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December 5, 2014

Mr. Douglas Bell
Chair, Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, DC 20508

RE: TIA Public Comments Concerning Compliance with Telecommunications Trade Agreements (Docket Number: "USTR-2014-0022")

Dear Mr. Bell:

In response to the Federal Register notice USTR-2014-0022, the Telecommunications Industry Association (TIA) and its member companies would like to thank you for the opportunity to comment on the annual review of the operation and effectiveness of all U.S. trade agreements regarding telecommunications products and services ("1377 Report"). With over 300 members, TIA represents the manufacturers and suppliers of global communications networks through standards development, advocacy, tradeshows, business opportunities, and market intelligence.[1] In addition, TIA is a standards development organization that is accredited by the American National Standards Institute (ANSI).

TIA and its members wish to thank the U.S. government and, in particular, the Office of the United States Trade Representative, for their continued work on behalf of the telecommunications sector to reduce barriers to trade and investment in foreign markets with respect to telecommunications equipment and services. It is important that the U.S. government continue its efforts, both bilaterally and multilaterally, to bring about a fully competitive global market for the U.S. telecommunications sector.

In addition to addressing the issues cited in our submission, a competitive global market can be accomplished through the enforcement and expansion of existing trade agreements, as well as the negotiation of new trade agreements. Our attached submission identifies market access barriers confronting the telecommunications sector and broader ICT sector in key markets around the world. If you have any questions, please contact Eric Holloway, Director for International and Government Affairs at eholloway@tiaonline.org.

Sincerely,

Danielle Coffey
Vice President & General Counsel, Government Affairs

[1] Telecommunications Industry Association (TIA), "About TIA", http://www.tiaonline.org/about/

Telecommunications Industry Association

Public Comments Concerning Compliance with Telecommunications Trade Agreements
(Docket Number: "USTR-2014-0022")

Brazil

Localization Barriers to Trade

There is a continuing trend in Brazil to protect domestic manufacturing and technology development at the expense of foreign goods and services through localization barriers to trade. A recent example of this continuing trend is localization requirements established by the Brazil National Telecommunications Agency (*Anatel*) for the 700MHz spectrum auction held in September 2014. As in past auctions for the 2.5 GHz and 450 MHz spectrum bands, companies were required to prove investments that include a high percentage of products, equipment, and telecommunication systems with local content – this includes goods manufactured in Brazil according to the "basic manufacturing process" rules (*processo produtivo básico – "PPB"*) and locally developed technology. These eligibility requirements appear to be inconsistent with the WTO Agreement on Trade Related Investment Measures ("TRIMS"), Article 2.

Testing and Certification

TIA remains concerned with *Anatel* not accepting test data generated outside of Brazil, except in those cases where the equipment is physically too large and/or costly to transport. Therefore, virtually all testing for IT/telecommunications equipment (including everything from mobile phones to optical cables) must be physically tested in Brazil. This "in-country" testing requirement limits TIA members' ability to flexibly and cost effectively service customers, creating unnecessary barriers to trade in terms of certification time and increased cost. The requirement for in-country testing effectively creates an advantage to locally manufactured telecommunications equipment through higher costs and delays caused by the need to ship products to Brazil for testing. We believe that the in-country testing requirement is inconsistent with the WTO Agreement on Technical Barriers to Trade (TBT Agreement), Paragraphs 5.1.2 and 5.2.6. In addition, TIA recommends that the United States and Brazil negotiate and conclude a Mutual Recognition Agreement under the Inter-American Telecommunications Commission ("CITEL") framework to reduce technical barriers to trade between the two countries.

Taxation of Foreign-Based Data Centers

Through the *Ato Declaratório Interpretativo* RFB No. 7, the Brazil Internal Revenue Service (*Receita Federal do Brasil – "RFB"*) has reclassified the tax liability for payments made within Brazil for the use of data centers located outside of Brazil.[2] The effect of the reclassification is an increase in tax liability for foreign located data centers that provide Internet-based services within Brazil. We are concerned that this reclassification may differentiate the tax treatment of data centers located outside Brazil as compared to data centers located within Brazil that are providing like services, which would be inconsistent with the WTO General Agreement on Trade In Services ("GATS").[3] In addition, the implications of a potential differentiation in tax treatment based on data center location would create a *de facto* barrier to the cross-border flow of information.

[2] Brazil, *Receita Federal do Brasil*, "Ato Declaratório Interpretativo RFB No. 7", 15 August 2014
[3] WTO, General Agreement on Trade in Services, Art. XVII, Para. 1

China

Conformity Assessment

The telecommunications sector continues to experience a regulatory regime that creates unnecessary barriers to trade through a system of overlapping and redundant conformity assessment procedures through the Radio Type Approval ("RTA"), the Network Access License ("NAL"), and the China Compulsory Certification ("CCC"), which is more burdensome than necessary when compared to other markets around the world. We also note that there are instances where testing and certification programs can require the unnecessary disclosure of business confidential information and would urge regulators to refrain from these types of requirements. China's current testing and certification processes for telecommunications equipment appears to be inconsistent with its WTO accession commitment where it committed that "*imported products shall not be subject to more than one conformity assessment*".[4] In addition, we believe that China's conformity assessment practices are not consistent with the TBT Agreement, Paragraph 5.4. We also recommend that China look to clarify the enforcement of labeling requirements, which can be applied inconsistently at the provincial level, leading to added costs for manufacturers.

TIA encourages China to look for ways to further address the underlying problem of redundancy by limiting the NAL's scope to basic testing requirements for network interoperability and functionality. In addition, we note that the NAL has been used to introduce indigenously developed technologies and standards as technical requirements under the NAL. TIA urges the elimination of test requirements that support specific indigenous technologies and standards from inclusion in the NAL.

Expansion of Telecommunications Regulations

TIA remains deeply concerned with the draft revisions to the Catalogue of Telecommunication Service Categories ("Telecom Services Catalogue") and the draft Administrative Measures for the Trial Operation of New Types of Telecommunications Businesses ("Trial Operations Measure") by the Ministry of Industry and Information Technology ("MIIT"). The measures would broaden China's licensing regime for telecommunications services to new categories of ICT and related services and subject some existing services that require a license to new and more stringent licensing requirements. The Trial Operations Measure would create a "catch all" regulation that would create a *de facto* approval process through registration requirements for new types of services that use the public network.

Equally troubling is that the revised draft of the Telecom Services Catalogue and draft Trial Operations Measure would improperly classify a wide range of ICT technologies and services as basic or value added telecommunications services. Implementing the two measures will lead to the imposition of an assortment of market access barriers, which include equity caps, joint venture requirements, and unreasonably high minimum capitalization requirements that appear to be inconsistent with China's commitments under the GATS for market access and national treatment.[5] Moreover, historically very few licenses for basic or value-added services for foreign-invest entities have been issued. The draft amendments to the Telecom Services catalogue and draft Trial Operations Measure appear to be

[4] WTO Protocol of Accession, "Accession of the People's Republic of China", WT/L/432, 10 November 2001, Art. 13, Para. 4(a)
[5] WTO, General Agreement on Trade in Services, Art. XVI, Para. 2 (e) (f) and Art. XVII.

inconsistent with China's commitment to "*ensur*[ing] *that China's licensing procedures and conditions would not act as barriers to market access and would not be more trade restrictive than necessary*".[6]

India

Tariffs on Telecommunications Equipment

The 2014-2015 Indian Union Budget includes a 10 percent tariff increase for certain telecommunication equipment. This policy announcement was put into effect by the *Notification 11/2014-Customs*, which removes the existing import duty exemption and implements a 10 percent basic duty for the importation of a broad range of telecommunications equipment.[7] *Notification 11/2014-Customs* appears to incorrectly use evolving technologies as the determining factor to identify products as not being covered by the ITA. The Notification includes a variety of technologies rather than specific products including, VoIP, various types of optics-based technologies, multiple input/multiple output ("MIMO"), and long term evolution ("LTE"). Established WTO precedent suggests that ITA coverage is based on the product and its function as included in the ITA and not based on the evolving technologies that underlie the functionality of the products.

While the Government of India has stated its belief that these products and technologies are not under the purview of the WTO ITA[8], TIA's analysis strongly suggests that these products, *regardless of the underlying technology within the products*, are covered by the ITA and should continue to receive duty-free treatment. In Attachment A of the ITA, all telecommunications products in the Harmonized Tariff Schedule (HS) 8517 are affirmatively covered. Moreover, Attachment B reinforces the coverage of all network equipment through a list of products covered by the ITA, regardless of where the product may be classified in the HS (*i.e.* Attachment A of the ITA). We urge the Government of India to rescind the 10 percent tariff as expeditiously as possible.

In-Country Security Testing Requirements

In 2011, the Department of Telecommunications ("DoT") announced a series of security-related amendments to the DoT licensing agreements for telecommunication service providers ("TSPs").[9] In 2014, the DoT announced a delay in the implementation of the requirement to test and certify "network elements" to relevant contemporary Indian or international security standards from authorized and certified labs or agencies in India. Prior to the implementation of the in-country testing requirement, testing and certification from any accredited international testing lab is permitted. Given the current acceptance of testing and certification data from any accredited international lab, we believe that the implementation of an in-country testing requirement would be inconsistent with India's WTO commitments under the TBT Agreement, Article 5, which states that "*conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade*".[10] The new implementation date for the in-country testing requirement is April 1, 2015.

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[6] WTO Working Party on the Accession of China, "Report on the Working Party on the Accession of China", WT/ACC/CHN/49, 1 October 2001, Para. 308

[7] India, Ministry of Finance, "Department of Revenue Notification 11/2014-Customs", 11 July 2014

[8] WTO, "Ministerial Declaration on Trade in Information Technology Products", 13 December 1996

[9] India, Ministry of Communications and Information Technology, Department of Telecommunications, "License Agreement for Unified License", Chapter 6

[10] WTO, "Agreement on Technical Barriers to Trade", Art. 5, Para. 5.1.2

The requirement to test for security assurance in a specific geographic location goes against global norms and does not in itself enhance security. In addition, private sector entities, such as TSPs, should have the ability to determine which of their vendors' products require formal testing and certification, and how to most effectively procure certified products. We recommend India allow the TSPs this flexibility under the revised license amendments. While in some cases, it may be desirable for a vendor to test their product in a laboratory located in India, it may be impractical in some cases where the same product is already being tested to the same international standard and a security certificate is obtained from an internationally accredited laboratory. Providing flexibility in terms of where products are tested is critical for maintaining a trusted global market and distributed supply chain models for the ICT industry.

The Compulsory Registration Order for Electronics and IT Products

In October 2012, the Department of Electronics and Information Technology (DietY) announced the implementation of the "Electronics and IT Goods (Requirements for Compulsory Registration) Order" ("CRO"), which requires the registration and in-country safety testing of a broad range of electronics and IT products.[11] While the Compulsory Registration Order was ostensibly drafted to ensure the safety of consumer electronics, the CRO was expanded to include non-consumer ICT products (e.g. computer servers). In November 2014, DeitY announced a broadening of the scope of products under the CRO, which includes an additional 15 product categories, including mobile phones.[12]

The CRO testing can only be conducted at a testing lab accredited by the Bureau of Indian Standards and affected products must be tested to the relevant Indian Standard, rather than allowing for testing to the equivalent international standard. We believe this requirement is inconsistent with the TBT Agreement, Paragraph 2.4.[13] We would urge the CRO allow for testing to equivalent international standards at any testing labs that is accredited to the relevant international standard.

Germany

Discriminatory Procurement Rules

The Federal Ministry of the Interior (*Bundesministerium des Innern* – "BMI") Procurement Office released a Decree on April 30, 2014 for procurements by the BMI.[14] The Decree appears to create discriminatory legal burdens on foreign bidding companies. The Decree requires a bidder to self-declare its ability to keep confidential information that is considered confidential, and it introduces vague terms to define what is considered to be confidential information. Further, the Decree stipulates that in the event of non-compliance of the confidentiality clause of the self-declaration by the bidder, the procuring agency can terminate the contract. The Decree appears to allow exceptions to the confidentiality self-

[11] India, Ministry of Communications and Information Technology, Notification S.O.2357(E), "The Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order, 2012", September 7, 2012, www.gazette.nic.in, S.No. 2575, October 3, 2012

[12] India, Ministry of Communications and Information Technology, Department of Electronics and Information Technology, "Notification for expansion of list of items under CRO", November 2014

[13] WTO, Agreement on Technical Barriers to Trade, Art. 2, Para. 2.4

[14] Germany, Bundesministerium des Innern Office of Procurement, "Using a self-declaration and a contractual clause in procurement procedures with regard to risks posed by non-disclosed information outflows to foreign security agencies", April 30, 2014

declaration for legal requirements to supply information to certain types of regulatory organizations (e.g. financial and tax regulatory authorities), but does not extend this exception to similar types of requests from foreign security agencies. As such, the Decree appears to be inconsistent with the national treatment and non-discrimination provisions within the WTO Agreement on Government Procurement (GPA).[15]

Korea

Security Verification Requirements for Government Procurement

The U.S. and Korean governments are parties to the Common Criteria Recognition Agreement ("CCRA"). However, the Korean government requires products certified at a CCRA-accredited lab outside of Korea undergo an additional security verification process for every procurement – even when it is the same product being purchased by the same government customer. In contrast, products that are certified at a CCRA-accredited lab in Korea are exempt from this additional security verification process.

This additional security verification goes against the purpose of the CCRA to allow for certified products to "*be procured or used without the need for further evaluation*" by including country-specific standards beyond those standards agreed to under the CCRA.[16] The additional security verification also appears to be inconsistent with Korea's commitments for national treatment under the U.S.-Korea Trade Agreement ("KORUS"). We would urge the Korean government to eliminate the unequal treatment of CCRA certification.

Preferential Treatment for Government Procurement

The Korean government has in place several policies that appear to be designed to promote domestic industry at the expense of U.S. companies competing for the same procurement opportunities for telecommunications equipment and possibly other products. Procuring agencies may have to modify tender specifications based on a review by a central panel if domestic vendors complain that the specifications cannot be met by local vendors – regardless of the technical needs of the procuring agency. In addition, large companies may be precluded from certain government procurement opportunities if the tender is designated for small and medium-sized enterprises ("SMEs") by the Korean government, including for server and storage products, as well as software.

We are also seeing a trend towards favoring local companies over foreign companies in several policies. For example, products of local origin are provided additional "evaluation points" in tender bids – regardless of technical merit. In addition, procedures for local performance benchmark testing of ICT products are developed by local testing bodies, which results in locally manufactured products receiving an enhanced performance rating and testing criteria that does not fully account for the performance of state-of-the-art products from global manufacturers.

These government procurement policies appear to be designed to provide Korea's industry with an unfair advantage by protecting domestic manufacturers. The policies appear to be at odds with Korea's commitments under KORUS and limit the ability of government agencies to purchase the most advanced and cost-effective products based on technical merit. We urge the Korean government to allow

[15] WTO, Agreement on Government Procurement, Art. 3, Para. 1 and 2
[16] Common Criteria Portal, "About the Common Criteria – Purpose of the Arrangement"

procuring agencies to develop their technical specifications independently; taking into account each government customers' specific requirements. In addition, we would request that companies, foreign and domestic, be treated equally with respect to procurement opportunities by eliminating restrictions based on company size and policies that provide unfair advantages to domestic companies.

Indigenous Standards

The Korean government requires the use of locally developed technical standards for government procurement. For example, rather than utilizing internationally developed cryptographic standards, the Korean government has made mandatory the Korea-developed "ARIA" cryptographic standard for Internet Protocol (IP) telephony. Rather than relying on indigenous standards to develop specifications for government procurement bids, we would urge the Korean government to utilize internationally developed standards where such relevant international standards exist, per global practices and consistent with the WTO TBT Agreement, Article 2.4.[17]

Nigeria

In December 2013, Nigeria implemented the "Guidelines for Nigerian Content Development in Information and Communications Technology (ICT)" with the goal of achieving a series of national objectives related to the development of domestic production, sales, and consumption of ICT products and services for the Nigerian and global markets.[18] In addition, the Guidelines include the laudable goal of promoting and encouraging an environment in Nigeria that will attract foreign investment in the ICT sector and the protection of intellectual property rights. However, TIA is deeply concerned with provisions within the Guidelines, Section 12, that create localization barriers to trade for telecommunications products and services, which appear to be inconsistent with Nigeria's WTO commitments.

Section 12 of the Guidelines requires the use of locally manufactured SIM cards for the provision of data and telephony services that will come into effect within 18 months of the Guideline's being implemented. Moreover, the Guidelines include local content requirements of at least 50 percent for the build out of mobile telephony infrastructure, including cell sites, cell towers, and base transceiver stations. These local content requirements for telecommunications equipment are inconsistent with the national treatment obligations in the WTO General Agreement on Tariffs and Trade (GATT) Article 3, paragraph 5.

With respect to telecommunications services, we are concerned with the requirement for foreign invested companies to use Nigerian companies' networks for at least 60 percent of all value added services, which increases to an 80 percent requirement after three years. In addition, the Guidelines require at least 50 percent of value added services be locally provided by a Nigerian company. Further exacerbating these concerns is the vague definition within the Guidelines of "value added services", which is overly broad in its application. These services localization requirements appear to be at odds with Nigeria's national treatment obligations under GATS, Article 17, paragraph 3.

[17] WTO, "Agreement on Technical Barriers to Trade", Article 2, Para. 2.4

[18] Nigeria, National Information Technology Development Agency (NITDA), "Guidelines for Nigerian Content Development in Information and Communications Technology (ICT)"

Beyond the concerns related to potential inconsistencies with respect to Nigeria's WTO commitments, we firmly believe that the localization requirements are at odds with Nigeria's goal of creating an attractive investment environment for the global ICT industry. In addition, these localization requirements, including local data storage requirements, would slow the growth of Nigeria's domestic ICT industry by creating barriers to the export of Nigerian ICT services to the world.

Russia

WTO Information Technology Agreement

In the "Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization" (the Working Party Accession Report), Russia agreed to "*submit its Information Technology Agreement (ITA) Schedule to the ITA Committee for verification, in accordance with ITA procedures, in order to enable the Russian Federation to join the ITA when it became a WTO Member*".[19] However, we understand that Russia has still not taken the necessary final action to incorporate its WTO ITA commitments into its bound rates and would strongly urge Russia to make the necessary changes to its bound rates so that it can join the ITA as expeditiously as possible.

Import Licensing for Products with Encryption Technology

With regard to import licensing for products containing encryption technology in Russia, the Russian Federation committed in the Working Party Accession Report to apply "*on a non-discriminatory basis and in conformity with the relevant provisions of the WTO Agreement, in particular, Articles I and III of the GATT 1994, and that procedures related to the notification, evaluation, approval, and licensing of goods containing encryption technology, would be transparent and predictable and would not impose unreasonable or burdensome requirements on such goods*".[20] Currently, Russia has in place a complex and non-transparent licensing regime that unnecessarily impedes the importation of telecommunications equipment that incorporates encryption technology. In addition, the use of these products is further encumbered through the use of activity licenses once imported into Russia.

The current system of import licensing for products containing encryption technology poses unnecessary barriers to their importation through inconsistent application of the licensing requirements and an overly broad scope of product coverage. In addition, we understand that in some cases, import licensing requirements for commercial products are issued on a per shipment basis rather than for a "product family", which further burdens importers of these products through added administrative processes and costs.

To meet its WTO accession commitments, we recommend that Russia ensure that all exempted products as defined under the Notes to Category 5, Part 2 of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies are exempted from import and activity licensing requirements.[21] To the extent that a product does require an import license, we recommend that blanket licenses and one-time notifications be implemented to streamline the import licensing

[19] WTO, "Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization", WT/ACC/RUS/70 WT/MIN(11)1, Para. 324, 17 November 2011

[20] *Ibid*., Para. 472

[21] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Category 5 – Part 2, Accessed on 28 August 2013

system. To enhance transparency, we recommend that explanations on why a license is denied or revoked be provided in a timely manner to the license applicant and the establishment of an appeals process, should a license be denied or revoked. Finally, we would urge regulatory consistency among the Customs Union Members.

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