2012 Section 1377 Review

On Compliance with
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*.[1] The list of trade agreements containing requirements relevant to telecommunications and technology includes the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), the North American Free Trade Agreement (NAFTA) with Canada and Mexico, the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic, and bilateral free trade agreements (FTAs) with Australia, Bahrain, Chile, Israel, Jordan, Korea,[2] Morocco, Oman, Peru, and Singapore.

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 ten companies and trade associations and reply comments from three companies and trade associations and one foreign government. All public comments are available at the following web-site: www.regulations.gov, docket number USTR-2011-0034.

Summary of Findings

This 2012 Review addresses several general themes: cross-border data flows and Internet enabled trade in services, including Voice over Internet Protocol services; issues concerning independent and effective regulators; limits on foreign investment; access to major supplier networks; increases in fixed and mobile call termination rates; issues concerning satellites and submarine cable systems; and issues affecting the telecommunications equipment trade.

Although several of the issues in the 2012 Review have been discussed in past Reviews, USTR considers it appropriate to continue to raise these issues and encourage our trading partners to implement appropriate solutions. The 2012 Review describes practices or measures of U.S. trading partners that USTR will actively monitor throughout the year and with respect to which, if warranted, USTR may take further action.

Of particular note this year are progress in resolving a longstanding dispute in Mexico and an encouraging decision by Canada to seek legislative changes to partially open its telecommunications market to fully foreign-owned suppliers. Of growing concern this year, is a trend to impose measures requiring suppliers to use locally-manufactured or developed equipment, a trend now including Brazil.

[1] Codified at 19 U.S.C. §3106 (Review of trade agreement implementation by Trade Representative).
[2] The Korea-United States Free Trade Agreement entered into force on March 15, 2012.

Discussion of Key Issues

Cross-Border Data Flows and Internet Enabled Trade in Services

The Internet's global reach and the growing array of Internet-enabled services are redefining the value of cross-border trade. Movement of data is increasingly critical to such trade, both in business-to-business transactions and in consumer-oriented services. Accordingly, restrictions on data access and transfers are becoming more consequential trade barriers. There are legitimate reasons for governments to impose certain restrictions on the data flows, such as protection of public morals and privacy. However, such restrictions can sometimes be overbroad, having the unintended effect of restricting legitimate trade. In some instances, the restrictions are intended to create a preference for local suppliers. Whether intended or not, these restrictions can have an impact on trade obligations relating to access and use of networks. Restrictions in Vietnam and China, two countries where such problems have been well documented, are illustrative of such barriers.

China

Websites have become a key means for businesses to interact with their customers. China's implementation of a national firewall, which filters access to certain websites and keyword searches ostensibly to protect public order and public morals, has a direct impact on the ability of businesses to conduct commercial activity in China. The trade impact is hard to estimate, however, it is clear that the firewall operates broadly and blocks access in a way that goes well beyond any possible need to protect public order and public morals. For example, it is well documented that a significant number of the top global websites are regularly blocked in their entirety (*e.g.*, four of the top ten visited global websites as ranked by the Internet measurement firm Alexa are regularly blocked).

China has begun to articulate its Internet policies more clearly, for example by issuing a White Paper[3] on the subject, which has provided a basis for dialogue with the Chinese government to discuss its rationale for blocking and, possibly, mechanisms to improve access. With this in mind, USTR submitted a series of questions to the Chinese government in late 2011 to determine the basis for restrictions, mechanisms for appeal, and other possible avenues for minimizing the uncertainty and trade-distortive effect of unclear measures.[4] China has provided initial answers to these questions and USTR is seeking follow-up engagement to better address the significant amount of content that remains blocked for unclear reasons.

Vietnam

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[3] *See The Internet in China,* Information Office of the State Council of the People's Republic of China, June 8, 2010, available at http://www.china.org.cn/government/whitepaper/node_7093508.htm.

[4] *See United States Seeks Detailed Information on China's Internet Restrictions*, available at http://www.ustr.gov/about-us/press-office/press-releases/2011/october/united-states-seeks-detailed-information-china's-i.

Although Vietnam has generally been open to major commercial foreign sites, businesses experience significant blocking of websites. In particular, the social networking sector has experienced intermittent but significant blocking over the past year. There are conflicting claims as to the rationale and legal basis for the blocking, as well as which entity is responsible for implementing the blocking, with Internet Service Providers (ISPs) asserting governmental instructions and the government denying it. USTR has asked the regulator, the Ministry of Information and Communications (MIC), to publicly instruct ISPs not to block any legitimate website. The request has yet to be acted upon.

Voice Over Internet Protocol

As noted in last year's report, a trade association representing suppliers of Voice over Internet Protocol services (VoIP) submitted comments that point to a range of barriers faced around the world in the provision of this service. Key barriers include regulatory requirements that impose the same requirements on VoIP providers as on traditional fixed or mobile voice providers and limitations on the ability of VoIP providers to connect with the Public Switched Telephone Network (PSTN). In addition, many incumbent telecommunications carriers block or discriminate against the provision of competitive VoIP services over their networks.

VoIP is an important alternative to traditional phone service that provides additional choices to consumers. VoIP services are another example of Internet-enabled services where regulations imposed by certain countries have the effect of restricting legitimate trade or creating a preference for local suppliers. USTR will continue to evaluate the barriers listed in this year's comments and – as appropriate – will engage with countries to ensure that any measures taken regarding the service are consistent with each country's telecommunications trade commitments.

INDEPENDENT AND EFFECTIVE REGULATOR

Costa Rica – Licensing of Internet Services

More than three years have passed since Costa Rica's commitment under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) to liberalize Internet services became effective, yet this sector is still effectively closed to competition. As we noted in last year's 1377 Report, one U.S. company seeking a license to provide Internet services via satellite in Costa Rica continues to encounter serious delays in obtaining the required authorization from the Costa Rican regulatory authorities. USTR has worked extensively with the government of Costa Rica and the U.S. company involved to facilitate the resolution of any outstanding issues regarding the U.S. company's application.

Over the past year, the U.S. company has continued to be engaged in a protracted authorization process, responding to questions and requests for additional documentation and information from both the regulator (SUTEL) and the Telecommunications Ministry of Costa Rica (MINAET). This raises concerns about the ability of the regulator to ensure compliance with Costa Rica's

CAFTA-DR commitments and foster a competitive marketplace that is accessible to U.S. operators.

FOREIGN INVESTMENT

Foreign investment limits, typically in the form of limits on the percentage of equity a foreign firm can control, were widely cited by commenters as a trade-distortive barrier. Most countries cited have equity limits that reflect the country's commitments under the GATS. However, as the opportunity arises to negotiate further liberalization, either in the GATS or in FTAs (*e.g.*, in the ongoing Trans Pacific Partnership (TPP) negotiations), these comments will help guide U.S. priorities.

Two countries where foreign equity limits have been longstanding impediments to U.S. investment deserve particular focus: Mexico, where the government has proposed eliminating investment limits, but Mexico's Congress has yet to act; and Canada, where on March 14, 2012, the government proposed lifting investment limits on companies comprising less than 10 percent of the market. Questions remain on how the latter proposal would be implemented (*e.g.*, whether it would cover cable TV platforms, a key player in the telecommunications market) and why larger companies would be exempted. It is also unclear at this point whether Canada's Parliament would approve such a proposal, but it is a welcome move that could help bring more competition and foreign participation into the Canadian market.

Of particular concern is Thailand, where compliance with existing GATS commitments is an ongoing issue. In 1998, Thailand committed to improve its GATS commitments, no later than 2006, by binding a liberalization of its foreign investment limits that was still in the process of development at the time. Although Thailand did pass legislation liberalizing its foreign investment limits in 2001, increasing permissible foreign equity for facilities-based operators from 20 percent to 49 percent, Thailand has failed to bind that liberalization in its GATS commitments.

In addition, Thailand is currently seeking to enforce a more recent law that aims to prevent foreign control of facilities-based telecommunications suppliers. Notwithstanding the equity limit which Thailand scheduled in the GATS, Thailand has never scheduled a limitation on control, raising questions as to whether this new law is consistent with its GATS commitments.

ACCESS TO MAJOR SUPPLIER NETWORKS

<u>MEXICO</u>

In previous 1377 Reviews, USTR has expressed significant concerns regarding competitive access to the networks of America Movil affiliates: Telmex (incumbent fixed line telecommunications carrier) and Telcel (mobile telecommunications carrier). Beginning with last year's 1377 process and continuing through this year, America Movil has actively engaged with USTR regarding these issues. USTR commends America Movil for its engagement with USTR and for the progress it has made in addressing a key portion of the outstanding competition issues in Mexico.

Mexico adopted the Reference Paper on Pro-Competitive Regulatory Principles in its GATS commitments and has an obligation to ensure that its major suppliers provide interconnection at any technically feasible point of its network at cost-oriented rates, and to maintain appropriate measures to prevent its major suppliers from engaging in anti-competitive practices. Mexico is the second largest destination for calls from the United States after India. According to the latest available data from the Federal Communications Commission (FCC), in 2010, U.S. consumers sent 8.1 billion minutes to Mexico compared, for example, to 15.9 billion minutes to India and 8.0 billion minutes to Canada. The ability of U.S. carriers and U.S. affiliated carriers to obtain non-discriminatory, cost-oriented access to the networks of Telmex and Telcel is critical, as increased access costs have a significant indirect impact on the prices paid by U.S. consumers to call Mexico.

Major Decisions in 2011

Since our 2011 Review, significant events and decisions have impacted the competitive landscape in Mexico. On March 16, 2011, Mexico's Federal Telecommunications Commission (COFETEL), as part of its decision resolving an interconnection dispute between Telcel and a Mexican fixed operator, set a mobile termination rate (MTR) of 0.39 Mexican pesos (approximately US$0.04), a rate much lower than those established by incumbent operators through commercial negotiations. The COFETEL order reduced rates in areas subject to long-distance competition (referred to as "equal access" areas) by 63 percent and in non-equal access (NEA) areas by 68 percent. COFEMER (Mexico's regulatory improvement agency – Comision Federal de Mejora Regulatoria) also approved COFETEL's cost model for interconnection, which COFETEL intends to use to settle disputes between operators that occur in 2012 and beyond. COFETEL published its cost model in the Mexican Diario Oficial on April 12, 2011.[5]

On May 3, 2011 the Mexican Supreme Court issued an opinion finding that interconnection is an issue of public interest and therefore not subject to an injunctive form of a constitutional appeal known as an amparo. Before this decision, interconnection determinations in Mexico were routinely challenged in court and subject to an immediate stay, effectively neutralizing any effort of COFETEL in this area. As a result of the Mexican Supreme Court decision, COFETEL's interconnection order was immediately effective and cannot be stayed by an Amparo appeal.

Through ongoing discussions with industry and government officials, USTR was able to facilitate negotiations between incumbent and competitive carriers in Mexico. America Movil and its affiliates have made substantial progress towards resolving several outstanding issues

[5] *See* http://www.cofetel.gob.mx/es_mx/Cofetel_2008/Lineamientos_Modelos_de_Costos.

with their competitors, including a U.S. company, Marcatel. In September 2011, Telmex stopped inserting recordings on its termination of calls from the Marcatel network into equal access areas. These recordings had told Marcatel customers that future calls might be blocked.

In November 2011, Marcatel and Telcel signed an interconnection agreement allowing Marcatel, for the first time, to directly interconnect with Telcel. In January 2012, Telmex and Marcatel resolved network quality issues that affected traffic into NEA areas. Telmex also agreed to provide to Marcatel new circuits and ports into equal access areas in exchange for Marcatel's agreement to more stringent payment guarantees for service.

Interconnection in Non Equal Access (NEA) areas

Mexican regulatory authorities deem certain areas as "non-equal access" areas, meaning that subscribers in those regions cannot choose a competitive long-distance provider ("pre-subscription") – they are required to use Telmex to originate long-distance calls. NEAs encompass approximately half the calling areas in Mexico, making up about 11 percent of its fixed lines. They are mainly rural areas; nonetheless, U.S. operators report that up to 25 percent of calls from the United States terminate in such regions, underscoring their importance to U.S. operators and consumers.

In addition to reducing competitive opportunities for originating long-distance calls, NEAs are also subject to a differential termination regime (*i.e.*, completing calls from other regions, mainly urban and international). Prior to the recent COFETEL decision, Telmex did not offer a cost-oriented rate for termination into NEAs. Telmex would terminate calls, but would only offer a 25 percent discount off its large-volume retail rate – a resale or "reventa" rate more than six times greater than the regulated long-distance interconnection rate in the rest of Mexico. The resale rate into NEAs is almost US$0.07 per minute, compared with the regulated long-distance interconnection rate of a little more than US$0.01 per minute in the rest of Mexico. Now that COFETEL has established a nationally applicable termination rate that is legally binding, USTR hopes that Telmex and its competitors will negotiate appropriate interconnection arrangements for NEAs. USTR remains concerned, however, that interconnection agreements in Mexico continue to be considered private contracts without recognition of the inherent public interest of such agreements. Mexico has an obligation under the GATS to maintain public availability and transparency of interconnection arrangements, including at least a reference or standard interconnection offer. Telcel appears to have done this; USTR urges Mexico to ensure that Telmex files and makes publicly available their interconnection agreements or a Reference Interconnection Offer sufficient for competitors to avail themselves of and enter the market. USTR will continue to keep in close touch with Mexico's regulators, given the U.S. interest in seeing these remaining issues resolved.

<u>GERMANY</u>

Level 3, a U.S.-based company, operates five data centers and provides Tier 1 network access to wholesale customers in Berlin, Hamburg, Dusseldorf, Frankfurt, and Munich. Level 3 and members of the German Competitive Carriers Association (VATM) argue that entrance hurdles to the German market severely hamper their ability to compete with Deutsche Telekom (DT) in several sectors of the market.

Level 3 states that the non-availability of high-speed Ethernet services from DT hurts competition in the leased lines market as enterprise customers demand high bandwidth capabilities. VATM wants regulated access to Ethernet services at speeds equal to or higher than 2.5 Gbps. In a March 2012 decision, the regulator BNetzA has now included Ethernet-based leased lines in the market for wholesale terminating segments of leased lines. BNetzA also found DT to have significant market power with regards to terminating segments with a bandwidth of 2 Mbps up to and including 10 Mbps and terminating segments with a bandwidth of more than 10 Mbps up to and including 155 Mbps. While it is too early to determine if the recent decision of BNetzA will sufficiently address the access concerns of competitive carriers in the German market, (*i.e*. if the higher bandwidths sought are commercially available, obviating the need for regulation), we are encouraged by BNetzA's recognition that it must proactively regulate these segments of the market.

Level 3 also asserts that Germany is at a critical juncture in its transition from traditional Time Division Multiplexing (TDM) network technology to Internet Protocol (IP) switching and Ethernet and that the German government needs to act during this window or miss a significant opportunity for competition in the market. Competitive carriers are concerned about the pace and scope of DT's offerings for "Next Generation" or NGN interconnection, typically involving IP-based connectivity. As telecommunications networks transition from the traditional, switched public switched telephone network (PSTN) to a next generation network (NGN), operators and policymakers will have to ensure that reasonable interconnection options are available, particularly from incumbents controlling access to customers on "last mile" facilities, consistent with the GATS Annex on Telecommunications and the Telecommunications Services Reference Paper[6].

BNetzA, the German regulator, has defined interconnection as a market requiring regulatory oversight. VATM states that BNetzA must do more to ensure access to NGN-based interconnection. In particular, VATM would like to see BNetzA strengthen the requirements on DT for collocation and for coordination on the implementation of interconnection. It also recommends that DT should be required to provide more transparency into its process of deploying NGN and for retiring parts of its existing PSTN network (an issue recently encountered as well in other countries, such as Singapore). In March 2012, BNetzA issued a

[6] Reference Paper, Negotiating Group on Basic Telecommunications, Job No. 2104 (24 April 1996), reproduced in S/C/W/337 (July 13, 2011).

comprehensive consultation document that seeks to address, among other things, requirements to ensure that transitioning to NGN does not impede competitive opportunities. USTR will follow developments in the proceeding with interest and encourages all stakeholders to actively participate in this process.

INCREASES IN 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 GATS Telecommunications Services Reference Paper 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-oriented. 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.

Termination rates for both fixed and wireless traffic should be set in relationship to the costs of providing termination, as would be reflected in a competitive market. Where competition does not discipline the costs of termination services, governments should ensure that the termination rates charged by its operators are not unreasonably above cost. Unfortunately, in this year and for the last several 1377 Reviews, we have seen various governments taking actions that serve to ensure an increase in the termination rates of calls into their countries. These actions adversely affect the ability of U.S. telecommunications operators to provide affordable, quality services to U.S. consumers and may raise questions regarding those governments' international trade obligations. Such cost increases also disadvantage enterprises in those foreign markets for whom foreign communications are a key part of their business (*e.g.*, traders, hotels). In some cases, the major supplier benefits from the increased rates; in others, the governments in question uses the revenues to fund universal service programs or programs unrelated to telecommunications, or do not account for the use of the funds adequately, if at all. 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.

Tax on Inbound International Traffic

<u>El Salvador</u>

Since 2008, El Salvador has imposed a US$0.04 per minute tax solely on inbound international traffic. This is likely one factor in the recent decrease in call volumes between the United States and El Salvador: between 2009 and 2010, the volume of traffic from the United States to El Salvador decreased by 42 percent. In the same period, U.S. carriers' payments to carriers in El Salvador decreased 47 percent, thus hurting them as well. This practice appears inconsistent with the International Telecommunication Union principle that incoming calls not be taxed.[7] A less trade-distortive approach, which would not discriminate against foreign service suppliers, would be to simply tax the overall revenue of the Salvadoran operators.

Originally, El Salvador did not apply the tax to traffic from certain other Central American countries. As a result of concerns express by USTR that this distinction was problematic under the most-favored-nation obligation of the GATS (Article II) and the CAFTA-DR, El Salvador began applying this tax in 2011 to calls from all countries. Although this removes the discriminatory aspects of the tax, it does not resolve the underlying issues with the tax itself.

Tonga

Since 2010, Tonga has imposed a US$0.051 per minute tax solely on inbound international traffic. Between 2009 and 2010, the volume of traffic from the United States to Tonga declined from 7.7 million minutes to 5.7 million minutes. This raises the same issues as noted above with respect to El Salvador.

In addition, although the Tonga Government has rescinded its former requirement that its carriers charge a minimum termination rate of US$0.30 per minute, U.S. carriers report that the two Tongan carriers, Tonga Communications Corporation (TCC, which is owned by the government of Tonga) and Digicel, continue to insist on unreasonable above-cost rates and refuse to restore direct circuits between the United States and Tonga. USTR urges the Tongan Government to take immediate action to ensure that its carriers restore direct circuits with U.S. carriers and offer reasonable, cost-oriented rates to U.S. carriers.

Government Mandated Termination Rate Increase

Ghana

In 2009, Ghana mandated an increase in the termination rate for incoming international calls to US$0.19/minute.[8] USTR has previously expressed concerns that this increase appears to be inconsistent with Ghana's obligations under the GATS Annex on Telecommunications and the Telecommunications Services Reference Paper. Ghana has not provided any evidence that the mandated rate is related to costs associated with terminating calls.

Universal Service Surcharge

Jamaica

In 2011, Jamaica renewed its universal service surcharge on the termination rate paid by international operators to deliver international telephone calls to Jamaica: an additional US$0.02/minute for fixed and US$0.03/minute for mobile. U.S. operators and consumers have

[7] International Telecommunication Regulations, Article 6.1.3, available at http://www.itu.int/osg/csd/wtpf/wtpf2009/documents/ITU_ITRs_88.pdf

[8] Act 786 (2009). Thirty-two percent of the rate (US$0.06) goes to the government of Ghana.

born the bulk of the expense, given that 80 percent of Jamaica's incoming calls originate in the United States. Between 2009 and 2010, the volume of traffic from the United States to Jamaica decreased by 41 percent, and U.S. carriers' payments to carriers in Jamaica decreased by 39 percent.

Jamaica's obligations under the GATS Telecommunications Services Reference Paper require it to ensure that universal service obligations are administered in a transparent, non-discriminatory manner, and that they be no more burdensome than necessary to achieve its universal service goals. The FCC has held that "universal service obligations that are levied disproportionately on foreign-originated calls clearly violate these principles." (The United States does not target in-bound, international traffic for unique surcharges to support universal service or other purposes.)

USTR supports efforts to ensure universal telecommunications service; however, levying a surcharge solely on international calls not only places an unwarranted burden on foreign operators and consumers but also adds to the cost of doing business in Jamaica, arguably detrimental to Jamaica's own broader economic interests.

SATELLITES AND SUBMARINE CABLE SYSTEMS

Barriers to Provision of Satellite Services

As in previous years, commenters note problems regarding U.S. operators' ability to offer satellite capacity to customers in China and India. Commenters continue to point to a lack of transparency in the rules governing the provision of satellite capacity in these countries and note that the requirement to sell capacity only through government-owned satellite operators is problematic.

In the case of China, foreign satellite operators are prohibited from leasing transponder capacity directly to end-users in the country without the prior approval of the Ministry of Industry and Information Technology (MIIT). Only one company, China Direct Broadcast Satellite Company ("China DBSat"), holds the license necessary to sell domestic satellite services and foreign satellite operators must therefore sell capacity to end users through that company. China DBSat continues to have a monopoly for the provision of satellite services in the country, as no other company has been granted a basic telecommunications services (BTS) license.

In the case of India, foreign operators are precluded from participating directly in the provision of satellite capacity for the lucrative direct-to-home (DTH) market. Foreign operators are required to first sell DTH capacity to India's domestic satellite operator, the Indian Space Research Organization (ISRO), which resells the capacity to the DTH customers and establishes and maintains the direct relationship with the retail customer. Local users in India should be allowed to contract directly with any satellite operator that has the ability to serve India, and not be constrained by regulatory policies that establish a preference for a domestic operator or service provider.

USTR will continue to raise concerns regarding the barriers to supplying satellite services in China and India and will encourage these countries to consider changes to their respective frameworks.

Access to Submarine Cable Systems

Commenters in this year's Review again cite problems in obtaining competitive access in a timely fashion to cable landing stations (CLS) located in India. In past 1377 Reviews, USTR has urged the Telecommunications Regulatory Agency of India (TRAI) to conduct a public consultation to determine if there are deficiencies in the Reference Interconnection Offers (RIOs) submitted by the companies that control access to CLS. USTR commends TRAI for undertaking a review of current RIOs and looks forward to the results of the review, which should help ensure competitive access to submarine cables, which was India's goal when it decided to mandate non-discriminatory and reasonable access to these network facilities several years ago.

ISSUES AFFECTING THE TELECOMMUNICATIONS EQUIPMENT TRADE

China - Multi-Level Protection Scheme

In 2010 and 2011, both bilaterally and during meetings of the WTO's Committee on Technical Barriers to Trade, the United States raised its concerns with China about framework regulations for information security in critical infrastructure known as the Multi-Level Protection Scheme (MLPS), first issued in June 2007 by the Ministry of Public Security (MPS) and the Ministry of Industry and Information Technology (MIIT). The MLPS regulations put in place guidelines to categorize information systems according to the extent of damage a breach in the system could pose to social order, public interest, and national security. The MLPS regulations also appear to require buyers to comply with certain information security technical regulations and encryption regulations that are referenced within the MLPS regulations.

If China issues implementing rules for the MLPS regulations and applies the rules broadly to commercial sector networks and IT infrastructure, they could adversely affect sales by U.S. information security technology providers in China. The United States has therefore urged China to notify to the WTO any MLPS implementing rules laying down equipment-related requirements in accordance with China's obligations under the Agreement on Technical Barriers to Trade. In addition, the United States will continue to urge China to refrain from adopting any measures that mandate information security testing and certification for commercial products or that condition the receipt of government preferences on where intellectual property is owned or developed.

India – Restrictions on Encryption

India is currently exploring how it will implement the 2008 Amendments to the Information Act of 2000. U.S. companies are concerned that, in trying to meet its national security concerns, India will develop policies to implement the 2008 Amendments that will impose unnecessarily stringent and burdensome encryption requirements, including for equipment sold solely for commercial use, or even ban the use of certain encryption technologies. Given that India's national security concerns may be shared by many other countries, the United States has encouraged India to actively seek to address those concerns through policies that do not deviate from commonly-accepted best practices. To date, the United States and U.S. industry have engaged in a constructive dialogue with India focused on best practices for managing security concerns while not unduly restricting industries' ability to utilize encryption technology. USTR will continue to engage India to seek ways to ensure U.S. telecommunication companies can effectively protect information, while also respecting security concerns of the Indian government.

India – License Amendments Affecting Importation of Telecommunications Equipment

India issued a series of requirements for telecommunications service providers (TSP) and equipment vendors in December 2009, February 2010, March 2010, and July 2010, which were designed to maintain the security of India's commercial networks. The requirements would have applied to the purchase of imported products but not products manufactured in India by Indian-owned or Indian-controlled manufacturers. Issued in the form of amendments to telecommunications service licenses, those regulations sought to impose an inflexible and unworkable security approval process, which mandated the forced transfer of technology to Indian companies, the escrowing of source code and other high-level and detailed designs, and assurances against malware and spyware during the entire use of the equipment. In response to concerns raised by industry and trading partners, including the United States, India suspended implementation of the license amendments while it consulted interested parties to better evaluate the extent to which those requirements in fact addressed India's security challenges.

Following those consultations, India issued a new set of license amendments in May 2011, which eliminated many of the most trade-distorting conditions of the previous proposed license amendments. Concerns remain, however, regarding certain provisions in the May 2011 license amendments, including: (1) the requirement for telecommunications equipment vendors to test all imported information and communications technology (ICT) equipment in labs in India; (2) the requirement to allow the telecommunications service provider and government agencies to inspect a vendor's manufacturing facilities and supply chain, and to perform security checks for the duration of the contract to supply the equipment; and (3) the imposition of strict liability and possible "blacklisting" of a vendor for taking "inadequate" precautionary security measures, without the right to appeal and other due process guarantees. USTR will continue to engage India to seek ways to ensure that U.S. telecommunications companies can continue to participate meaningfully in the Indian market, while also respecting security concerns of the Indian government.

Local Content Requirements

Various countries have proposed or adopted policies that require the use of local content in their telecommunication sector infrastructure. Specific policies of concern include:

- Brazil’s draft proposal regarding the auctioning of certain radio electric spectrum (Bid No. XXX/2011/SPV – ANATEL).
    - This proposal includes requirements that the winning bidders commit to “purchase goods, products, equipment and systems for telecommunications and data networks with national technology,” and ensure a 70 percent local content ratio in its infrastructure deployment after five years.
- India’s policy, approved by the Cabinet but not yet in force, requiring preferences for domestic goods when government agencies, State-owned enterprises, and certain licensees purchase “electronic products”; as well as proposals including certain recommendations by the Telecommunications Regulatory Authority of India and Draft National Policies on Electronics, Information Technology, and Telecommunications proposed by the Ministry of Communications and Information Technology (MCIT).
- Indonesia’s Ministry of Communication and Informatics’ decrees on wireless broadband: 19/PER/M.KOMINFO/09/2011
    - Indonesia’s Minister of Communications and Informatics issued regulation 19/PER/M.KOMINFO/09/2011 which specifically requires that telecommunication devices used for wireless broadband services offered in the 2.3 GHz radio frequency band contain at least 50 percent local content within five years.

Such policies are often advocated as way to boost their respective domestic manufacturing sectors, despite the fact that they actually undermine that long-term objective. Building a globally competitive and sustainable manufacturing sector, and ensuring world-class service suppliers—both in telecommunications and in sectors that use such services—is a goal of most major economies, including the United States. Achieving this goal, however, requires the adoption of open, market-oriented policies which encourage establishing manufacturing facilities that can be incorporated into the global supply chains that are a central feature of manufacturing in this sector. Policies that discriminate against imported products, in contrast, interfere with the operation of these global supply chains and discourage firms from establishing new manufacturing facilities.

Such policies also raise serious questions of consistency with multilateral and bilateral trade rules, including the GATT and the WTO Agreement on Trade-Related Investment Measures (TRIMs). The United States will continue to engage with these economies to explore ways to achieve manufacturing goals without recourse to discriminatory, trade distorting policies that hamper competition and limit the growth potential and ultimately the competitiveness of their telecommunications sector. Specifically, the United States will raise this as a serious ongoing issue for consideration under the WTO TRIMs Committee, and if not resolved, will consider other appropriate options.

General 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 certain electromagnetic compatibility (EMC) testing and certification requirements. Mandatory certification requirements maintained by China, Costa Rica, India, and Brazil (especially for EMC), as well as requirements maintained by China that equipment be tested domestically, are areas of concern. Requirements that telecommunications and information technology 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).

U.S. industry has identified several specific redundant testing requirements that China imposes with respect to mobile phones, as well as a lack of transparency with respect to the testing and certification procedures China maintains for mobile phones. China's three main approval processes for mobile phones—the Network Access License (NAL), the Radio Type Approval (RTA), and the China Compulsory Certification (CCC) mark—often overlap. For example, the NAL and RTA processes both require electromagnetic interference tests. The NAL and the CCC both require EMC testing and product safety tests. In addition to redundancy, China does not consistently publish its requirements for mobile phones. For example, the requirement that mobile phones be WLAN Authentication and Privacy Infrastructure (WAPI) enabled, is unpublished. Those requirements that are published are often unclear and subject to change without written notification and adequate time for companies to adjust. In some cases, testing requirements for products can change on an almost monthly basis. The United States and China discussed these issues bilaterally in 2011, including working group meetings held under the auspices of the U.S. – China Joint Commission on Commerce and Trade (JCCT). At the JCCT Plenary in November 2011, China announced its plan to build on its earlier 2010 JCCT commitment to develop a one-stop shopping mechanism for telecommunications network access license and radio type approval by agreeing to publish these procedures by the end of 2011. In 2012, the United States will continue to pursue progress in enhancing transparency and streamlining China's telecommunications testing and certification requirements. The United States will also continue to pursue discussions regarding bilateral APEC Telecommunications Mutual Recognition Agreement (MRA) negotiations.

MRAs can help address restrictions countries maintain on equipment testing outside their territories, and eventually can lead to a country permitting equipment sold in their markets to be certified in the United States. Both Chile and Israel have indicated a willingness to consider MRAs for ICT and other telecommunications equipment. USTR will remain engaged with both countries on this issue. In May 2011 the United States and Mexico signed a bilateral telecom MRA fulfilling a long outstanding NAFTA obligation. Mexico and the United States are currently engaged in confidence building exercises to ensure that they are ready to implement the agreement in December 2012.

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