Coalition of Service Industries

December 21, 2007

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

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

Dear Ms. Blue:

The Coalition of Service Industries ("CSI") appreciates the opportunity to submit these comments in response to the request of the United States Trade Representative ("USTR") for comments pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. Section 3106, concerning the operation, effectiveness, implementation of, and compliance with the World Trade Organization ("WTO") Agreement and other agreements regarding telecommunications products and services of the United States.[1]

CSI strongly supports USTR's efforts to ensure compliance with telecommunications trade agreements. Telecommunications networks and services are the building blocks enabling the knowledge based economy of the 21st century to function and are the backbone of the Internet and electronic commerce. Telecommunications is both a major economic sector in its own right and a critical driver in developing an information economy that stimulates much broader economic growth in both developed and developing economies. The World Bank reports that information and communications technology has become critical to economic growth for countries at all levels of development and that competitive markets "grow faster, lower costs, facilitate innovation, and respond better to users' needs."[2] Similarly, the World Economic Forum finds that "[a]ccess to the global networked economy is becoming an important cornerstone of the development of economies and societies."[3] As these and other studies demonstrate, the development of competitive telecommunications markets brings lower

[1] Office of the United States Trade Representative, *Request for Comments Concerning Compliance With Telecommunications Trade Agreements*, 72 Fed. Reg. 65109 (2007).

[2] World Bank, *Information and Communications for Development 2006: Global Trends and Policies*, at 6 & 42.

[3] World Economic Forum, *The Global Information Technology Report 2006-2007*, Executive Summary, at 1.

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prices and fosters new and innovative services that not only benefit U.S. consumers and U.S. industries competing in the global marketplace, but also encourages greater global economic growth.

CSI therefore wishes to emphasize the tremendous importance of new telecommunications trade commitments by U.S. trading partners. Although considerable progress has been made in opening formerly closed foreign telecommunications markets as the result of the WTO Agreement and U.S. Free Trade Agreements, significant barriers to telecommunications trade and investment remain in both developed and developing countries. To remove these barriers, countries should be encouraged to allow full market access for all services, with 100 percent foreign capital investment and control, and to adhere to the regulatory principles listed in the WTO Reference Paper. A significant concern, as described below, is the need to expand trade commitments to address constraints on foreign investment in telecommunications that continue to limit competition, investment and growth in many countries.

CSI encourages USTR to use all potential opportunities to address these barriers and is particularly concerned that the major opportunity presented by the Doha Round for significant further progress toward opening all global telecommunications markets not be lost. CSI strongly supports USTR's efforts to encourage WTO members to come forward with improved offers in telecommunications.

CSI's comments for USTR's 2008 Section 1377 Review set forth below highlight market access barriers in China and discriminatory universal service programs in India and Jamaica.

China

Since its WTO accession in 2001, China has committed to open key services sectors to foreign participation, improved its policy predictability, and subjected itself to WTO rules. Important progress has been made in revising existing laws and passing new laws and regulations to open service sectors to foreign competition. China also has greatly benefited from its WTO membership. According to the World Bank, Chinese global cross-border services exports grew from $5.7 billion in 1990 to $91 billion in 2006. The U.S. services trade surplus with China was $2.6 billion in 2005, based on strong U.S. exports in business, professional, educational, financial, and telecommunications services. The level of foreign direct investment in China has also been growing steadily, from $46.9 billion in 2001 to $86.1 billion in 2005. These developments demonstrate that China's decision to open its economy to foreign capital has benefited both China and its trading partners.

Nevertheless, China's WTO compliance record in services is hurt by incomplete implementation of its accession commitments and by remaining services trade barriers. In telecommunications, these include China's narrow interpretation of value added services, high capitalization requirements for basic telecommunications services, and the lack of an independent regulator.

Market entry opportunities for U.S. telecommunications providers in China are limited by China's overly narrow definition of value-added services (VAS) for value added network service licensing. China's regulator, the Ministry of Information Industry ("MII"), defines the meaning of VAS in China's WTO commitments narrowly to exclude commercially important services, such as international IP-virtual private networks (IP-VPN) services demanded by global enterprises, by limiting VAS virtual private networks to "domestic" services. The narrowing of value added services is a backward step from China's pre-WTO service classifications and is inconsistent with its WTO commitments. China should expand the list of VAS to include such value-added services as international IP-VPN services.

China's unreasonably high capitalization requirement for basic telecommunications services has further greatly limited market access. Basic services licenses are subject to a 2 billion RMB (US$270 million) capitalization requirement, which is 100 times larger than the capital requirement for China's value added service licensees, and is an excessively burdensome restriction that violates Article VI of the GATS. A foreign service provider otherwise meeting the licensing qualifications is unlikely to allocate such capital to a new and risky enterprise, and a Chinese joint venture partner is unlikely to divert this capital from its core business.

A further problematic restriction is the requirement that foreign telecom service providers may only enter into a joint venture with one of the existing state-owned enterprise telecom providers.

On December 11, 2007, USTR announced that China had confirmed, at the JCCT meetings, that it will lower the registered capital requirements for U.S. telecommunications service providers to operate in China. This is a positive development and China should be encouraged to make public the details of the lower capitalization requirements expeditiously. China has already established a precedent for lowering its foreign joint venture capitalization thresholds in other sectors, including insurance and trading companies, and it should now do so in the telecom sector.

Further, China has not implemented its WTO Reference Paper commitment to establish an independent regulator. The Chinese Government still owns and controls all major operators in the telecommunications industry, and the Ministry of Information Industry still regulates the sector. CSI encourages USTR to work with China to establish a regulatory body that is separate from, and not accountable to, any basic telecoms supplier, and that is capable of issuing impartial telecom decisions and rules. Specifically, it is important that the regulatory body adopts the following: transparent procedures for drafting, finalizing, implementing and applying regulations and decisions; appropriate measures, consistent with the WTO Reference Paper to prevent dominant suppliers from engaging in, or continuing, anti-competitive practices; a defined procedure – as it has done for interconnection – to resolve efficiently and fairly public telecom suppliers' commercial disputes over their agreements; an independent and objective process for administrative reconsideration of its decisions; and appropriate procedures and authority to enforce China's WTO telecom commitments, such as the ability to impose fines, order injunctive relief, and modify, suspend, or revoke a license.

Lastly, CSI notes that with the passage of six years since China's WTO accession on December 11, 2001, all remaining geographic restrictions on the provision of telecommunications services in China are to expire under the terms of its WTO commitments and the level of permitted foreign investment in basic services providers (domestic and international) is to be raised to 49 percent (from 35 percent).[4] CSI looks forward to China's rapid implementation of these additional market opening measures. In light of China's undertaking in its WTO commitments that "[f]urther liberalization of this sector, including with respect to the level of equity participation permitted, will be discussed in the services negotiations during the new round of trade talks,"[5] CSI also hopes that China will come forward with an offer of additional market-opening commitments in telecommunications in the current round of WTO services negotiations.

India

India is a critical market for U.S. service industries and is taking important steps to encourage telecommunications competition that will benefit consumers, suppliers and the broader economies in both countries. India has increased the permissible level of foreign direct investment in telecom licensees to 74 percent and has lowered entry barriers for International and Domestic Long Distance licenses to encourage new competition and investment. CSI commends India for these pro-competitive reforms and urges India to improve its WTO market access and national treatment commitments to reflect its current pro-liberalization telecom initiatives. Doing so will provide investors with the necessary confidence that the changes are permanent and enforceable.

India's Access Deficit Charge ("ADC") regime, which disproportionately impacts consumers making international calls to India, continues to require ongoing effort from USTR to ensure that India complies with its WTO commitments. India's telecommunications regulator, the TRAI, implemented the ADC in 2003 in connection with its Telecommunications Interconnection Usage Charge ("IUC") Regulation. The TRAI has stated explicitly, that although implemented as part of the IUC Order, the ADC is not an "interconnection charge," which is defined separately in the order as comprising termination or origination charges and carriage charges. Rather, the ADC is a supplemental collection to subsidize socially desirable services and a component of India's overall universal service regime.

There have been longstanding concerns with the ADC, and in particular with the disproportionate treatment of inbound international long distance traffic. Although India implemented significant reductions in these charges in 2007, inbound international calls to India remain subject to a per – minute ADC of 1.00 Rupee (US$0.025), while such charges were removed altogether for outbound international calls from India. All service providers, including access providers, long distance operators and international operators

[4] *See* World Trade Organization, The People's Republic of China, Schedule of Specific Commitments, GATS/SC/135, Feb. 14, 2002, at 20.

[5] *Id*. at 17.

are also subject to a "revenue-share" ADC of 0.75 percent of adjusted gross revenues. Thus, as a result of India's most recent changes in the ADC regime, inbound international calls are now the *only* telecom service subject to per minute ADC.

India's ADC regime therefore continues to place an unreasonable and discriminatory burden on foreign international carriers and their customers in violation of its WTO Reference Paper commitment to administer universal service obligations in a transparent and non-discriminatory manner.[6] Indeed, the Telecom Regulatory Authority of India (TRAI) estimates that 70 percent of the total amount of ADC to be collected for the financial year 2007-2008 will be contributed by the charges on inbound international calls.[7] The TRAI has made multiple commitments that the ADC will fall to zero by 2008 or earlier and should be encouraged to meet this deadline.

Jamaica

Jamaica similarly maintains a discriminatory and unreasonably burdensome "universal service" levy introduced in June 2005 to fund broadband Internet access for schools and libraries in Jamaica. The levy of 3 cents per minute for fixed-terminated calls and 2 cents per minute for mobile-terminated calls applies only to international-inbound traffic terminating in Jamaica. Because this levy does not apply to international-outbound calling from Jamaica or to domestic calling within Jamaica, it imposes the entire burden of subsidizing this Jamaican universal service program on U.S. and other non-Jamaican carriers and their customers. In announcing this levy, Jamaica's Minister of Commerce, Science and Technology "emphasized that the levy would not be a charge on the Jamaican consumer, as it would only be applied to incoming international calls."[8] The WTO Reference Paper states that universal service "obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively-neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member."[9] The FCC has noted

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[6] WTO, Fourth Protocol to the General Agreement on Trade in Services, *India – Schedule of Specific Commitments Supplement 3, Reference Paper*, Apr. 11, 1997, ¶ 3.

[7] Telecom Regulatory Authority of India, Press Release No. 30/2007, *TRAI Announces Lowering of "Access Deficit Charge (ADC),"* Mar. 21, 2007 (total amount of ADC to be collected for financial year 2007-08 is reduced to approximately Rs. 2000 Crores (US$500 million), of which incoming international calls are expected to contribute Rs. 1400 Crores (US$355 million)).

[8] Government of Jamaica, Ministry of Commerce, Science and Technology, News Stories, *Government Imposes Levy on Incoming International Calls*, http://www.mct.gov.jm/call_levy.htm.

[9] WTO, Fourth Protocol to the General Agreement on Trade in Services, *Jamaica – Schedule of Specific Commitments Supplement 1*, Apr. 11, 1997, at 10.

that "universal service obligations that are levied disproportionately on foreign-originated calls clearly violate these principles."[10]

USTR expressed its concerns in the 2006 and 2007 Section 1377 Reviews that Jamaica is funding this program on the basis of fees imposed largely on U.S. operators (up to 80 percent of inbound international calls to Jamaica originate in the U.S.), and regarding the lack of transparency in the program to determine the need for this large surcharge and the absence of information concerning the use of these funds. As USTR made clear in the 2006 and 2007 Reviews, Jamaica should adopt a more equitable and transparent approach to funding its universal service programs that does not require foreign operators to bear an inappropriate share of these costs and should suspend the surcharge until it is able to provide adequate information concerning the need for and duration of this program.

Foreign investment restrictions

CSI also wishes to emphasize the need for additional and expanded commitments to remove remaining foreign market access barriers in telecommunications. Among the significant market access barriers that require urgent attention are the constraints on foreign investment that restrict competition and growth in this critical sector in both developed and developing countries. The costs of FDI restrictions far outweigh any purported benefits by raising the cost of capital for incumbents and new entrants alike, and by impeding competitive market entry and efficient management. The World Bank reports that FDI has "typically been the driver of sector growth in liberalizing countries" and has brought "new management approaches, technology, and skills transfer to the host countries."[11] Conversely, "FDI restrictions not only place a maximum limit on potential foreign private investment, they can also deter such investments altogether."[12]

Canada is a prominent example of a developed country that maintains these anticompetitive restrictions. It has taken many steps to open its telecom market to some forms of competition, but continues foreign ownership restrictions in telecommunications. These restrictions prohibit U.S. and other foreign investors from controlling facilities-based telecommunications carriers, and thus prevent open competition. Canada continues to limit foreign investment in facilities-based carriers to a maximum of 46.6% for all services except fixed satellite and submarine cable service.

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[10] *International Settlement Rates*, 12 FCC Rcd. 19,806, ¶ 87 (1997). *See also, id.*, ¶ 148 ("We disagree with commenters who argue that foreign carriers are entitled to require that universal service requirements be financed disproportionately through settlements revenues. . . . [W]e believe that universal subsidies must be nondiscriminatory and transparent").

[11] World Bank, *Information and Communications for Development 2006: Global Trends and Policies*, at 16.

[12] World Bank Working Paper No. 65, *Financing Information and Communication Infrastructure in the Developing World*, at 16.

A recent Canadian government policy review panel acknowledged that Canada retains one of the most restrictive and inflexible sets of rules limiting foreign investment in the telecom sector among *all* OECD member countries, and recognized the drawbacks of this policy. In June 2006, Canada's Telecom Policy Review Panel issued a proposed policy directive to the Canadian Radio-television and Telecommunications Commission (CRTC) that included a recommendation that foreign ownership restrictions be phased out over time. However, although Canada's Minister of Industry formally called for changes in telecom regulation, there was no request for removal of Canada's foreign ownership restrictions.

As a consequence of these restrictions, U.S. firms' presence in the Canadian market as wholly U.S.-owned operators is limited to that of a reseller, dependent on Canadian facilities-based operators for critical services and component parts. These restrictions limit global telecommunications service providers' options for providing high-quality, end-to-end telecommunications services as they cannot own or operate their own telecommunications transmission facilities. The removal of these foreign investment restrictions would increase telecommunications market entry and investment in Canada, open broad access for Canadian carriers to international capital markets, and encourage sustainable facilities-based competition in the Canadian telecommunications market.

Canada's recent measures undertaking additional deregulation of its telecom market further highlight the need for U.S. and other foreign telecom suppliers and investors to have opportunities for 100% facilities-based telecom ownership in this important market. Without the ability for foreign telecom suppliers to own facilities-based networks, and with fewer regulations to govern the terms on which Canadian carriers provide wholesale network services, U.S. firms face a structural competitive disadvantage. We urge USTR to explore with the Canadian government possible opportunities to pursue the recommendation of the Telecom Policy Review Panel.

Other countries also maintain foreign ownership restrictions in their telecom trade commitments impeding market entry, competition and economic growth, including China, India, Indonesia, Korea, Malaysia, Mexico, South Africa, Thailand and Turkey. CSI urges USTR to use all potential opportunities to press for the removal of these continuing telecom barriers to provide broad economic benefits to customers, service providers and carriers in all countries, including in particular through the Doha Round negotiations.

CSI hopes that USTR will consider all the matters raised in this letter and would be pleased to provide any additional information that would be helpful in the review.

Sincerely,

Bob Vastine
President