



**United States Council for
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December 16, 2005

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

VIA ELECTRONIC TRANSMISSION

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

Dear Ms. Blue:

The United States Council for International Business (USCIB) is pleased to have this opportunity to submit comments on the operation and effectiveness of U.S. telecommunications trade agreements pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1998 (19 U.S. C. Section 3106). The effective implementation of telecommunications trade agreements is of concern to all of our members.

USCIB has worked closely with the Office of the U.S. Trade Representative and others in the Executive Branch on many U.S. trade initiatives addressing telecommunications, and we greatly appreciate your efforts on behalf of U.S. industry. USCIB is unique in that it represents all facets of the telecommunications and information services industry – including international carriers, long distance carriers, incumbent local exchange carriers, competitive local exchange carriers, wireless carriers, broadband providers, Internet and value-added service providers, satellite service providers and manufacturers, equipment manufacturers, software companies and

business users. The Comments submitted herein represent common concerns in the effective implementation of the WTO Basic Telecoms Agreement, the GATS Telecommunications Annex, and the GATS schedule of commitments on value-added services.

As stated in your notice, the purpose of the review is to “determine whether any act, policy, or practice of a country that has entered into a telecommunications trade agreement with the United States is consistent with the terms of such agreement, or otherwise denies to U.S. firms, within the context of the terms of such agreements, mutually advantageous market opportunities.” With regard to the WTO Basic Telecoms Agreement, you seek comments on whether any WTO member is acting inconsistently with its commitments, including the Reference Paper, or with other obligations, including the Annex on Telecommunications, in a manner that affects market opportunities for U.S. telecommunications products and services.

Several general issues should be noted at the outset of these comments. The first is the importance that our members place on the establishment of a strong independent regulator with effective enforcement powers. The second is the importance of ensuring compliance with the WTO Reference Paper requirements for cost-oriented interconnection.

USCIB submits comments on China, France, India and Germany, Jamaica and Mexico:

CHINA

China has made no meaningful progress towards complying with its WTO telecommunications commitments in the past year, so many of our comments will of necessity be repetitive. There are reports that a long-awaited Telecom Law is making its way through the Chinese bureaucracy, and that provides a modicum of hope that China may take such steps as overhauling its licensing regime and establishing an independent telecom regulator. Offsetting this apparent development, there has been regression in other areas such as the regulation of value-added services. In most other liberalizing countries, the concept of value added services was introduced as a way to open up the telecom market to competition. By contrast, China has become more conservative 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. It would be an improvement if the pending law were to replace these conservatively applied vertical service classifications with more objective and transparent guidelines for Type I (facility-based) and Type II (non-facility based) services.

China has the opportunity to demonstrate its commitment to both liberalization and to transparency by making the draft law available for public comment well in advance of adoption. Further, China should seize this opportunity to grant equivalent national treatment to both domestic and foreign investors, boldly taking advantage of the gains that an open telecom market can bring to the economy as a whole.

China’s WTO commitments to liberalize telecommunications services became effective upon its accession to the WTO on December 11, 2001. These commitments include a six-year schedule for phasing in direct foreign participation in value-added network services and basic telecommunications. China also agreed to be bound by the obligations in the Reference Paper to

establish an independent, impartial regulatory authority and a pro-competitive regulatory regime. USCIB recognizes and appreciates the positive steps China has taken to implement its WTO commitments. However, China's overly narrow interpretation of market access opportunities for foreign participants and a lack of an independent regulator have negatively impacted market opportunities for U.S. telecommunications companies, contrary to China's WTO commitments. We are especially concerned by China's unreasonably high capitalization requirements for basic services, and the prohibition on resale which greatly limits market access.

High Capitalization Requirements: In 2003, China's regulator, the Ministry of Information Industries (MII), reclassified several international value-added services as basic services. This action had the undesirable effect of delaying until December of 2004 the ability of foreign entrants to offer these services, thus subjecting any would-be entrant to the excessively high capitalization requirements placed on new basic services providers. This reclassification has had an unwelcome market constraining effect. A basic services license, when available for application by foreign invested joint ventures in late 2004, will be subject to a 2 billion RMB (US\$250 million) capitalization requirement. This amount is 100 times the capital requirement for value added service licensees. USCIB considers the existing capitalization requirement in basic services to be an excessively burdensome and unjustified restriction that violates Article VI of the GATS. The requirement was effected by State Council Order No. 333 of December 11, 2001, the day of China's accession to the WTO, and "could not reasonably have been expected" when China made its commitments, as stipulated by Article VI 5 (a)(ii). A narrowly tailored performance bond would be sufficient to address any existing concerns. In addition, the approval process for equity joint ventures is cumbersome and lengthy -- four separate government authorities are required to approve such ventures pursuant to a long and complicated process.

Market Access: Presently, market entry is being delayed by the MII's extremely narrow views of what constitutes a value-added service for purposes of international value added network service licensing as well as a complicated and lengthy licensing process for basic and value-added services. The regulator has construed the meaning of value-added services in its WTO commitment schedule so narrowly that any meaningful offerings, such as IP-VPN services demanded by global enterprises, are excluded. The Catalogue of Telecommunication Services defines basic and value-added services in a manner that discourages and severely limits new providers from entering China's telecommunications market. The narrowing of the scope for value added services represents a counter-liberalization trend inconsistent with China's WTO commitments. For example, it limits virtual private networks to "domestic" services, and deletes "resale" services.

Most markets around the world including many with the Asia Pacific region have fully liberalized their VAS markets – along Type 1 (facilities-based) and Type 2 (service-based resale) classifications – and permit 100% foreign ownership of VAS enterprises. This approach would have the positive effects as outlined in the document tabled by the United States and other WTO member countries on the benefits of telecommunications liberalization. (Document TN/S/W/50).

We urge USTR to encourage China to take the following steps to remove the bottlenecks to development of value added services in China:

- Expand the list of value-added services in the Catalogue to include such services as managed, IP VPN, in conformity with the international norm; and,
- Lift the prohibition on resale enabling incumbent carriers, as well as new entrants, to acquire capacity at wholesale rates and interconnect their networks to deliver services to a broader reach of the country.

Independent and Impartial Regulator: China is far from achieving its Reference Paper Section 5 commitment to establish an independent regulator. The Chinese Government owns and controls all of the major operators in the telecommunications industry, and the MII still occupies dual roles as protector of state enterprise operators and as industry regulator. The pending Telecom Law could improve this situation by mandating a regulatory body that is organizationally separate from government agencies that are focused on developing the state-owned telecommunications industry. Because this new law has been pending for a long time, finalizing and adopting it 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 Telecom Catalog went into effect last year.

USCIB encourages USTR and others in the U.S. Government 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 decisions and regulations affecting the telecoms sector. In this context, it is important that the regulatory body adopts the following:

- transparent processes for drafting, finalizing, implementing and applying telecom regulations and decisions;
- appropriate measures, consistent with the Reference Paper, for the purpose of preventing major suppliers from engaging in or continuing anti-competitive practices;
- a defined procedure – as it has done for interconnection -- to resolve commercial disputes in an efficient and fair manner between public telecom suppliers that are not able to reach mutually acceptable 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.

At present the regulatory environment in China is discouraging new entrants from participating. This will continue until foreign investors have confidence that China has a clear intention and a demonstrated plan to implement its WTO commitments.

Geographic Restrictions: Notwithstanding the business model of the Internet, MII has at times suggested that a commercial presence must be established in each city where customers will be located, and that an inter-regional service, based in one city but serving customers in another, is not permitted. Such an interpretation is inconsistent with the global model of how value-added, non-facilities based Internet service providers are structured, and imposes geographical restrictions that make an inter-regional, or national scaled business model non-viable. The impact of this interpretation is to negate the benefits accorded to foreign value-added telecommunications providers under the WTO agreement. This interpretation, if implemented will also greatly impact the cost to local Chinese businesses adding an unnecessary burden to

them as they wish to become more robust and increase their participation in a broader geographic market.

FRANCE

New entrants continue to face multiple barriers in France that affect market opportunities for U.S. telecommunications companies. These barriers are in clear violation of the WTO Reference Paper and GATS Telecommunications Annex.

Independent and Impartial Regulator: Section 5 of the Reference Paper requires that the regulatory body be separate from, and not accountable to, any supplier of basic telecommunications services. However, the regulator established by the French Government to oversee telecommunications policy (“ART”) effectively shares oversight with the Finance Ministry. Although the privatization of France Telecom (“FT”) distanced the French Government from FT somewhat, they continue to intervene excessively. This arrangement results in confusion and a lack of transparency, in violation of Section 5 of the Reference Paper.

Interconnection and Local Access Leased Lines: In comments submitted in last year’s 1377 review, USCIB raised continued concerns about the provisioning of local access leased lines in France. Although ART has taken actions to make FT’s prices for local access leased lines more reasonable, they have not been sufficient and USCIB member companies are continuing to experience obstacles in France with respect to discriminatory pricing and provisioning delays. France has not fully implemented the Section 2 Interconnection provisions in the Reference Paper.

The ART has issued decisions in an effort to improve FT’s Reference Interconnection Offer (RIO), including a decision in February 2002 and successive decisions for 2003-2004, addressing a number of leased line issues. While these decisions required FT to address leased lines in its RIO and to modify conditions for delivery, including applicable penalty clauses in order to end the discriminatory treatment harming FT’s competitors, the conditions have not been implemented by FT, which continues to engage in discriminatory pricing and provisioning delays. Additionally, FT continues to stonewall on provision of interconnection at its ATM switch consistent with the Reference Paper.

With regard to provisioning of leased lines, FT unilaterally has degraded the quality of service commitments contained in its local access leased line contracts with new entrants, and substantially stiffened the terms of such contracts. Such actions are highly detrimental to the businesses of emerging carriers. In particular, FT gives preferential treatment to its retail arm in the “premium” service that FT offers to its own clients covering repair times and guarantees on downtime, and which is not available for other operators. Such discrimination, lack of transparency and unreasonable delays in provisioning clearly violate Sections 2.2(a) and (b) of the Reference Paper.

In addition to the Reference Paper, Section 5(a) of the GATS Telecommunications Annex requires France to ensure that service suppliers of other WTO members have access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions for their provisioning of value-added services.

INDIA

India has made great strides in opening its market to competition, but now the continued development of that market is at a critical juncture. Many new entrants are poised to enter the Indian communications market to help bring the benefits of robust competition to India. Competition benefits individual consumers and the economy as a whole by ensuring lower prices, new and innovative products and services and expanded customer choice. The Department of Telecommunications (DOT) as the policy maker and TRAI, as the regulator, have a mutual responsibility in developing, implementing, and enforcing laws and regulations that provides new entrants the assurance that they can compete on a fair and equitable basis in India before investing in the Indian market.

Submarine Cable Capacity

In response to concerns raised by USCIB and other parties in previous 1377 submissions, the Indian regulator, TRAI, took action this year to lower the cost of international private leased circuits (“IPLCs”) which provide the essential links connecting India’s robust economy with the rest of the world. The positive effects of lower bandwidth prices, however, will be lost unless the Department of Communications takes quick action to adopt the recommendations submitted by TRAI on December 16, 2005, to facilitate competitive access to submarine cable capacity. TRAI’s recommendations appears to address many of the concerns previously raised by USCIB regarding the need to: (1) put into place and enforce a set of pro-competitive principles promoting open cable access; and, 2) permit resale to stimulate meaningful competition in the market for international bandwidth. USCIB would like the opportunity to provide more detailed comments to USTR on TRAI’s recommendation after having the opportunity to review specific details as well as the new licensing guidelines for International Long Distance Licenses released by the Department of Telecommunications on December 14, 2005.

(1) Remove Barriers to Competitive Access to Submarine Cable Capacity

The absence of effective cable landing station access regulation has severely inhibited the competitive possibilities afforded by reforms undertaken by DOT and TRAI. As TRAI has acknowledged in its December 16th recommendations, the incumbent international long distance service provider maintains a stranglehold on control of landing stations. As a result of this bottleneck control, the incumbent carrier enjoys an unrestrained ability to: (1) charge extremely high amounts for cross-connection between the cable head and carriers' co location equipment; (2) prevent or delay much-needed capacity upgrades; and (3) delay the ability of other carriers to install and connect their equipment. Experience throughout the world has indicated that these tactics are extremely damaging to the ability of suppliers to deliver a cheap and plentiful supply of capacity to domestic markets - capacity that is the lifeblood of the India ITeS industry and of competitive outcomes generally. Accordingly, regulatory intervention is necessary to level the playing field and remove the cable landing station owner’s advantage as gatekeeper.

(2) Permit Resale

The details of the new licensing guidelines for national and international telecommunications services were released on December 14, 2005. Resale is not to be permitted under the new guidelines. We note, however, the TRAI is recommending that resale be permitted for international services and facilities beginning in February 2007- a date that we recommend should be moved forward. In the past, India has rejected resale as an option for entry into its market. As we noted earlier in our comments on China, resale is an effective mechanism to quickly inject competition into the marketplace. As long as resale entry requirements are minimal (*e.g.*, no foreign ownership restriction; no onerous licensing or registration requirements; and low or no entry fees) and ongoing regulatory obligations are light, resale encourages new players to enter into the market. Increasing the number of market players serves as a catalyst for competition in a number of ways:

- Resale promotes growth. Resale increases traffic volumes, increases demand for and use of a facilities-based carrier's network, and thus increases investment in additional infrastructure.
- Resale lowers prices. Additional market players help exert downward pressure on prices.
- Resale increases customer choice and creates customer value. For example, resellers may offer a wide variety of billing plans, target under-served groups within the community, and encourage the development of innovative products and services.

GERMANY:

Lack of Independent Regulator / Lack of Transparency:

BNetzA, the newly renamed German regulator, continues to be subject to inappropriate political pressure. The German Government still holds a direct and indirect ownership interest of 37.5% in Deutsche Telekom AG ("DTAG"), the incumbent. In addition, BNetzA 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 since BNetzA's rules of procedure and decisions are published infrequently. When BNetzA does release a decision, only the operative provisions are made available, 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 is not the case because the regulator does not even fully release non-confidential decisions.

Discrimination regarding leased lines provisioning and price calculation remains:

DTAG continues to treat its competitors less favourably than its affiliates and itself in the provisioning of local access leased lines, although DTAG's new tariff scheme for leased lines has led to significant rate reductions. New entrants rely on DTAG's local access leased lines to connect business customers of all sizes to their networks.

Competitors of DTAG using DTAG's leased lines continue to struggle with significant discrimination when obtaining the lines as information about the tariff structure is still not available in an appropriate manner. For example, DTAG does not disclose the geo-coordinates of its tariff measuring points which is key for competitors' calculations of costs and ability to optimize their networks through selection of locations. Despite the request of BNetzA's Advisory Council (*Beirat*) that BNetzA take appropriate action on this issue, nothing has happened.

Moreover, competitors worry about a further disclosure of their customer data in connection with the proposed introduction of a Web based tool by DTAG in relation to pricing calculations. Without the above mentioned geo-coordinates to calculate prices, competitors are even more heavily reliant on DTAG's pricing tool. Currently this is delivered on CD so each competitor can use it on its own secure system. However, DTAG has announced that as of 2006 the service will migrate to a Web-based tool hosted by DTAG with the effect that DTAG could gain access to the information requests by its competitors and thus would be able to draw conclusions on tenders in which the competitors participate in and their bids. Just recently, DTAG agreed to reschedule the introduction of the web tool until June 2006 due to numerous complaints by competitors. However, this rescheduling does not eliminate the above-mentioned concern.

Competitors in Germany also are concerned about the lack of legal certainty as a result of the delayed market analyses decisions (discussed below) in particular with regard to the leased lines markets. An end of the market definition and market analysis proceedings regarding leased lines is nowhere in sight - the national consultation which was scheduled by BNetzA for the end of May/early June 2005 still has not started. Waiting for the results of end of the market analysis and remedy proceedings and for a BNetzA order, as is reflected by BNetzA's current approach, leaves the competitors without remedies and opens a legal "dark hole" until the new remedies are in place. As a consequence, competitors still can rely neither on contractually agreed provisioning and service times for DTAG's leased lines, nor on penalties in case of a neglect of duty on DTAG's side.

Facilitation of New and Innovative Services:

USCIB is concerned that BNetzA's lack of regulation with respect to new services allows DTAG to expand its dominant market position into new fields. BNetzA, for example, recently evaluated several interconnection services offered by DTAG, including interconnection for a nationwide non-geographic number range that will be used primarily for voice-over-IP (VoIP) services. Since this number range is new, there is no previous guidance on DTAG's interconnection obligations with respect to this service. In the absence of previous regulatory guidance for this service, BNetzA declined to establish an interconnection obligation for DTAG, and failed to impose rate regulation for the new 032 service.

As a result, connections to the new 032 VoIP numbers are not regulated at all. In the absence of regulation, DTAG has offered its competitors access to the 032 numbers only at rates that are significantly higher than the rates DTAG is prepared to pay the competitors for the reciprocal termination service into the competitor's networks. This situation makes it difficult, if not impossible, for alternative market players to offer innovative services in Germany.

Duration of Administrative Proceedings:

USCIB continues to have concerns about the lack of transparency in the German appeals courts and the length of time needed for cases to reach a final legal conclusion. The appeal of a BNetzA decision to Germany's Administrative Courts can result in a court process that lasts several years; thereby effectively delaying application of the German Telecommunications law and allowing DTAG to continue to pre-empt competition in the marketplace. Court decisions also must be decided in a period of time that allows effective redress.

Competitors also must be afforded an opportunity to participate in any proceeding that will have a direct and substantial impact on their business plans. Due to the Administrative Court's rules of procedure, competitors have little opportunity to participate as third parties in the court's proceedings, and therefore have no opportunity to follow these regulatory developments in court.

Similarly, USCIB is concerned that 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.

Problem of delayed market analysis:

Under the new European Regulatory Framework which came in force in mid 2003, the imposition of regulatory measures is largely dependent on the national regulators carrying out market analyses and imposing appropriate remedies on undertaking which have been found dominant on the relevant markets. BNetzA started this process in 2004. To date, however, BNetzA has completed this process for only two out of 18 markets. Meanwhile, the level of regulatory protection in the interim even falls short in comparison with the regime under the former German Telecoms Act, which was in force until mid 2004 as BNetzA and the Cologne Administrative Court have made several diverging decisions dealing with the application and scope of the transitory provision of § 150 sec 1 German Telecoms Act ("TKG"). Thus the result of the delay in the consolidation procedure is significant and increasing legal and planning uncertainties for market players.

JAMAICA

In June of this year Jamaica put into place a so-called universal service charge that in fact applies only to inbound international calls. Incoming international calls that terminate on fixed-line telephones must pay an additional \$0.03 per minute, and those that terminate on mobile telephones must pay an additional \$0.02 per minute. The surcharge fails to comply with the commitments that Jamaica made when it acceded to the WTO. It does not qualify as a legitimate universal service charge under the WTO Reference Paper, since it fails the tests of being transparent, non-discriminatory, and not more burdensome than necessary. Further, it is clearly levied disproportionately on foreign-originated calls. No such levy is placed on either domestic calls or outbound international calls. Placing the burden solely on U.S. and other non-Jamaican callers making international calls to Jamaica is unjustified, unreasonable and distorts the

international market by artificially raises calling costs. Imposing disproportionate universal service funding requirements on other countries' carriers and consumers in this way is not consistent with Jamaica's obligations under the Reference Paper, and USCIB urges USTR to highlight this concern in the 1377 review. The situation was particularly troubling given the anti-competitive disruption of bilateral circuits as a means of overriding existing commercial agreements and pressuring U.S. international carriers to accept the universal service surcharge. This situation was recently exacerbated when C&W Jamaica, separate from the government of Jamaica's universal service actions, demanded further increases in fixed and mobile rates and threatened service disruption if U.S. carriers did not comply.

USCIB calls on the United States Trade Representative's office to review with Jamaican officials and regulators the significant and unjustified burden being placed on U.S. consumers and other callers from around the world by the above conduct.

MEXICO

The telecommunications market in Mexico is a major market for U.S. telecommunications companies and constitutes the second largest U.S. international route. Overall, the telecommunications market in Mexico is worth an estimated US\$18 billion. U.S. companies continue to be harmed by Mexico's failure to implement its WTO obligations, which, if fully implemented, would allow effective competition to flourish. Such competition would provide benefits to customers, service providers and carriers in both countries bringing market growth, lower prices and the introduction of new and innovative services.

USCIB commends USTR's continuing efforts to bring Mexico into compliance with its WTO commitments for basic telecommunications services, however, the continuing major problems concerning Mexico's failure to allow fully open markets in domestic services, foreign investment, and the lack of an effective and independent regulator also must be addressed.

Prohibition on Foreign Ownership and Control: Mexico should eliminate its prohibition on foreign control of Mexican "concessionaires" (carriers authorized to own and operate basic telecommunications facilities), which is also contrary to Mexico's WTO obligations. This restriction constitutes a major impediment for foreign carriers interested in entering and investing in the market. Mexico is the only major country in Latin America that still does not welcome foreign investment in the telecommunications' sector. If Mexico does not remove these restrictions we do not see how a competitive telecommunications market could develop.

Lack of Effective Regulation and Anti-Competitive Practices: The telecommunications regulator, Cofotel, was established under Mexico's New Federal Telecommunications Law in 1995, and reports to the Mexican Ministry of Communications and Transport (SCT). Cofotel 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 and USCIB has addressed these concerns in comments submitted during the last three years' 1377 reviews. The current regulatory climate continues to serve to sustain market dominance by Telmex and its subsidiaries, while offering potential competitors only limited opportunities to serve the market. 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 Mexico's Competition Commission, 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.

Enforcement of dominant carrier safeguards is long overdue in Mexico. Telmex has denied competitors phone lines needed to provide service, priced its own services at predatory rates, refused to allow other carriers to interconnect to its network, and has withheld fees it owes competitors.

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. This regulatory structure has not been effective.

CONCLUSION

USCIB would like to close by emphasizing the importance of a strong and effective regulatory authority with the powers necessary to ensure compliance with its decisions. Such regulatory authorities will enhance compliance with trade commitments and minimize barriers in telecommunications markets.

We appreciate this opportunity to provide our views and look forward to continuing to work with you on telecommunications trade matters.

We would be pleased to provide additional information if necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is fluid and cursive, with a large initial "P" and "R".

Peter Robinson