October 15, 2012

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Mr. Donald Eiss
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, DC 20036

RE: USTR's 2013 National Trade Estimate on Foreign Trade Barriers Report. Countries/regions covered in this submission include Argentina, Brazil, China, Ecuador, the European Union and India.

Dear Mr. Eiss:

In response to the Federal Register notice issued on August 15, 2012, the Telecommunications Industry Association (TIA) and its member companies would like to thank you for the opportunity to comment on the 2013 National Trade Estimate (NTE) on Foreign Trade Barriers report. TIA represents the global information and communications technology (ICT) industry through standards development, advocacy, tradeshows, business opportunities, and market intelligence. TIA continues to facilitate the convergence of new communications networks while working for a competitive and innovative market environment. Obstacles still remain for U.S. exports of goods and services around the world, and we would like to highlight the following trade barriers faced by TIA members:

Argentina

Non-Automatic Import Licenses and Pre-Approval Requirements

Argentina utilizes non-automatic import licenses and other pre-approval requirements to restrict imports in a way that is not compliant with WTO measures. As many as 4000 finished products in over 600 harmonized tariff codes are subject to non-automatic import licenses, including electronics. Non-automatic import license approvals face significant delays beyond the 60-day period outlined by the WTO, and some companies continue to wait over a year to obtain import licenses. Article 3.5(f) of the WTO Agreement on Import Licensing Procedures states that "the period for processing applications shall not be longer than 30 days if applications are considered as and when received and not longer than 60 days if applications are considered simultaneously." Companies are facing delays well beyond the 60-day requirement.

The Government of Argentina has also introduced pre-approval requirements, which mandate that companies seek advance approval prior to importing any goods into Argentina. The Government of Argentina's use of non-automatic import licenses and pre-approval requirements is inconsistent with WTO law and practice in distorting trade. The WTO Agreement on Import Licensing Articles 1.2 & 3.2 has been interpreted by the Dispute Settlement Body of the WTO to mean that the requirement to prevent trade distortion "refers to any trade distortion that may be caused by the introduction or

operation of licensing procedures, and is not necessarily limited to that part of trade to which the licensing procedures themselves apply." Resoluciones Generales Nos. 3252 and 3255 require all importers to provide a sworn affidavit to the Government of Argentina's tax agency (AFIP). Additionally, the Secretary of Domestic Commerce announced a requirement that importers provide a separate Petition Form directly to the Secretariat. This additional requirement has been mandated without formal publication in the Argentine Government's Official Bulletin. Additionally, Resolucion Generale No. 3276 obligated companies in the service industry to file a sworn declaration to both the AFIP as well as directly to the Secretariat, including information on services delivered between parties in Argentina and abroad. These requirements lack transparency and have added significant delays to the release of imported goods by creating a multiple track application process.

Market Surveillance Controls

Argentina has adopted measures requiring all importers of a certain product to provide market surveillance reports before products can clear customs. These market surveillance requirements go beyond the goal of market surveillance controls to ensure that dangerous and noncompliant goods are removed from the market and the workplace. The controls require repetitive testing of the same product and delay time to market for importers, giving select domestically manufactured goods a competitive advantage over imported products. Article 2.2 of the Agreement on Technical Barriers to Trade states that, "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create." In addition to market surveillance requirements, Argentina also requires initial product safety certification, factory audits, and periodic verification of essential safety requirements as well as price-control policies. The product families for which market surveillance requirements exist have not been adequately defined, making a broad range of products potentially liable to meet the requirement. Additionally, local testing labs lack the capacity to conduct product examinations in a timely manner exacerbating the negative impact of these policies on importers. The market surveillance requirements mandated by the Government of Argentina are more trade-restrictive than necessary to achieve their stated purpose.

Valuation of Imports

The Government of Argentina's use of reference values in valuating imports is also in violation of Argentina's obligations as a member of the WTO. Resolucion Generales No. 1907/2005 created a system for determining and controlling the value of goods through the establishment of reference values with the stated goal to stop tax evasion and under-invoicing of imported goods. If an importer's declared value for the goods falls below the reference value determined by the Government of Argentina, the goods must pass through a separate tedious review process in order to clear customs. The review process includes a complete review of documents and physical inspection of the goods being imported. Importers can only clear products from customs by posting a bond that secures the tax difference between the paid amount and the amount calculated with the reference value. After the importer has posted the bond and cleared goods from customs, the importer has 15 days to justify the declared value. The reference value process is not WTO compliant because the reference values established by the Government of Argentina do not follow the GATT Valuation Agreement. Additionally, the reference value system unfairly disadvantages importers by requiring them to automatically post a bond whenever the

declared value is less than the fixed reference value determined by the Government of Argentina.

Financial Services Requirements
Resolucion Generales No. 36.615/2011 prohibits most cross-border reinsurance operations. The result of the new regulation is that local cedants are only allowed to cede reinsurance risks to local-based Argentine reinsurers, Argentina subsidiaries or branches of foreign companies. Prior to the regulation, reinsurers were allowed to engage in business from their home country, either upon registration with the regulator or through a broker authorized to operate in Argentina. The new regulation would require foreign reinsurance companies to set up local operations, or they will be restricted from conducting business absence local capacity and subject to case-by-case approval from the regulator. Additionally, the Government of Argentina has blocked payment of dividends and royalties to parent companies and shareholders abroad, restricting Argentina subsidiary companies from paying dividends and royalties outside the country.

Brazil

WTO Information Technology Agreement
TIA strongly encourages Brazil to join the WTO's Information Technology Agreement (ITA). This agreement removes tariffs on a broad range of ITA-covered products, including telecommunications equipment, which reduces costs and stimulates demand. The ITA would lower the costs of telecommunications equipment to Brazilian enterprise purchasers and the end consumer, thus freeing up resources to increase connectivity and enable the Brazilian economy to more quickly realize the economic and social benefits of expanded use of ICT in Brazil. This is especially important as Brazil implements its National Broadband Plan and promotes the expansion of broadband connectivity throughout the country as well as other digital inclusion initiatives.

Complexity of Tax System
The inherent complexities of the Brazilian tax system pose numerous challenges to foreign companies that seek to increase their business with Brazil. The current taxation system discourages investment and development of the ICT industry through its complexity and by imposing one of the world's highest tax rates on telecommunications services. Special attention should be given to tax disputes among the various states (including unconstitutional discriminatory taxes imposed by state governments), the transfer pricing guidelines, the multiple cascading taxes, the constant changes in the interpretation of tax laws and many other tax-related difficulties. As a concrete example of these difficulties, TIA notes the series of restrictions imposed on the export and re-importation of imported equipment that is being sent abroad for repair. The requirements are so laborious and complex that they create significant challenges for the ability of companies to provide quality services to customers in Brazil due to significant delays in the export and re-importation process. Brazil should address the problems created by the tax system in order to help achieve the goals of its National Broadband Plan and digital inclusion.

Protectionist Measures Favoring Domestic ICT Industry
There is a growing trend in Brazil to protect domestic manufacturing and technology development at the expense of foreign goods. One example of this protectionist trend is the bidding for spectrum bands promoted by the Anatel in June 2012. Companies who were given the right to explore the 2.5 GHz and 450 MHz spectrum bands 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 PPB rules and locally developed technology. In addition, Brazil is currently working to develop a methodology that will allow locally developed software to receive government procurement preference. TIA believes that market dynamics, not government requirements, should be the main factors determining which technologies should be deployed based on customer needs. Brazilian consumers, including government agencies, as well as businesses should benefit from competition and have access to world-class technologies, irrespective of where they are produced.

People's Republic of China

U.S. exporters and investors still see China as a key destination. While U.S. exports of information and communications technologies to China are increasing, TIA remains concerned about lack of progress in several key areas.

Voice over Internet Protocol (VoIP) Restrictions

TIA believes technology neutrality is important for promoting competition and ensuring that consumers are empowered to choose technologies that best suit their needs. China's policies restrict the use of VoIP to closed user groups that do not allow for origination or termination of IP phone calls on the Public Switched Telephone Network (PSTN). TIA encourages China to allow all VoIP providers to offer services that connect to the PSTN on an unlicensed basis, and eliminate joint venture requirements that apply to non-Chinese companies who wish to offer VoIP services in China.

Imports and Import Discrimination

China continues to struggle with economic inefficiencies, exacerbated by preferences for domestic industries and pricing procurement practices that discriminate against imports. Specifically, it appears that in some telecom procurements, companies are ignoring published criteria for bid evaluation, resulting in the selection of "national" champions, which are state-invested enterprises. As a result of these practices, foreign companies are at a disadvantage when bidding against Chinese suppliers.

TIA is pleased that China has taken steps to join the WTO Government Procurement Agreement (GPA). The GPA principles of openness, transparency and non-discrimination will benefit China and the United States, as suppliers of goods and services in both countries seek business opportunities in each other's markets. TIA urges China to work with USTR to make certain that its July 2010 offer on government procurement is in accordance with its domestic procurement law and ensures that its accession package is in agreement with international norms as negotiations progress.

Ecuador

Import Restrictions

In June 2012, the Government of Ecuador passed Resolution COMEX 67 which imposes quotas on mobile phone imports and justifies this measure by classifying mobile phones as dangerous to the environment. These import quotas are retroactive to January 2012 and effectively cut imports by 50%. The industry believes the real motivation for implementing this resolution is to restrict imports into Ecuador to help manage Balance of Payments rather than to protect the environment. TIA recommends that the Government of Ecuador rescind Resolution COMEX 67 and refrain from imposing any import quotas on mobile phones.

European Union

WTO Information Technology Agreement
TIA and its members welcome the WTO dispute resolution panel's July 2010 ruling that upheld the U.S. claim that the European Union's (EU) imposition of duties on a variety of products is a violation of its tariff commitments and that the products should remain free from tariffs, as they are covered by the Information Technology Agreement (ITA). While the WTO's decision is favorable to the U.S., TIA is concerned about reports of the EU still applying tariffs, although less, on multifunction machines. Furthermore, while the EU has taken some steps to come into compliance and provide duty-free import of products such as set-top boxes and flat-panel displays, it is still unclear whether these products will actually entry duty free because the EU has not provided explicit guidelines to customs officials for this allowance.

India

Despite the global economic slowdown, India continues to be one of the world's fastest growing ICT markets. Since 2006, India's total wireline and wireless telephone subscribers have increased from approximately 164 million to over 944 million, representing almost 475% growth in five years. Broadband (> 256 kbps) has grown from 10 million subscribers in August 2010 to over 14.6 million subscribers as of July 2012, yet numbers of connections remain low relative to the population. While India has undertaken a number of policy initiatives to open the market, areas of concern remain.

Department of Telecom License Amendments-Tech Transfer - Beginning in December 2009, India imposed a series of increasingly onerous license amendments on telecommunications operators governing the procurement of telecommunications equipment and software. These successive regulations instituted transfer of technology requirements on commercial procurements with criminal penalties for non-compliance, India nationality requirements for network maintenance engineers, and a mandatory security agreement required between telecommunications operators and vendors that included escrowing of source code, among other troubling provisions.

In June 2011, the Indian government reversed course and issued an improved set of regulations. The removal of technology transfer requirements, the mandatory 3rd party source code escrow, and the mandatory contractual terms represent a much-needed step forward in improving the regulatory approach to improving the security of India's telecommunications networks in line with global best practices and standards. As a result, our member companies are now able to compete on a more equitable footing in this growing market, supporting job creation, economic growth and innovation here in the United States.

While the revised license amendment represents important improvement, certain elements of the revised regulations are concerning due to their deviation from global practice whilst others require clarification to understand how they will be implemented to ensure that these do not become stumbling blocks or have unintended consequences. TIA looks forward to engaging with the Indian government and the U.S. government as India works through the implementation of these regulations to find practical and effective solutions to the issues raised below:

1) **In country security assurance testing beginning April 1, 2013:** The new regulations require that all equipment procured by telecommunications service providers licensed in India be tested in Indian laboratories starting April 1, 2013. While we understand that the Indian government may feel products tested locally may provide greater security assurance, there is no evidence that the geography of development or testing of a product corresponds with the level of assurance provided by the product. Furthermore this requirement is broadly impractical and inconsistent with the mutual recognition provision of the Common Criteria Agreement. There are longstanding internationally accredited/recognized laboratories conducting testing in this area and the location where the test is performed, in accordance with global best practice, should and does have no bearing on the accuracy of the test in question as long as the laboratory has achieved the appropriate certification.

   We understand that the concept of "network elements' under clause iii of the license amendment refers only to "core" network equipment, which is helpful to focusing implementation on protection of the most important network elements or those most susceptible to security breaches. However, even mandatory testing in laboratories in India for only "core" equipment runs counter to Common Criteria and will likely fail to provide greater product assurance.

   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 laboratory located in India, it may be impractical in some cases where the same product is already being tested 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 for ICT products.

2) **Facility Inspection:** The new regulations require that the vendor, through its agreement with the telecommunications service provider (TSP), allow the TSP, licensor/DoT, and or its designated agencies to inspect the hardware, software, design, development, manufacturing facility and supply chain, and subject all software to a security/threat check any time during the supply of equipment. Given the proprietary and sensitive issues surrounding the design of products, this provision creates concerns as to the intrusive nature of such a request into the intellectual property rights, legal obligations and business operations of vendors. In addition, such inspections will be time consuming, costly, and overly burdensome, and will likely negatively impact a vendor's ability to effectively and efficiently get products into the marketplace. Also, equipment and software suppliers in many jurisdictions must also satisfy national-level legal and regulatory obligations with respect to any customer inspections or visits, which could create another obstacle to fulfilling this obligation. Finally, if a product has achieved the necessary testing certifications by an accredited lab, it is unclear what an intrusive, overly burdensome and unprecedented requirement such as this would achieve in practical terms. We recommend DoT replace the mandatory facility inspection requirement with a provision that

allows the equipment/software supplier and the TSP negotiate mutually acceptable customer assurance arrangements consistent with industry best practices and the relevant national laws governing the equipment/software supplier.

3) **Security Breach/Blacklisting of Products:** The new regulations establish penalties for "inadvertent inadequacy/inadequacies in precaution" and "inadequate measures, act of intentional omissions, deliberate vulnerability left into the equipment or in case of deliberate attempt for a security breach." The amendment provides for the imposition of a strict liability penalty in addition to possible "blacklisting" of a vendor from the Indian market. These provisions have a potentially significant adverse impact on telecommunications service providers and vendors. First, the concept of what would constitute adequacy remains undefined in the amendment. We assume this determination would be left to the discretion of a five member committee to identify and define. This system presents several concerns: 1) the ability to achieve a consistent and predictable definition of "adequate;" 2) the composition and expertise of the five-member panel, how they are appointed and whose interest they represent; 3) the process for conducting an investigation into the breach and determining adequacy; and 4) the ability for a service provider or vendor to effectively respond to an allegation of an intentional omission or deliberate vulnerability and there is no appeal mechanism. Unfortunately, there is very little information provided on the legal due process that would be involved in making a determination in these instances. The lack of clear judicial procedures and rights of appeal, create regulatory uncertainty that could create unforeseen complications for DoT, vendors, and TSPs in the future.

   We recommend that the procedures for making a determination of penalty under these provisions be revisited and opened to a public comment procedure. Determining fault in security breaches can be highly complex and require clear legal procedures based on the rule of law. The stakes for companies in such a scenario are too high to not be grounded in the law. We also recommend the adoption of due process protections and an appeal process which should be extended to include all TSPs and vendors subject to the regulations. Furthermore, given the highly technical and complicated nature of the network security, we recommend that the liability provision not be strictly applied in terms of penalties. Rather, the committee, once properly constituted under clear framework of due process, should be given the discretion to determine the appropriate penalty in all cases.

TIA encourages the U.S. government to continue engaging with the Indian government as it works through the implementation of these regulations to find practical and effective solutions to issues of 1) in-country security assurance testing beginning April 1, 2013; 2) facility inspections; and 3) the black-listing of products due to a security breach.

Encouraging Domestic Manufacturing/Government Procurement Preferences

TIA is very concerned about the Government of India's Preferential Market Access Notification. We are extremely concerned that the notification, which establishes preferential market access for locally manufactured electronic products of 30% that increases to 45% over a period of 5 years will significantly harm trade in ICT products.

The rules would provide procurement preference to domestically manufactured electronic goods "due to security considerations and in Government procurement." While we are concerned overall with any rules providing preferences in government procurement, we are particularly concerned that these rules could apply to private sector procurements, including those by "government licensees" and "managed service providers." Indeed, Section 4.5 of the July draft guidelines implementing the PMA policy states unequivocally that "it shall be mandatory for all organizations, *public or private, procuring electronic products notified under this clause to provide preference to domestically manufactured electronic products in terms of the policy."* (Emphasis added). Preference policies, quotas, and other trade barriers run counter to the market opening reforms that India has implemented and which provided the catalyst for the unprecedented economic growth the country has experienced in recent years. The application of the policy to private entities represents an unprecedented interference in the procurements of commercial entities and is inconsistent with India's WTO obligations. We urge the Government of India to rescind this PMA entirely and initiate a consultation process with the private sector and other stakeholders to more effectively address India's security and economic concerns.

The Telecommunications Regulatory Authority of India (TRAI) bases its recommendations on establishing a preference program for domestically manufactured products on a belief that government licensed entities, including private telecommunications service providers, can be treated as government entities as it relates to their procurement practices. This assertion is clearly contradicted by the WTO's rules, which state under Article III of the General Agreement on Tariffs and Trade (GATT) that generally requires that imported products be treated no less favorably than domestic products. The TRAI recommendations' assertion that entities licensed by the government can be categorized as "government" for the purposes of procurement policies is not supported by the WTO.

In addition to the negative consequences for meeting India's ICT connectivity goals and hampering its ability to benefit from global collaboration, these policies run counter to India's longstanding international trade commitments under the WTO, its national treatment obligations under the GATT, and its G20 pledge in 2008 not to increase barriers to trade. Non-discriminatory, technology neutral and incentive-based policies are preferable to discriminatory policies that favor one producer over another.

Internet Protocol (IP) –Enabled Services

Although the Telecommunications Regulatory Authority of India (TRAI) has recommended (August 2008) to the Department of Telecommunications (DoT) to allow VoIP to connect to the PSTN, the Indian government continues to only permit VoIP to be used in closed user groups (CUGs), or just among sites. For example, if a company has two offices, they are allowed to link using an IP trunk and VoIP, but not out to the PSTN. This causes companies to maintain separate systems for internal and external communications, increasing establishment costs. If India permits VoIP to connect to the PSTN, the requirement of users to have a dual-investment in infrastructure would be eliminated. Additionally, enterprise users would realize enormous savings in the cost of moving telephones or adding telephones, and company investment in Internet communications would realize a higher return because more applications could be

managed on a single infrastructure. TIA recommends that the Indian government follow TRAI's recommendations on Internet telephony and resolve this issue immediately.

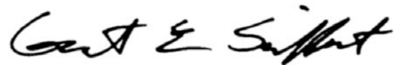
Licensing and Regulatory Efficiency

Capitalization and Licensing Fees: TIA urges India to reevaluate the basis for license application fees, capitalization requirements, and bank guarantees as it applies to telecommunications service provider licenses. As a general matter, application fees should reflect the cost of processing an application. While bank guarantees are appropriate in limited cases, such requirements should reflect the scope of business intended to be offered, and should be a temporary, not permanent requirement. India should seek to reduce high licensing fees and capitalization requirements as they reduce the amount of resources available to service providers to invest in building out their networks and connecting India's vast population.

Conclusion

TIA wishes to express its appreciation to USTR for its efforts on behalf of the U.S. ICT industry. It is important that the United States continue its efforts, both bilaterally and multilaterally, to bring about a fully competitive world market for ICT equipment. In addition to addressing the issues cited above, this can be accomplished through the enforcement and expansion of existing trade agreements, as well as the negotiation of new trade agreements.

Sincerely,



Grant Seiffert
President