



## United States Council for International Business

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January 10, 2003

Rhonda Schnare  
Office of the General Counsel  
ATTN: Section 1377 Comments  
Office of the United States Trade Representative  
600 17<sup>th</sup> 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. Schnare:

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, 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 the following countries:

## **I. CANADA**

USCIB members have encountered a number of barriers to competition in the Canadian basic and value-added telecoms markets that prevent U.S. service providers from competing fairly. An important example is Canadian Radio-Television and Telecommunications Commission's (CRTC) failure to effectively implement its obligations to ensure non-discriminatory access to public telecommunications networks pursuant to Section 5 of the GATS Annex on Telecommunications, Section 1 of the WTO Reference Paper and Chapter 13 of NAFTA. These provisions apply to dominant cable operators in Canada given that the networks used to provide wholesale and retail Internet access constitute a public telecommunications transport network under Canadian law. Moreover, CRTC has ruled that dominant cable companies are subject to regulation as common carriers when they use their networks to provide non-programming services and must provide access to unaffiliated entities, including independent Internet service providers. It is important to note that USCIB does not have a position as to whether cable networks constitute public telecommunications networks and consequently have no position on Canadian law in this regard. However, since Canada considers cable networks as such and ruled that dominant cable companies are subject to regulation as common carriers, its GATS Telecoms Annex and NAFTA Chapter 13 commitments apply.

Notwithstanding the above, CRTC has failed to ensure that independent ISPs have access to cable networks on reasonable terms and conditions and/or by failing to engage in anti-competitive conduct, namely the offering of "lite" broadband services at predatory prices which are not offered to independent ISPs. The denial of competitive access to these networks will drive independent ISPs from the market, allowing dominant cable operators to preserve their dominant position, preventing fair competition and thus stalling the provision of high-speed Internet access to Canadian consumers.

## **II. CHINA**

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.

Market Access: Presently, market entry is being delayed by the Ministry of Information Industry's ("MII") extremely narrow views of what constitutes a value-added service for purposes of international value added network service licensing. 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.

Furthermore, the definition applied to foreign investors is much more narrow than the list of value-added services contained in China's own Telecom Regulation (State Council Order 291), that applies to domestic-owned operators. Without a change in MII's differing and discriminatory interpretations, the net effect of current licensing criteria is to define foreign-invested value added service operators out of competition.

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 this should be a top priority for the government. In addition, China needs to ensure adequate due process and transparency in its regulatory decision-making. In this regard, we note the lack thereof in recent decisions to increase international charges. The fact that the increase was ultimately reversed does not minimize the lack of transparency and due process.

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.

Geographic Restrictions: China's WTO accession commitments on telecommunications services, and in particular, value-added services, imposed the following limitations with respect to geographical coverage for suppliers providing service through a commercial presence: "foreign service suppliers will be permitted to establish joint venture value-added telecommunications enterprises, without quantitative restrictions, and provide services in the cities of Guangzhou, Shanghai and Beijing within one year after China's accession, the areas will be expanded to include Chengdu, Chongqing, Dalian, Fuzhou, Hangzhou, Nanjing, Ningbo, Qingdao, Shenyang,

Xiamen, Xi'an, Taiyuan and Wuhan".

Value-added services are defined as electronic mail, voice mail, on-line information and database retrieval, electronic data interchange, enhanced/value-added facsimile services, code and protocol conversion and on-line information and/or data processing.

Interactive services, Internet services and Internet content services clearly fall within this category. The business model of value-added interactive, Internet and Internet content services is that they lease capacity from basic service providers to reach customers wherever the value-added service can be accessed. A facilities-based commercial presence is not required to provide service to customers who access value-added Internet services through their basic telecommunications provider.

Notwithstanding the business model of the Internet, MII has taken the position that the WTO accession agreement limits the customers that can be served by a value-added telecommunications provider to, initially, three cities and subsequently 17 cities. At times they have also 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 interregional, 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.

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.

### **III. THE EUROPEAN UNION**

USCIB recognizes the strides that the EU is taking to ensure effective enforcement of its rules regarding telecommunications services. However, enforcement has been far from uniform, resulting in a net negative impact on investment through this area. In particular, there are substantial failings in the implementation of the rules on cost and accounting information which underpin the workings of the entire regime. In addition, the EU has demonstrated its inability to secure compliance in the long term. While various Member States have been taken to the European Court for failure to implement these rules, this process has proven to be quite lengthy, and it can take upwards of 4 years to secure a final determination. These problems are particularly evident in France, Belgium and Germany. However, with the exception of the United Kingdom and Ireland, no effective regime is in place to ensure the WTO obligations on cost orientated pricing for interconnection and non-discrimination can be met. USCIB urges USTR to monitor very closely any progress in this area and maintain appropriate pressure on the relevant national authorities in this regard.

#### IV. 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, which also is the majority owner of the major supplier, France Telecom (“FT”). This arrangement results in confusion and a lack of transparency, in violation of Section 5 of the Reference Paper. The French Government’s recent decision to make available a 9 Billion Euros loan facility to FT has increased concerns about the prospects of impartial regulation of FT and such subsidies further raise questions about distortion of competition and consistency with the national treatment obligation under the GATS. Further investigation may be warranted with regard to state aid.

Interconnection and Local Access Leased Lines: In comments submitted in last year’s 1377 review, USCIB raised concerns about the provisioning of local access leased lines with regard to Germany. USCIB member companies are now experiencing 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 French regulator, ART, has issued decisions in an effort to improve FT’s Reference Interconnection Offer (RIO), including a decision in February 2002, addressing a number of leased line issues. This decision 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. These 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.

The EU’s 8<sup>th</sup> Implementation Report corroborates the claims of new entrants and in particular states that “tariffs for most retail leased lines have remained unchanged from last year with the result that France remains above the EU average for most types and lengths of leased line, with the exception of short distance high capacity lines (140/155 Mbits/s).”<sup>1</sup>

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

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<sup>1</sup> 8<sup>th</sup> Implementation Report, Annex 3, Country Report, France, p. 76

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.

## V. GERMANY

USCIB members continue to face barriers in the German telecommunications market that constitute clear violations of the WTO Reference Paper and the Telecommunications Annex.

Independent Regulator: USCIB applauds the pro-competitive decisions issued by the German telecommunications regulator. However, RegTP remains incapable of enforcing its rulings in a timely and effective manner. RegTP lacks basic tools, such as the ability to levy meaningful fines for violations of its orders. Moreover, German law gives competitors no opportunity to examine the evidence presented by Deutsch Telekom (DT) to RegTP to justify telecommunications rates, and RegTP lacks the resources or institutional capacity to scrutinize this information with appropriate rigor. In addition, the absence of effective pro-competitive regulatory authority severely limits RegTP's ability to order DT to offer circuit capacity and leased lines in a manner consistent with the Reference Paper.

USCIB recognizes the importance of an opportunity for judicial review of decisions by regulators. However, judicial review should not be a mechanism to circumvent the enforcement of regulatory decisions necessary to comply with trade commitments and should be conducted pursuant to due process and in a timely manner. German courts have not acted in a timely manner resulting in a current backlog of 900 lawsuits challenging RegTP rulings in the telecom and postal sectors. It is essential that:

1. RegTP is granted the statutory authority to implement and enforce Germany's trade commitments; and
2. the courts have the statutory authority to hear appeals in a timely manner and to enforce Germany's trade commitments.

Other Violations: Germany has also failed to ensure non-discriminatory and reasonable terms and conditions and compliance with the interconnection provisions of the Reference Paper. This failure has resulted in high prices and lengthy provisioning delays for leased lines and the refusal to provide interconnection services in basic telecommunications.

Germany is in the process of amending its telecommunications law, the TKG. In this context, it is critical for RegTP to have the legal tools and political authority to act independently against anti-competitive abuses. In particular, it is important that the amendments provide for stronger and more efficient enforcement vis-à-vis those basic wholesale, e.g. interconnection, products covered by and consistent with Germany's trade agreements, including that GATS Telecoms Annex and the Reference Paper. These products are essential for competing providers to

introduce innovative services, particularly where the incumbent provides no similar retail service to end-users. The amendments should also be sufficiently flexible to address changing market conditions. In particular, this involves addressing those bundling practices that are inconsistent with safeguards in the Reference Paper, especially with regard to anti-competitive practices.

## **VI. JAPAN**

Japan has made significant strides in market liberalization and development since the *May 1998 U.S.-Japan Deregulation Joint Statement*, and the entry into force of its WTO Commitments. However, more work needs to be done to effectively regulate NTT as dominant, to remove burdensome regulation on non-dominant carriers, and to establish a truly independent regulator. As raised in our comments last year, USCIB members continue to find that Japan has not fully implemented the Reference Paper and is not in compliance with the GATS Telecommunications Annex and the *May 1998 U.S.- Japan Deregulation Joint Statement*.

Anticompetitive Practices: The Ministry of Public Management, Home Affairs, Posts and Telecommunications (“MPHPT”) and the Japan Fair Trade Commission (“JFTC”) issued guidelines in 2001 to promote competition in telecommunications reflecting the “pro-competitive” principles set forth in the Revised Telecommunications Business Law (June 2001) and the Anti-Monopoly Act (“AMA”). Although the new Law authorizes MPHPT to apply “asymmetrical regulation” on NTT because of its control of bottleneck facilities, there is strong political pressure to minimize actual restraints on NTT’s activities.

What still is lacking is adequate controls on NTT. The most critical need is for a stronger commitment on behalf of both MPHPT and the JFTC to issue and enforce rules in a manner that promotes effective competition by addressing NTT’s dominance in local telecommunications. An example is the cross-subsidy of NTT’s data services from its basic telecoms services, as well as predatory pricing in this regard. The MPHPT must establish and publish clear and detailed guidelines to ensure that NTT does not abuse its dominant position in the market.

Interconnection: Interconnection charges remain a point of contention, and it appears that planned revisions for next year will only exacerbate this situation (as some charges may actually rise). Without full implementation of the Section 2 provisions of the Reference Paper, including interconnection at cost-oriented rates, competitive carriers will have little success in challenging the dominant market position of NTT, thus stifling competitive entry to the Japanese market.

Licensing Regime: Japan’s licensing regime is based on whether a service provider owns its facilities (Type I) or leases facilities (Type II) to provide services. Such a regime makes it difficult for a new entrant carrier to offer end-user services by using a combination of its own infrastructure and leased facilities from other providers. Under the present system, a Type I carrier is authorized to lease services from other Type I carriers to serve customers within its approved “operational areas.” For customers whose place of business is outside an approved “operational area,” a new-entrant Type I carrier must submit for approval detailed documentation to the MPHPT that includes business plans, financial information, and network topology. This review process is time consuming, non-transparent, and does not meet the needs of the Japanese market. The Type I and Type II licensing regime currently in place is likely to be

eliminated in the new legislation that will be introduced in 2003. USCIB will monitor this issue and urges USTR to take into consideration progress in Japan's licensing regime.

In addition, all facilities-based carriers, regardless of their market power, are required to submit the terms and conditions for their pricing of data, Internet and leased line services to MPHPT, resulting in an overly burdensome licensing requirement for non-major suppliers.

Independent and Impartial Regulator: Japan committed under the Reference Paper to establish an impartial regulatory body to implement the pro-competitive regulatory principles set forth in that document. Although Japan played a leading role in promoting international support for the Reference Paper, the Japanese Government has failed to create an independent regulatory body with sufficient autonomy to exercise effective oversight over the sector. The fact that both telecommunications policy and regulatory responsibilities reside in the same Cabinet Ministry, the MPHPT, raises questions regarding the transparency of the regulatory process when dealing with the dominant carrier, NTT, in which the government remains the major shareholder. A particular example of the lack of independence over the last 12 months has been the manner in which revision of interconnection charges has been dealt with, to the advantage of NTT over competitors. As USCIB stated in comments filed in last year's 1377 review, Japan is still not compliant with the Reference Paper obligation that the regulator be impartial with respect to all market participants. In addition, Article VI of the GATS requires impartiality in domestic regulation and a route for prompt review of administrative decisions.

## **VII. 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\$14 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 efforts to bring Mexico into compliance with its WTO commitments for basic telecommunications services, including a formal WTO complaint filed in February 2002 concerning international services that is currently before a panel established by the WTO Dispute Resolution Body. However, major problems concerning Mexico's failure to allow fully open markets in domestic services must be addressed as well as the lack of an effective and independent regulator.

Lack of Effective Regulation and Anti-Competitive Practices: The telecommunications regulator, Cofetel, was established under Mexico's New Federal Telecommunications Law in 1995, and reports to the Mexican Ministry of Communications and Transport (SCT). 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 and USCIB addressed these concerns in comments submitted in last year's 1377 review. 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 again found that Telmex possesses market power, Cofotel 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.

Cofotel's authority and enforcement powers need to be addressed. Cofotel'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 Cofotel's recommendations, the SCT has the sole authority to implement or reject the sanctions. This regulatory structure has not been effective. USCIB notes that legislation has been introduced in the Mexican Congress that would amend the current Federal Telecommunications Law. Two versions of the bill are pending before Congress -- one measure supported by the PRI/PRD parties, and the other supported by the Mexican Parliamentary Commission. The Parliamentary Commission's version of the bill strengthens the decision-making power and enforcement authority of Cofotel and appears to offer a significant opportunity to correct inadequacies and imbalances in the existing regulatory regime. We request USTR to encourage the Mexican Government to support the expeditious passage of the Parliamentary Commission's version of the telecommunications reform legislation.

Lack of Dialing Parity: In 1996, Mexico adopted a new telephone number policy requiring all Mexican telecommunications carriers to implement a 10-digit dialing system by November 2001. The conversion to 10-digit dialing required significant investments in networks and systems to transition from the former 8-digit dialing system. Today, only Telmex's mobile subsidiary, Telcel, has failed to comply with the compulsory 10-digit dialing system. Telcel's customers are not obliged to dial the prefix number of "01" identifying long distance calls and the prefix number of "044" identifying the calling party pays system. Although Cofotel has ruled that Telcel is in violation of the new numbering plan and has recommended monetary sanctions against it, the SCT thus far has failed to impose the penalty. This clearly constitutes a discriminatory and unfair market practice.

Interconnection: Mexico has failed to ensure the availability of cost-oriented interconnection arrangements with Telmex, its major supplier, as required by Section 2.2 of the Reference Paper.

*On-Net Interconnection:* For interconnection of domestic long distance calls to Telmex's network in a city where a new competitive carrier has a network, Cofotel allows Telmex to charge competitive carriers 0.975 cents per minute for 2002 interconnection, without any cost-justification. In addition, long distance carriers must pay a "call attempts" surcharge (2.85% of

the interconnection charge) and 0.53 cents per interconnection minute for special projects, resulting in a net payment of 1.53 cents per minute. By comparison, long-distance interconnection in countries with effective competition is routinely available for about one cent per minute.

*Off-Net Interconnection:* At the outset, we would like to note that Cofotel has defined Off-Net as an interconnection services but has not yet implemented its decision. For interconnection of long distance calls to areas of Mexico where equal access interconnection arrangements are not available, or where a new competitive carrier does not have a network, Telmex charges competitive carriers a "resale" tariff rate. The resale rate is currently about 8 cents per minute, about four times the level of a cost-oriented rate. The resale rate is based, without cost-justification, on a 25% discount from Telmex's commercial rates to customers.

Similar regional interconnection is routinely available in countries with effective competition for approximately 2 cents per minute.

*Local Interconnection:* Mexico has also failed to ensure timely, non-discriminatory, cost-based interconnection for local competitors. Although Telmex has recently provided interconnection to several carriers, Telmex has imposed several restraints to prevent full and fair competition. While USCIB does not have a position on "bill and keep" we do have concerns about discriminatory practices in the application of Telmex' "bill and keep" system that selectively benefits only Telmex. Additionally, the lack of interconnection quality standards results in routing and programming failures for competitors' local service traffic. Furthermore, Telmex imposes several restrictions on the provision of transit services between local service providers and long distance networks that increases competitors' costs and results in degraded service levels.

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.

Lastly, USCIB is concerned about the impact of various tax measures on the telecommunications business. For example, effective January 1, 2002, the Mexican government imposed a new 10% luxury tax on certain categories of mobile telecommunications. The newly adopted tax unjustly burdens the mobile communications sector, particularly considering that it has been levied in addition to an existing 15% value added tax. The revenue benefits that the Mexican Government hopes to gain through the implementation of the mobile tax are likely to be largely offset as a result of its detrimental effect on users and on investment in mobile communications facilities and services.

## **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 "Thomas M.T. Niles". The signature is fluid and cursive, with a large initial "T" and a long, sweeping underline.

Thomas M.T. Niles