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October 29, 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 Regarding the 2015 National Trade Estimate Report on Foreign Barriers to Trade (Docket Number: USTR-2014-0014)

Dear Mr. Bell:

In response to the Federal Register notice issued on August 15, 2014, the Telecommunications Industry Association (TIA) and its member companies would like to thank you for the opportunity to comment on the 2015 National Trade Estimate on Foreign Trade Barriers 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).

In 2013, the global telecommunications market was valued at $5.1 trillion, with about 76 percent of the total market located outside the United States.[2] Global investment is increasing in both wireless and fixed broadband networks. This trend includes the global deployment of long term evolution (LTE) 4G wireless networks, continued growth in smartphone penetration, and fiber deployments to enhance fixed broadband infrastructure, as well as new and innovative applications of technology that will require more capacity in global communications networks in the near future. Equally important are the global expansion of Internet-based computing and storage services, and the continued uptake of the "Internet of Things"; all of which represent important commercial opportunities for U.S manufacturers and service providers.

Members of TIA are helping to meet this demand for a strong and dynamic global digital economy – one that requires quality infrastructure, a network of telecommunications services, and a solid legal and commercial framework that contribute to a level playing field for all manufacturers and service providers. TIA advocates for three overarching principles that help to promote full, fair, and open competition in international markets.

- **Enhancing Trade Liberalization and Expanding Markets:** Secure access to international markets by promoting trade liberalizing, market-based, and technology neutral approaches to regulation in international markets. Promote transparency,

[1] Telecommunications Industry Association (TIA), "About TIA", http://www.tiaonline.org/about/
[2] TIA, "TIA's 2014-2017 ICT Market Review & Forecast", http://www.tiaonline.org/resources/market-forecast

independent regulatory authorities, nondiscrimination of foreign suppliers, and technology neutrality for the telecommunications sector.

- **Combating Protectionism and Localization Barriers to Trade:** Enforce existing WTO commitments and bilateral commitments to limit the growth of protectionism and in particular, the requirement to manufacture locally for equal access to foreign markets. Localization barriers to trade distort markets and limit access to the best technologies and products available in the global information and communication technology (ICT) supply chain.
- **Ensuring the Free Flow of Cross-Border Data:** Encourage approaches to data privacy that allow for interoperable systems that will not unnecessarily impede the cross-border flow of information and avoid regulations that require data to be stored in specific locations.

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. It is important that the U.S. government continue its efforts, both bilaterally and multilaterally, to bring about a fully competitive global market for ICT equipment.

In addition to addressing the issues cited in our submission, this can be accomplished through the enforcement and expansion of existing trade agreements, as well as the negotiation of new trade agreements. Our attached submission summarizes 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

Telecommunications Industry Association

Public Comments Regarding the 2014 National Trade Estimate Report on Foreign Barriers to Trade (Docket Number: USTR-2014-0014)

Brazil

WTO Information Technology Agreement

TIA strongly encourages Brazil to join the World Trade Organization (WTO) 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 information and communication technologies (ICTs) in Brazil. This is especially important as Brazil implements the 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.

Protectionist Measures Favoring Domestic ICT Industry

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/telecom equipment (including everything from mobile phones to optical cables) must be physically tested in Brazil. This requirement that testing be done "in country" limits TIA members' ability to flexibly and cost effectively service customers, creating unnecessary barriers in terms of certification time and increased cost. 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.

China

As a parent association of the U.S. Information Technology Office (USITO)[3] located in Beijing, China, TIA encourages USTR to review the broad range of trade and investment barriers identified in the USITO 2014 submission to USTR regarding China's compliance with its accession commitments to the WTO.[4] TIA and its member companies remain deeply concerned with a range of policies in China that would create new or perpetuate existing barriers to trade and investment in China. We would also note the general deterioration of the business environment in China for foreign ICT manufacturers, which is being hastened by the use of various policies tools that favor domestic businesses in "strategic sectors" like telecommunications.

Indigenous Standards Policy

TIA recognizes China's desire to foster domestic innovation; however, we remain concerned with China's current approach of indigenous innovation through the development of national standards that favor certain indigenously developed technologies over globally accepted standards. Moreover, China's standardization process often limits participation or completely restricts the participation of foreign companies, which further exacerbates deviations from the global standards development process. An example is the restrictions placed on foreign companies' ability to participate in standards development activities under the China National Information Security Standards Technical Committee (TC260), which develops standard for an array of ICT-related technologies, including cloud computing.

Crucially, indigenous standards are incorporated into conformity assessment processes, thereby creating technical requirements that are specific to China rather than relying on existing relevant international standards. The outcomes are technical regulations that are more trade restrictive than necessary that delay the introduction of ICT goods from other markets to China. An example is the approval by MIIT of the Enhanced Ultra-High Throughput (EUHT) wireless local

[3] The United States Information Technology Office (USITO) is an independent, non-profit, membership-based trade association, representing the U.S. information communication technologies (ICT) industry in China.
[4] USITO, "2014 Written Comments to the U.S. Government Interagency Trade Policy Staff Committee in Response to Federal Register Notice Regarding China's Compliance with its Accession Commitments to the World Trade Organization", 19 September 2014

area network (LAN) technology, rather than utilizing the globally accepted 802.11 (WiFi) suite of LAN technologies. This example and others appear to run counter to various elements in Article 2 of the WTO Agreement on Technical Barriers to Trade (TBT Agreement).

We would urge the Chinese government to implement the principle of national treatment to standards development in China by allowing the full and equal participation for all industry stakeholders, including foreign companies, in Chinese standards development organizations. We would also underscore the importance of the principle of technology neutrality, thereby allowing market forces to play a decisive role in determining the technologies and standards that will be widely adopted. We encourage China to promote the use and adoption of voluntary, consensus-based international standards as an alternative to mandating specific technology and related standards.

Finally, we would note the effectiveness of the "multi-path approach" to the development of international standards, rather than reliance only on certain standards bodies that adhere to national frameworks. There are a wide variety of standards development organizations – from the most formal to the least formal – that develop widely adopted, effective international standards. There are also a broad range of consortia involved in the development of standards in cutting edge technologies. We encourage the Chinese government to more fully participate in these international standards development activities as an alternative to a closed system of standards development, which will ultimately impede domestic innovation and increase costs for Chinese manufactured products.

Anti-Monopoly Law

TIA notes the purpose of China's *Anti-Monopoly Law* (AML) is to prevent monopolistic behavior and enhance competition in China's commercial environment. While this is a laudable goal, recent AML investigations by Chinese authorities appear to be distorting the AML and related laws to target foreign companies as an additional policy tool to support China's national industrial policy objectives. Further underscoring this fundamental policy approach, are officials within the National Development and Reform Commission (NDRC) that have been publicly outspoken regarding the important role industrial policy should play in anti-trust enforcement.

The Chinese companies that benefit from these AML enforcement cases are often national champions in various strategic sectors, including the telecommunications sector. The companies targeted for investigation are disproportionately foreign. Underscoring this worrisome trend is the fact that all transactions blocked or conditionally approved by the Ministry of Commerce (MOFCOM) to date have involved foreign companies, and the resulting curtailment of intellectual property rights (IPRs) appears to be designed to strengthen the bargaining position of domestic licensees.

Conformity Assessment and Type Approval

The use of conformity assessment and type approval in the telecommunication sector are important to meeting the regulatory objectives of interoperability, non-interference, and the protection of health and safety. However, 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, 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.

We recommend that China continue to open up the China Compulsory Certification (CCC) testing market to foreign invested testing and inspection bodies, following the July 31 publication by the Certification and Accreditation Administration of China (CNCA) of the *No. 25 Notice (2014) on The Supplementary Decision on CCC Designated Certification Bodies and Testing Labs for public review*, which included two new foreign-invested testing labs - one for household electrical appliances (CNCA-01C-016) and one for A/V equipment (CNCA-01C-017).

China maintains three separate testing and certification processes for telecommunications equipment – the Radio Type Approval (RTA), the Network Access License (NAL), and the CCC. 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*".[5]

While there has been some limited action to streamline aspects of the three separate testing and certification procedures, we would urge China to look for ways to further address the underlying problem of redundancy. TIA suggests 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.

We would also note the financial impact of the redundant testing and certification procedures, which can cost between U.S. $20,000 and $30,000 for a given piece of equipment. In addition, the lack of clarity for labeling requirements for type approval has resulted in inconsistent enforcement at the provincial level of government, which leads to additional costs due to relabeling requirements. TIA would urge MIIT to provide clear written requirements for labeling to reduce the amount of relabeling required, consistent with its commitment "[f]*or imported and domestic products, all bodies and agencies shall issue the same mark and charge the same fee*".[6]

Finally, TIA suggest that both the U.S. and Chinese governments look to other approaches to reducing unnecessary barriers to trade related to conformity assessment such as national treatment for testing and certification organizations and through reengagement of discussions towards an eventual telecommunications mutual recognition agreement (MRA). Given the high trade flows of telecommunications equipment between our two countries, an MRA would reduce time to market for manufacturers, lower testing and certification costs, and facilitate the

[5] WTO Protocol of Accession, "Accession of the People's Republic of China", WT/L/432, 10 November 2001 Article 13.4(a)
[6] Ibid.

exchange of information on technical regulations and policies, among other mutual benefits to Chinese and U.S. industry. As APEC member economies, China and the United States have an existing basis for discussions under the APEC Telecommunications and Information Working Group (APEC-TEL), which has in place a mutually agreed to framework MRA.

Expansion of Telecommunications Services Regulations

In 2013, the Ministry of Industry and Information Technology (MIIT) released 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). Taken together, the revisions to the Telecom Services Catalogue and the Trial Operations Measure will create new market access barriers that will have major negative effects on the ability of ICT companies to effectively compete in China's ICT and services sector.

While the two measures have not been implemented, the negative ramifications of these measures to the ICT sector would be significant. 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 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. Examples of ICTs and related services that would be inaccurately reclassified under draft revisions to the Telecom Services Catalogue include cloud-based computing services; electronic commerce; and audio, video, and application software. The end result would be a greatly expanded level of regulatory oversight by MIIT that is inconsistent with China's WTO commitments.

Questionable Anti-Dumping Investigation Practices

TIA remains concerned about China's compliance with its WTO commitment on antidumping. Despite numerous WTO dispute panel rulings against China on its administration of antidumping cases, China continues to accept cases that are inconsistent with its WTO obligations. China has repeatedly targeted the global optical fiber industry, initiating numerous cases, all of which have substantial flaws. These flaws, all subject to previous WTO cases, include failure to meet WTO standards on injury or threat of injury, ignoring market conditions, especially existence of merchant markets, and failing to meet transparency and disclosure requirements.

The continued use of flawed processes to initiative antidumping investigations and the expansion of the scope of the products under investigation by China's authorities indicate that these investigations may be motivated by protectionism, as China develops its domestic optical fiber

industry. TIA urges China to refrain from instituting antidumping investigations that are not consistent with its WTO commitments under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO Anti-Dumping Agreement).

India

Import 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] 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 initial analysis strongly suggests that these products, *regardless of the underlying technology within the products*, should continue to receive duty-free treatment under the ITA. We urge the Indian government to rescind the 10 percent tariff as expeditiously as possible.

The Notification includes four broad categories of telecommunications equipment and technologies that would be affected by the duty increase:

- Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers;
- Optical transport equipment, combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS), Optical Transport Network(OTN) products, and IP Radios;
- Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products;
- Multiple Input / Multiple Output (MIMO) and Long Term Evolution (LTE) Products.

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.

The products in *Notification 11/2014-Customs* are, indeed, covered under the ITA in both "Attachment A" and "Attachment B" of the Annex to the ITA used to identify products that fall under the purview of the Agreement. In Attachment A of the ITA, all telecommunications products in the Harmonized Tariff Schedule (HS) 8517 were affirmatively covered. Moreover,

[7] Government of 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

Attachment B reinforces the coverage of all network equipment through a list of specific products covered by the ITA, regardless of where the product may be classified in the HS (*i.e.* Attachment A of the ITA).

Telecommunications Security-Related Amendments

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] We respect the legitimate concerns of India regarding the security of its network and would urge the DoT to delay the implementation of certain aspects of the security-related amendment to allow for deeper engagement with domestic and foreign industry – including service providers, as well as the manufacturers and suppliers of telecommunications equipment. More robust and thorough engagement with all industry stakeholders by the Government of India will help to identify potential alternative approaches to meeting India's security-related needs, while avoiding unnecessary barriers to trade in India's vitally important telecommunications sector.

***In-Country Security Testing Requirement*:** 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. The new implementation date for the in-country testing requirement is April 1, 2015. The requirement to test for security assurance in a specific geographic location goes against global norms and does not in itself enhance security. Indeed, there are longstanding internationally accredited/recognized laboratories conducting testing and certification for security assurance and the location where the test is performed, in accordance with global best practice, does not have any bearing on the accuracy of the test in question as long as the laboratory has achieved the appropriate certification.

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, which are critical for the ICT industry.

***Required Facility Inspection of Vendors*:** The revised licensing agreements require that the vendor, through its agreement with the TSP, allow the TSP, licensor (*i.e.* 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

[9] Department of Telecommunications, "License Agreement for Unified License", Chapter 6

negatively impact a vendor's ability to effectively and efficiently get products into the marketplace.

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

***Security Breach/Blacklisting of Products*:** The revised licensing agreements 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 security-related 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 TSPs and vendors. 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 constituted by the licensor/DoT to identify and define these terms.

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 the establishment of 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 network security, we recommend that the liability provision not be strictly applied in terms of penalties. Rather, the committee, once properly constituted under a clear framework of due process, should be given the discretion to determine the appropriate penalty in all cases.

Local Content Requirements for Government Procurement

TIA remains concerned with the revised Preferential Market Access Policy for Government Procurement (PMA-G) due to the market access barriers to India's government procurement market.[10] Although India is currently not a member of the WTO Government Procurement Agreement (GPA), we would urge caution in implementing a policy of forced localization for India's procurement market, whichwill invariably lead to limitations on the availability of the most cost effective and advanced ICT products available. Indeed, this would likely hold true even for ICT products manufactured in India.

Like all countries that manufacture ICT products, India's ICT manufacturing base is dependent upon a globally flexible supply chain that is characterized by intense competition and fluctuations in price and supply of different inputs. Products and their components may be designed, manufactured, and assembled in different locations. Market demands are such that it would be impractical for the commercial sector to eliminate the use of global resources or a distributed supply chain model. And while we recognize that there are some situations that may require additional procurement requirements to enhance security, we would underscore that the focus of any product security concerns must always be on whether the product is secure rather than the amount of local content.

As the Indian government continues implementation of the PMA-G policy, we would recommend that a robust stakeholder process be established that will ensure the meaningful participation of both domestic and foreign industry to ensure a PMA-G policy that allows for the flexibility for procuring agencies to purchase products based on performance, operational needs, and overall cost, rather than focusing on local content requirements. And while India many not be ready to join the GPA, we would encourage the Indian government to consider adopting the practices in the GPA as a way to enhance its own access to other government procurement markets around the world.

Freedom to Use Strong Encryption

India does not permit the use of strong encryption online, which has placed many companies in a precarious operating situation in the country. The use of strong encryption is a global norm for securing information online, such as confidential business information, financial information, online transactions and internal government communications, from intrusion by hackers, competitors and other wrongdoers. Strong encryption also enables India's rapidly growing IT-enabled services and business process outsourcing industries, which rely on strong encryption to secure their global clients' information.

We understand that India has not yet released a new encryption policy as part of its implementation of the 2008 IT Act Amendments.[11] In order to create strong and workable encryption policies, we recommend India develop public-private partnerships that are open to all

[10] Department of Electronics and Information Technology (DeitY), "Revised Notification: Preference to domestically manufactured electronic products in Government Procurement", December 2013

[11] Ministry of Communications and Information Technology, Department of Electronics and Information Technology, "The Information Technology (Amendment) Act, 2008", Chapter XIIA Section 84(a), 5 February 2009

stakeholders to discuss encryption and broader information security issues. Since information security has a significant effect on privacy, the government should require due process in the judicial system that allows law enforcement access to network information, but at the same time respects the legal rights of an individual.

Korea

Government Procurement

***Security Verification Requirements*:** 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.[12] 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. 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 procuring agencies to develop their technical specifications independently;

[12] Common Criteria Portal, "About the Common Criteria – Purpose of the Arrangement"

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 Article 2.4 of the WTO TBT Agreement.

Cross-Border Data Flows and Local Data Storage

***Restrictions on Cloud Computing*:** We understand that there is proposed legislation in Korea that has the potential to introduce new restrictive regulations for cloud computing services that could impede the growth of cloud services and introduce barriers to U.S. cloud service providers. Areas of concern include potential restrictions on data center locations and the ability to transfer data across borders, as well as certification systems for cloud service providers. Rather than developing a new regulatory regime for cloud computing, we would encourage the Korean government to take into account existing laws and policies that already protect data and address security concerns. In addition, we would urge the continued dialogue on best practices for Internet services through the U.S.-Korea ICT Policy Forum.

Mexico

Conformity Assessment and Type Approval

TIA applauds the U.S. and Mexican governments for signing a Mutual Recognition Agreement for telecommunications (MRA) in May 2011 that will allow Mexican regulatory authorities to accept test results, which determine the conformity of telecommunications equipment with Mexican technical requirements, performed by recognized U.S. laboratories. Passage of the U.S.-Mexico MRA will reduce technical barriers to trade for U.S. telecommunications manufacturers exporting to Mexico, saving ICT manufacturers the time and expense of additional product testing. TIA encourages both governments to continue working together to urge Mexico's telecommunications regulatory, the *Instituto Federal De Telecomunicaciones* (IFT), to take the remaining necessary actions so that the MRA can be implemented as soon as possible.

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". [13] 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*". [14] Currently, Russia has in place a complex and non-transparent licensing regime that unnecessarily impedes the importation of goods that incorporate 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. The implementation of activity licenses further impedes commercial activity for imported products with encryption technology by requiring separate licenses for the resale and servicing of these products after their importation.

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. [15] 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 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 (Russia, Belarus, and Kazakhstan).

[13] 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
[14] *Ibid*., Para. 472
[15] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Category 5 – Part 2, Accessed on 28 August 2013

Copyright Levy System

With regard to the management of copyright levies in Russia, the Russian Federation committed in the Working Party Accession Report to "*adopt necessary measures to monitor and hold accountable organizations engaged in collective management of rights to ensure that right-holders received remuneration that was due to them*".[16] While we respect the need to compensate copyright holders for their works, copyright levies tend to be an inexact method of distributing remuneration for a variety of reasons, which affect ICT manufacturers and importers to the Russian market. Examples of the challenges encountered include inconsistent application of the copyright levy, difficulty in determining an equitable distribution of remuneration to rights holders, and in some cases, issues regarding the transparency of collection agencies.

TIA continues to be concerned with the administration of the existing copyright levy system administered by the Russian Union of Right-Holders (RUR), which is the accredited organization for the collection and distribution of remuneration to rights holders in Russia. We were encouraged last year by the announced review of Russia's current copyright levy system by the Ministry of Economic Development (MED) in its consultation request. However, we understand that the consultations and review have not yet been completed, and would urge the MED to complete the review and consultations as expeditiously as possible.

A transparent process is essential to the effectiveness of a copyright levy system; in particular, in the areas of how the scope[17] and the amount of a copyright levy are determined as well as the process of distributing remuneration to rights holders, which are lacking in the current system administered by the RUR. This lack of transparency increases the difficulty to meet the commitments by Russia to monitor and hold accountable the RUR. We would also note our concern that the RUR, as the accredited collection organization, does not appear to have the legal authority to effectively administer the copyright levy system. Furthermore, for those companies that have entered into contracts, the RUR continues to assert the right to reject these contracts at any time, which increases the uncertainty with respect to the current copyright levy system.

In addition, we would note that the current copyright levy system allows for the unequal treatment of importers of products as compared to domestic manufacturers. The current system requires the Russian Customs Authority to report to the RUR all imported products that fall under the copyright levy system, while domestic manufacturers are allowed to self-declare their products, resulting in a higher burden for imported goods. The current system also differentiates the scope of product coverage for imported products as compared to domestic products, which exacerbates the concerns of companies with regard to entering into agreements with the RUR as the accredited collection society.

[16] 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. 1216, 17 November 2011

[17] The current list of levied products, accredited by the Decree October 14, 2010, No. 829, contains products which do not have any recording function (*e.g.* DVD players) and products which are not used for reproduction of copyrighted works for private purpose (*e.g.* digital still cameras). These are clearly inconsistent with the article 1245 of the Civil Code of the Russian Federation (CC RF).

We understand that in 2014 the Ministry of Culture has commenced inspection of alleged non-payment for some businesses, which appears to primarily focus on foreign companies doing business in Russia. Given MED's consultations and review of the current copyright levy system, TIA requests a halt to these inspections by the Ministry of Culture and a withdrawal of the Ministry of Culture's orders as a result of the inspections until the MED has completed its review process and issued recommendations.

We urge Russia to reexamine the practicality of copyright levies as a way to distribute remuneration to rights holders for alternative approaches that provide a more transparent and effective means of remuneration, which could include licensing directly from rights holders to users by including the remuneration in retail prices, with or without digital rights management, or direct government subsidies. In addition, we would strongly encourage USTR to examine the disparity of treatment between importers and exporters and to pursue the issue of operational transparency of the RUR.

With respect to Russia's commitments related to collective management of rights and distribution of remuneration, we would urge the MED to complete its review of the current copyright levy system to address the shared concerns that we have provided, with the goal of developing a transparent system that treats all products equally. Finally, we would also urge the Russian Federation to immediately dismiss criminal proceedings against importers which have not concluded agreements with the RUR and, as a result, have not yet started to pay copyright levies because such proceedings have no legal grounds.[18]

Localization Requirements for Personal Data

We wish to note our concerns regarding the implementation of Federal Law No. 242-FZ[19], which would establish localization requirements for the personal data of Russian citizens. In addition to concerns with the general policy of data localization, we are concerned with the broad scope and vague definition of "personal data" in Federal Law No. 242-FZ. We understand that there is consideration of changing the original implementation date of September 2016 to January 2015, which will create implementation problems for global and Russian industry that depend on the ability to transmit data across borders.

The free flow of information across borders is critical for a broad range of industries by facilitating access to international markets, lowering operational costs by leveraging global computing resources like cloud-based services, and providing a platform for a variety of new and

[18] According to Article 1245 of CC RF, the legal nature of copyright levy is categorized as a civil matter. According to the Decree October 14, 2010, No. 829, payment of copyright levy shall be made in pursuance of a contract concluded between the importer of the levied products and the accredited organization (RUR). Article 421 of CC RF establishes freedom of contract principle. No compulsion to conclude a contract shall be allowed, excluding any cases when the obligation to conclude the contract is fixed by CC RF, any law or a voluntary obligation. Meanwhile, the legislation fixes no importer's obligation to conclude contracts with the accredited organization. So, objectively importers which have not concluded with RUR are innocent under the current system. The same thing is described by the MED in its consultation request.

[19] Federal Law No. 242-FZ "On Amendments to Certain Legislative Acts of the Russian Federation for Clarification of the Procedure of Personal Data Processing in Information and Telecommunication Networks" was adopted on 21 July 2014.

innovative business models. We would urge the Russian government to abstain from policies that unnecessarily impede the cross-border flow of information, which will hinder Russia's further integration into the global digital economy.

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