United States Council for International Business
Peter Robinson, President

1212 Avenue of the Americas, New York, NY 10036-1689
tel: 212-354-4480 ~ fax: 212-575-0327
e-mail: info@uscib.org ~ Internet: www.uscib.org

Serving American Business as U.S. Affiliate of:

International Chamber of Commerce (ICC)
International Organisation of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the OECD
ATA Carnet System

December 15, 2006

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.

USCIB submits comments on Canada, China, India and Germany, Jamaica, Mexico and Singapore. Please note throughout the importance that our members place on the establishment of a strong independent regulator with effective enforcement powers.

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. 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.

A recent Canadian government policy review panel 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 Telecom Policy Review Panel issued a proposed policy directive to the Canadian Radio-television and Telecommunications Commission (CRTC) that included a recommendation that foreign ownership restrictions be phased out over time. However, although Canada's Minister of Industry formally called for changes in telecom regulation, it did so without also calling for removal of foreign ownership restrictions.

As a consequence of these foreign ownership restrictions, U.S. firms' presence in the Canadian market as wholly U.S.-owned operators is 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 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. A recent announcement by the Canadian government that Canada will proceed with additional deregulation of its 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. We urge USTR to explore with the Canadian government possible opportunities to pursue the timely recommendation of the Telecom Policy Review Panel.

CHINA

Since its WTO accession 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. 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 $62 billion in 2004. U.S. cross-border exports to China also increased by 30 percent from $5.6 billion in 2001 to $7.2 billion in 2004. The U.S. services trade surplus with China is $1.6 billion, 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 $60.6 billion in 2004. 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 and a lack of an independent regulator 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's regulator, the Ministry of Information Industry ("MII") defines the meaning of VAS in China's WTO commitments narrowly to exclude commercially important services, such as international IP-virtual private networks (IP-VPN) services demanded by global enterprises, by limiting VAS virtual private networks to "domestic" services. The narrowing of value added services is a backward step from China's pre-WTO service classifications and that is inconsistent with China's WTO commitments. China should expand the list of VAS to include such value-added services as international IP-VPN services. China also should be encouraged to lift its prohibition on resale.

China's unreasonably high capitalization requirement for basic telecommunications services has further greatly limited market access. Basic services licenses are subject to a 2 billion RMB (US$250 million) capitalization requirement, which is 100 times larger than the capital requirement for China's value added service licensees, and comprises an excessively burdensome restriction that violates Article VI of the GATS. A foreign service provider otherwise meeting the licensing qualifications is unlikely to allocate such capital to a new and risky enterprise, and a Chinese joint venture partner is unlikely to divert this capital from its core business. A further problematic restriction is the requirement that foreign telecom service providers may only enter into a joint venture with one of the existing state-owned enterprise telecom providers. At this year's JCCT Plenary meeting, the U.S. government obtained China's specific commitment to address the capitalization requirement, and USCIB looks forward to China's early elimination of this trade restriction. China has already established a precedent for lowering its foreign joint venture capitalization thresholds in other sectors, including insurance and trading companies, and it should now remove this barrier to market access in the telecom sector.

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 Information Industry still regulates the sector. USCIB 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.

The Chinese government also imposes strict limitations on non-Chinese companies that wish to offer VoIP services in China. No non-Chinese company may offer VoIP service in China that connects to the PSTN. Only a few small pilot VoIP projects – typically involving the dominant Chinese telco operators – are allowed to offer PSTN-interconnected VoIP services to Chinese consumers. USTR should urge the Chinese government to lift its ban on non-Chinese companies offering VoIP services in China that connect to the PSTN.

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.

(1) Market Entry

India's regulatory framework impedes the ability of foreign carriers to access India's telecommunications market on a fair and non-discriminatory basis. Even though the Indian government reduced the National Long Distance (NLD) and International Long Distance (ILD) license fees to approximately US$550,000 (each), this fee is still high relative to license fees in other countries. On top of this exorbitant fee, foreign carriers must bear additional costs associated with forming joint ventures and operating with Indian companies in order to comply with India's 74% foreign ownership restriction.

(2) Resale of International Bandwidth

USCIB urges the Indian government to implement promptly the recommendations of the Telecommunications Regulatory Authority of India ("TRAI") to permit the resale of international private leased circuits ("IPLCs") in India by February 2007. Specifically, in December 2005, based on a thorough consultation, TRAI found that permitting IPLC resale

would increase competition and thereby exert significant downward pressure on IPLC prices – up to 20-25%. We understand that the Department of Telecommunications recently accepted TRAI's recommendations and steps are being taken to move forward in this regard. We urge the Indian Government to expeditiously implement these recommendations, which benefit both carriers and end users.

(3) Submarine Cable Capacity

In response to concerns raised by USCIB and other parties in previous 1377 submissions, TRAI, took action late in 2005 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. TRAI recommendations submitted in December 2005 to facilitate competitive access to submarine cable capacity have recently been accepted by the DOT but not yet adopted. TRAI's recommendations appear to address many of the concerns previously raised by USCIB regarding the need to put into place and enforce a set of pro-competitive principles promoting open cable access. We are encouraged by the fact that the Minister of Telecommunications has now accepted the recommendation and directed TRAI to forward guidelines that would implement these principles and create more transparent rules and non-discriminatory access to cable landing station facilities in India.

The absence of effective cable landing station access regulation has severely inhibited the competitive possibilities afforded by reforms undertaken by DOT and TRAI. 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. In this area, as with resale discussed above, we hope that the relevant government entities will move as quickly as possible to obtain expert input and implement reforms.

(4) Operational Restrictions Tied to FDI reforms

We are encouraged by the India government's recent reforms to International Long Distance (ILD) and National Long Distance (NLD) licenses, including the increase of the FDI ceiling from 49% to 74%. However, we remain very concerned by the introduction of certain conditions[1] imposed as part of these amendments, which would fundamentally undermine the ability of foreign operators to offer world-class IP-based services to customers connecting to India. We hope that the problem of these conditions will have been addressed soon and certainly well before the completion of this Section 1377 review.

(5) Permit Non-Indian Competitors to Offer VoIP Service

---

[1] These conditions are described in the Press Note No. 5 (2005 Series) Issued 3 November 2005 concerning the *Enhancement of the Foreign Direct Investment Ceiling from 49 Per Cent to 74 Per Cent in the Telecom Sector* (*FDI Press Note*), and subsequently incorporated into the conditions of ILD and NLD licences.

Currently, the Indian telecom regulator imposes strict limitations on the provision of VoIP services (sometimes known as "Internet telephony") by non-Indian companies. Competitive providers cannot offer VoIP services to consumers in India that connect to the PSTN unless they enter into partnerships with Indian incumbent telcos. Also, India imposes strict limitations on private enterprises that wish to use VoIP for internal communications. Such enterprises cannot connect to the Indian PSTN directly, or through a competitive VoIP provider, unless the enterprise partners with an incumbent telecom operator. Thus, action is necessary to: (1) open the Indian VoIP market to non-incumbent operators (including direct interconnection to the PSTN); and (2) enable private enterprises to choose carriers/technologies of their communications needs (including VoIP) without having to use the Indian incumbent telcos' services.

GERMANY:

<u>Lack of Independent Regulator / Lack of Transparency:</u>

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 32% in Deutsche Telekom AG ("DTAG"), the incumbent.

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 is not the case because the regulator does not even fully release non-confidential decisions and decisions are not published on BNetzA's website at all. 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.

USCIB continues to be concerned about the lack of opportunities for competitors 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 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.

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 undertakings which have been found dominant on the relevant markets. BNetzA started this process in 2004 and yet still has not completed market analysis and remedies proceedings for the complete list of the 18 markets. In particular, BNetzA has not completed the analysis of the leased lines market, which has been the subject of a "Serious Doubts" letter from the European Commission to BNetzA, which leaves competitors reliant only on a "self-commitment" by DTAG. 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, the Cologne Administrative Court and the Federal Administrative Court (FAC) have issued 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 is significant and increasing legal and planning uncertainties for market players.

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."[2] 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."[3] The FCC has noted that "universal service obligations that are levied disproportionately on foreign-originated calls clearly violate these principles."[4]

USTR expressed its concerns in the 2006 Section 1377 Review 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 and the absence of information

---

[2] 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.

[3] WTO, *Jamaica – Schedule of Specific Commitments Supplement 1*, at 10.

[4] *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").

concerning the use of these funds. As USTR made clear in the 2006 Review, Jamaica should adopt a more equitable and transparent approach to funding its universal service programs that does not require foreign operators to bear an inappropriate share of these costs.

MEXICO

The telecommunications market in Mexico is a major market for U.S. telecommunications companies and constitutes the second largest U.S. international route. Mexico is the top trading nation in Latin America and the ninth-largest economy in the world. Additional competition in Mexico 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.

Mexico has recently introduced surcharges for international calls to mobile networks as the result of its decision to apply the CPP system to these calls rather than the RPP system formerly in effect. As the result of the new rules applying CPP, which became effective on November 4, 2006, U.S. carriers are subject to per-minute surcharges of more than 14 cents for international calls to wireless phones in Mexico.[5] In addition, legal proceedings in Mexico have resulted in a non-uniform environment for inter-carrier compensation; some Mexican carriers are currently not within the CPP system and calls handled by these carriers that are terminated on mobile phones are rated differently. The rating of calls with identical points of origination and termination can thus vary significantly based on the routing of traffic among Mexican carriers, which creates the potential for favoritism and discriminatory treatment. The Mexican regulator, 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 from the current level of approximately 14-15 cents down to approximately 9 cents in 2010. Cofetel has thus explicitly recognized the need and ability for reductions in CPP termination rates in Mexico and should be encouraged to accelerate this reduction process.

Mexico should eliminate its prohibition on foreign control of Mexican “concessionaires” (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.

SINGAPORE

Access to SingTel’s local leased lines continues to be a major concern for US carriers in Singapore despite progress in implementing the FTA. The regulations continue to deny (i) the supply of local leased circuits at tandem-switching centers; (ii) the availability of high capacity aggregation options; and (iii) the provisioning of tie cables for cross connections within reasonable time frames. The decision restricting service provision at end-office switching centers, has now encountered further implementation challenges. In June 2006 SingTel

---

[5] *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.

announced plans to consolidate its end-office switching centers, to reduce them from 27 to 12. SingTel's subsequent failure to provide details concerning which end-office switching centers would be decommissioned has put U.S. and other companies' build out plans on hold. SingTel has also has refused access to ducts it controls, creating further inefficiencies and slowing competitive entry.

SingTel's practice of appealing regulatory decisions directly to the Minister of Communications (MOC) has reduced transparency and predictability in the regulatory process. In particular, there is no obligation to make information publicly available concerning a company's request for a stay of decision or the filing of an appeal, to request public comments about such request, or to publish a detailed explanation concerning final decisions made by the Infocomm Development Authority ("iDA") or MICA. The Singapore government reportedly is reviewing this process to determine how to make it more transparent, and we hope significant improvements in the process will be adopted.

Further regarding regulatory process, we are concerned about the absence of judicial review of decisions by the telecommunications regulator. The sector is regulated by a Telecoms Competition Code ("Code") addressing regulatory principles and framework, consumer protection rules, interconnection regime, infrastructure sharing requirements, sector-specific competition rules, mergers and consolidation framework, and enforcement mechanisms. (The general Competition Law of 2004 excludes the telecommunications sector.) The Code does not contain the right of judicial review, which seriously undermines the effectiveness regulatory regime in achieving the competition for which it is intended.

Furthermore, on its own, the Code is inadequate for addressing competition concerns typical of the telecoms sector, such as –

- Its voluntary approach to regulating the provision of wholesale services by a dominant undertaking;
- Limited dispute resolution by the iDA and only concerning interconnection and infrastructure sharing issues;
- No ability to appeal an NRA decision to an independent third party.

Given the market structure of telecoms and international practice, there is a role for *ex-post* competition law and *ex-ante* competition regulation to coexist in effectively regulating the behaviour of undertakings with Significant Market Power (SMP). We strongly urge the Singapore government to lift the exemption and subject the telecommunications sector to general competition law provisions while retaining existing competition regulation.

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,

Peter M. Robinson