December 21, 2007

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

RE: **CHINA, COLOMBIA, GERMANY, INDIA, JAMAICA, MALAYSIA, MEXICO, NEW ZEALAND, PERU, SWEDEN AND VENEZUELA**

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 ("Section 1377"), COMPTEL hereby responds to the request of the Office of the United States Trade Representative ("USTR") for comments regarding compliance with U.S. telecommunications trade agreements.

COMPTEL has a 25-year history as the largest and oldest association in the United States representing competitive facilities-based carriers, providers using unbundled network elements and interconnection, global integrated communications companies, and their supplier partners. COMPTEL has over 250 members of all sizes and profiles that provide voice, data and video services in the United States and around the world. COMPTEL is headquartered in Washington, D.C.

COMPTEL members share a common objective: to create and sustain true competition in the telecommunications industry, both in the United States and overseas. COMPTEL appreciates the opportunity to present its members' experiences in a number of countries which have undertaken specific commitments with regard to telecommunications services as part of their WTO obligations or are party to a free trade agreement with the United States or are in the course of negotiating a free trade agreement with the United States.

The countries identified in this report represent places where COMPTEL members are doing business and encountering significant market barriers except, in the case of China, where COMPTEL members would like to do business but cannot. We have also included countries with which a free trade agreement has been negotiated but not yet ratified and countries with which negotiations are on-going.

February 2008 marks the tenth anniversary of the entry into force of the WTO commitments on basic telecommunications. The Reference Paper is widely accepted as an example of "international best practice" and incorporated verbatim in the laws and regulations of many WTO members. In many countries, implementation of the market access and Reference Paper commitments has resulted in increased competition, dramatic improvements in the availability and quality of telecommunications services and equally dramatic decreases in the affordability of these services.

Many of the market access barriers that COMPTEL has cited over these past nine years have been resolved. We note particularly the significant changes in Japan, which was a perennial object of our comments. We have removed Japan from this year's filing, as well as Spain, France, Australia and Italy. We are also pleased to report that Colombia has repealed its excessive license fee for international long distance service.

In contrast, there has been absolutely no improvement in the Chinese and German markets. COMPTEL members are not able to enter the Chinese market at all. In Germany, although there have been improvements in some areas over the ten years, COMPTEL members are still denied effective market access, as promised by Germany's WTO commitments.

The Federal Register notice asks "whether any act, policy, or practice of a country cited in a previous section 1377 review remains unresolved." With respect to China and Germany, COMPTEL has raised the same issues year after year. In response, USTR has expressed concern, actively monitored and held bilateral discussions. COMPTEL believes that it is time for USTR to move beyond monitoring and discussion to dispute settlement.

Since 2002 COMPTEL has highlighted two fundamental market barriers that exist in a number of countries: 1) above-cost fixed-to-mobile termination rates and 2) excessive pricing and discriminatory provisioning of local access leased lines. Since 2003, COMPTEL has raised the issue of access to and use of unbundled high speed network elements. All three of these issues remain of concern. All three constitute violations of WTO commitments and the provisions of U.S. free trade agreements.

Excessive Fixed-to-Mobile Termination Rates. In many countries, fixed-to-mobile termination rates are significantly above cost and the failure of the regulator in that country to require cost-orientation is a violation of Section 2.2(b) of the Reference Paper. In order to prove that violation, mobile termination must be a separate market, the mobile carrier must be a major supplier in that market, termination with the called party must constitute interconnection for purposes of the Reference Paper, the prices charged must be higher than cost-oriented pricing and the regulator must have failed to take action to require cost-orientation.

The European Commission has determined that mobile termination is a separate market for purposes of determining whether a supplier has market power.[1] Regulators in numerous countries have determined that a mobile carrier has "significant market power" with respect to called parties on its network.[2] That carrier meets the definition in the Reference Paper of "major supplier:" It has an "essential facility," the only network to reach that called party, a network that cannot be technically duplicated.

The Reference Paper defines interconnection as "linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another suppliers . . . ." Terminating a call on the network of a mobile carrier is a classic example of one carrier (in this case, a fixed-line carrier) linking with another (a mobile carrier) to allow users of the fixed line carrier to communicate with users of the mobile carrier. As a result, the price of termination must be cost-oriented, according to Section 2.2.(b) of the Reference Paper. Failure to mandate cost-oriented pricing would be a violation of this WTO obligation.

A recent TeleGeography report[3] estimated the costs of mobile termination based on available wholesale pricing information. It concluded that the costs of terminating calls on fixed lines and mobile networks should be similar. TeleGeography stated that in 2006 the average fixed-line termination rate was between US$0.05 – 0.07 per minute and the average mobile termination rate was about US$0.07.[4] Mobile termination rates in almost all of Europe and in Mexico and New Zealand far exceed this world average.[5]

<u>Access to Leased Lines and Unbundled Broadband Network Elements</u>. Failure to provide local leased lines and unbundled broadband network elements on reasonable and non-discriminatory terms and conditions is a violation of Section 5 of the GATS Telecom Annex in those countries with specific commitments on basic telecommunications services. Unlike the Reference Paper, which focuses on actions of major suppliers, the Telecom Annex applies to all suppliers of public telecommunications transport networks and services. In addition, the Reference Paper definition of "interconnection" does not apply to the Telecom Annex, making its application much broader than that of Section 2 of the Reference Paper.

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1 *See* Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (13 November 2007).

2 Regulators in France, the United Kingdom, Spain, Italy, Australia, New Zealand, Korea, Peru, Chile and Colombia have concluded that mobile carriers possess significant market power in the call termination market. *TeleGeography 2007* at 14

3 *Id.* at 12.

4 *Id.* at 13.

5 The European Regulators Group has published a chart of mobile termination rates in the 27 EU members, available at http://erg.ec.europa.eu/doc/whatsnew/erg_07_27_mtr_update_snapshot_for_publication.pdf. The rates range from Euro 0.02 in Cypress to Euro 0.18 in Bulgaria. At the current exchange rate of Euro 1 = US$1.47, clearly most EU members are charging rates much higher than the TeleGeography average.

Section 5 of the Telecom Annex refers to "access to and use of" public telecommunications networks or services. Section 5(a) states that "access and use" must be available "on reasonable and non-discriminatory terms and conditions." Section 5(b)(ii) describes the scope of "access and use," specifying that it refers to access to and use of public networks and services, "including private leased circuits," in order "to interconnect private leased or owned circuits with the public telecommunications networks or services or with circuits leased or owned by another services supplier."

Section 5(b) is very clear that a WTO member must ensure that access to and use of private leased circuits is required. But private leased circuits is only one example of the type of access covered by Section 5(b). The U.S.-Mexico Panel Report established that the word "including" denotes an example of what is covered by a provision but not a closed list.[6] Unbundled broadband network elements are also covered by Section 5 of the Telecom Annex.

The question then is whether the terms of access and use are "reasonable and non-discriminatory." In the country specific sections, COMPTEL provides a description of practices that do not meet this standard and the failure of the regulatory authority to act as required by Section 5.

The problem of leased lines and broadband access is not just a problem overseas. It is a problem in the United States. The Federal Communications Commission ("FCC") has slowly removed interconnection and access obligations from the incumbent network owners, shutting off network access by permitting incumbent providers to act as network gatekeepers. Actions by the FCC should not act as a restraint on USTR's ability to vigorously enforce the obligations of our trading partners. Instead, USTR should use the firm legal ground provided by the U.S.-Mexico Panel Report to push for removal of illegal barriers to competition and active implementation of WTO and other trade obligations. At the same time, USTR should exercise its authority as the U.S. government agency charged with interpreting and enforcing trade obligations to provide guidance to the FCC on U.S. obligations.

CHINA WTO VIOLATIONS GATS, Reference Paper and GATS Telecom Annex

The six-year phase in period for China's WTO commitments has expired, but the market remains closed to service suppliers of other WTO members. There is not a single example of a foreign-invested equity joint venture providing mobile or fixed line services[7] and not more that a dozen examples of joint ventures providing value-added

[6] Mexico - Measures Affecting Trade in Telecommunications Services, WT/DS/204/8 (June 9, 2004) ("U.S.-Mexico Panel Report") at ¶ 7.232.

[7] The AT&T joint venture in Shanghai predates China's entry in to the WTO.

services.[8] This contrasts with over 22,000 licenses awarded to domestic PRC applicants.[9]

Rather than repeat what is in COMPTEL's previous filings and filings by other trade associations and companies, COMPTEL refers USTR to its own *2006 Report to Congress on China's WTO Compliance*.[10] The Report presents an accurate description of the many WTO violations: high capital requirements for investment; lack of a regulator independent from the operators; reclassification of value-added services as basic services subject to lower permissible foreign ownership and more stringent investment restrictions; and the lengthy license application process.

In addition to the violations cited in the *2006 China Report*, COMPTEL reiterates the inability of foreign service suppliers to provide service through resale, even though it is part of China's WTO commitments. In addition, access to and use of the incumbents' networks are not being offered on terms that are reasonable and non-discriminatory.

USTR should make it clear that it will initiate dispute settlement proceedings on these long-outstanding issues.

COLOMBIA WTO VIOLATIONS GATS
U.S.-COLOMBIA FTA

COMPTEL congratulates the Colombian regulator for removing the exorbitant licensing fee of US$150 million for international long distance services. The licensing fee created a *de facto* barrier to entry. Unfortunately, the newly adopted regulatory regime still imposes obligations which are more burdensome than necessary to provide the service in question and will therefore act to keep competitors out of the market.

Burdensome Licensing Criteria. On July 31, 2007, the Ministry of Communications (MOC) issued Decree 2870, creating a "Convergent License." Companies, whether currently licensed or not, will need to obtain this new license to offer any basic or value-added telecommunications service, other than mobile and local switched telephony. Existing companies which wish to provide long distance service under this new license, for example, will need to change their legal status from "private corporation" to "public corporation," incurring significant legal fees and more intrusive government regulation.

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8 *2007/2008 European Business In China Position Paper*, page 256, available at: http://www.europeanchamber.com.cn/show/details.php?type=3.

9 The statement that 22,000 VAS licenses habe been issued, was made by MII Vice-Minister Xi Guohua, speaking at the Annual Conference 2007 of the Boao Forum for Asia. See: "Chinese Value-added Telecom Service Open To Foreigners", ChinaTechNews.com, April 24, 2007, available at http://www.chinatechnews.com/2007/04/24/5304-chinese-value-added-telecom-service-open-to-foreigners.

10 *2006 Report to Congress on China's WTO Compliance* (December 11, 2006) ("*2006 China Report*") at 88-90.

The Convergent License has more burdensome requirements than the old value-added service and carrier licenses. The Convergent License requires accounting separation by service, regardless of the size or market power of the licensee. Accounting separation imposes significant costs on operators, which are justifiable if the carrier in question has a dominant market position and can easily subsidize one service with the proceeds from another. Accounting separation has no redeeming feature for carriers which do not have market power.

In addition, the Convergent License requires all operators to post a performance bond of approximately US$215,000. The amount of the bond is not related to the size of the company and therefore poses a potentially higher burden on new entrants and small or medium-sized businesses wishing to provide any kind of telecommunications service in Colombia. In all cases, a service provider has to provide the issuer of the performance bond with a bank guarantee, significantly raising the cost of entry.

GATS Article VI provides minimal obligations on domestic regulation, stating that in sectors where a WTO Member has undertaken specific commitments, it will not apply licensing and qualification requirements that "nullify and impair such specific commitments in a manner which (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c)." Subparagraph 4(b) and (c) state that qualification requirements and licensing requirements shall be "not more burdensome than necessary to ensure the quality of service" and "in the case of licensing procedures, not in themselves a restriction on the supply of the service."

The U.S.-Colombia FTA, which is currently pending ratification, imposes more concrete obligations with respect to qualifications and licensing requirements. Section 11.7(2) requires each party to endeavor that measures applying to licensing and qualification are "not more burdensome than necessary to ensure the quality of service" and "in the case of licensing procedures, not in themselves a restriction on the supply of the service."

The requirements for accounting separation and the performance bond are by themselves a "restriction on the supply of" any telecommunications services and the entry of new competitors. Each imposes costs on non-dominant carriers and small and medium-size carriers which are not counter-balanced by any public interest objective. There is certainly no relationship between these license conditions and the ability to provide a quality service.

<u>Discriminatory Treatment and Failure to Act in a Technology-Neutral Fashion</u>. In 2007 the MOC, without a bidding process or legal proceeding, granted national WIMAX licenses to the three existing fixed-line international and long distance operators (ETB, Orbitel, Telefonica). At the same time, new entrants and providers of other services could only obtain similar WIMAX licenses through an auction – and those licenses came with limited geographic coverage (departmental coverage, not national). In all cases, the WIMAX licenses were limited to use with fixed networks and are not valid for mobile services.

The manner in which these licenses were granted and the license terms present potential WTO/FTA violations. First, MOC acted in a discriminatory manner by granting national licenses for free to three existing operators, while requiring others to compete in an auction for limited geographic regions. Both the GATS and the FTA contain requirements for non-discriminatory treatment of like services and service suppliers. Potentially, the service suppliers can be distinguished because they were incumbents who had paid the $150 million licensing fee at one time. But the service being provided is the same and there should not have been distinctions made with respect to auctions related to that service.

Second, MOC decreed that the technology (WIMAX) could only be used in a certain way. Section 14.14 of the FTA states that service providers will have flexibility in choosing what technology to use to provide service. In this case, MOC dictated the technology to be used.

COMPTEL urges USTR to seek changes to the Convergent License and improvements in transparency as part of the ratification and implementation process of the FTA.

GERMANY WTO Violations Reference Paper and GATS Telecom Annex

Germany continues to present one of the most difficult markets for competitive carriers, largely because of the German Government's inability (or lack of desire arising from its continuing ownership interest) to impose full interconnection and access obligations on Deutsche Telecom ("DTAG"), the major supplier in almost all the relevant telecommunications services markets.

For a number of years, COMPTEL has asked USTR to take more decisive action to address the widespread failure of the German Government to live up to its WTO commitments. At a minimum, USTR should make it clear to the German Government that if it will seek consultations with Germany under Section XXII of the GATS with respect to the amendments to the German Telecommunications Law.

In the Federal Register Notice, USTR sought information on any country which has "permitted or encouraged extensive reliance on or abuse of its judicial system to systematically or unreasonably delay or prevent regulatory action to ensure its compliance" with trade agreement commitments. Germany is a perfect example of this phenomenon. DTAG appeals every "adverse" decision, and an appeal automatically stays implementation of the measure subject to the appeal. This enables DTAG to delay by years the implementation of BNetzA decisions, depriving competitive carriers of effective market entry.

Failure to Provide Access to and Use of Public Telecommunications Networks and Services in Violation of the Telecom Annex

Germany is violating its obligations under Section 5 of the Telecom Annex in a number of ways. All have been mentioned in previous COMPTEL filings. The regulatory holiday described below is a prima facie violation of Section 5. Not surprisingly, broadband provisioning per household in Germany has fallen significantly behind other leading industrialized nations.[11]

Regulatory Holiday. DTAG's high-speed optical fiber network (referred to as "VDSL") has been operational in a number of metropolitan areas since August 2006 and is being rolled out to all major metropolitan areas. While BNetzA identified the market as subject to *ex ante* regulation and DTAG as dominant in that market, BNetzA has failed to order DTAG to offer access to and use of unbundled network elements on that network on reasonable and non-discriminatory terms and conditions to its competitors. In fact, DTAG has NO obligation to offer access to and use of the VDSL network on any terms or conditions.

BNetzA's failure to require access to and use of the VDSL network was enshrined in German law last year. Amendments to the German Telecommunications Law effectively exempt the VDSL network from *ex ante* regulation.[12] These amendments are inconsistent with European Union directives and the European Commission ("EC") has referred Germany to the European Court of Justice ("ECJ").

More importantly, these amendments are a *prima facie* violation of Section 5 of the Telecom Annex. There is nothing in Section 5 which permits Germany to completely exempt a public telecommunications network from its obligations. The services that competitors would provide if they had access to and use of elements of the VDSL network are included in Germany's Schedule of Specific Commitments.

Bitstream Access to DTAG's DSL network. BNetzA has failed to ensure that competitors have access to and use of unbundled network elements, such as ATM and IP bitstream access, in order to provide a scheduled service. This is in sharp contrast to a large number of other EU member States (U.K., France, Spain, Netherlands) where access is available.

It has been more than five years since competitive carriers began to seek such access. As described below, BNetzA has taken some steps in order to require ATM and IP bitstream access to DTAG's network, but access is still not available. The U.S.-Mexico Panel Report noted that the time frame for implementation of WTO commitments is not open-ended. It stated that the "dates of entry into force and implementation of specific commitments under the GATS coincide in principle."[13] The

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[11] Germany holds the last rank (with 37.8 broadband connections per 100 inhabitants) of the countries compared by Ofcom (Italy, United States, U.K., France, Netherlands, Japan etc.) see page 151 of Ofcom's 2007 Annual Market Report (Telecommunications) at http://www.ofcom.org.uk/media/news/2007/12/nr_20071213,

[12] *See* Position Papers and releases of the German Competitive Carriers Association ("VATM") at www.vatm.de/english/publications for more details.

[13] *U.S.-Mexico Panel Report* at ¶7.367

ability of other European regulators to implement Section 5 obligations with respect to similar networks demonstrates that five years of waiting for implementation effectively means that U.S. suppliers have not received the market access promised.

BNetzA issued a "remedies" decision in September 2006 with regard to IP bitstream and in March 2007 with regard to ATM bitstream, both requiring DTAG to grant access to these unbundled network elements and to publish a reference interconnect offer within three months. DTAG has appealed both of BNetzA's decisions to the Administrative Court of Cologne, thus staying the effectiveness of the orders.

On December 13, 2006, DTAG released a draft reference interconnect offer for IP bitstream access, which does not provide reasonable terms and conditions. The draft offer only enables carriers to use a small portion of bandwidth (up to 16 megabits) and it does not provide quality of service guarantees available from incumbents in other markets. In any case, to be effective the offer must be approved by BNetzA. Even though more than a year has passed, BNetzA has not approved the draft offer. As a result, competitors still lack access to and use of the broadband network at IP interconnect level.

It took DTAG more than a year to produce a draft reference interconnection offer ("RIO") for ATM bitstream access. Like the IP offer, the ATM offer is still under review by BNetzA and therefore competitive carriers still lack access to the broadband network at the ATM interconnect level.[14]

<u>Access to Local Leased Lines on Reasonable Terms and Conditions</u>. Despite statements by USTR in its 2006 Report that it would urge Germany to grant competitive carriers access to combinations of high-capacity trunk lines and lower capacity end-user links, such access is still not available. While it is positive that BNetzA has adopted an access obligation for wholesale leased line access segments in excess of 2Mbit/s (including Ethernet access), DTAG has not begun to deliver these circuits yet. This constitutes another failure to enforce the Section 5 obligations.

<u>Access to Unbundled Local Loops</u>. Competitors' contracts with DTAG usually require that DTAG switch a loop over to a new provider within seven days from a request to do so. However, more than 100,000 customers of competitive carriers are currently waiting at least three weeks and, in many cases months, for the switch-over. Section 5(b) of the Telecom Annex covers access to and use of the local loop elements. Under Section 5(a), terms and conditions for that access have to be reasonable. Terms and conditions include provisioning times. DTAG's delay of weeks is not reasonable and so far BNetzA has failed to intervene to ensure that loops are switched over to the competitors in a timely manner.

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[14] The delays by DTAG and BNetzA in providing reasonable terms and conditions for IP bitstream and ATM bitstream access were harshly criticized by the European Commission. It urged BNetzA by letters dating June 18, 2007 (case DE/2207/0639) and November 22, 2007 (case DE/2007/0702) to secure full implementation of IP and ATM offers within the shortest possible time.

DTAG also denies competitive carriers access to and use of local loops by tying potential customers into long term contracts. DTAG's retail broadband agreements, which bundle DSL and telephony services, have a minimum term of 24 months, with automatic renewal of 12 months. This lengthy term is unique in Europe.

Lack of Independent Regulator and Impartiality in Violation of the Reference Paper

Section 5 of the Reference Paper requires a WTO member to maintain a regulatory authority that is separate from and not accountable to any network operator. In addition, the regulator must act in an impartial manner with respect to all market participants. While technically separate from DTAG, BNetzA lacks independence from the German government which continues to hold a significant financial interest in DTAG. Under German law, BNetzA is subordinate to the Federal Ministry of Economics and is bound by the Ministry's instructions, even if the decisions of its ruling chambers cannot be overruled by the Ministry.

The lack of transparency in BNetzA's decision-making makes it impossible to determine whether it is actually acting in an impartial manner or in a manner consistent with WTO obligations. BNetzA’s decisions are heavily redacted and it does not even fully release non-confidential decisions. There are 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.

Competitors cannot participate in BNetzA or court proceedings, even if those proceedings will have a direct and substantial impact on their business plans. For example, in order to create a cost model to determine mobile termination rates BNetzA did not consult with industry participants. Instead, for one mobile operator, BNetzA used cost documentation provided by that operator without giving competitors an opportunity to review or challenge the costing methodology. For the other three mobile operators, BNetzA selected a national benchmark as the basis for its findings. How BNetzA arrived at this benchmark was never explained.

Similarly, competitive carriers are not involved in court proceedings that directly affect their interests. 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. In contrast, DTAG always is a party to the case and can therefore influence decision making at the court level.

Finally, BNetzA’s decisions are not rendered in a timely manner, thus favoring DTAG. The German Telecommunications Act stipulates that cases on the abuse of market dominance must be decided within four months from the commencement of proceedings. BNetzA, however, has exceeded this time frame in numerous instances. Another example is the proceedings for the assessment and approval of standard reference offers. Again the German Telecommunication Act requires BNetzA to issue a decision within four months, a timeline which it has never met. The most prominent examples are the RIOs for ATM and IP bitstream. As already mentioned before, proceedings commenced in December 2006 and, a year later, have not concluded.

INDIA WTO VIOLATIONS GATS

COMPTEL recognizes that India has made significant progress in opening its market to competitive carriers. India has adopted a new licensing regime which recognizes the convergence of technologies and services and has increased its foreign ownership limits significantly.

<u>Excessive Licensing Fees.</u> While the new licensing regime is welcome, the licensing fees for these new licenses remain excessively high and a significant barrier to entry. Under the new regime, the license fee for a National Long Distance Operator ("NLDO") and an International Long Distance Operator ("ILDO") is approximately US$636,000 each. U.S. carriers wishing to provide internet protocol "virtual private networks," a critical service for multinational customers, must obtain both a NLDO and an ILDO license. This brings the license fee to over US$1.2 million. In contrast, none of the European Union members or Canada charge any fee for obtaining a license to provide long distance services, including international. The United States fee is under US$1,000.

Now that Colombia has dropped its US$150 million license fee, India seems to have one of the highest licensing fees for long distance and international services. For example, Bahrain charges a combined fee of about US$144,000 for national and international long distance licenses, while Kenya charges about US$320 for similar licenses. Malaysia charges about US$14,000 for an individual network facilities license.

In addition, under the new regime, India is charging about US$50,000 for a license to provide internet services. There is no relationship between the size of this application fee and the quality of the service to be provided. Again, India has one of the highest ISP license fees in the world. The United States, Canada and the 27 members of the European Union do not have any application fee. Kenya charges about US$160. Bahrain charges about US$2,666.

Article VI of the GATS states that in sectors where specific commitments are undertaken, a WTO member shall not undertake measures that nullify and impair such specific commitments by being "more burdensome than necessary to ensure the quality of a service" and, in the case of licensing procedures, not in themselves a restriction on the supply of the services. A license fee in excess of US$1 million for national and international service effectively eliminates market entry except for the largest multinational carriers. It prevents operators providing high technology services, such as IP VPN from entering the market. The ISP license fee, similarly, is out of proportion to the service provided and keeps small and medium-sized foreign service suppliers out of the market. The fact that India's license fees in these categories continue to be some of the highest in the world demonstrates that these fees are not related to ensuring quality of service and are not reasonable.

Lack of Transparency and Delay in Licensing ISPs. India undertook as part of the Uruguay Round commitments in "data and message transmission services." This included on-line information and data base retrieval and on-line information and/or data processing services. The only restriction was a foreign ownership limit of 51%. Up until mid-2006, however, India has been issuing licenses to 100% foreign-owned internet service providers ("ISPs").

Since 2006, India has denied foreign internet service providers the market access promised by its Uruguay Round commitments. In mid-2006 the Department of Transportation ("DoT") froze consideration of all applications for ISP licenses. This was not announced formally or advised to applicants whose license awards were pending at the time. Instead, applicants learned of the freeze through the Indian press.[15]

In May 2007, the Telecommunications Regulatory Authority of India ('TRAI') released its recommendations for reform of the standard ISP license terms.[16] In August 2007, DoT accepted these recommendations, including lowering the maximum permitted foreign ownership in ISP licensees from 100% to 74%. Although the TRAI's recommendations suggested that existing ISP licensees with foreign ownership in excess of 74 percent be given a grace period to comply with the new, more restrictive foreign ownership limit, there has been no formal statement from the DoT confirming that such a grace period will be provided.

Nor is it clear whether existing licensees will need to apply afresh for the new ISP license and pay the $50,000 fee. Wholly foreign owned entities who had their applications pending with the DoT prior to mid-2006 are not permitted to 'rectify' their applications by introducing a minority Indian partner in order to meet the new 74% foreign ownership cap. Instead, those applicants are required to resubmit their applications anew. None of this procedural information is available publicly. The only way of learning the information is from individual DoT officials.

ISP licensing is just one example of the lack of predictable, comprehensible and timely licensing arrangements in India. While India has not committed to the WTO Telecommunications Reference Paper, it did provide undertakings in regard to licensing in an "Explanatory Paper on Additional Commitments by India." It undertook that all licensing criteria and the terms and conditions of individual licenses will be made publicly available. India has failed to honor those commitments in regard to ISP license applicants in 2006-2007, by suspending consideration of license applications without informing applicants; by failing to make known migration arrangements for existing licensees from the previous ISP license terms and conditions to the new ISP license terms and conditions; and by forcing applicants that have had applications pending for 12 months or more, to withdraw their applications and commence afresh.

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[15] See for example the report by Joji Thomas Philip and Moumita Bakshi Chatterjee, "Govt hits pause on ISP licences," *Economic Times* (Mumbai), November 17, 2006

[16] Media release, "TRAI recommends major functional and structural revamp of Internet Services," Regulatory Authority of India, New Delhi, May 10, 2007.

USTR should work with the Indian Government to bring the licensing fees and procedures more into line with international practice and India's WTO commitments.

JAMAICA WTO VIOLATIONS Reference Paper

Unfortunately, Jamaica continues to impose a surcharge on incoming international traffic to fund universal service objectives. The surcharge is discriminatory and not competitively neutral because it applies only to in-bound international service and not to out-bound international service. On the surface it looks non-discriminatory and competitively neutral because it applies to all in-bound international traffic. So foreign carriers and Jamaican carriers are both subject to the surcharge for terminating foreign traffic on the Jamaican network. But the benefits of the surcharge go only to Jamaican carriers. In effect the Jamaican carriers recoup the surcharge through receipt of universal service funds in Jamaica. The surcharge thus treats foreign carriers in a discriminatory manner and is not competitively neutral.

Second, it is probably "more burdensome than necessary." Even though the surcharge has been in effect for about two years, there is still no information about how the amount was determined or how the money is being spent. So it is not possible to determine whether the surcharge is actually related to the funding needed.

MALAYSIA WTO VIOLATIONS GATS

Malaysia has very limited GATS commitments, with a foreign ownership cap of 30% and a limit on investment only in existing carriers. But like all WTO members, Malaysia has a MFN obligation. So once it permits foreign investment in excess of the 30% cap in its GATS schedule or greenfield joint ventures, it is obligated to provide like treatment to similar service suppliers and services. In addition, under Article III, Malaysia has an obligation to "publish promptly . . . all relevant measures of general application which pertain to or affect the operation" of the GATS.

One of the goals of the MFN and transparency principles is to prevent discretionary and discriminatory treatment of foreign service suppliers. Malaysia's practice with respect to foreign investors in the telecommunications sector violates these principles.

The Foreign Investment Committee ("FIC") *Guidelines on the Acquisition of Interests, Mergers and Take-Overs by Local and Foreign Interests* do not specifically address the permitted level of foreign investment in telecommunications businesses, nor the approval process for such investments.[17]

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[17] FIC approval is required for any acquisition that is above RM 10 million (about US$3 million) or where the investment gives a single foreign equity holder over 15% of the voting share in a Malaysian company, or investments giving foreign investors over 30% jointly

The position adopted in practice by the FIC and the Communications and Multimedia Commission ("CMC") has been that maximum foreign investment of up to 61% is permitted subject to a requirement that the foreign investor sell down to 49% within five years. This rule is not written down anywhere, leaving the Government of Malaysia the possibility of treating service suppliers from WTO members differently.

COMPTEL urges USTR to raise this lack of transparency and potential for discriminatory treatment with Malaysia and hopes that USTR will be able to negotiate greater market access, transparency and investment protection should the free trade negotiations with Malaysia proceed.

MEXICO WTO VIOLATIONS Reference Paper, GATS Telecom Annex, GATS

Excessive Pricing for Fixed-to-Mobile Termination. USTR noted in its 2007 Report the numerous problems with Mexico's implementation of a calling party pays system for mobile termination. As described above, each mobile operator has market power in the termination market and COFETEL has an obligation to require mobile operators to adopt cost-oriented prices for termination. COFETEL has failed to do so and has left pricing to carrier-to-carrier negotiations.

It is important to remember that the mobile termination rate ("MTR") in Mexico is a surcharge, added to the landline termination rate. As shown by the difference in landline vs. mobile termination rates cited by TeleGeography,[18] there should not be more than 1 to 2 US cents difference in cost between the two types of termination. Landline termination rates in Mexico are between one and 3.5 US cents a minute. The MTR surcharge is many times higher. In 2007, the MTR rate is 1.23 pesos a minute (US$0.113 cents); and the 2008 rate is 1.1 pesos a minute (US$0.10 cents). In 2009, the rate will be 1 peso a minute (US$0.092 cents) and in 2010, it will be 0.9 peso a minute (US$0.083 cents). As USTR noted in its 2007 report, Mexico is effectively charging U.S. consumers a surcharge to pay for network expansion in Mexico. This is a violation of the requirement that interconnection between two network be cost-oriented and that universal service regimes be administered in a non-discriminatory, competitively neutral manner. COMPTEL urges USTR to take action to ensure that Mexico carries out its obligations.

Failure to Provide Access to and Use of Local Networks. As demonstrated above, Mexico has an obligation to require all operators to provide access to and use of their public telecommunications networks and services on reasonable and non-discriminatory terms and conditions. Mexico has failed to do this with respect to local access markets for high-capacity local loops. Non-recurring charges for new access lines are in the thousands of U.S. dollars, even with a two-year commitment, while in the United States, such charges are usually less than US$1000, and only US$200-300 for a term of more than one year. There are also substantial delays in installation, maintenance and repair, depriving competitive carriers of the access promised by Section 5 of the

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[18] See p. 3 above.

Telecom Annex. USTR should work with COFETEL to ensure that Mexico lives up to those obligations.

Limits on Market Access due to Delays in Issuing Licenses. Although there is no specific provision in the GATS or NAFTA requiring timely processing of applications for licenses,[19] delays of one or more years act as effective barriers to entry and deprive U.S. service suppliers of the market access promised by Mexico. Much of the delay seems to come from the requirement that COFETEL review all requests for authorizations and renewals, while the Secretariat for Communications and Transportation ultimately approves the licenses. A lack of coordination and competing bureaucratic interests of the two agencies cannot justify the delays, which effectively bar entry to the market. Although USTR cannot make COFETEL and SCT work effectively together, it can point out that failure to do so deprives foreign service suppliers of promised market access.

NEW ZEALAND WTO VIOLATIONS REFERENCE PAPER

Excessive Mobile Termination Rates. New Zealand is violating its WTO obligations by not requiring mobile carriers to charge cost-oriented mobile termination rates. The regulator, the New Zealand Commerce Commission, undertook two separate studies in which Vodafone and Telecom NZ, the two mobile operators, were each found to have market power. As a result, the Commerce Commission recommended that the price of fixed to mobile termination be regulated and proposed a cost-oriented pricing mechanism.[20]

Instead of following the Commission recommendations, the Ministry of Economics accepted the rates and time frame proposed by Vodafone and Telecom NZ. Over a five year period, Telecom NZ will reduce its mobile termination rate to about US$0.09 a minute from US$0.15 a minute, and Vodafone will reduce its termination rate to US$0.10 cents a minute from US$0.15 cents.[21] In contrast, a report on mobile termination costs prepared for the Australian Competition and Consumer Commission determined that the cost per minute of voice termination for an efficient operator is about US$0.05.[22] This is also in the range cited by TeleGeography. The Government's failure

19 Section 13.03(1) of NAFTA does require expeditious processing of licenses to provide value-added services, but there is similar provision regarding basic telecommunications services.

20 "Schedule 3 Investigation into Regulation of Mobile Termination, " Reconsideration, Final Report (21 April 2006), at 97 available at http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/Investigations/MobileTerminationRates/ContentFiles/Documents/Mobile%20Termination%20Reconsideration%20Final%20Report%2021%20April%202006%20.pdf,

21 "New Zealand government approves industry-led mobile termination plan" (April 30, 2007), available at (http://www.marketwatch.com/news/story/new-zealand-government-approves-industry-led/story.aspx?guid=%7BEFEC9C5F-20E7-4B7C-A74E-58D53BD7D1FA%7D

22 wik-Consult, "Mobile Termination Cost Model for Australia" (January 2007) at 121, available at http://www.accc.gov.au/content/item.phtml?itemId=783055&nodeId=1a2eee9394ef3123590dbf874692a13b&fn=Mobile%20termination%20cost%20model%20for%20Australia%20(WIK%20report).pdf.

to require cost-oriented pricing by Vodafone and Telecom NZ is a breach of its obligations under Section 2 of the Reference Paper.

PERU U.S.-PERU FTA

Under the U.S.-Peru FTA, which recently entered into force, Peru has an obligation to maintain an independent regulatory body whose "procedures are impartial with respect to all participants." COMPTEL members are concerned that recent developments at OSIPTEL, the Peruvian regulator, will make it impossible for Peru to implement this obligation.

Currently, OSIPTEL has only two members of its Board of Directors. In May 2007, three of the five Board members resigned in response to a change in Board powers which eliminated the authority of the Board to appoint OSIPTEL's General Manager and granted such power exclusively to the President of the Board.[23] Since the resignations, the President of the Board has been using powers granted under OSIPTEL internal regulations[24] to carry out OSIPTEL's duties when the Board cannot validly be convened. These powers allow the President to issue "emergency" decisions in cases which generally require consensus of the Board members. This situation has severely undermined the transparency and calls into question the impartiality of the decisions.

COMPTEL urges USTR to carefully monitor the effect of these prolonged vacancies in the Board of Directors of OSIPTEL on Peru's ability to faithfully carry out its FTA obligations.

SWEDEN WTO VIOLATIONS GATS TELECOM ANNEX, GATS

Failure to require access to leased lines and unbundled network elements. In last year's filing, COMPTEL noted the failure of the Swedish regulator to make sure that TeliaSonera provides access to and use of private leased circuits on its network on reasonable and non-discriminatory terms and conditions, as required by Section 5 of the Telecom Annex. Nothing has changed in Sweden in this respect. Over two years ago, the Swedish regulator, Post-och telestyrelsen (PTS), completed its market analysis and mandated that TeliaSonera offer local private lines at cost-oriented rates.

TeliaSonera has a virtual monopoly (over 89%) in the wholesale leased lines market and it has so far failed to implement the regulator's decision. Its failure is not only evidence of Sweden's violation of its Telecom Annex obligations but also a barrier to entry depriving foreign service suppliers of the market access promised in Sweden's schedule.

Similarly, TeliaSonera has never implemented the regulator's decision of November 2004 that it provide wholesale bitstream market (DSL) at cost-oriented and

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[23] Supreme Decree 046-2007-PCM (May 26, 2007).

[24] Supreme Decree 008-2001-PCM, Article 86(j).

non-discriminatory prices. This situation is a perfect example of the denial of market access through excessive use of the court system.

TeliaSonera challenged the November 2004 PTS findings in court, resulting in a stay of implementation of the PTS decision. In April 2006 the court ruled in favor of PST and for a brief period during 2006, the stay was lifted and TeliaSonera was forced to present a reference interconnection offer for bitstream access. Before PTS had a chance to review the reference interconnection offer, TeliaSonera sought further court action and the implementation was again stayed.

The matter proceeded through a number of courts, reaching Sweden's Supreme Court. In February 2007, the Supreme Court rejected TeliaSonera's appeal and the regulator tried once again to implement its 2004 decision. However, TeliaSonera promptly went back to the courts, with an appeal on a different matter relating to an implementation mandate issued by regulator. While this appeal is being heard, implementation is stayed once again.

The consequence of this endless appeal process is that almost four years after the PTS found that TeliaSonera had to provide cost-oriented and non-discriminatory access to and use of its network, prices remain significantly higher than elsewhere in Europe. The EU Commission recognized in its 12th Implementation Report[25] that lengthy appeal procedures was the most important regulatory issue facing Sweden. The Implementation Report calculated that in June 2006 there were over sixty PST decisions on appeal before various Swedish courts. The situation in the intervening 18 months has not improved.

A further aggravating factor is that the only wholesale product that TeliaSonera does make available to competitive carriers (at a price which COMPTEL noted in last year's filing was many times higher than cost) has been withdrawn from the market since June 2007 and will be completely unavailable after June 2008. Thus, there is no access to TeliaSonera's network as required by Section 5 of the Telecom Annex.

The members of COMPTEL ask USTR to monitor the enforcement efforts of PTS to ensure that local access leased lines and unbundled high speed network elements are made available in the manner required by Sweden's WTO obligations.

VENEZUELA WTO VIOLATIONS GATS

Venezuela has recently nationalized the incumbent operator, CANTV, which controls about 75% of the local and domestic long distance telecommunications markets. While this is not a violation of a trade agreement relating to telecommunications, it has been followed by actions of the government and the regulator, CONATEL, which

25 EUROPEAN ELECTRONIC COMMUNICATIONS REGULATION AND MARKETS 2006 (12th REPORT), available at
http://ec.europa.eu/information_society/policy/ecomm/doc/library/annualreports/12threport/sec_2007_403.pdf

discriminate in favor of CANTV. More favorable treatment of a national service provider is a violation of Venezuela's national treatment obligation with respect to foreign telecommunications service providers. For instance, CANTV was recently exempted from paying a newly created tax of 1.5% of the value of any transaction made by a legal entity through the bank system. This discriminatory rule presents CANTV with a competitive advantage over all its other competitors.

CONATEL has also instituted a performance bond of about US$1,000,000 in order to obtain a domestic or international long distance license. COMPTEL noted in its discussion of Colombia that a performance bond of $215,000 constitutes a market access barrier which deprives foreign service suppliers of the market entry promised in Colombia's schedule. The Venezuelan bond is even more problematic.

CONCLUSION

For the reasons described above, COMPTEL urges the Office of the U.S. Trade Representative to commence dispute settlement with China and Germany. It should also work aggressively to address with the governments cited the fundamental issues presented by excessive mobile termination rates, unreasonable and discriminatory terms and conditions for provision of local access leased lines and unbundled high speed network elements, as well the other issues set out herein. USTR should take appropriate actions to ensure that these countries ensure fair and non-discriminatory market conditions in accordance with their respective trade commitments.

Respectfully submitted,

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