

Results of the 2009 Section 1377 Review of Telecommunications Trade Agreements

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Introduction

USTR annually reviews the operation and effectiveness of U.S. telecommunications trade agreements and the presence or absence of other mutually advantageous market opportunities, pursuant to Section 1377 of the *Omnibus Trade and Competitiveness Act of 1988*. The Section 1377 Review (“Review”) is based on public comments filed by interested parties and information developed from ongoing contact with industry, private sector, and foreign government representatives in various countries. This year USTR received comments from seven companies and trade associations and reply comments from one company and two foreign governments. All public comments are available at the following web-site: www.regulations.gov, docket number USTR-2008-0039.

Summary of Findings

Several general themes are addressed in this year’s Section 1377 Review: **fixed and mobile call termination rates** in El Salvador, Jamaica, Japan, Peru, and Tonga; **problems with major suppliers** in Australia, Colombia, Germany, India, Mexico, Singapore, and Sweden; **transparency and regulatory independence** in China, Egypt, Germany, India, Israel, Mexico, and South Africa; **failure to update WTO commitments** in Thailand; and **issues affecting the telecommunications equipment trade** in Brazil, China, India, Korea, Malaysia, Mexico, and Thailand. This year’s Review also highlights **progress** on an issue in Oman that was mentioned in last year’s report.

Although several of the issues in the Review have been discussed in past Reviews, we consider it appropriate to highlight them again, in particular given that some of these issues raise ongoing questions regarding trading partners’ compliance with their trade obligations. The 2009 Review describes a set of issues that USTR will actively monitor throughout the year and on which, if warranted, USTR may take further action.

Discussion of Key Issues

1. Fixed and Mobile Call Termination Rates

One of the main cost components of an international telephone call from the United States to another country is the rate a foreign telecommunications operator charges a U.S. operator to “terminate” the call on the foreign operator’s network and deliver the call to a local consumer. Both U.S. free trade agreements and the World Trade

Organization's (WTO) Reference Paper on pro-competitive regulatory principles include disciplines designed to ensure that the charge for terminating a call on a network of a major supplier (which in most countries is the largest or only fixed-line telecommunications supplier) is cost-based. This ensures that a major supplier is not able to gain an unfair competitive advantage from terminating foreign or competitive carriers' calls, and also helps to ensure that U.S. carriers can offer reasonable and competitive international rates to consumers located in the United States.

USTR has noted the emergence of a troubling trend whereby some foreign operators are increasing termination rates due to measures implemented by their governments that are adversely affecting the ability of U.S. telecommunications operators to provide low-cost, quality services to U.S. consumers and in ways that may raise questions in connection with those governments' international trade obligations. In some cases, the major supplier benefits from the increased rates; in others, the governments in question use the revenues to fund universal service programs or programs unrelated to telecommunications. Even where these measures do not provide additional revenue to the local operators, the result for U.S. operators and consumers is the same—higher costs and, consequently, for both the United States and foreign country, lower calling volumes. As noted in this year's public comments and as discussed in detail below, countries are employing diverse methods to increase termination rates, such as mandating rate increases through regulation; imposing per-minute taxes on incoming international calls; and assessing per-minute contributions to domestic universal service funds. In other cases, the government is not directly involved in setting charges, but through inaction may fail to ensure that commercially offered rates are reasonable.

El Salvador – Tax on Incoming International Calls

In July 2008, El Salvador promulgated a law imposing a \$.04/minute tax on incoming international telephone calls. Salvadoran carriers have passed on the cost to foreign carriers in the form of higher termination rates. The imposition of this tax has resulted in a 100% increase in call termination rates for calls from the United States to El Salvador. In August 2008, El Salvador modified the law to exempt calls from other Central American countries from payment of this tax.

Imposing a tax on incoming calls from the United States and other countries but not Central American countries raises concerns about whether El Salvador is abiding by its Most-Favored Nation (MFN) obligations under the WTO General Agreement on Trade in Services (GATS). In addition, the tax raises questions regarding El Salvador's adherence to its commitment in the GATS Annex on Telecommunications (GATS Annex) and the Dominican Republic – Central America – United States Free Trade

Agreement (CAFTA-DR) to ensure reasonable access to and use of its public telecommunications network.

Beyond the specific trade obligations at issue, the United States is concerned that the tax disproportionately affects Salvadorans living in the United States who rely on affordable telecommunications to remain in contact with their families in El Salvador. USTR has been trying to address these concerns with El Salvador and will continue to press this issue. Depending on the results of these efforts, USTR will consider taking additional action.

ITU Network Externalities Recommendation

In October 2008, the International Telecommunication Union (ITU) adopted Recommendation¹ D.156, which recommends that developing countries consider the imposition of a “network externality” fee on telephone traffic originating in developed countries and terminating on developing country networks, as a means to fund the extension of developing countries’ telecommunications networks. The United States, together with 27 other ITU members, expressed a reservation against this recommendation.²

The recommendation is premised on the idea that a network externality fee would ostensibly be used to compensate operators in developing countries³ for building out networks and providing developed countries with greater calling opportunities. While network build-out in developing countries is a worthy goal, there are concerns that revenues generated by a “network externality fee” may not in fact be used to fund network expansion in developing countries and instead may be used simply to raise costs for foreign operators in developed countries.

Moreover, the ITU recommendation appears to encourage potentially WTO-inconsistent action. In particular, the recommendation appears to run counter to obligations set out in the GATS and various U.S. free trade agreements (FTAs) to afford MFN treatment to foreign services suppliers. Practically all ITU Members are also WTO Members, and a number of ITU Members are also party to FTAs with the United States. Thus, if a WTO Member or U.S. FTA partner were to implement the ITU recommendation, it would raise serious concerns about whether the country was affording MFN treatment to foreign telecommunication suppliers.

¹ ITU-T Recommendations are voluntary and non-binding.

² USTR has just been informed that at least one African country has already begun to apply a network externality fee. We will seek to confirm this information.

³ The term “developing country” is undefined in this context.

In addition, were any of the 70-plus WTO Members that have undertaken specific commitments with respect to basic telecommunications services to implement the ITU recommendation, it would raise questions as to whether the country was acting consistently with its obligations in the GATS Annex on Telecommunications to ensure access to and use of public telecommunications transport networks and services on non-discriminatory terms and conditions. Moreover, were a major supplier in any of the 60-plus WTO Members that have undertaken WTO Reference Paper commitments to impose a “network externality” fee solely on developed country foreign suppliers, it would raise concerns regarding the Member’s adherence to its Reference Paper commitment to ensure that its major suppliers offer interconnection to other suppliers of basic telecommunications (including suppliers from other Members) on a non-discriminatory basis.

It bears noting that the one country that has experience with “network externality” charges, the United Kingdom, is now reconsidering this policy. In the United Kingdom, this policy has resulted in a premium being imposed on all calls to mobile networks. Although this premium is charged on incoming international calls as well, the policy does not distinguish between calls from developing and developed countries; hence the issue of discrimination does not arise. However, the same policy problems that arise with implementation of the ITU recommendation are evident – inefficiencies and market distortions were created, and network expansion has been negligible. In a recent review of mobile termination rates set by the regulator Ofcom, the U.K. Competition Commission stated “our conclusion is that inclusion of a Network Externality Surcharge (NES) in Mobile Call Termination charge controls constituted an error.” The key reason stated by the Commission was that “at least 60%, and up to 90% of revenues gained from NES will be used for purposes other than that for which the NES was intended.”

USTR will work with its trading partners to urge them not to implement the ITU recommendation or similar policies.

Jamaica – Universal Service Surcharge

For the past several years, Jamaica has levied a surcharge on incoming international calls (US\$.02/minute and US\$.03/minute for fixed and mobile termination, respectively) to fund a universal service program called the Universal Access Fund. In last year’s 1377 Review, USTR encouraged Jamaica to cease collection of the surcharge until it more fully defined its universal service program and utilized the money collected thus far to build out infrastructure. Jamaica has taken neither action, yet continues to collect the fee. USTR supports efforts to ensure universal telecommunications service; however, the cost of funding these programs should be borne by domestic

telecommunications operators and consumers, and the domestic carriers should not be allowed to simply pass the surcharge through to foreign carriers. Levying a surcharge solely on international calls places an unfair burden on foreign operators and consumers, both of whom are at best only marginally able to benefit from the domestic universal service program. U.S. operators and consumers bear the bulk of the expense, given that 80% of Jamaica's incoming calls originate in the United States.

Although Jamaica has provided USTR with more information this year regarding the management and use of the funds, thus far it appears that much of the money spent has been on items unrelated to a telecommunications network development. These items include the purchase of laptop and desktop computers, printers, and textbooks and expenses related to teacher training. The amount currently available in the Universal Access Fund (according to information provided to USTR by the Jamaican government) appears to be sufficient to fund all projects currently identified, which raises the question of why Jamaica must continue collecting the surcharge. Jamaica's WTO Reference Paper obligations require it to ensure that universal service obligations be administered in a transparent, non-discriminatory manner, and that they be no more burdensome than necessary to achieve its goals. Jamaica's Universal Access Fund continues to grow and appears to be used largely or at least disproportionately for non-telecommunications related items. Additionally, it is unclear whether new projects will be added that require funding, and whether the stated project sums include both up-front costs and on-going costs or only the former. Finally, Jamaica has not yet completed an audit of the Universal Access Fund's activities, with the first audit (covering only 2005-2006) to be published by March 31, 2009.

USTR will continue to press Jamaica to restructure its universal service contribution program by eliminating the surcharge on incoming international calls as soon as possible.

Japan – Review of Mobile Termination Rate Policy

In Japan, where the regulator does not set mobile termination rates, a proceeding is under way to reconsider that policy, given persistently high rates. In that proceeding, at least one operator has advocated introducing a "bill and keep" system for compensation (whereby operators do not charge each other for terminating each others' calls), which is widely used by U.S. mobile operators. USTR will monitor this proceeding and continue to urge the regulator to put in place a transparent system for better evaluating whether rates imposed by operators are truly reasonable.

Peru – Review of Maximum Mobile Termination Rates

In 2004, Peru's telecommunications regulator OSIPTEL established a five-year plan according to which mobile termination rates would decrease on a yearly basis. Commenters continue to raise concerns that the speed at which the rates are decreasing is not fast enough, given that the plan was established using 2004 costs that the commenters claim are significantly overstated. Last year USTR stated that Peru should consider accelerating the rate reduction, taking into account more recent pricing information.

Although Peru has taken the positive step of initiating the process to review the plan, the process only formally began at the end of last year, suggesting that a new plan is not likely to be in place before the current one expires at the end of this year. This is problematic because companies will be required to continue to pay termination rates they believe are above cost and based on outdated data.

USTR urges OSIPTEL to do everything in its power to ensure that the rate reduction plan is in place as soon as possible, taking into account the public comment and review procedures established in Peruvian law.

Tonga

In August 2008, the Government of Tonga unexpectedly issued rules mandating a US\$ 0.30/minute rate for terminating international long distance calls in the country. U.S. carriers were previously paying a termination rate of approximately US\$ 0.13/minute and were in the process of renewing their interconnection agreements with the country's major supplier, the fixed-line operator Tonga Communications Corporation (TCC).⁴ When U.S. carriers refused to pay the new government-mandated rate, which they believed was unacceptably high, TCC cut off the circuits used to deliver their traffic. TCC has stated it is simply increasing the rate in order to comply with the government's rules. However, the Tongan government (which owns TCC) claims that the rate increase is justified as a means to cover TCC's costs.

Tonga's GATS commitments on basic telecommunications include the WTO Reference Paper, which contains a commitment to ensure cost-based interconnection with major

⁴ The lower termination rates previously in effect in Tonga resulted from competition that had developed between the incumbent TCC and a new international carrier, Digicel. This competition resulted in more normal market-based termination rates, below the FCC's benchmark rate for Tonga of 19 cents. By imposing a uniform termination rate of 30 cents, the Tongan government eliminated the price competition that had previously existed between TCC and Digicel. It raised the termination rate both well above the FCC's benchmark and far in excess of the rate that had prevailed in a competitive market, which provided a more accurate reflection of the costs of providing service.

suppliers. In February 2009, the Tongan government responded to a September 2008 letter from USTR by making the general assertion that Tonga's costs are higher than those in other countries because it lacks economies of scale and does not have access to submarine cable capacity. This letter, however, provided no information demonstrating that costs have increased such that a higher rate would be justified.

In response to a petition by a U.S. carrier, the Federal Communications Commission has sought public comment on a petition requesting a stop-payment order, which would prohibit U.S. carriers from paying substantially increased termination rate to TCC. The petition alleges that TCC has acted anti-competitively in disrupting the circuits of two U.S. carriers for service to Tonga as a result of the U.S. carriers' refusal to pay the higher termination rate.

USTR will continue to urge Tonga to demonstrate that the rates are cost-oriented and in compliance with its WTO obligations, or if it cannot do so, to rescind the rate increase and ensure that operators provide cost-based interconnection for foreign telecommunications suppliers.

2. Issues with Major Suppliers

One common challenge in many markets is obtaining wholesale network access products for services offered by incumbents. Such products enable competitors to provide a range of services to both business and residential customers. The availability of such products, provided by incumbent operators either commercially or pursuant to a government mandate, factors into an analysis of whether trading partners offer reasonable access to and use of their public telecommunications services, consistent with their obligations both under the GATS Annex on Telecommunications and U.S. FTAs.

Australia – Timely and Reasonably Priced Access to Major Supplier's Network

Competitive suppliers in Australia are at an important juncture: while still dependent on Telstra (Australia's dominant supplier) for key inputs in the near term for many services they offer, competitors are increasingly focusing on deployment of a government-subsidized network ("National Broadband Network", or NBN). As a condition for obtaining the AUS \$4.7 billion in government funding to build this network, the successful bidder must agree to ensure open access to the network for wholesale customers based on predetermined terms and conditions established by the Australian government. This is a welcome feature in light of the fact that operators' access to Telstra's network has thus far only been achieved through *ad hoc* negotiations

or regulator-imposed outcomes, resulting in much regulatory uncertainty and many unresolved disputes to date.

Australia's Department of Broadband, Communications and the Digital Economy is reviewing the report of a panel of experts, which evaluated five proposals to build the NBN. Telstra linked its willingness to participate in the bid to its longstanding request with the Australian government for regulatory relief relating to wholesale access to its network, and a commitment by the Australian government not to adopt a competitor-supported proposal to require functional separation of Telstra's wholesale and retail business. The government declined to accept Telstra's preconditions, and although Telstra did submit a short bid, it did not include a section on small and medium enterprises and its bid was therefore determined to be non-conforming. As a result, Telstra's bid was disqualified by the panel of experts. We welcome the Australian government's decision. Whether Telstra deserves regulatory relief and whether functional separation is appropriate are distinct issues that should be judged on their merits, rather than be used to entice participation in the NBN process.

Although the proposed NBN offers the promise of lessening competitors' dependence on Telstra for key inputs, competitors will still need access to Telstra's facilities until such a network is built, and likely even beyond that. Thus, we continue to be concerned about ongoing difficulties in obtaining timely, reasonably priced access to such facilities and services. USTR supports the efforts of the regulator to address these issues, consistent with WTO and FTA obligations (including its decision on March 19, 2009, to investigate allegations that Telstra falsely claimed lack of space at certain exchanges for competitors), and will continue to monitor progress in this area.

Colombia – Access to Submarine Cable Landing Station Facilities

USTR is investigating allegations of discriminatory conditions imposed on a U.S. operator with respect to access to the submarine cable landing station facilities of Colombia Telecommunications (COTEL), which may implicate Colombia's GATS commitments. Both the U.S. operator and COTEL are owners of submarine cable capacity in the Maya submarine cable system, and COTEL operates the only cable landing station for the system in Colombia. This issue is now the subject of a formal complaint in Colombia filed by the U.S. operator with Colombia's Superintendencia de Industria y Comercio (SIC). USTR is aware that Colombia's independent regulator (the Comisión de Regulación de Telecomunicaciones – CRT) has issued a resolution requiring a reference interconnection offer of all cable landing station owners by April 30, 2009, which should also be helpful in resolving the U.S. operator's problems. USTR will monitor this issue closely in the coming months and, if appropriate, will urge Colombia to remedy any discriminatory conditions imposed on U.S. carriers.

Germany – Access to Wholesale Transmission Services

In 2005, the European Commission (EC) approved the decision of the German regulator, BNetzA, to require the incumbent, Deutsche Telekom, to provide a wholesale service called bitstream access. During the past two years, BNetzA has approved Reference Interconnection Offers (RIOs) for two specific wholesale products, IP Bitstream (targeting consumers) and ATM Bitstream (targeting business users). Following Deutsche Telekom's appeal of its obligation to offer IP Bitstream, the court this year remanded the order to BNetzA for further review. Thus, five years after the EC mandated a market analysis, and three years after BNetzA made a finding of significant market power in this subsector and established prices, there is still no formal obligation for Deutsche Telekom to offer IP Bitstream to competitors at prices that have been previously reviewed and approved by the regulator. Deutsche Telekom is voluntarily offering the service on the basis of the previously approved RIO, which BNetzA is reviewing again pursuant to the court mandate. USTR urges BNetzA to finalize its review promptly to ensure that competitive carriers have legal certainty of access through an approved RIO, and ensure that procedures are in place to guarantee that Deutsche Telekom can adequately respond to large-scale demand for such services.

Although ATM bitstream was a viable technology when the product was first mandated in 2005, competitors are now interested in more efficient technologies that have superseded ATM. Competitors would like to see Deutsche Telekom offer a wholesale-access service appropriate for business use that incorporates the best current standardized technology, comparable with what Deutsche Telekom offers to its own retail customers. USTR understands that BNetzA is evaluating this in the context of its current broadband access market review and urges BNetzA to ensure that suitable products be made available to competitive carriers in the short term

Deutsche Telekom is in the process of rolling out another new commercial product, VDSL, and some competitors are interested in obtaining a wholesale version (VDSL Bitstream). While not required to do so by the regulator, Deutsche Telekom has initiated commercial negotiations with competitors.

Operators that are dependent on EC-mandated unbundled local loops (ULL) offered by Deutsche Telekom to supply their service have raised concerns about Deutsche Telekom's recent proposal to raise rates for ULL by over 20 percent. The ULL platform is one of the most widespread means of competitive entry for the residential consumer market. Although facilities-based competition (primarily from cable operators) is spreading, eliminating the viability of ULL-based competition could have an adverse effect on consumer choice. USTR urges BNetzA to evaluate this proposal carefully, and

consider whether any proposed increase in wholesale prices for unbundled loops has a sufficient cost basis.

India – Access to Submarine Cable Systems

As reported in the 2007 1377 Review, India took the positive step of mandating non-discriminatory and reasonable access to the country's cable landing stations. However, this year, commenters note that the regulations mandating access do not go far enough to ensure the transparent and timely provision of services. Specifically, they note that the terms and conditions of the incumbent's Reference Interconnection Offer (RIO) are not mandated by the Indian regulator. As a result, in order to obtain access to the cable landing stations competitive carriers must negotiate new agreements with the incumbent. Commenters have also expressed concerns about: guidelines that appear to grant the cable landing station owner broad discretion to deny access to competitors; unreasonably long time-frames for obtaining access to the cable landing station; and the absence of a mandate to establish separate rates for cross-connect services and submarine capacity services. USTR urges India to commence a new public consultation process that will allow competitive carriers to formally voice these concerns, and allow the Telecommunications Regulatory Authority of India to make necessary changes to its rules.

Mexico – Lack of Dominant Carrier Regulation

Commenters observe that Mexico continues to have difficulty preventing anti-competitive practices by its major suppliers Telmex and Telcel, and has not yet issued dominant carrier rules despite preliminary findings of dominance by Mexico's Federal Competition Commission. USTR urges Mexico to ensure that its regulator acts on these findings by developing appropriate rules.

Singapore – Access to Leased Lines

USTR continues to be concerned by the refusal of Singapore's major supplier, Singtel, to offer competitors access to leased lines at efficient aggregation points (called tandem exchanges), which competitors can use to provide services to their customers. The regulator's assertion that such links do not constitute a "bottleneck facility" and thus need not be made available to competitors is inconsistent with the practice in most developed, competitive markets, where broad access to a variety of leased lines at different points in the network is the norm. Not only is Singapore obligated under its WTO and FTA commitments to provide for interconnection at any technically feasible point, it also has committed to allow reasonable access to the network, including with respect to leased lines. USTR will continue to engage with Singapore to determine how best to address this issue.

The regulator – the Infocomm Development Authority (iDA) – has suggested that competitors instead build out to the two dozen local exchanges where a leased line is available for the final link to the end-users, but competitors have been reluctant to avail themselves of this alternative because SingTel plans to consolidate its network and shut down an undetermined number of its existing exchanges. This puts competitors in the position of having to invest in facilities that would soon become unusable if SingTel closes the local exchange. To date, SingTel has not provided a full list of exchanges it plans to close and, although the regulator increased the notice period SingTel is required to provide (from six months to eighteen months), the timeframe may still be insufficient for competitive carriers to recoup their investment if a particular exchange is closed. In addition to the inability to recoup an investment once an exchange is closed, the added uncertainty regarding future closures seriously hinders the ability of competitive carriers to plan further expansions of their networks.

USTR asks that iDA identify which competitive alternatives for inter-exchange transport have developed in the market since the time that iDA determined there was no compelling reason to mandate that Singtel provide leased capacity at tandem exchanges. If insufficient alternatives have developed during the past six years, USTR asks iDA to consider reviewing this policy, or indicate why it still expects that competitive alternatives will eventually develop. On the issue of exchange closures, USTR urges iDA to require SingTel to at least identify exchanges it will not shut down, creating a "safe harbor" for operators willing to build out to an exchange without bearing the risk that their investment would be stranded.

Sweden – Access to Wholesale Transmission Services

Competitors in Sweden face a situation similar to that in Germany. Although the European Commission and the Swedish Post and Telecom Agency (PTS), the national regulator, have required the dominant carrier (TeliaSonera) to offer competitors wholesale bitstream access, TeliaSonera has yet to adopt PTS-approved access terms and conditions. Lack of access to this wholesale service has impaired competitive opportunities in the market. As in Germany, this process has languished for years, challenging the effectiveness of the regulator. USTR urges the Swedish regulator to resolve this issue expeditiously.

3. Transparency and Regulatory Independence

A large share of responsibility for promoting and protecting fair competition in telecommunications markets resides with the national regulator. Adopters of the WTO Reference Paper and signatories of most U.S. FTAs commit to ensure that the regulatory body is separate from, and not accountable to, any supplier of basic telecommunications

services, and that the decisions of and the procedures used by regulators shall be impartial with respect to all market participants. Impartiality is most strongly at risk in markets where the government maintains an ownership stake in privatized national public telecom companies. Often the government is, if not a majority shareholder, the largest single shareholder in a country's incumbent telecommunications operator. Even the perception of an unfair playing field can have a stifling effect on investment; therefore, it is important to note in this Report those cases where governments appear to undermine or infringe on the independence of the regulator.

Transparency in rulemaking, licensing and adjudication of disputes is essential to demonstrating and safeguarding such impartiality, a key reason for inclusion of extensive obligations on transparency in U.S. FTAs, and to some extent, the WTO. The Internet provides low-cost options for meeting transparency requirements, and thus there is little reason why regulatory authorities cannot post pertinent information in full on a website.

Commenters noted instances of actual or apparent bias and insufficient transparency in the following cases.

China

China's longstanding effort to license 3G wireless networks has been characterized by a lack of transparency and is replete with evidence of policies favoring a domestic technology. China initially delayed licensing, apparently due to a desire first to see a domestic technology (TD-SCDMA) mature and then be deployed in conjunction with a restructuring plan for the government-owned operators that dominate the industry. This highlights the government's extensive involvement in the sector, and its unwillingness to let commercial judgments drive the development of the market—often at the expense of foreign suppliers. It has since issued licenses, and although foreign equipment suppliers welcomed the new sales opportunities the licensing has provided, persistent questions remain about how additional spectrum will be assigned, how ongoing policies to promote this domestic technology will be developed, and lack of clarity on whether new competing technologies (*e.g.*, WiMax) and services will be authorized.

Other areas in which a lack of transparency has seriously hampered foreign suppliers include the unwritten prohibition on offering 802.11 technologies (known as WiFi) on mobile handsets and lack of clarity on the scope of services foreign-affiliated value-added service suppliers are permitted to offer.

Given that these issues impair the ability of U.S. equipment manufacturers to sell their equipment in China, USTR continues to engage with the regulatory authority, the Ministry of Industry and Information Technology (MIIT), to encourage the documentation of rulemaking and decisions in a transparent manner, and to reduce the inevitable biases introduced when operators are seen as instruments of broader industrial policy.

Egypt

Commenters assert that Egypt does not fully disclose its regulations regarding access to foreign satellites. Publicly available information for satellite service suppliers is limited to general guidelines, which indicate that satellite capacity must be “approved” by the National Telecommunications Regulatory Authority (NTRA), yet no information about this approval process is available. There are currently only four licensed VSAT operators, and Egypt’s regulator exercises discretion in licensing additional operators based on its judgment of whether or not the business is viable.

USTR urges Egypt to make public the criteria for approving satellite capacity and also to remove any economic needs analysis affecting the number of VSAT service providers that can be licensed in the market.

Germany

Commenters continue to complain that German telecommunications regulatory body BNetzA redacts large portions of its decisions prior to releasing them publicly. While it does so ostensibly to protect confidential information, heavy redaction results in a lack of transparency. BNetzA contends that German privacy law and its telecommunications law require it to remove the information in order to protect confidential information. However, greater transparency can be achieved without sacrificing legitimate confidentiality. The fact that many other countries, also subject to confidentiality constraints, are able to publish a far greater amount of information in their proceedings suggests that BNetzA may be taking an overly restrictive view of what information can be released to the public, thus undermining the credibility and integrity of the regulatory (and appeal) process. If interested parties are prevented from reviewing large portions of a decision, including data that may form the basis on which a decision is made, they may be unable to effectively respond to or challenge such data, which may in turn prevent the regulator or a court from taking their views into consideration.

India

Commenters have raised concerns this year about a lack of transparency in India’s process for modifying foreign direct investment (FDI) requirements for Internet Service

Providers (ISP) in India. India previously had allowed 100 percent foreign ownership of ISPs. However, in 2007, India's independent regulator, the Telecom Regulatory Authority of India (TRAI), issued recommendations calling for a reduction in foreign ownership of ISPs to the same level currently allowed for international and domestic long distance operators (74 percent). Although the recommendations did suggest that companies be given a grace period to come into compliance with the new ownership rules, the grace period has never been formalized by India, and as a result, many companies are uncertain as to their status in the market. They are also uncertain about whether or not they must seek new licenses under their new ownership structure.

USTR urges India to clarify this issue as soon as possible, to afford greater regulatory certainty to companies already operating in India, and to comply with its GATS commitments to make such measures publicly available.

Israel

Commenters note that, although there are published standards for obtaining national "general" licenses for telecommunications services, there are no such standards for obtaining licenses for activities deemed to fall under the scope of "special" licenses. The Ministry of Communication's process of granting "special" licenses on a case-by-case basis provides it flexibility to consider a wide range of licensing requests, but at the cost of transparency and predictability. USTR recommends that Israel establish general rules for obtaining all forms of licenses and make those rules publicly available.

Mexico

Companies continue to complain about Mexico's lack of an effective regulator and unnecessary delays in issuing and renewing telecommunications licenses and concessions. Commenters point to the overlapping roles of the Secretaria de Comunicaciones y Transportes (SCT) and the independent telecommunications regulator – the Comisión Federal de Telecomunicaciones (COFETEL). Because COFETEL is not empowered to issue licenses or concessions for the provision of telecommunications services, companies often are required to wait an extraordinarily long time in order to obtain a license or renew an existing license. This creates regulatory uncertainty for the companies and can impair their ability to continue to secure outside financing for their operations, especially in cases in which licenses expire due to inaction by the regulatory authorities.

Although there have been recent indications that the SCT is attempting to reduce the current backlog of license requests and renewals, USTR encourages Mexico to review its current regulatory framework and to increase the ability of COFETEL to act

independently of the SCT, in particular with respect to its ability to issue instruments of authorization such as licenses and concessions.

South Africa

Commenters are concerned about a pattern of interference by the Department of Communications (DOC) in the efforts of the independent regulator, Independent Communications Authority of South Africa (ICASA), to implement liberalization policies stemming from the 2005 Electronic Communications Act. For example, due to DOC interventions, including an effort by the DOC to impose an invitation-only application process, ICASA missed a 2007 deadline for issuing new value-added network services licenses to compete with the incumbent operator, Telkom. Telkom competitors have had to rely on the courts to overrule DOC interventions and allow the processes to move forward; ICASA is now overseeing the roll-out of a new license-conversion process and allocating new spectrum. However, significant concerns remain about ICASA's ability to carry out its regulatory mandate given the DOC's structural influence (as the authority responsible for approving ICASA's funding) and its apparent reluctance to see ICASA strengthened. The DOC has a 38 percent shareholding in Telkom. USTR urges South Africa to ensure that ICASA is given the resources and independence to fulfill its mandate.

4. Failure to Update WTO Schedule of Commitments

Thailand

In its April 1997 GATS commitments, Thailand agreed to revise its GATS schedule by the end of 2006 to reflect the results of subsequent legislation (passed in 2002, and amended this year), including with respect to foreign equity participation, national treatment, competition safeguards, interconnection, and the separation of regulatory and operational functions. To date, Thailand has not submitted any such revisions, calling into question its adherence to its 1997 commitment. USTR urges Thailand to submit a revised schedule expeditiously in accordance with this commitment.

5. Issues Affecting Telecommunications Equipment Trade

Equipment standards and conformity assessment requirements (including testing requirements) that help ensure safety and interoperability are integral to the telecommunications industry. Unfortunately these measures can also be used by governments as a barrier to entry for foreign suppliers. Recognizing the dual nature of these tools, the WTO Agreement on Technical Barriers to Trade (TBT) and the WTO Agreement on Government Procurement ensure that equipment standards and

conformity assessment requirements do not create unnecessary barriers to international trade.

China – Information Technology Security Certification Rules

In August 2007, China notified to the TBT Committee 13 proposed technical regulations relating to information technology security for various IT products, including routers, smart cards, and secure databases and operating systems. Subsequently, in March 2008, China's Certification and Accreditation Administration (CNCA) issued an announcement indicating that the final regulations would be published on May 1, 2008, and would become mandatory on May 1, 2009.

In part because of past actions that China has taken in this area, including China's issuance of mandatory encryption standards for Wi-Fi technologies in 2003 and rules that China issued in 1999 requiring the registration of a wide range of hardware and software products containing encryption technology, these proposed regulations generated immediate concerns from U.S. and other foreign governments and industry. In particular, the proposed regulations go substantially beyond global norms by mandating testing and certification of security functions for commercial users of information technology products. In other countries, mandatory testing and certification for such functions is only required for products used in sensitive government and national security applications.

The United States expressed serious concerns to China about these proposed regulations in 2008 and at the September 2008 United States-China Joint Commission on Commerce and Trade (JCCT) meeting. China announced that it would delay publication of final regulations while Chinese and foreign experts continue to discuss the best ways to ensure information security in China. USTR will participate in these discussions and will continue to urge China to refrain from adopting any measures that would impose requirements to test and certify security functions of commercial IT products.

China – Prohibition on Use of Wi-Fi Technology in Mobile Handsets

In 2009, as China rolls out 3G networks nationwide, U.S. companies are increasingly concerned about China's existing prohibition on marketing mobile phones with WLAN (wireless local area network) capability such as 802.11 (also known as "Wi-Fi"). This current prohibition has no obvious legitimate policy justification, and MIIT's own regulations do not appear to address the issue—equipment approvals for this technology are simply not granted. The United States in 2009 will continue to press China to ensure that it permits mobile phones with WLAN capability to be marketed in China, noting the merits of applying principles of technology neutrality and taking into

account the WTO Technical Barriers to Trade provision regarding the use of international standards, such as 802.11.

Concerns with Conformity Assessment Requirements

U.S. industry continues to identify conformity assessment procedures relating to information and communications technology (ICT) equipment as a significant barrier to trade, focusing in particular on electromagnetic compatibility (EMC) testing and certification. Mandatory certification requirements maintained by China, India, Mexico, and Brazil (especially for EMC), as well as requirements maintained by China, Thailand, and Malaysia that equipment be tested domestically, are areas of concern. Requirements that telecommunications and IT equipment be tested domestically can lead to redundant testing, particularly where a product is required to undergo testing to the same standard in both the exporting and importing country (e.g., for EMC).

India – Restrictions on Encryption

India's restrictions on the use of strong encryption are both confusing and detrimental to the security of companies operating in India. In 2007, India issued rules regulating the use of encryption at key strengths above 40 bits in telecommunication products (for example, handsets). Under these rules, use of key strengths greater than 40 bits is allowed, but users must receive written permission from the Department of Telecommunications (DOT) and deposit the decryption key, split into two parts, with the DOT. Furthermore, India prohibits the use of any encryption on a dedicated network (as opposed to a public network) without prior approval from the DOT. Both of these restrictions limit telecommunication companies' ability to effectively manage risks ever present on the Internet. USTR will engage India to seek ways to ensure telecommunication companies can effectively protect information, while also respecting any security concerns of the Indian government.

Korea – Encryption Technology for Public Procurement of VoIP Equipment

In December 2008, the Korean government announced long-term plans to switch its government wireline telephone systems from a standard circuit-switched system to an Internet protocol based system (Voice over Internet Protocol, or VoIP). To ensure that this transition does not result in diminished security, Korea also issued guidelines recommending that agencies procure and use encryption-capable systems. The Korean government's plans in this regard would place it internationally on the forefront in terms of large-scale government adoption of VoIP systems. However, the Korean government is considering mandating that government agencies purchase equipment that contains encryption technology based on a Korean encryption standard called "ARIA".

Korea has failed to provide a justification for using a national standard when international standards for encryption are available and widely used. As U.S. suppliers' equipment and software are built to international standards, it would require considerable time and expense to develop ARIA-capable equipment (assuming U.S. suppliers determine it is in their commercial interest to undertake a significant investment for a product that could only be marketed in Korea, since no other country uses ARIA for such systems). Therefore, there are strong concerns that U.S. suppliers could be effectively excluded from competing for government tenders for VoIP if Korea were to implement such a mandate.

USTR has raised these concerns with the Korean government, and the Korean government has informed us that it will postpone implementation of its procurement plans while it works to address U.S. concerns.

Telecom Equipment Testing Requirements

China and Brazil have indicated a willingness to negotiate mutual recognition agreements (MRAs) for ICT and other telecommunications equipment, which could help address restrictions on equipment testing outside the country, and eventually permit certification by foreign bodies as well. USTR will continue to seek timely implementation of such agreements.

Mexico continues to defer the implementation of the CITELECOM (Inter-American Telecommunications Commission) MRA for conformity assessment of telecommunications equipment vis-à-vis the United States. This delay is of great concern to USTR as Mexico's independent regulator, COFETEL, has stated publicly its interest in deferring implementation in order to protect its "nascent" testing industry and allow for the development of laboratory infrastructure in Mexico.

Given Mexico's requirement (as of 2005) that all telecommunications equipment that connects to a public telecommunications network in Mexico be tested, the U.S. telecommunications equipment manufacturing industry is incurring unnecessary cost and delay by having to send equipment to Mexico for testing before it can begin to export. The WTO Agreement on Technical Barriers to Trade encourages WTO Members to enter into negotiations for the conclusion of MRAs, and implementing an MRA that would avoid such burdens was also clearly contemplated in the North American Free Trade Agreement (NAFTA). USTR will continue to press Mexico to implement the CITELECOM MRA vis-à-vis the United States.

Areas of Progress

Oman – Completion of Pro Competitive Regulatory Framework

In last year's 1377 Review, USTR urged Oman to complete the creation of a transparent regulatory framework to ensure the licensing of operators to compete with incumbent fixed-line operator Omantel, which had been enjoying a *de facto* monopoly despite Oman's WTO commitments to fully liberalize its telecommunications market by January 2004.

At the end of 2008, Oman granted a second fixed-line license to a competitive carrier, promulgated a series of regulations that established the framework for new entry into the market, and provided the country's regulatory body – the Telecommunications Regulatory Authority – the tools it needs to effectively regulate the market. Oman also eliminated licensing fees of up to US\$ 65 million that would have created significant barriers to market entry, and replaced them with fees in line with other countries in the region.

USTR applauds Oman's efforts to comply with both its WTO commitments and the enhanced commitments it assumed under the United States – Oman Free Trade Agreement.