffling some very important value-added services into the highly protected basic category. The narrowing of the scope for value added services is a counter-liberalization trend inconsistent with China's WTO commitments. Replacing these conservatively applied vertical service classifications with more objective and transparent guidelines for Type I (facilities-based) and Type II (non-facilities based) services would invite more foreign carriers to invest in China which eventually would stimulate economic growth in the Chinese market. As long as the vertical VAS and basic classifications persist, we urge the USG agencies to encourage China to take the following steps to remove barriers to the development of value-added services in China:

- Open the entire list of value-added services in the Catalogue to foreign investors including services such as managed IP-VPN, in conformity with international norms.
- Lift the prohibition on resale of the underlying telecommunications services used in the provision of value-added services, thereby enabling both incumbent and new entrant carriers to acquire capacity at wholesale rates and interconnect their networks to deliver services to a broader customer base.
- Permit 100% foreign ownership of VAS enterprises.

In early September of 2008, the Chinese government announced a reduction in the capitalization requirement for a basic service license from 2 billion RMB (approximately US\$291 million) to 1 billion RMB (US\$145.9).⁵ While the reduction in the capitalization requirement for a basic service license is a step in the right direction, China's requirement is still very high and continues to be a significant barrier to entry. The reduced capitalization requirement is 100 times the capital requirement for value added service licensees, which is itself many times the actual level of capital investment needed to build a national, non-facilities-based value added network. The reduced capitalization requirement in basic services continues to be excessively burdensome and unjustified restriction that violates the GATS. A narrowly tailored performance bond would be sufficient to address any existing concerns. China should take additional steps to reduce the capitalization requirement to a reasonable level.

⁵ State Council, Decisions on Amending the Regulations for the Administration of Foreign-invested Telecommunications Enterprises (FITEs), issued on September 10, 2008.

The requirement that a foreign company select a state-owned and licensed telecom company as a joint-venture partner should be eliminated under the Basic Service license regime. This requirement is a significant market access barrier. Incumbent licensees have only limited incentive to partner with foreign competitors. It is not an ideal model for promoting competition to require foreign telecom service providers to partner with a company that may also be a horizontal competitor of their joint venture.

The foreign direct investment restrictions of 49% and 50% respectively for a basic service license and VAS license also constitute a significant market access barrier from an operational and economic perspective. The lack of operational control by a foreign operator in a joint venture with ownership of 50% or less not only affects its ability to protect its brand but also constitutes an impediment to achieving a service that is seamlessly integrated in the foreign operator's global network offerings.

China also has not implemented its WTO Reference Paper commitment to establish an independent regulator. The Chinese Government still owns and controls all major operators in the telecommunications industry, and the Ministry of Industry and Information Technology (MIIT) still regulates the sector. CSI encourages USTR to place a high priority on working with China to establish a regulatory body that is separate from, and not accountable to, any basic telecoms supplier, and that is capable of issuing impartial telecom decisions and rules. Specifically, it is important that the regulatory body adopts the following: transparent procedures for drafting, finalizing, implementing and applying regulations and decisions; appropriate measures, consistent with the WTO Reference Paper to prevent dominant suppliers from engaging in, or continuing, anti-competitive practices; a defined procedure – as it has done for interconnection – to resolve efficiently and fairly public telecom suppliers' commercial disputes over their agreements; an independent and objective process for administrative reconsideration of its decisions; and appropriate procedures and authority to enforce China's WTO telecom commitments, such as the ability to impose fines, order injunctive relief, and modify, suspend, or revoke a license.

Further, finalizing and adopting the pending Telecom Law should be a top priority for the government. Interested parties must also be provided a reasonable period for review and comment on the Ministry's regulations and decisions as required by China's accession documents. Virtually no notice was given, and no comments invited, before the revised Catalogue of Categories of Telecom Businesses went into effect in 2004 and 2007.

The Chinese government also imposes strict limitations on non-Chinese companies that wish to offer Voice over Internet Protocol (VoIP) services in China. No non-Chinese company may offer any kind of VoIP service in China, as VoIP requires a VAS license, which foreign companies may obtain only through a joint-venture company. Connection to the public switched telephone network (PSTN) requires a basic service license. Only a few small pilot VoIP projects -- involving the dominant Chinese telecom operators -- are allowed to offer PSTN-interconnected VoIP services to Chinese consumers. In its 2008 1377 Report, USTR expressed its strong concern about policies among trading partners that stifle technologies that help promote innovative services, such as voice services provided through VoIP.⁶ USTR should continue to urge the Chinese government to remove restrictions in the efficient use of IP technologies, including voice applications.

In addition, recently China's National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) jointly issued a revised Catalogue for the Guidance of Foreign Investment Industries that places some Internet services under the prohibited foreign investment industries category. More specifically, the revised foreign investment catalogue indicates that foreign investment in "[n]ews websites, Internet-based video and audio program services, Internet services

⁶ See Results of the 2007 Section 1377 Review of Telecommunications Trade Agreements at p. 13.

establishments, and Internet cultural operations” is prohibited. At this time, it is unclear to what extent the new classification of these Internet services will impact the ability of foreign investors to offer Internet services in China. What is clear is that these policies create additional barriers to market entry in the telecom sector and discourage foreign investment.

EL SALVADOR

El Salvador this year increased international termination rates by approximately 100 percent by imposing a \$US 0.04 per minute tax on those calls to fund domestic social programs. The tax is paid by domestic operators in El Salvador that receive inbound international traffic and is passed through to U.S. and other non-El Salvador carriers sending traffic to that country in the form of higher termination rates. The El Salvador legislation imposing this tax, Decreto No. 651, expressly seeks to shift the funding costs for these domestic social programs away from domestic end users in that country and to impose these costs on U.S. and other foreign consumers. The introductory paragraph to the legislation states: “Charges for interconnection services for inbound calls from outside the country are paid for outside the country and therefore have no impact on the cost of calls made by domestic end-users because these charges are not made part of the domestic charges.” Based on the most recent FCC international traffic data showing approximately 1.45 billion U.S. international traffic minutes to El Salvador for 2006, the new tax increases annual U.S. carrier out-payments to El Salvador by at least \$57 million.

The new tax violates El Salvador’s international trade commitments under both the WTO and CAFTA agreements. Section 2.2 of El Salvador’s WTO Reference Paper commitment is titled “[i]nterconnection to be ensured” and states that, with respect to commercial telecommunications services, “[i]nterconnection with a major supplier will be” provided at “cost-oriented rates.” Since there is no relationship between the domestic social programs funded by the tax and the costs of interconnection services provided to cross-border suppliers, the new tax fails to be cost-oriented.⁷ Accordingly, by imposing this tax, El Salvador is preventing its major supplier carrier, CTE, from charging cost-oriented rates for inbound international calls, and fails to comply with its WTO commitment under the Reference Paper that interconnection for those calls with its major supplier at cost-oriented rates is “to be ensured.”

Additionally, Section 5 of the WTO Annex on Telecommunications requires El Salvador to “ensure that any service supplier of any other member is accorded access to any use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions.” The increased rates for access to public telecommunications transport networks in El Salvador resulting from the new tax are also contrary to the WTO Annex on Telecommunications. The WTO Dispute Settlement Body has found that “access to and use of public telecommunications transport networks and services on ‘reasonable’ terms includes questions of *pricing* of that access and use.”⁸ The new tax has increased international termination rates by approximately 100 percent without any demonstration of increased costs. These increased rates fail to provide the reasonable terms for access and use required by the Annex.

The new tax also violates similar requirements of the CAFTA entered into by the United States, El Salvador, Costa Rica and the Dominican Republic. Article 13.4 (5)(a) of the CAFTA contains similar language to Section 2.2 of the WTO Reference Paper requiring the provision of interconnection services with major supplier carriers at cost-oriented rates. Further, Article 13.2 (1) of the CAFTA includes

⁷ WTO, El Salvador, Schedule of Specific Commitments, Supplement 1, GATS/SC/29/Suppl.1, Apr. 11, 1997.

⁸ WTO, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, Apr. 2, 2004, ¶ 7.333

similar language to Section 5 of the WTO Annex on Telecommunications requiring that “enterprises of another Party have access to and use of any public telecommunications service . . . on reasonable and non-discriminatory terms and conditions.”

CSI encourages USTR to press El Salvador to comply with its WTO and CAFTA commitments by removing this new tax immediately.

GERMANY

The German Federal Network Agency, BNetzA, continues to be subject to inappropriate political pressure. The German Government still holds a direct and indirect ownership interest of 31.7% in Deutsche Telekom AG (“DTAG”), the incumbent.

Under German law, BNetzA itself is a subordinated authority of the Federal Ministry of Economics. Although the decisions of its ruling chambers cannot be overruled by the Ministry, BNetzA remains bound by the Ministry’s directives.

In addition, there continues to be a lack of transparency in the regulator’s operations. When BNetzA does release a decision, only the operative provisions are made available in print, not the entire decision. As a result, in some cases only one-half page of a twenty page decision may be released. Although the data is arguably redacted to protect business data, this does not appear to be the reason for such a limited release of decision. At present, the regulator does not even fully release non-confidential decisions and only recently started to make available operative provisions of some decisions on its website, limiting access to even the presently inadequate representation of regulatory decision-making. BNetzA also has no rules comparable to the FCC’s ex parte process by which there is disclosure of meetings that the regulator has held with outside parties regarding matters being decided by it.

We are concerned that the lack of opportunities for U.S. companies to participate in any proceeding that could have a direct and substantial impact on their business plans. Due to the Administrative Court’s rules of procedure, competitors have little or no opportunity to participate as third parties in the court’s proceedings, and therefore have no opportunity to follow regulatory developments in court. In contrast, DTAG always is a party to the case and can therefore influence decision making at the court level.

In addition, BNetzA’s decisions must be made in a timelier manner. The German Telecommunications Act requires cases on the abuse of market dominance to be decided within four months from the commencement of proceedings. BNetzA, however, has exceeded this time frame in numerous instances. USTR should continue to monitor BNetzA’s progress in this area and encourage BNetzA to make its methodology clear and consistent and publish its reasoning.

INDIA

India has made great strides in opening its market to competition, and CSI commends India for these pro-competitive reforms. India has increased the permissible level of foreign direct investment in telecom licensees to 74 percent and has lowered entry barriers for International and Domestic Long Distance licenses to encourage new entrant competition and investment. As a result AT&T, BT, Cable and Wireless, and Verizon now have obtained international (ILD) and national (NLD) long distance licenses and joined domestic operators in the market for these services. Additionally, India is considering the liberalization of Internet Telephony (VoIP) services, the opening of its market to mobile virtual

networks (MVNOs), and the institution of long-distance carrier selection. Already, India has acted to eliminate the Access Deficit Charge (ADC) on the provision of international long-distance services, to permit the resale of international private leased circuits (IPLCs) and to allow non-discriminatory access to cable landing station facilities. The additional competition in India's telecom markets resulting from these far-sighted measures will benefit Indian businesses and consumers and the economy as a whole by ensuring lower prices, new and innovative products and services and expanded customer choice.

However, the Department of Telecommunications (DOT) as the policy maker and the Telecom Regulatory Authority of India (TRAI) as the regulator have a continuing mutual responsibility in developing, implementing, and enforcing laws and regulations that provide new entrants the assurance that they can compete on a fair and equitable basis in India. We recommend that TRAI consider adopting over time a licensing regime such as those in Europe and the US where a single, easily-obtained authorization allows operators to provide a broad range of data and voice services, fixed and mobile, facilities-based and resold. More generally, we encourage India to continue its efforts to provide legal and regulatory certainty both in the development of a body of clear and consistent laws and regulations, and in the transparent and equitable application and enforcement of those laws and regulations.

(1) Foreign Ownership Restrictions

CSI commends the Government of India on its recent increase of its foreign direct investment (FDI) limitation to 74%, while also urging an increase to 100% FDI.

(2) IP-Enabled Services

CSI also recognizes the important Telecommunications Regulatory Authority of India (TRAI) recommendations issued in August 2008 to liberalize IP-Enabled or VoIP services. Currently, these regulations are pending before India's DOT. CSI urges the DOT to implement them as soon as possible.

(3) Annual License Fees

CSI urges India to take a closer look at the methodology it currently uses to calculate the annual license fees for both ILD and NLD operators to ensure that India's license fee regime does not frustrate the goals of promoting competition, creating a level playing field among all service providers, and reducing the sales price of services to consumers.

Under the current methodology, license fees for these operators are based on revenues from both licensed and unlicensed activities, which make the calculation of such fees unnecessarily burdensome.

In addition, we have argued that the license fee should not operate as a multi-stage and cumulative assessment. The fact that input costs (such as charges for interconnection or local loops which themselves already reflect the license fee) are not deductible from the adjusted gross revenue on which the license fee is calculated, results in the double assessment of license fees in some cases. Whereas facilities-based operators using their own networks need only pay the license fee once, wholesale inputs that operators such as ILDOs, NLDOs, ISPs, MVNOs and potentially ISPs buy from other operators as part of their own infrastructure-based service offerings are subject to the license fee twice – once when they are sold from the first network owner to the second operator, and then again when the second operator sells them to the end user. The same applies to operators who interconnect to facilities-based operators' facilities. As a consequence of levying a license fee at every point in the supply chain, a telecom operator who buys wholesale inputs from other licensed operators is placed at a competitive disadvantage with those who do not need to buy these inputs.

To avoid this double assessment, India could clarify that such license fees apply only to revenues from retail sales transactions where the service is provided to an end user. Intermediate or wholesale transactions where the purchaser is another carrier would not be counted. In this instance, revenues of a telecom operator from services sold as inputs to another carrier would not be subject to a license fee. Since the service fee charged by the first telecom operator would not need to recover any license fee, all operators would be able to compete on a true level playing field. Alternatively, India could specify that for purposes of license fee calculations licensed providers are permitted to deduct from the adjusted gross revenue base the value of any telecom services they have purchased as inputs.

Either of these two approaches would eliminate the double taxation problem. For example, in the United States, the Federal Communications Commission (FCC) has adopted the excise tax approach purposes of USOF contribution, where each carrier reports only its retail sales to end users. This system has been in place for about ten years and has worked well.

Lastly, should licensing fees be extended to additional ISP services, we have recommended that the methodology for calculating the revenue base should not result in a similar double assessment of fees.

(4) Encryption

Companies support the freedom of business and consumers in India to use strong encryption to protect their corporate and personal information. Strong encryption uses robust encryption algorithms. The freedom to use strong encryption is a global standard for securing information online, such as confidential business information, financial information, online transactions and internal government communications, from intrusion by hackers, thieves, competitors and other wrongdoers. Strong encryption also enables India's rapidly growing IT and BP industries, which rely on strong encryption to secure their global clients' confidential information.

We continue to note that India's encryption standards have not been updated in India's telecom regulations to appropriately reflect the needs of next generation data and IP services providers or the considerations of their business enterprise customers.

There also is a discrepancy in India's limitations on the use of encryption. Under the ISP license encryption is permitted but only up to 40 bits whereas under the ILD/NLD licensing regime no encryption is allowed without the prior approval of the DOT, which as a practical matter is never granted. It is unclear why encryption is treated differently depending on whether it relates to traffic on the public Internet (i.e., under an ISP regime) versus a dedicated network (i.e., under an ILD/NLD regime). This discrepancy in applicable levels of encryption standards makes it impossible for telecom operators and other next generation data and IP services providers to comply with these inconsistent obligations.

Although under current telecom regulations licensed operators and their customers are not allowed to deploy high encryption in their network service, other industry regulations require these same customers to deploy high encryption on their data networks (e.g., Information Technology Security Guidelines, the Securities and Exchange Board of Indian Guidelines on Internet Based Trading and the Reserve Bank of India Guidelines on Internet Banking). However, because of the limitations stipulated under the telecom regulations, companies subject to the aforementioned industry regulations and the telecom operators are in the legal impossibility of both complying with their respective obligations under Indian law.

For these reasons, U.S. telecom companies have urged India to modify its encryption policies to resolve these inconsistencies and to protect the freedom to use strong encryption online.

(5) Resale of International Bandwidth

We understand that the DOT recently accepted the recommendations of TRAI to permit the resale of international private leased circuits (IPLCs) in India. Guidelines and license conditions were issued by DOT on 24 September 2008.

Whereas we applaud the efforts of India to promote competition by allowing non-facilities based operators to resell IPLs pursuant to a Reseller License, we are concerned about its application.

It would appear that ILDOs wishing to resell IPLCs of other ILDOs are equally required to obtain an IPCL Reseller License. If the intent of opening up the IPLC reseller market (like any other reseller market of telecom services) is to promote competition in the sector, India should ensure that the IPLC reseller licensing requirements are only applicable to entities without a facilities-based license (i.e. non-ILDOs) wishing to resell IPLCs. In other words ILDO's are properly licensed facilities based operators. The license conditions under the IPLC reseller license do not go beyond those which ILDOs are already subject to under their current ILD license. The sole apparent purpose of requiring ILDOs to obtain a reseller license is to subject the ILDOs to a further entry fee for the reseller license which is in the same amount as that for an ILD license.

We continue to encourage India to instill further competition in all segments of the telecoms market by creating a reseller's licensing regime for all services (not only for IPLCs under the IPLC reseller license or for mobile services currently contemplated under the MVNO consultation paper). However in the meantime India should clarify that duly licensed facilities-based operators are allowed to resell under their existing licenses.

(6) Submarine Cable Capacity

In response to concerns raised by USTR, TRAI took action late in 2005 to lower the cost of IPLCs, which provide the essential links connecting India's robust economy with the rest of the world. In June 2007, TRAI issued regulations that appear to address many of the concerns raised previously regarding the need to ensure non-discriminatory, fair, and open access to essential facilities at cable landing. Whereas we applaud the efforts made by TRAI, the regulations do not uniformly provide sufficient assurance of transparency, certainty, or timely provision of needed services. These concerns include the following: (i) the Reference Interconnection Offer (RIO) is not a mandated set of agreements but is to be negotiated on an ad-hoc basis, (ii) denial of access can be "for any valid reason" – a term that is not defined in the regulations, (iii) there are extensive time periods to give effect to RIOs for new systems, (iv) rates of cross-connection charges should be independent of capacity, (v) the minimum provisioning period for access services is too long, and (vi) many of the maximum time periods for the negotiation and payment of access and backhaul arrangements are too brief.. CSI asks that TRAI clarify its regulations to address the above-stated concerns.

JAMAICA

Jamaica maintains a discriminatory and unreasonably burdensome "universal service" levy introduced in June 2005 to fund broadband Internet access for schools and libraries in Jamaica. The levy of 3 cents per minute for fixed-terminated calls and 2 cents per minute for mobile-terminated calls applies only to international-inbound traffic terminating in Jamaica. Because this levy does not apply to international-outbound calling from Jamaica or to domestic calling within Jamaica, it imposes the entire

burden of subsidizing this Jamaican universal service program on U.S. and other non-Jamaican carriers and their customers. In announcing this levy, Jamaica's Minister of Commerce, Science and Technology "emphasized that the levy would not be a charge on the Jamaican consumer, as it would only be applied to incoming international calls."⁹ The WTO Reference Paper states that universal service "obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory, and competitively-neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member."¹⁰ The FCC has noted, "universal service obligations that are levied disproportionately on foreign-originated calls clearly violate these principles."¹¹

USTR expressed its concerns in its 2006-2008 Section 1377 Reviews that Jamaica is funding this program on the basis of fees on foreign operators and regarding the lack of transparency in the program to determine the need for this large surcharge.¹² Jamaica should adopt a more equitable and transparent approach to funding its universal service program that collects such funds from a broader base of users (i.e., not exclusively foreign operators) to ensure that the program does not adversely affect access to the Jamaican market nor constitute a program that is more burdensome than necessary to achieve Jamaica's program goals. USTR recommended that the surcharge collection be suspended until Jamaica is able to find a means to fund the program in a more equitable manner. CSI urges USTR to continue to monitor this situation closely. Further, Jamaica should suspend the surcharge until it is able to provide adequate information concerning the need for and duration of this program.

MEXICO

In 2006, Mexico introduced surcharges for international calls to mobile networks in late 2006 as the result of its decision to apply the calling party pays (CPP) system to these calls rather than the receiving party pays (RPP) system formerly in effect. U.S. carriers are subject to per-minute surcharges¹³ of approximately 14 cents for international calls to wireless phones in Mexico. In its 2007 1377 Report, USTR urged Mexico's regulatory authority, Comisión Federal de Telecomunicaciones (COFETEL) to ensure that— at a minimum— Telcel, with more than 70 percent of the Mexican mobile market, immediately offers a wholesale rate for terminating calls on its network that is no higher than the rate it charges its own retail customers to terminate within the Telcel network. That rate is as low as 7 cents per minute, compared with over 12 cents it currently charges other networks for the same function. COFETEL issued a ruling in September 2006 requiring annual termination rate reductions for domestic local fixed to mobile calling in Mexico under the CPP system be reduced to approximately 9 cents in 2010. COFETEL has thus explicitly recognized the need and ability for reductions in CPP termination rates in Mexico. However, the September 2006 ruling is being challenged in court, and the glide path has been suspended. USTR should encourage COFETEL to accelerate the process to reduce rates.

⁹ Government of Jamaica, Ministry of Commerce, Science and Technology, News Stories, Government Imposes Levy on Incoming International Calls, http://www.mct.gov.jm/call_levy.htm.

¹⁰ WTO, Jamaica – Schedule of Specific Commitments Supplement 1, at 10.

¹¹ International Settlement Rates, 12 FCC Rcd. 19,806, ¶ 87 (1997). See also, id., ¶ 148 ("We disagree with commenters who argue that foreign carriers are entitled to require that universal service requirements be financed disproportionately through settlements revenues. . . . [W]e believe that universal subsidies must be nondiscriminatory and transparent").

¹² See Results of the 2007 Section 1377 Review of Telecommunications Trade Agreements at pp. 7-8.

¹³ See FCC Consumer Advisory, Probable Increase in Charges for Calling Wireless Telephones in Mexico, Oct. 19, 2006, http://www.fcc.gov/cgb/consumerfacts/Mexico_caller_pays.html.

Mexico continues to maintain a ceiling of 49% on foreign direct investment in wireline carriers authorized to own and operate basic telecommunications facilities. This restriction constitutes a major impediment for foreign carriers interested in entering and investing in the market. There have been reports of interest among government officials in eliminating this prohibition on foreign participation in the Mexican market. CSI urges USTR to explore all avenues for encouraging the Government of Mexico to address this market access barrier as soon as possible.

Mexican regulations also impose unduly onerous limitations on non-Mexican companies that wish to offer Voice over Internet Protocol (VoIP) services in Mexico. Connection to the public switched telephone network (PSTN) requires a telecom license in Mexico. Because Mexico makes no regulatory distinction between traditional voice and VoIP, no non-Mexican company may offer any VoIP service that interconnects with the PSTN there without first obtaining a telecom license. However, foreign companies may only obtain the required telecom license through a joint-venture company because of Mexico's restrictive foreign ownership.

Mexico's Competition Commission, the CFC, has launched separate investigations into the country's mobile telephony and broadband Internet markets. The CFC said that wireless carriers charge rivals termination fees that are higher than what they bill their own clients to make on-net calls. CFC also launched an investigation into possible market dominance in the fixed-line telephony market. While CSI recognizes that the Mexican government is taking some positive steps towards improving its regulatory climate, more needs to be done.

COFETEL repeatedly has failed to effectively regulate and enforce its regulations. U.S. telecommunications operators have voiced concerns about the problems inherent in Mexico's telecommunications regulatory environment. The absence of an independent and effective regulator has had a negative impact on the development of competition. For example, Mexico has failed to maintain appropriate measures to prevent anti-competitive practices by Telmex, as required by Mexico's commitments under Section 1.1 of the Reference Paper. Although the CFC has found that Telmex possesses market power, COFETEL has failed to promulgate new dominant carrier rules to prevent Telmex from engaging in anti-competitive conduct.

COFETEL's authority and enforcement powers need to be addressed. COFETEL's regulatory authority is limited to issuing recommendations to the SCT for the imposition of sanctions in instances in which telecommunications operators violate the telecommunications law or fail to comply with regulatory obligations. Upon receipt of COFETEL's recommendations, the SCT has the sole authority to implement or reject the sanctions. In addition, COFETEL does not have the power to issue licenses or concessions. Because of overlapping responsibilities between COFETEL and the SCT, delays have occurred in obtaining licenses. The law states that licenses should be issued within 120 days, but that has rarely occurred. This regulatory structure has not been effective.

SINGAPORE

The Infocomm Development Authority of Singapore (iDA) should reconsider its decision to exempt SingTel, the incumbent operator, from offering interconnection at the tandem exchange level. Facilities-based operators which compete with SingTel have argued over the years that the lack of availability of interconnection at SingTel's tandems places them at a competitive disadvantage vis-à-vis SingTel. The reason for this is that new entrants are required to build or lease facilities to SingTel's end-office switching centers that serve their customers, instead of interconnecting more efficiently with SingTel at the tandem level. In addition, SingTel has also announced plans to consolidate its end-office switching centers, reducing them from 27 to 12. While iDA has imposed certain obligations on SingTel

that would require advanced notice to other carriers before decommissioning any end-office switching centers, competing carriers would like additional certainty about which switching centers will be closed. This would allow them to plan better and avoid the risk of investing in infrastructure that may have to be prematurely discontinued due to SingTel's consolidation of end-office switching centers.

The USTR has included the interconnection issues described above in its annual Section 1377 Review of Telecommunications Trade Agreements over the last several years. However, the iDA has indicated that competitive alternatives exist and there is no need to mandate access to tandem exchanges. iDA's rationale for not requiring SingTel to offer tandem interconnection does not take into consideration the significant challenges/barriers new entrants face when offering telecommunications services in some geographic areas of the country. New entrants have created competitive alternatives in the Central Business District (CBD) of the country, and in this area the lack of access to tandem interconnection is less harmful to them. But as more businesses move out of the CBD into lower cost areas of the city-state, it becomes essential that new entrants have access to SingTel's facilities under the interconnection rules in order to serve their customers. It is clear that in these geographic areas of the city-state, SingTel has significant competitive advantages that may only be overcome by competitors by having access to the incumbent's facilities under the interconnection framework. iDA acknowledged the lack of competitive options outside the CBD when it concluded that "while some LLC End Users in the CBD have a choice of more than one operator, End Users outside the CBD must rely almost exclusively on SingTel for LLCs".¹⁴ Competitive carriers' access to tandem exchanges outside the CBD would provide new entrants the ability to compete with SingTel on a level playing field, and deploy their own alternative networks when economically justified.

SingTel's plans to reduce the number of local exchanges from 27 to 12 pose significant challenges for competitive carriers in building out efficient networks. Network rollouts to these local exchanges has become a financially risky proposition. Without a transparent plan of SingTel's future reductions in local exchanges, competitive carriers face a high probability of misdirecting their network investment to facilities that have been scheduled for decommissioning. Competitive carriers which have proceeded with collocations at these exchanges risk a complete investment write-off should such facilities be shut down within months of network deployment and equipment installation. Furthermore, without tandem exchange access, competitive carriers must replicate a dedicated set of network rings and network equipment in each of the 27 local exchanges to achieve nationwide access. The requirements to replicate these investments to each local exchange, in the absence of transparency on exchange closures, multiply the investment risks for competitive carriers.

The lack of access to tandem exchanges by competitive carriers puts them at a significant competitive disadvantage vis-à-vis the incumbent operator. The negative impact on competitive carriers is greater in geographic areas outside the CBD where competitive alternatives are virtually nonexistent. In addition, the lack of transparency in SingTel's plan to significantly reduce the number of local exchanges increases the risk of investment in infrastructure and equipment by competitive carriers because of the high probability that a significant percentage of the exchanges will be closed. In addition, access to tandem exchanges outside the CBD would further strengthen competition in the telecom sector in Singapore and would alleviate some of the concerns associated with SingTel's plan to close a large number of local exchanges.

¹⁴ iDA's Preliminary Decision on the Request by Singapore Telecommunications Limited for Exemption from Dominant Licensee Obligations with Respect to the Business and Government Customer Segment and Individual Markets, ¶ 47, 26 (August 2008).

SOUTH AFRICA

Although a second network operator in South Africa's PSTN market has been licensed, Telkom SA Limited retains the *de facto* monopoly. The value added network services industry remains of the view that Telkom continues to abuse its *de facto* monopoly through margin squeezes in horizontal participation and competition with its wholesale market. To this extent, various complaints have been lodged and are under investigation at the South African Competition Commission. However, some of these complaints were lodged as far back as 2005, and the investigation has not yet been finalized.

Furthermore, the authority of the independent regulator, Independent Communications Authority of South Africa (ICASA) has been limited through a cumbersome dual jurisdictional structure with the Ministry of Communications, and the Government's mistrust of ICASA's independence has resulted in efforts to control it. The Ministry itself has a structural conflict of interest as both the policy-maker for the sector and the custodian of the state's considerable shareholding in Telkom. As a result, policy in the sector has unfolded in fits and starts, marked by many controversial incidents and abrupt reversals of strategy, including the cancellation of ICASA regulations by the Minister."¹⁵ However, it has been noted that a recent judgment of the Pretoria High Court (in the *Altech* litigation) may, in the medium-to-long term, change substantially the competitive landscape in the South African telecommunications infrastructure market.¹⁶ Following the Minister of Communications' decision to abandon attempts to overturn a High Court judgment that allows VANS operators to self-provide their own networks, ICASA has announced proposals for issuing network licenses to existing VANS operators and invited VANS operators in South Africa to indicate their network rollout proposals by December 5, 2008.

THAILAND

In December 2007, Thailand brought its domestic telecommunications regulatory regime into compliance with its 1997 GATS Schedule of Commitments, including a new licensing framework. The National Telecommunications Commission has been created to oversee implementation of the regulations. Despite these positive steps, the new licensing framework offers limited market opportunities for U.S. telecommunications services providers in Thailand.

For instance, the new licensing regulations¹⁷ authorize 100% Foreign Direct Investment in only a limited number of value added services¹⁸ which offer little incentive for U.S. telecommunications services

¹⁵ See *Another instance where privatization trumped liberalization: The politics of telecommunications reform in South Africa—A ten-year retrospective*, Robert B. Horwitz, Department of Communication, University of California-San Diego, and Willie Currie, Association for Progressive Communications, published by Science Direct Telecommunications Policy 31 (2007), pp. 445–62.

¹⁶ On August 29, 2008, the Pretoria High Court ruled in favor of Altech Autopage Cellular to the entitlement of having its existing Value Added Network Services (VANS) licence converted into an individual electronic communications network service (I-ECNS) licence, enabling the group's telecommunications subsidiary to develop and operate its own telecommunications network. The Court ruled that South African bylaw obliges ICASA to issue network provider licenses to VANS licensees such as Altech and additionally held that the Minister of Communications had acted beyond the scope of statutory powers in directing ICASA to issue I-ECNS licences to only some (as opposed to all) VANS licensees. The Ministry has reportedly chosen not to appeal the decision.

¹⁷ The licensing categories are describe in "Notification of the National Telecommunications Commission re Nature and Categories of Telecommunications Businesses."
http://www.ntc.or.th/uploadfiles/NotificationOfNTC/NTC_Notifications_On_Telecommunication_Business_Operation/NTC_Notification_Regarding_Nature_and_Categories_of_Telecommunications_Business.pdfThe licensing categories are::

to make investments in Thailand. The regulations further limit FDI to 49% in companies seeking to provide advanced telecommunications services (whether provided by a network operator or a reseller) to businesses (Closed User Groups) and consumer groups.

Thailand should further broaden the list of telecommunications services that can be provided by foreign carriers. Expanding market access would increase competition and stimulate new investment in the Thai telecommunications market. As is the case with China, restrictions on FDI are a significant disincentive to investment by U.S. service providers seeking to provide seamless, global services to their multinational enterprise customers.

TONGA

Tonga has recently increased international termination rates by more than 230 percent and that country's major supplier, Tonga Communications Corporation ("TCC"), is blocking the circuits of U.S. carriers that refuse to pay these increased charges. Tonga's rate increase is a blatant violation of its recently-made WTO Reference Paper and Annex commitments to ensure that termination rates are both cost-oriented and reasonable. Additionally, Tonga's failure to prevent TCC's disruption of U.S. carrier circuits violates Tonga's Annex commitment to "ensure that service suppliers of any other [WTO] Member have access to and use of any public telecommunications transport network or service offered within or across the border of [Tonga]."¹⁹

Tonga joined the WTO on July 27, 2007 pursuant to commitments that it would, among other things, ensure that interconnection rates for the termination of international traffic with TCC, its major supplier carrier, are both "cost-oriented," as required by the WTO Reference Paper, and "reasonable," as required by the WTO Annex on Telecommunications.²⁰ Tonga also made the further Annex commitment described above to ensure that carriers from WTO member countries would have access to and use of its cross-border circuits. At that time, U.S. carriers terminated international calls with TCC at rates of approximately US\$ 0.13 per minute. Subsequently, under one U.S. carrier's most recent agreement with TCC, international termination rates were further reduced to approximately US\$ 0.09 per minute for the period July 1, 2008 through August 31, 2008.

Type I license is for an operator who does not have a network and will offer a service where no restriction applies. The operator will only have to notify the Commission of its business intention, and a license will be issued.

Type II license is for an operator who may or may not have a network and will offer a service that is directed to a specific group, or the business operation will neither affect market competition nor adversely affect the public. The operator would only have to comply with the requirements set by the Commission to obtain a license.

Type III license is required of an operator who owns a network and intends to offer a service to the public, or the business operation may have an effect on market competition or on public welfare. The licensee will have to undergo evaluation by the Commission before it can commence business operation.

¹⁸ Examples include: Internet Access Service, Audiotext, Resale of Public Switched Telecommunications Services, Store-and-Retrieve Value Added Services, Public Payphone Services, and, International Calling Services.

¹⁹ Annex on Telecommunications, Sect. 5(b).

²⁰ WTO, *Report of the Working Party on the Accession of Tonga*, T/ACC/TON/17/Add.2, Dec. 13-18 2005.

Notwithstanding its recent WTO commitments, the Tongan government issued a ruling on August 11, 2008 requiring all international traffic terminated in Tonga to pay a minimum rate of US\$ 0.30.²¹ The ruling provides no explanation or justification for the rate increase, which raised rates to more than three times the previously-negotiated level. Tonga has therefore provided no evidence that the rate increase reflects increased costs, as required by its WTO obligations. Indeed, the near-contemporaneous agreement of Tonga's major supplier, TCC, to the rate of US\$ 0.09 per minute for the period July 1, 2008 through August 31, 2008 is compelling evidence that there is *no* cost justification supporting this increase.

USTR should strongly press Tonga to take immediate action to rescind the rate increase and to require TCC to restore all U.S. carrier circuits.

NETWORK EXTERNALITY PREMIUMS

CSI also draws attention to the potential WTO concerns that would be raised by the "network externality" premium on international termination rates now being sought by some developing countries. This premium would be added to the rates paid by developed countries to terminate telecommunications traffic in developing countries. The intended purpose of the premium would be to subsidize network build-out in developing countries by recognizing the additional "value" to developed-country callers of expanded developing-country networks. Proponents of this approach have suggested that this premium could increase termination rates by as much as 50 percent. Such proposals ignore the empirical lessons of the ten years since the WTO Basic Telecommunications Agreement – that open markets and competition are far more effective than settlement rate subsidies in stimulating efficient network investment and usage in developing countries. As described below, developing country members of the WTO would also violate their WTO commitments by requiring the payment of such premiums.

Under the Most-Favored Nation ("MFN") requirement of Article II of the General Agreement on Trade in Services ("GATS"), each WTO member country must treat international traffic from developed countries no less favorably than it treats international traffic from any other country. The proposed network externality premium would be paid only on international traffic from developed countries and not on traffic from developing countries and would therefore violate the MFN requirement. Additionally, Article VIII of the GATS requires WTO member countries to ensure that their monopoly service suppliers comply with MFN.

Any required premium also would violate additional obligations by developing country WTO members with cross-border basic telecom market access commitments. Those countries are required by the WTO Annex on Telecommunications to provide access to public telecommunications transport networks on reasonable and nondiscriminatory terms and conditions. The premium would violate the non-discrimination requirement for the same reason that it would violate MFN and rates including this non-cost-based surcharge would not be reasonable. A requirement for a network externality premium would also be contrary to various commitments under the WTO Reference Paper, including the requirements for cost-oriented and non-discriminatory interconnection rates and transparent, non-discriminatory and competitively neutral universal service programs. The premium would not be cost-oriented because it is intended to reflect the additional "value" to the calling party of further connections to the terminating network rather than the cost of call termination. The discriminatory nature of the premium also would prevent any treatment of the premium as a valid universal service obligation under the Reference Paper.

²¹ Tonga Government Gazette, Aug. 11, 2008.

CSI hopes that USTR will consider all the matters raised in this letter and would be pleased to provide any additional information that would be helpful in the review.

Sincerely,

A handwritten signature in cursive script that reads "Bob Vastine".

Bob Vastine
President