

*Is the United States Trade Representative's monitoring and enforcement of its trading partners' obligations on telecommunications services market access still credible?*

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<sup>1</sup> The views expressed in this paper are my own, and do not necessarily reflect those of Telstra Corporation Limited. I have been greatly assisted with sections 5 - 8 and 11 of this paper, as well as the collation of the data in Appendices A - D, by Robert Aamoth and Robert Cassidy of Kelley Drye Collier Shannon, Washington D.C. However, any errors or omissions in these sections and appendices are solely my own.

## Abstract

*This paper examines the legal context and practise of the United States Trade Representative ('USTR') in monitoring and enforcing trade law obligations in the supply of telecommunications services, in respect of countries with which the US has entered into trade agreements. The USTR conducts this activity primarily through the vehicle of two distinct annual review and reporting processes, the 'section 1377 report' and the National Trade Estimate report. The paper examines the background to each report, and analyses why they have differing content despite covering the same topic of trade barriers to telecommunications services market access for US suppliers. In considering US trade law enforcement in this area, the World Trade Organisation's 2004 US-Mexico Panel decision is also briefly discussed.*

*The second major focus of the paper is the recent trade monitoring activity of the USTR concerning the application of the Australia – United States Free Trade Agreement ('FTA') which came into force at the beginning of 2005. While the USTR has commented on the Australian telecommunications market in both its reports each year since 2002, the FTA has a specific telecommunications chapter with greater and more detailed obligations than the multilateral WTO trade texts. In 2006 the USTR responded to lobbying by US suppliers by issuing a strong attack on the conduct of the former incumbent, Telstra. The comments made by US suppliers and Telstra's reply comments are summarised. The paper considers the credibility of the USTR's criticism in respect of specific regulatory issues such as geographic deaveraging of rates for the unbundled local loop service, and the corresponding impact on universal service related policy in Australia, by citing inconsistent US domestic regulation.*

*The paper concludes by questioning whether the Australian government's long-held practise of declining to respond publicly to the USTR's reports (a practise not followed by other countries such as Singapore) will continue to be sustainable after the full privatisation of Telstra.*

## Contents

1.	Background: the Australia-US Free Trade Agreement .....	4
2.	The Telecommunications Chapter in the FTA .....	5
3.	Intentional ambiguity in trade law texts .....	6
4.	Trade law compliance monitoring by the USTR.....	7
5.	Legislative context of the section 1377 review process .....	11
6.	The USTR's two distinct phases of use of section 1377 .....	13
6.1	<i>Country-specific phase, 1996 to 2001</i> .....	14
6.2	<i>'Matrix' issues-based phase, 2002 onwards</i> .....	15
6.3	<i>Still much bark, but the section 1377 review process is declining in bite</i> .....	16
7.	Legislative context of the NTE Report on Trade Barriers .....	18
8.	Why two reports on telecommunications trade issues? .....	19
9.	The 'Telmex' WTO panel decision .....	21
10.	The 2006 section 1377 review – Australia back in the headlights .....	22
10.1	<i>The Primus and CompTel comments, and Telstra's reply</i> .....	23
10.2	<i>The CCC submission</i> .....	27
10.3	<i>The USTR's 2006 reports</i> .....	27
11.	The USTR's comments do not reflect US domestic regulation .....	32
12.	Conclusion.....	36
	Appendix A: Country-specific phase of USTR section 1377 reports, 1996 – 2001 .....	39
	Appendix B: 'Matrix' or issue-specific phase of USTR section 1377 reports, 2002 onwards.....	43
	Appendix C: Individual country issue mop-up in section 1377 reports, 2002 onwards .....	46
	Appendix D: Network functionalities removed by the FCC from the mandatory UNE list since 1999 .....	49

## 1. Background: the Australia-US Free Trade Agreement

The bilateral Free Trade Agreement ('FTA') between Australia and the United States is the subject of ongoing political controversy. Critics claim that the Australian government failed to extract sufficient improvements in market access to the US for Australian agricultural produce, but made excessive concessions on intellectual property rights. The alleged impact of the FTA on the Pharmaceutical Benefits Scheme was a key issue in the 2004 Australian federal election campaign. The Australian government has responded by pointing to a significant increase in goods and services exports to the US since the FTA came into force at the beginning of 2005.<sup>2</sup> Australia's chief negotiator argues that, "while we may not have gained everything we wanted, we did achieve gains in agriculture and elsewhere that we simply could not have done through the World Trade Organisation."<sup>3</sup>

The ongoing controversy over the FTA is driven by a growing public understanding that once Australia has entered into a trade agreement, there is the possibility of enforcement of its terms if Australian domestic law or regulation is found to be non-compliant. Chapter 21 of the FTA provides for dispute resolution, which begins with attempted face-to-face resolution by the two governments, but can be escalated to an adjudicatory panel. In its ruling the panel can order sanctions such as trade compensation, similar to the dispute resolution process in the World Trade Organisation ('WTO'). Australia is a veteran litigant in WTO panel proceedings, but to date there has been no dispute taken by either government to a panel under the FTA (only governments may bring disputes, not private individuals or corporations) nor under the other recent Australian bilateral trade agreements with Singapore and Thailand. It is unclear how long this honeymoon period will continue, but the first dispute is likely only a matter of time.

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<sup>2</sup> See, for example, the exchange of letters in the *Australian Financial Review* between Patricia Randal of the Public Interest Advocacy Centre ('Abandon China free-trade talks', 13 September 2006) and De-Anne Kelly, Parliamentary Secretary to the Minister for Trade ('AUSFTA delivers outcomes', 19 September 2006, page 60).

<sup>3</sup> "Free Trade Agreements – a discussion with Chief Negotiator Stephen Deady", *Industry Magazine* (37) Winter 2006. For a contrasting view of Australia's recent bilateral trade agreement activity, arguing that bilateral agreements are trade-diverting preferential arrangements that undermine the multilateral trade system, see Ross Garnaut, "Australia, US and China: Open Regionalism in an Era of Bilateral FTAs", public lecture at Asialink, Melbourne, 22 March 2005, available at [http://rspas.anu.edu.au/economics/publish/papers/garnaut/2005\\_Australia\\_US\\_and\\_China.pdf](http://rspas.anu.edu.au/economics/publish/papers/garnaut/2005_Australia_US_and_China.pdf).

## 2. The Telecommunications Chapter in the FTA

Usually lost amid the fray over the FTA, is that it contains a chapter on trade in telecommunications services. Chapter 12 of the FTA, titled ‘Telecommunications’, is composed of 25 articles that codify domestic regulatory principles common to the US and Australia.<sup>4</sup> The chapter draws its inspiration, and a good part of its text, from the Telecommunications Annex and Reference Paper in the WTO General Agreement on Trade in Services (‘GATS’),<sup>5</sup> but is far more detailed and specific. For example, the FTA telecoms chapter imposes a specific obligation on the US and Australia to ensure that each country’s regulatory system provides for ‘dialling parity’ (Article 12.5), which enables new entrant carriers to provide preselected services to customers rather than forcing them to use annoying override codes. (Though a footnote allows the US to exempt rural local exchange carriers from both this obligation and another FTA obligation enabling fixed line number portability – creating a class of US carriers that are shielded from the FTA, about which more will be said in section 11 of this paper.)

Many of the specific regulatory obligations in the FTA, such as the obligation to ensure access is provided to network elements on an unbundled basis, retain the maddening vagueness of their WTO predecessor text when it comes to key phrases, such as that rates for unbundled access must be ‘cost-oriented’ (Article 12.10).

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<sup>4</sup> The FTA text can be found at [http://www.dfat.gov.au/trade/negotiations/us\\_fta/final-text/index.html](http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html).

<sup>5</sup> These instruments are contained in the Fourth Protocol to the GATS, which came in force on 4 February 1998 and liberalised trade in basic telecommunications services. The relevant instruments are the Annex on Telecommunications, the country-by-country Schedules of Specific Commitments, the country-by-country Lists of Exemptions from Article II of the GATS, and the Reference Paper on Basic Telecommunications. The Reference Paper sets out best-practice principles for WTO member states’ domestic regulatory frameworks in respect of basic telecommunications services, and has been adopted by the majority of WTO member states (although in some cases the Reference Paper has been adopted in modified form with key provisions stripped out, e.g. by India). The text of the Reference Paper can be found at: [http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm). The Annex is available at: [http://www.wto.org/english/tratop\\_e/serv\\_e/12-tel\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm). WTO member states’ commitments can be found at [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_commitments\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm). A guide on how to decipher the template schedule in which commitments are lodged, can be found at [http://www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm).

### 3. Intentional ambiguity in trade law texts

This vagueness in critical parts of the text of the telecommunications chapter of the FTA is, in fact, intentional. The following exchange in a 2002 US congressional committee hearing between Rep. John Shimkus and an Assistant US Trade Representative, Florizelle Liser, about similar wording in the US' bilateral trade agreements with Chile and Singapore, explains:

**Shimkus:** What does 'cost-oriented' rates mean?

**Liser:** Well, I think 'cost-oriented' is the provision of certain elements of the network at prices that we consider to be competitive, though we are leaving the actual methodology for how Singapore or Chile calculates 'cost-oriented' up to the authorities there, as we are still able to do here.

**Shimkus:** Does that make it difficult to evaluate market entry opportunities by not being able to understand how you calculate more 'cost-oriented' rates?

**Liser:** Here again, we want to have it so that 'cost-oriented' is a basic principle but at the same time we want to provide essential flexibility to the authorities in those markets where they know how the market works, they know how telecom services have evolved in those markets to determine what's the best methodology for calculating what is, in fact, 'cost-oriented'.<sup>6</sup>

The aim in bilateral trade agreement texts, as Liser puts it elsewhere in her testimony, is to strike a "cheerful balance" between putting in place headline principles for market access and pro-competitive domestic regulation on the one hand, and the need

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<sup>6</sup> Hearing of the Commerce, Trade, and Consumer Protection Subcommittee of the House Energy and Commerce Committee concerning "Telecommunications and Trade Promotion Authority: Meaningful Market Access Goals for Telecommunications Services in International Trade Agreements", 9 October 2002, at page 15 of the record.

to allow flexibility for changes in regulatory policy often forced by technological developments on the other hand.

In multilateral agreements the use of vague terminology often has a more pragmatic, if less cheerful, motive: the signatory states have vastly different institutional regulatory arrangements, often reflecting a differing political structure, hence text that is open to broad interpretation is intentionally adopted. A notorious example is Article 5 of the WTO Reference Paper, titled 'Independent regulators', that requires the regulatory body to be "separate from, and not accountable to, any supplier of basic telecommunications services." Some WTO members regard this as requiring an institutionally separate and independent regulatory body along the lines of the Office of Communications ('Ofcom') in the UK or the Australian Competition and Consumer Commission ('ACCC') in Australia. Other WTO members say this is not what they agreed to at all, and they will be fully compliant with Article 5 if their relevant Ministry is merely a separate entity to the telecommunications carriers. For example, policy setting and day-to-day regulation are both carried out by the Japanese Ministry of Internal Affairs and Communications. The former head of the Malaysian Communications and Multimedia Commission, Tan Sri Nuraizah Abdul Hamid, said bluntly that, "the FCC and Ofcom are not relevant models for us."<sup>7</sup> In some countries that have signed up to the Reference Paper, the state retains control of all basic telecommunications services operators. For example, in China senior executives are routinely revolved by the government between jobs at the competing state-owned carriers.<sup>8</sup> Yet China would argue, some believe plausibly, that it is nonetheless in full compliance with Article 5 of the Reference Paper.

#### **4. Trade law compliance monitoring by the USTR**

Although key provisions in the WTO texts on telecommunications were intentionally left ambiguous at the time of their conclusion, it was hoped that in the process of

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<sup>7</sup> Quoted by Marina Bidoli, "Follow the Leader", *FutureCompany*, 29 March 2002. Although more recently the Malaysian regulator has displayed an admirable degree of independence.

<sup>8</sup> This last occurred in November 2004, when the chairman-president of China Unicom was named as general manager of China Mobile. In the same reshuffle the deputy general manager of China Mobile became the general manager of China Telecom; and the vice-president of China Telecom became chairman of the China Unicom board. ("Reshuffle a prelude to mergers", *People's Daily Online*, 10 November 2004, available at [http://english.people.com.cn/200411/10/eng20041110\\_163368.html](http://english.people.com.cn/200411/10/eng20041110_163368.html).)

implementation by the 69 signatories some common interpretation would ultimately emerge. From the date of the WTO agreements on telecommunications coming into force in 1998, the US has been forcefully articulating its interpretation of the agreements, by repeatedly alleging non-compliance by its trading partners.

The US was instrumental in negotiating the terms of the WTO texts on telecommunications in the mid-1990s. Several of the key competition principles of the 1996 US Telecommunications Act found their way into the WTO Annex on Telecommunications and the Reference Paper. The United States Trade Representative ('USTR') at the time, Charlene Barshefsky, claimed that, "the US has effectively exported American values of free competition, fair rules and effective enforcement to global telecom services markets."<sup>9</sup> The interpretation applied by the USTR over the past 8 years to its trading partners' WTO obligations on telecommunications services market access, therefore, reflects the philosophy of the 1996 US legislation, or at least the manner in which the US Federal Communications Commission ('FCC') applied that legislation until around 2003.

The USTR is responsible for monitoring compliance by trading partners of the US with their trade law obligations, and for initiating action to enforce those obligations where remedies are available. This activity by the USTR would probably pass completely unnoticed by the Australian telecommunications industry, and by the general public, save for occasional press reporting on the USTR's so-called 'section 1377 report'.

In 2001 attorneys acting for the US parent of Australian carrier Primus Telecommunications lodged a lengthy treatise with the USTR, alleging a raft of "competition issues in the Australian telecommunications market".<sup>10</sup> This was augmented in March 2002 by a further letter from Primus' US attorneys accompanied by a voluminous sheaf of press cuttings containing negative comment on Telstra's conduct, and alleging this gave rise to various breaches of Australia's commitments

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<sup>9</sup> Testimony of USTR Charlene Barshefsky before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Commerce Committee, 19 March 1997, at page 1 of the record.

<sup>10</sup> Swidler Berlin Shereff Friedman LLP, "Competition Issues in the Australian Telecommunications Market", 17 September 2001.

under the WTO telecommunications texts, including “the lack of a truly independent regulator”.<sup>11</sup>

Sometime in November every year the USTR publishes a notice in the Federal Register calling for comments by US industry under section 1377 of the Omnibus Trade and Competitiveness Act of 1998 (‘Trade Act of 1988’).<sup>12</sup> The comments sought are on the operation, effectiveness of, and implementation of the WTO telecommunications texts, as well as any other WTO agreement affecting market opportunities for telecommunications products and services of the US, and any telecommunications provisions in bilateral free trade agreements that the US has concluded (the section 1377 report process).

The process under the section 1377 proceedings is typically that comments must be filed with the USTR by mid-December. It then publishes these comments on its website and invites reply comments by mid-January. Those reply comments are also then published. (In some years the entire cycle runs up to a month or more later, i.e. the Federal Register notice is only published in December.) The USTR then reports its findings around April every year.

Confusingly, the USTR also publishes another, more general annual report, the National Trade Estimates Report on Foreign Trade Barriers, which examines trade barriers of trading partners in all sectors of the economy, from import tariffs on goods to agricultural quotas, but also including telecommunications services.

The USTR released its section 1377 report in April 2002, stating in respect of Australia that,

“USTR has received complaints that Australia's telecom regulator has not acted impartially toward competitors to Telstra - Australia's 50.1 percent government-owned telecom operator. USTR will monitor

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<sup>11</sup> Swidler Berlin Shereff Friedman LLP, letter to the USTR on behalf of Primus dated 14 March 2002.

<sup>12</sup> 19 USC. 3206.

such developments closely and will continue to urge Australia to fully divest its shares of Telstra.”<sup>13</sup>

That same month the USTR’s 2002 National Trade Estimates Report was released, saying:

“Serious concerns have been raised about the apparent inability of Australia’s telecommunications regulator to curb alleged anticompetitive conduct by the government-owned Telstra Telecom including delays in access to its network and the inflated pricing of its wholesale services. Such conduct limits US carriers’ ability to compete effectively in this market. The United States continues to urge the Australian Government to privatize its 50.1 percent share of Telstra.”<sup>14</sup>

Because neither of the Primus submissions was lodged as part of the USTR’s regular section 1377 review cycle, they do not appear on the USTR’s website and Telstra remained unaware of the Primus allegations until the USTR issued its 2002 reports. The reports appeared to impugn the ACCC and the Australian government as much as Telstra, but there was no public response from the Australian government. Telstra therefore submitted its own detailed rebuttal of the Primus allegations to the USTR in August 2002,<sup>15</sup> defending the independence of the ACCC by pointing to a prior FCC finding that Australian telecommunications regulators were “sufficiently separate from the carriers they regulate”;<sup>16</sup> noting that the Australian government had committed to full privatisation of Telstra but this was a matter for the Australian parliament, the upper house of which the then-government did not control; and providing various data illustrating that wholesale rates were priced at least as low as those in the US.

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<sup>13</sup> All documents in section 1377 proceedings from 2002 onwards are available at:

[http://www.ustr.gov/Trade\\_Sectors/Telecom-E-commerce/Section\\_1377/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Telecom-E-commerce/Section_1377/Section_Index.html)

<sup>14</sup> USTR, *National Trade Estimates Report on Foreign Trade Barriers*, April 2002, available at:

[http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2002/2002\\_NTE\\_Report/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/2002/2002_NTE_Report/Section_Index.html)

<sup>15</sup> “Australia’s Competitive Telecommunications Market: A Regulatory Update”, Vinson & Elkins LLP on behalf of Telstra, 26 August 2002. Copy available from the author on request.

<sup>16</sup> *Cable & Wireless Inc. et al.*, 12 FCC Rcd 21692 (1997), ¶43.

After the flurry of activity around the USTR's 2002 reports, the process settled into an annual ritual of the USTR issuing its call for comments towards the end of the year; then in December/January one or more of Telstra's US-owned competitors lodging comments critical of telecommunications competition regulation in Australia (usually via the US competitive local exchange carrier lobby group CompTel) and alleging that Australia was thereby in breach of its WTO commitments; then Telstra filing reply comments rebutting the claims in a filing lodged early in the new year; then the USTR releasing its reports in April, usually adopting some criticism of the ACCC and Telstra, and always repeating its call for the full privatisation of Telstra.

Before more closely examining the USTR's most recent section 1377 review cycle, that of 2006, it is helpful to explain the background and purpose of these two annual USTR trade compliance monitoring processes.

## **5. Legislative context of the section 1377 review process**

The US Trade Act of 1988 represented a shift in legislative efforts to shape US trade laws and policies, largely resulting from a perceived failure of US administrations to address the widening trade imbalances with Japan, as well as to set negotiating priorities for the Uruguay Round of Trade Negotiations that had recently commenced. Part 4 of that legislation is known the 'Telecommunications Trade Act of 1988',<sup>17</sup> and the relevant provisions are sections 1374 to 1377.

Section 1374 provides for the investigation of foreign telecommunications trade barriers for the purpose of identifying 'priority' foreign countries. The USTR considers the following key factors:

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<sup>17</sup> The purpose of the telecommunications provisions in the Telecommunications Trade Act was to foster economic and technological growth of, and employment in, the United States telecommunications industry; to secure a high quality telecommunications network; to develop an international consensus in favour of open trade and competition in telecommunications products and services; to ensure the countries which have made commitments to open telecommunications trade fully abide by those commitments; and, to achieve a more open world trading system for telecommunications products and services through negotiations.

- the nature and significance of acts, policies or practices that deny mutually advantageous market opportunities for telecommunications products and services of US firms;
- the economic benefits accruing to foreign firms from open access to the US market;
- the potential size of the foreign market;
- the potential increase in US exports of telecommunications products and services; and
- measurable progress being made to eliminate objectionable acts, policies, or practices.

Once a country has been designated a ‘priority’ foreign country, section 1375 requires the US President to enter into negotiations with the foreign country for the purpose of reaching a multilateral or bilateral trade agreement. The period of negotiations is one year which can be extended for a further two one-year periods. If no agreement is reached, the President is authorized (under section 1376) to take whatever action that is appropriate and most likely to achieve an agreement. South Korea has been the only country designated as a ‘priority’ foreign country under the Act, in July 1996. In 2001, prior to its accession to the WTO, Taiwan was threatened with designation.

Section 1377 requires the USTR to determine whether any act, policy, or practice of a foreign country that has entered into a relevant trade agreement with the US,

- is not in compliance with the terms of the trade agreement, or
- denies mutually advantageous market opportunities in that foreign country to US telecommunications goods and services.

If the USTR finds that either of the above is true, then section 304 of the Trade Act of 1988 provides for sanctions against the foreign country. These sanctions would preferably be in the telecommunications sector, but could be imposed in any trade sector. In 1988 when the law was passed, trade sanctions would have been unilateral with the US acting as the investigator, prosecutor and judge since no binding dispute resolution mechanism existed under the General Agreement on Tariffs and Trade, the

predecessor to the WTO. But the United States committed in the Uruguay Round Implementation Act to use WTO dispute settlement for all matters falling within the ambit of the WTO agreements, so the US would no longer use the section 304 unilateral sanctions path.

The Telecommunications Trade Act of 1988 was therefore intended to force the executive branch of the US government to act aggressively in trade issues involving telecommunications. In substance, however, the section 1377 review process by the USTR is the only part of the legislation that remains in regular use today.

## **6. The USTR's two distinct phases of use of section 1377**

Two distinct phases can be observed in the USTR's use of section 1377:

- from 1996 to 2001 the USTR adopted a 'country specific' approach;
- since 2002 the USTR has changed its approach to examining generic issues related to trade in telecommunications goods and services, adopting a 'matrix' approach, while still mentioning additional country specific issues where they do not readily fit the list of generic issues it has compiled for that year.

The previous section explained that section 1377 amounted to implicit criticism by the US federal legislature that the executive branch of the US government was failing to vigorously implement its trade agreements. So, the section 1377 process was a means to assure Congress that the USTR was doing its job. Each annual review under section 1377 focused on individual countries and the specific issues related to the implementation of existing agreements on telecommunications. Similar to the so-called 'Special 301' process dealing with intellectual property rights, the USTR used section 1377:

- as leverage to ensure compliance with existing agreements covering trade in telecommunications goods and services prior to the report being issued every April; and

- as an embarrassment factor after April each year, if a satisfactory resolution could not be reached.

### 6.1 *Country-specific phase, 1996 to 2001*

**Appendix A** to this paper contains a list of the countries cited by the USTR in its section 1377 process during the country-specific phase, and the issues on which they were cited. Two countries, Mexico and Japan, featured just about every year from 1996 to 2001, reflecting the key factors in section 1374. Asian economies such as Korea and Taiwan caught the attention of the USTR due to their attractiveness as potential markets for US suppliers, and after 1998 there is a sharp focus on several of the US' traditional developed country trading partners, Canada, Germany and the UK, for their perceived tardiness in implementing the WTO telecommunications texts. The remaining countries cited in this period, South Africa, Israel, Peru and Columbia, were existing or potential destinations for US telecommunications carrier investment at the time. No doubt there were many other WTO members committing infractions of their obligations on telecommunications market access at the time, but absent complaints in the section 1377 process it seems that the USTR's gaze did not fall on them. Notably, Australia is not mentioned at all in this phase – which is why the first citation of Australia in the section 1377 report of 2002, came as something of a surprise.

In an attempt to prevent issues from becoming simple annual reviews, USTR also initiated 'out-of-cycle reviews', a device more often used in the 'Special 301' process. For example, out-of-cycle reviews were initiated with respect to Mexico and Germany in 1999 to maintain pressure on those countries' regulators as they were reviewing and implementing decisions. More generally, however, the call-for-comment stages were used by USTR to press for positive results since the pressure of being cited was at its greatest prior to issue of the section 1377 report.

In addition to using the section 1377 review process for identifying barriers to trade in telecommunications goods and services, the USTR has also used the process to highlight successes of US trade pressure. For example, the USTR cited positive

developments in resolving disputes with Peru (2000) and Israel (2000) and in long-standing disputes with countries such as Mexico and Japan.

## 6.2 *'Matrix' issues-based phase, 2002 onwards*

Following the launch of the Doha Round of WTO negotiations, the USTR adopted a 'matrix' or issues-based approach to the section 1377 review process. The USTR report now began to give primary focus to selected headline issues under review and relegated the country-specific analysis to secondary status. This approach was designed to give more attention to the US' Doha Round and bilateral trade agreement objectives in the telecommunications sector. The report focused on the measures that were inconsistent with the WTO telecommunications texts or otherwise constituted unfair trade barriers, listing against each measure the offending countries allegedly engaging in the mischief. In a second section of the report, the USTR would do a sweep of individual countries whose alleged contraventions were not otherwise covered.

This 'measure-specific' approach was designed to have the secondary benefit of demonstrating that only a few countries were not applying the WTO rules, thus hopefully generating support from all the other members on that specific issue.

**Appendix B** to this paper contains a list of the issues the USTR has identified since 2003, and the countries cited on those issues. Some of the issues identified have been staples of domestic regulatory attention in many countries over the past five years, for example mobile termination rates, and provision and pricing of leased lines. This is where Australia features, keeping good company with several other OECD jurisdictions. Given that regulators have been addressing these issues consistently across the OECD, it is questionable what real benefit the USTR derives for US suppliers by continually raising them. The effort in complaining to the USTR would likely be better spent by US suppliers participating in the domestic regulatory proceedings on issues such as mobile termination. These issues are usually well on foot, and have been for some time, by the time the USTR publishes its annual report. If a domestic regulator is already dealing with a particular issue such as mobile termination, and has remedies in mind that more than meet the USTR's demands, then

the USTR prodding on the issue is liable to be seen as an annoying interference rather than a source of pressure.

Other issues raised since 2002 are largely rhetorical, such as independence of the regulator. There is also a group of issues that are typical of developing countries, such as excessive universal service imposts, prohibitive licence fees, and non-transparent and time consuming licensing processes. Countries pursuing protectionist domestic technology development schemes are identified by the generic concern of discriminatory and unjustified technical standards and technology-specific licensing.

From an Australian perspective, the most notable development during this second phase has been that the FTA has come into force, and with it has come a significant escalation in the specificity and aggressiveness of allegations of trade law breaches in US industry comments on Australia. With 25 articles in the FTA telecommunications chapter to hang their hat on, in addition to the traditional instruments of the Annex on Telecommunications and the Reference Paper, it can be expected that if US complainants are dissatisfied with regulatory processes or outcomes in Australia, they will produce ever more detailed claims of FTA breaches.

**Appendix C** to this paper contains the mop-up list of countries about which complaints have been made by US industry since 2002, but that did not fit the generic issues list in Appendix B. These country-specific issues found in the second half of the section 1377 report usually do not make it into the USTR's press release, which focuses on the generic issues identified that year (i.e. Appendix B issues).

### 6.3 *Still much bark, but the section 1377 review process is declining in bite*

As the descriptions of the 1377 results above demonstrate, the reviews over time have become more complex and the focus more diffuse. Most of the 'easy targets' in the form of egregious anti-competitive conduct in developed nations, were picked off in the first 'country-specific' phase until 2001. More recent allegations by the USTR on telecommunications trade issues tend to get caught up in more complex, less objectively problematic conduct, for example the appropriate assessment of 'cost-oriented' pricing.

It is questionable whether the section 1377 process continues to be effective in encouraging policy changes and creating more market opportunities for US suppliers. In the decade after its introduction, the Telecommunications Trade Law of 1988 was effective in generating policy change because of the 'fear' factor of being identified in the sections 1374 and 1377 processes, with the risk of US trade sanctions being imposed unilaterally. This was the pressure that compelled Korea to reach a number of agreements with the US including market access concessions on telecommunications in 1992. Similar pressure was exerted by 'name-and-shame' lists published by the USTR in the area of intellectual property and government procurement.

With the launching of the Doha Round, the US began using the 1377 process as a mechanism for identifying negotiating objectives for the round. Thus, the process was not solely a retrospective evaluation of compliance with agreements but also a prospective evaluation of objectives for the current WTO negotiations on services. Finally, with the passage of Trade Promotion Authority, the USTR significantly expanded negotiations of bilateral trade agreements. These negotiations provided a vehicle for including binding obligations in bilateral agreements that could later become elements of regional (APEC and Free Trade Agreement of the Americas negotiations) and multilateral WTO services agreements. Thus, the complexities of the review process to a large extent mirror the complexities in the negotiating agenda for the USTR. The matrix negotiating agenda required a matrix review process.

The complexity of the 'matrix' approach to the section 1377 review process has not been without its negative effects. First, the 'fear' factor has been reduced significantly over time as more countries and practices have been added to the list. The review has effectively been reduced to publishing a menu of negotiating objectives set by private sector interests and US government agencies. With the US only ever having initiated one WTO dispute in respect of telecommunications services, against Mexico (to be discussed in section 9 below), few countries fear being identified in the 1377 review process. Second, the review process, by trying to identify and achieve a number of compliance issues as well as bilateral, regional and multilateral negotiating objectives, has lost its impact on each of those areas. Simply

put, the USTR is using the section 1377 process to achieve a number of objectives when that tool would be better employed and more effective in dealing with one objective, for example, compliance with existing agreements.

## **7. Legislative context of the NTE Report on Trade Barriers**

Section 303 of the Trade and Tariff Act of 1984<sup>18</sup> requires the office of the US Trade Representative to submit an annual report on significant foreign trade barriers, known as the National Trade Estimate on Foreign Trade Barriers ('NTE report'), to the President, the Senate Finance Committee, and appropriate committees of the House of Representatives. The NTE report is published in March/April of each year. The practice of publishing an annual trade report goes back to the Trade Act of 1974 which provided for an annual report by the then Special Trade Representative.

The NTE report requires an inventory of the most important foreign barriers affecting US exports of goods and services, foreign direct investment by US persons, and protection of intellectual property rights. The inventory of trade barriers facilitates negotiations to reduce or eliminate those barriers. The NTE report also serves as a valuable tool for enforcing US trade laws.

While there is no set definition for a trade barrier, it is broadly considered to be any government law, regulation, policy or practice that either protects domestic products from foreign competition or artificially stimulates exports of particular domestic products. The NTE report classifies foreign trade barriers into ten different categories that cover government-imposed measures and policies that restrict, prevent, or impede the international exchange of goods and services. It covers significant barriers whether they are consistent or inconsistent with international trading rules.

The NTE report discusses the largest export markets for the United States, now including: 58 nations, the European Union, Taiwan, Hong Kong SAR, and one regional body. If countries are excluded from the NTE report, it would be due

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<sup>18</sup> As amended by section 1304 of the Omnibus Trade and Competitiveness Act of 1988, section 311 of the Uruguay Round Trade Agreements Act, and section 1202 of the Internet Tax Freedom Act.

primarily to the relatively small size of their markets or the absence of major trade complaints by US industry.

The NTE report is based on information compiled within the USTR, the US Departments of Commerce and Agriculture, other US government agencies and US diplomatic posts abroad. In addition, the Office of the USTR requests public information through an annual notice in the Federal Register and members of the private sector trade advisory committees also supply information for the report. There is no set pattern for preparing the report, but typically the US embassy in each country prepares an initial draft based on the previous year's report which is then submitted to the USTR for further drafting. While the regional directors at the USTR have responsibility for drafting the report on each country, each section of the country drafts is also reviewed by the sector specialist. For example, the country section on Australia would be reviewed by the sectoral directors on telecommunications, intellectual property rights, etc. The draft is then submitted to other agencies for comments and suggestions. Each country chapter must be approved by the relevant agencies within the Trade Policy Committee structure, consisting primarily of the Departments of State, Commerce, Treasury, Agriculture, Justice and Defence (which plays a very minor role), and other agencies such as the Council of Economic Advisors and the US International Trade Commission.

This far more complex and multi-agency drafting process for the NTE report, as compared to the section 1377 report, explains the curious discrepancies between the two reports each year, an aspect considered at greater length in the next section.

## **8. Why two reports on telecommunications trade issues?**

The existence of two largely duplicative reports covering telecommunications trade issues is a creation of the US Congress. The USTR provided an annual report to Congress since 1974 and that report was expanded as a result of the 1974 Trade Act to become what is now known as the NTE report. When Congress was preparing the 1988 Trade Act, the consensus on the Hill was that the USTR was not effectively enforcing existing trade agreements. Moreover, in setting the agenda for the Uruguay

Round, Congress wanted to ensure that not only were efforts made to reach agreement on key areas such as telecommunication, intellectual property rights, and government procurement, but that adequate enforcement mechanisms and sanctions were available and that the USTR would have to report to the Congress on whether those agreements were enforced and whether sanctions had been applied. The USTR argued at the time that such additional reporting was not necessary, but Congress wanted to boilerplate the scrutiny and enforcement measures, and prod the executive branch of government into action.

So while the sanction provisions have fallen into disuse (due to the requirement that the US exclusively use WTO dispute resolution processes following the conclusion of the Uruguay round), the reporting requirements in 1988 Trade Act nevertheless remain. The duplication of reports covering the same subject matter, is made even more confusing by the NTE report often containing different content on telecommunications issues to the section 1377 report despite their being issued one or two weeks apart. The fact that the USTR makes no attempt to explain on its website why there are two different reports and their interrelationship, begs the question of whether process has trumped purpose in the production of these reports. The fact that the same US agency can issue two reports a week apart with commentary on telecommunications trade barriers, that contain (sometimes very) different content, is so baffling to an outsider as to invite dismissal as being one of those typical oddities of government bureaucracy.

The more persuasive view is that the NTE report contains different content on telecommunications issues because it is sourced from a far more diverse range of contributors, including US diplomats on the ground in the relevant countries who will usually write the first draft. This is a very different genesis to that of the section 1377 report, which is written by staff at the USTR with specialist telecommunications knowledge, reacting to the specific complaints made in any particular year by US suppliers. To some extent, then, the differing content of the two reports reflects different priorities and perhaps even some inter-agency disagreement within the US government – the US diplomatic corps and the various Departments represented on the Trade Policy Committee may not always be on the same page as the USTR.

## 9. The ‘Telmex’ WTO panel decision

In August 2000 the US commenced action against Mexico under the WTO dispute resolution procedures, in a complaint that concerned regulatory arrangements for carriage of international calls between the US and Mexico (the world’s busiest cross-border telephony route) imposed by the Mexican regulator. A WTO Panel ultimately ruled in the United States’ favour in April 2004.<sup>19</sup> Panel rulings do not create binding precedent under WTO jurisprudence, and this Panel expressed particular caution that its decision should be confined to the facts of the case. But the so-called ‘TelMex’ decision has enjoyed a great deal of attention because it was the very first in the WTO to deal with a services trade dispute, and it covered the interpretation of much-debated phrases in the Reference Paper such as ‘cost-oriented’ pricing, as well as application of the access commitments in the Annex on Telecommunications.

In brief, the Mexican rules provided that the largest carrier of outgoing calls to a particular international destination had the exclusive right to negotiate the terms and conditions for the termination of international calls in Mexico that then would apply to all carriers on that route. The largest carrier on all routes was the former incumbent Telefonos de Mexico S.A. de C.V. (or ‘Telmex’), but 27 other carriers were licensed to provide long-distance services of which 11 had licensed international gateways. Each international gateway operator was required to apply the same uniform settlement rate to every international direct dial call to or from a given destination, regardless of which operator originated or terminated the call. Gateway operators were required to allocate proportionate returns amongst themselves: incoming calls or associated revenues from a foreign country had to be distributed among the gateway operators in proportion to each gateway operator’s market share in outgoing calls to the relevant country. The US alleged that this scheme led to settlement rates into Mexico that were on average 77 percent above cost, using as evidence rates provided by ‘grey market’ operators bypassing the scheme. The Panel in most part agreed with the US contention that this practice was in breach of Mexico’s WTO commitments under the Annex on Telecommunications and the Reference Paper.

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<sup>19</sup> WTO Dispute Panel Report on Mexico – Measures Affecting Telecommunications Services, 2 April 2004 (WT/DS204/R). Available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/204r\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/204r_e.pdf)

A healthy academic literature has developed around the ‘Telmex’ decision, and this paper will not attempt to compete with the several good pieces already written about it, to which readers are respectfully referred.<sup>20</sup> Several authors have observed that the effect of the decision is to accelerate tariff rebalancing between long-distance and local services in Mexico, at a speed which that country’s regulatory system and socio-economic cross-subsidy settings may not be able to bear.<sup>21</sup> Sidak and Singer trenchantly criticise the Panel decision, arguing that if anything it was the US carriers who were engaging in tacit collusive conduct to maintain their margins on international calls, and that Mexico was not in breach of any of its WTO commitments.<sup>22</sup> Whatever the merits of the WTO’s ‘Telmex’ decision, it represents the high-water mark to date of USTR enforcement activity in respect of international trade obligations in telecommunications services.

## 10. The 2006 section 1377 review – Australia back in the headlines

Sections 4 - 6 of this paper, and their appendices, explain that over the past five years the USTR has received representations from US-owned telecommunications suppliers active in the Australian market, complaining of alleged breaches by Australia of its trade commitments. Most of the complaints have been directed at Telstra in its capacity as a ‘major supplier’ under the Reference Paper and more recently the FTA. As noted, though, wholesale mobile termination rates have become a more recent focus of USTR attention, and there the USTR’s argument is largely with Telstra’s mobile network operator competitors SingTel Optus, Vodafone and Hutchison ‘3’ – though the USTR has yet to mention any of those carriers by name in the Australian context, while liberally sprinkling its comments with references to Telstra.

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<sup>20</sup> For example, Hal Singer and Gregory Sidak, *Überregulation without Economics: The World Trade Organization’s Decision in the U.S.-Mexico Arbitration on Telecommunications Services*, 57 Federal Communications Law Journal 1 (2004) which is available online at <http://www.law.indiana.edu/fclj/pubs/v57/no1/Sidak.pdf#search=%22%C3%9Cberregulation%20without%20Economics%22>; and Angus Henderson, Iain Gentle and Elise Ball, *WTO Principles and telecommunications in developing nations: challenges and consequences of accession*, Telecommunications Policy 29 (2005) 205-221. See also the brief piece by Laura Sherman at [http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/workshop\\_dec04\\_e/wk\\_prog\\_dec04\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/workshop_dec04_e/wk_prog_dec04_e.htm).

<sup>21</sup> See for example Henderson et al at 214-215.

<sup>22</sup> Sidak and Singer, op.cit.

### 10.1 *The Primus and CompTel comments, and Telstra's reply*

In the USTR's 2006 report cycle, Primus and the US lobby group CompTel lodged complaints, and Telstra again responded with a detailed rebuttal. The full texts of this exchange are available from the USTR's website,<sup>23</sup> so this paper will suffice with a brief summary.

Primus' US attorneys alleged in their section 1377 comment filing to the USTR dated 16 December 2005 that the following actions either already violated or would violate the FTA:

- Telstra's proposals for regulatory reform, e.g. investment safe harbours;
- averaging of Unbundled Local Loop Service ('ULLS') wholesale pricing;
- changes to wholesale line rental charges made by Telstra at the end of 2005; and
- Telstra's contractual terms applicable to the wholesale Business DSL ('BDSL') service.

Primus further claimed that:

- the Australian government's operational separation legislation sidelines the ACCC and does not meet the standard of regulatory independence required under the FTA;
- Telstra's proposals for regulatory reform have "the apparent backing of the Finance Ministry";
- Telstra is "unique" in allegedly not having any cable-based competition; and
- Primus is the only global telecommunications company in Australia.

The Primus filing is colourful, using adjectives like "incredible", "massive", "woefully", and "completely ineffectual" in describing Telstra's alleged market dominance and the Australian regulatory system.

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<sup>23</sup> The URL for the USTR website is provided at footnote 13.

Telstra lodged its section 1377 reply filing with the USTR on 13 January 2006, summarised in the table below:

Issue	Telstra response
safe harbours	FTA Article 12.23 specifically permits safe harbours through regulatory forbearance, as has already happened in the US with roll-back of mandated access to incumbent networks
ULLS price averaging	<ul style="list-style-type: none"> <li>• Averaged ULLS pricing meets the FTA requirement of cost-orientation. The ‘Telmex’ WTO Panel decision looking at identical language stated the requirement is that actual costs in the supply of the service be reflected, and that the methodology be reasonable. ULLS price averaging meets those requirements.</li> <li>• ULLS price averaging is driven by urban-rural retail pricing parity, itself a policy approach permitted under Article 12.18 of the FTA (‘Universal Service’).</li> </ul>
wholesale line rental increases and wholesale BDSL service	Due process is being followed as required by FTA Article 12.22. Complaints made by Primus are the subject of current investigation by the ACCC. Primus should allow due process to be completed under Australian law and calling for USTR intervention is premature and inappropriate.
Operational Separation	There is no requirement in the FTA for operational separation. Australia has already complied with Articles 12.7 and 12.8 of the FTA by virtue of Part XIB of the Trade Practices Act 1974 and the Standard Access Obligations in Part XIC of that Act.
No cable competition	Optus HFC passes 2.2 million homes. Many other facilities-based competitors compete with Telstra across a range of technologies.
Primus the only global telco in Australia	Numerous global operators operate in Australia, e.g. AT&T, which has lodged detailed submissions with the USTR covering many jurisdictions but did not make any comment on Australia in the 2006 USTR section 1377 review cycle.

The Australian government initially responded to the allegations made by Primus, once they had been reported in the Australian press more than a month after they were filed, by saying that the government would “seek advice on whether the Primus submission was a serious complaint or a stunt”.<sup>24</sup> The next day Trade Minister Vaile’s spokesperson dismissed the Primus allegations, saying,

“The government rejects any suggestion that Australia is not complying with its international trade obligations under the WTO or its bilateral FTAs. In many cases, the Primus submission complains about hypothetical actions by the Australian government that have not in fact

<sup>24</sup> David Crowe, “Telstra bucking trade deal: US”, *Australian Financial Review*, 18 January 2006.

been taken. It is difficult to see how a company can claim concerns about Australia's WTO or FTA obligations when the measures complained about are not in place."<sup>25</sup>

Commenting on the Primus submission in the Australian telecommunications trade press, John de Ridder observes that Primus' objective was "clearly to cut across any [Australian federal government] cabinet instruction to the ACCC to average unbundled local loop (ULL) prices", and that a secondary objective was to protect its investment of up to \$60 million in DSLAMs to take advantage of ULL. Primus claimed that if the government aided Telstra in its fibre loop modernization, this would constitute "indirect expropriation" of competitive carriers' stranded DSLAM investments. De Ridder expresses doubt that this would be the case if it were policy to forbear from regulating all fibre investments, and notes that in US regulation such forbearance is practiced, giving rise to similar dilemmas.<sup>26</sup>

CompTel's most recent section 1377 submission picks up on De Ridder's final point, by questioning the continued moral authority of the USTR to pursue enforcement in respect of trade obligations given that the US regulatory environment has now changed so dramatically in favour of the former incumbent Regional Bell Operating Companies ('RBOCs'), coupled with rapid consolidation of the RBOCs and their former long-distance foes in a wave of mergers:

"The problem of leased lines and broadband access is not just a problem overseas. It is a problem in the United States. The FCC has slowly removed interconnection and access obligations from the incumbent network owners, shutting off network access by permitting incumbent providers to act as network gatekeepers. Actions by the FCC should not act as a restraint on USTR's ability to vigorously enforce the obligations of our trading partners. Instead, USTR should use the firm legal ground provided by the US-Mexico Panel Report to push for removal of illegal barriers to competition and active implementation of WTO and other trade obligations. At the same time, USTR should exercise its authority as the US government agency charged with interpreting and enforcing trade obligations to provide guidance to the FCC on US obligations."<sup>27</sup>

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<sup>25</sup> David Crowe, "Vaile: Telstra market power not issue for trade talks", *Australian Financial Review*, 19 January 2006.

<sup>26</sup> John de Ridder, "The US Free Trade Agreement – how constrained is telecoms regulation?" *Exchange*, 17 February 2005.

<sup>27</sup> CompTel submission dated 16 December 2005, at page 2.

This illustrates the tension between the change in direction of US telecommunications regulatory policy at home from 2003 onwards, and the USTR's continued pursuit of US trading partners on similar issues offshore. Grahame Lynch comments,

“the USTR's views on telecoms carry less weight than before as the US moves to dismantle much of the country's 1996-era competition regulation. Last month, it removed pricing regulations over ten Verizon high-speed services, including ATM, optical transmission and frame relay—a move that drew heavy criticism from the Federal Communication Commission's minority Democrat commissioners for dismantling ten years of telecom regulation without proper recourse to due process. The United States is one of few developed nations to move away from pro-access seeker regulation—others include Hong Kong, Germany and, to a lesser extent, Singapore.”<sup>28</sup>

Again, the concern being raised is that the USTR has lost the moral high ground, because on a strict trade law analysis regulatory forbearance is permissible under the WTO telecommunications texts and is explicitly referenced in Article 12.23 of the FTA. Whether or not the competitive conditions that facilitate a forbearance ruling exist, is a matter for the domestic regulatory authorities – and clearly in the US the view is that cable broadband competition justifies forbearance in respect of new fibre build by the remaining supersized RBOCs.<sup>29</sup> Even if there was any serious doubt about whether the US' new regulatory direction on telecommunications was in keeping with its trade law obligations, it is most unlikely that the USTR would heed CompTel's plea and lead a revanchist charge against the FCC. The fact that the specific forbearance instance Lynch cites amounted to a default ruling in favour of Verizon, has some interesting implications under the FTA which will be considered at the end of section 11 of this paper.

The Primus and CompTel submissions are entirely what should be expected of US suppliers, who realistically will make use of every available opportunity provided by their government to advance their commercial objectives. If Telstra were in their shoes it would likely do the same (though perhaps with fewer colourful adjectives). The section 1377 review process has long since ceased to be a serious tool for trade

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<sup>28</sup> Grahame Lynch, “US Trade Representative softens critique of Australian telecom regime”, *Communications Day*, 4 April 2006.

<sup>29</sup> See for example the summary of the current US forbearance position in *Earthlink v FCC*, decided by the DC Court of Appeal on 15 August 2006, <http://caselaw.lp.findlaw.com/data2/circs/dc/051087a.pdf>.

enforcement. These days it amounts to not much more than a forum for political pressure by the US government on domestic regulatory processes taking place in other countries, where that pressure will exact some kind of commercial benefit for a US supplier – for example, assisting Primus to obtain de-averaged ULLS rates that will enable it to cherry-pick Australia’s urban broadband customer base.

### 10.2 *The CCC submission*

While Primus’ and CompTel’s use of the section 1377 process is understandable, and Telstra was given a fair go in posting a reply, the involvement of the Competitive Carriers Coalition (‘CCC’) poses some questions. The CCC lodged a reply comment with the USTR on 9 January 2006, supporting the allegations already made by Primus and attaching a series of what appears to be unrequited correspondence from CCC Executive Director David Forman to Helen Williams, Secretary of the Australian Department of Communications. The CCC, as Forman explains, is an Australian industry association “representing the interests of non-dominant telecommunications carriers”, including Primus. However, unlike Primus most of the CCC’s members are not US-owned or controlled, they are Australian. The consequence is that Australian companies are writing to a foreign government to allege that Australia is in breach of its trade law commitments, and are calling on that foreign government to take trade law enforcement action against their own government. Of course, the section 1377 process is an open one, and anyone can write in (and does). But it is not clear that the USTR can have regard within its section 1377 mandate to the interests of foreign parties. This may have been a point Telstra would have made to the USTR had the CCC filing been lodged in the first round of comments, rather than as a reply comment to which Telstra had no further opportunity to respond.

### 10.3 *The USTR’s 2006 reports*

The USTR’s NTE report for 2006 on Australian telecommunications market access released at the end of March, is remarkably mild:

“US industry remains concerned about the ability of the majority government-owned telecommunications firm, Telstra, to abuse its monopoly power. This has included delays in making an acceptable public offer for access to its network, and the inflated pricing of its wholesale services such as leased lines and interconnection with its mobile network.

Australia’s government has made significant progress in addressing some of these issues by approving a reference interconnection offer and proposing a schedule of mobile termination rates that would introduce significant price reductions (termination rates in Australia are among the highest in Asia). Telstra has provided evidence that its leased line rates are now comparable with other competitive markets, and companies seeking to challenge these rates have the opportunity to do so under Australia’s rules.

The Australian Parliament has passed legislation to permit the sale of the remaining 51 percent share of Telstra held by the Australian government. The Australian government has not, however, addressed the issue of foreign equity limits in Telstra, now limited to 35 percent. The FTA includes several important new obligations for major suppliers, including for the resale and provisioning of leased circuits and co-location, and ensuring access for U.S. firms.”<sup>30</sup>

It is not clear why the USTR takes the view that pricing of interconnection with Telstra’s mobile network is at issue, when the current dispute in the Australian industry over the ACCC’s decision regarding the mobile terminating access service (‘MTAS’) is focused on MTAS pricing set by Telstra’s competitors Singtel Optus, Vodafone and Hutchison ‘3’ – as a visit to the ACCC’s list of current arbitrations on its website will readily reveal.<sup>31</sup> Even CompTel in its section 1377 filing pays Telstra a rare compliment by saying that Telstra’s actions in respect of MTAS are “laudable”.<sup>32</sup> But, that factual inaccuracy aside, the NTE report could hardly have prepared observers for the vastly different content and tone of the section 1377 report which followed a few days later.

In the 2006 section 1377 report the USTR takes its now standard ‘matrix’ approach of identifying a number of key issues and listing the offender countries under each issue. High mobile termination rates are identified as the #1 issue, but oddly, even though

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<sup>30</sup> USTR, *National Trade Estimates Report on Foreign Trade Barriers*, April 2002, available at : [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2006/2006\\_NTE\\_Report/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_NTE_Report/Section_Index.html)

<sup>31</sup> See: [http://www.accc.gov.au/content/index.phtml/itemId/635059/fromItemId/356715#h3\\_32](http://www.accc.gov.au/content/index.phtml/itemId/635059/fromItemId/356715#h3_32).

<sup>32</sup> CompTel submission dated 16 December 2005, at page 5.

Australia is named in the NTE report as having excessive mobile termination rates, in the section 1377 report Australia is not listed as an offender on this issue. This is not because the USTR failed to cast its net wide: it identifies Germany, Japan, Mexico, Peru and Switzerland as the problem jurisdictions. In fact, Australia is not on the offender list in any of the USTR's headline issues, and is not mentioned in the USTR's press release.<sup>33</sup> The text on Australia appears in the second part of the section 1377 report, the additional country-specific issues list. As a brief summary:

- The USTR noted that the legislation for the full sale of Telstra had been passed, a process it supported, but stated that “this has stimulated a widespread domestic debate about Telstra’s willingness and ability to continue its role as a universal service provider without this governmental stake.”
- The USTR accused Telstra of attempting to circumvent the ACCC through direct appeals to the Department of Communications, Information Technology, and the Arts (‘DCITA’) for regulatory relief, but conceded that DCITA had deferred to the ACCC on pricing decisions.
- The USTR accused Telstra of trying to dilute the operational separation legislation.
- The USTR alleged that Telstra was undermining ULLS pricing on the premise that, as the USTR put it, “Telstra has asserted that it can only maintain its policy of uniform retail pricing in Australia if wholesale rates are also set uniformly.” The likely effect of averaging of ULLS pricing, claimed the USTR, would be to preclude competition based on unbundled loops in the geographic areas that competitors want to serve. The USTR argued aggressively for retention of deaveraged ULLS pricing.
- The USTR then commented that, “given the effects on competition of Telstra’s proposed average rate, Australia should consider other mechanisms to address rural service issues, such as expanded use of a competitively neutral universal service fund.”<sup>34</sup>

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<sup>33</sup> USTR media release, “USTR Issues 2006 Review of Telecommunications Trade Agreements”, 4 April 2006.

<sup>34</sup> USTR, *Results of the 2006 Section 1377 Review of Telecommunications Trade Agreements*, 4 April 2006, at page 9.

Again, there are the troubling factual errors: for example, retail pricing parity between the cities and bush is not Telstra policy as suggested by the USTR, but is rather an Australian government policy with which Telstra has no choice but to comply.<sup>35</sup> Also, the USTR appears to miss the point that peak regulatory policy-setting is carried out by the government in Australia, not by the regulator, and that Telstra is entitled to lobby government on issues such as ULLS averaging, which ultimately is a universal service / retail pricing parity issue. The lack of alignment between government social policy and regulator-enforced competition policy, is a well-known phenomenon in developed economies (though is often far more problematical for developing countries which do not have the luxury of treating their former incumbent telcos as ‘magic puddings’<sup>36</sup> once competition is introduced), and ultimately can only be addressed by government.

But most problematical is that the USTR fails to reference any provision of the FTA which it considers may be relevant to its commentary. This is not surprising, since in Telstra’s reply comments it set out several reasons why there was no trade law basis in the FTA for the allegations made by Primus. In respect of cost-orientation of ULLS pricing, for example, Telstra referred at length to the interpretation of this phrase in the ‘Telmex’ decision.<sup>37</sup> Because the USTR’s commentary lacks any basis in the underlying trade law obligations between Australia and the US, it amounts to little more than unsolicited policy advice to the Australian Minister of Communications. As on all previous occasions where the USTR has been critical of Australian regulation, the Australian government has offered no public response to the section 1377 report, so it is not apparent what the Australian government thinks of the USTR’s advice, or why it should have any greater regard to the USTR’s opinion than it has accorded to Telstra’s views.

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<sup>35</sup> See for example Minister Coonan’s press release, “Wholesale access prices for ULL and wholesale pricing parity”, 19 December 2005, available at: [http://www.minister.dcita.gov.au/media/media\\_releases/wholesale\\_access\\_prices\\_for\\_ull\\_and\\_retail\\_pricing\\_parity](http://www.minister.dcita.gov.au/media/media_releases/wholesale_access_prices_for_ull_and_retail_pricing_parity) and at [http://www.financeminister.gov.au/media/2005/mr\\_5905\\_joint.html](http://www.financeminister.gov.au/media/2005/mr_5905_joint.html)

<sup>36</sup> Telstra has frequently characterised the misalignment of social and competition policy in Australian telecommunications regulation as resulting in Telstra being treated as a ‘magic pudding’ – the reference is to a much beloved character in classic Australian children’s literature created by Norman Lindsay. The ‘magic pudding’ was an endless source of pudding of many sweet and savoury flavours, and a headache for its owners Bunyip Bluegum, Bill Barnacle and Sam Sawnoff who spend most of their time fending off pudding thieves.

<sup>37</sup> Telstra section 1377 reply filing, 13 January 2006, pages 12 -13.

Singapore's regulator certainly does not appreciate the USTR's advice. In a letter dated 18 April 2006 from the Infocomm Development Authority ('iDA') of Singapore to the USTR, copied to several senior diplomats of both countries, the iDA describes the USTR's section 1377 report on Singapore in 2006 as being inaccurate and misleading in several respects, and notes that no complaints regarding Singapore were actually posted in the 2006 reply-and-comment proceeding. The iDA protests strongly against the alleged factual inaccuracies and the lack of transparency in the USTR's processes, and was sufficiently annoyed to make the letter publicly available online.<sup>38</sup>

Annual consultations are supposed to be held between the United States and Australia to discuss communications and information technology matters, including issues pertaining to market access, under side letters to the FTA exchanged between the USTR and the Australian Trade Minister in May 2004.<sup>39</sup> The US and Australia held a first year review meeting on the FTA, in Washington DC at the beginning of March, but telecommunications trade issues were not mentioned in any of the media releases or in the press conference held by Minister Vaile together with the then USTR, Rob Portman. The FTA side letters envisage that representatives of industry may be invited to attend the annual consultation, but if the telecommunications consultation meeting has been held, either at the time of Minister Vaile's visit to Washington for the annual FTA review or subsequently, industry has not been invited. It seems strange that in a context where serious allegations of trade law breaches are being flung about, the US and Australia would not take the opportunity to invite industry to air these issues in a consultation process that the FTA side letters themselves intend should take place every year.

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<sup>38</sup> Available at:

[http://www.ida.gov.sg/idaweb/doc/download/I3813/IDA\\_to\\_USTR\\_on\\_1377\\_Report.pdf#search=%22weisel%20ida%20singapore%22](http://www.ida.gov.sg/idaweb/doc/download/I3813/IDA_to_USTR_on_1377_Report.pdf#search=%22weisel%20ida%20singapore%22).

<sup>39</sup> Letter from Mark Vaile, Trade Minister for Australia, to Robert B. Zoellick, USTR, dated May 18, 2004; and reply from the USTR to Minister Vaile of the same date; both available at:

[http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Australia\\_FTA/Final\\_Text/asset\\_upload\\_file130\\_3905.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file130_3905.pdf).

## 11. The USTR's comments do not reflect US domestic regulation

The most serious difficulty with the USTR's section 1377 comments on Australia issued in 2006 is that they are frequently at odds with US domestic regulation. Let us take the issue of wholesale ULLS price averaging as an example.

The USTR argues that Australia should maintain ULLS price deaveraging, whatever the consequences for the policy of retail pricing parity and the bush may be, yet the FCC exempts Incumbent Local Exchange Carriers ('ILECs') serving rural areas in the US from all mandatory local loop unbundling requirements.<sup>40</sup> Congress adopted this exemption because it was concerned that new entrants would harm universal service in high-cost rural areas by undermining the cross-subsidies built into the retail rates charged by rural ILECs. While Congress empowered state regulatory agencies to remove this exemption, this has rarely occurred in practice. Hence, rural ILECs in the US are not required to provide any unbundled local loops to competing local providers, whether at averaged or de-averaged rates.

It is true that urban ILECs are required to deaverage their local loop rates in at least three defined geographic areas within a state to reflect geographic cost differences (FCC Rule 51.507(f)). But this rule did not come into force for most states until May 2000 – more than four years after adoption of the Telecommunications Act of 1996 – in order to give state agencies sufficient time to implement geographically deaveraged rates. However, the FCC would never have adopted this requirement but for the existing 'rural telephone company' exemption mentioned above.

The FCC's concern that geographic deaveraging can harm universal service is also illustrated by a series of decisions regarding Eligible Telecommunications Carriers ('ETCs'). A carrier must obtain ETC designation to receive subsidies from US federal universal service programs.<sup>41</sup> In cases relevant to this discussion, the ETC

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<sup>40</sup> Congress adopted Section 251(f) of the 1996 Telecommunications Act to exempt so-called 'rural telephone companies' from all the ILEC-specific requirements in Section 251(c), including the mandatory Unbundled Network Element provisions in Section 251(c)(3). A rural telephone company is defined to include, among others, ILECs providing local exchange service to fewer than 50,000 access lines or ILECs providing local exchange service in a study area with fewer than 100,000 access lines.

<sup>41</sup> The ETC requirements are set out in Section 214(e) of the 1996 Act.

designation decision for mobile carriers is made by the FCC.<sup>42</sup> The FCC's policies permit – but do not require – ILECs to receive geographically deaveraged Universal Service Fund subsidies under the US federal universal service programs. In cases where ILECs have rejected this option, and instead decided to continue with state-wide averaging, the FCC has issued several decisions denying ETC status to mobile providers.<sup>43</sup> In each case, the mobile carrier sought access to US federal universal service subsidies for providing service to specific wire centers located in the high-density, low-cost portions of the relevant state. Concerned that the mobile carrier would engage in 'cherry picking' commercial conduct, the FCC declined to grant ETC status to these mobile carriers so that they would not be able to undermine the subsidies built into the ILEC's retail rates (whereby subscribers in high-density, low-cost areas pay retail rates that subsidise below-cost retail rates for subscribers in low-density, high-cost areas). Significantly, the FCC did not respond to this situation by requiring the ILECs in these states to adopt deaveraged universal service subsidies. Rather, the FCC permitted them to continue using state-wide averaged subsidies despite this precluding certain mobile carriers to participate in the US federal subsidy programs.

Additionally, as previously noted, there have been a series of major FCC rulemaking decisions removing, or scaling back, the ILECs' mandatory unbundling obligations:

- Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696 (1999) (known as the 'UNE Remand Order');
- Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003) (known as the 'Triennial Review Order' or 'TRO'); and

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<sup>42</sup> Some ETC declarations are made by state Public Utility Commissions.

<sup>43</sup> *E.g.*, *In the Matter of Federal-State Joint Board on Universal Service*, 19 FCC Rcd 20985, para. 24 (2004) (denying in part the ETC petition filed by Advantage Cellular Systems, Inc.); *In the Matter of Federal-State Joint Board on Universal Service*, 19 FCC Rcd 6422, paras. 29-33 (2004) (denying in part the ETC petition filed by Highland Cellular, Inc.); *In the Matter of Federal-State Joint Board on Universal Service*, 19 FCC Rcd 1563, para. 35 (2004) (denying in part the ETC petition filed by Virginia Cellular, LLC). Note that in cases where the FCC has denied an ETC request, it has almost always been a partial denial. That is, the mobile carrier has asked to be designated as an ETC in certain complete geographical areas in addition to a partial geographic area. The FCC has denied ETC status for the partial geographic area, but has usually granted ETC status where the mobile carrier plans to serve the entire geographic area.

- Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 FCC Rcd 2533 (2004) (known as the ‘Triennial Review Remand Order’ or ‘TRRO’).

In this process, which has been interspersed with extensive litigation in the US courts, the FCC has removed 18 specific functionalities from the mandatory Unbundled Network Element list since 1999, which are listed in **Appendix D**. One example of removal is line-sharing, which remains a declared service in Australia. Some functionalities were never on the list of UNEs in the first place, for example packet switching.

Even when the FCC has retained certain network functionalities on the mandatory unbundling list, the FCC has imposed limitations on how those UNEs may be used by competing local carriers. The 1996 Telecommunications Act requires that access seekers use UNEs for the purpose of providing one or more ‘telecommunications services.’<sup>44</sup> Hence, a carrier may not obtain UNEs solely for the provision of what are defined in the US as ‘information services’ alone (e.g., internet access). In addition, the FCC in the TRO and TRRO narrowed the use of UNEs still further by holding that interexchange voice and data services are not ‘qualifying services.’ As a result, a carrier may use UNEs to provide these interexchange services, but only if it also is using the UNEs to also provide ‘qualifying services’ such as local voice or exchange access.

Recently, the FCC has begun to grant geographic exemptions from the mandatory unbundling rules for specific ILECs. Last year the FCC exercised its forbearance authority to eliminate Qwest’s obligation to provide all loop and transport UNEs in certain wire centers in the Omaha MSA.<sup>45</sup> The FCC also removed certain dominant carrier regulations for Qwest in the same geographic area. The FCC found that there existed sufficient facilities-based competition in the Omaha MSA to justify the

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<sup>44</sup> Section 251(c)(3).

<sup>45</sup> *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005).

removal of these statutory and regulatory obligations. Similar geographic-based forbearance orders are now the subject of a string of new applications by ILECs.<sup>46</sup>

As noted in the previous section of this paper, regulatory forbearance is explicitly permitted under Article 12.23 of the FTA. So there is no trade law issue under the FTA with these forbearance rulings, provided the due process set out in FTA Article 12.23 has been followed in the US. Article 12.23 requires that prior to issue of a forbearance ruling in respect of particular regulation the telecommunications regulatory body must be satisfied that:

- (a) enforcement of such regulation is not necessary to prevent unreasonable or discriminatory processes;
- (b) enforcement of such regulation is not necessary for the protection of consumers; and
- (c) forbearance is consistent with the public interest, including promoting and enhancing competition among suppliers of public telecommunications services.

The article is a broad amalgam of the conditions for regulatory forbearance contained in US legislation (47 U.S.C. § 160(a) and (b)) and Part XIC of the Australian Trade Practices Act 1974 (*C'th*).

Under the US statute a forbearance request is granted automatically if the agency does not act on it within a specified period of time. In March 2006 a forbearance petition by Verizon became due for decision after 15 months, but at the time the FCC was deadlocked 2-2 between two Republicans and two Democrats, pending new appointments to the FCC (which have since been made). In consequence the FCC was unable to act when the 15 month deadline was reached. The result was that the Verizon petition for forbearance was granted by default.<sup>47</sup>

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<sup>46</sup> For example, for the Anchorage, Alaska MSA; and Verizon recently sought forbearance from UNE requirements in Boston, New York City, Philadelphia, Pittsburgh, Providence and Virginia Beach.

<sup>47</sup> See CompTel, "COMPTTEL Blasts FCC for Granting Verizon Forbearance Plea", 20 March 2006, available at <http://www.comptelascent.org/news/recent-news/032006.html>.

In this case, forbearance has occurred in the US even though the FCC did not make the required determination under Article 12.23. It seems that the FTA negotiators never anticipated such an eventuality, and missed inserting the appropriate exculpatory footnote in the FTA text. This case is now on appeal, and it is always possible that the FCC could supply, at some later time, the required determination. But as things stand now, Article 12.23 of the FTA has clearly been violated by the US.

## **12. Conclusion**

The brief analysis in the previous section of a few select facets of US regulation, illustrates that the USTR is operating against the background of a domestic telecommunications regime which no longer supports broad brush and aggressive interpretations of its partners' trade commitments in this area. The US has historically applied such an interpretation to the regulatory obligations contained in the WTO telecommunications text and its bilateral agreements, particularly in respect of unbundling of bottleneck network elements, and pricing of those elements. This approach reflected the initial interpretation by the FCC of the onerous access obligations contained in the US Telecommunications Act of 1996.

However, the US has embraced regulatory forbearance since 2003 with a great deal more enthusiasm than the ACCC. Comparisons are difficult because the level of inter-modal competition present in the US (particularly cable competition) is, for now, more widespread than in Australia – though, as Telstra has pointed out in its 2006 section 1377 reply, there is both ample existing facilities-based competition in Australia as well as new competition emerging using a range of wireless and other innovative technologies.

Other than the default forbearance grant to Verizon in March 2006, the forbearance decisions adopted in recent times in the US are almost certainly legitimate under the relevant trade law rules, particularly given the intentional ambiguity built into those rules. The 2006 USTR section 1377 report on Australia reflects a disconnect between that agency's view of the optimal regulatory settings, versus the new bent in US telecommunications regulation towards strongly favouring facilities-based

competition. The section 1377 report no longer reflects a strong trade law enforcement agenda, but has rather become a political document reflecting the aspirations of US suppliers to obtain those regulatory settings offshore that will best suit their commercial needs. The section 1377 report reflects whatever regulatory issue *du jour* in an offshore jurisdiction the USTR staff believes worthy of US governmental pressure whether or not there is any trade law basis to the USTR's comment on the issue, irrespective of whether the domestic regulatory authorities are already dealing with the issue, and out of context from either the US domestic regulatory position on the issue or the particular offshore jurisdiction's general level of telecommunications competition regulation policy and enforcement.

The USTR's NTE report, on the other hand, appears to have retained a measure of broad perspective, possibly reflecting its wider and hence less idiosyncratic authorship. The full sale of Telstra (or 'T3' as it is known in Australia) has been a long-standing US trade policy goal, and this year's NTE comment on Australian telecommunications, for all its factual peccadilloes, does provide insight into the next US policy goal: removal of the 35 percent foreign ownership limit on Telstra.<sup>48</sup> In this respect, the NTE report is a more useful document than the section 1377 report, though it is the latter which is likely to continue to enjoy media attention in Australia each year.

If the USTR's reports on telecommunications market barriers in Australia have become no more than political missives, it is surprising that the Australian government declines to issue any public response to the reports each year. The Australian government is certainly quick to respond to political point-scoring by its trading partners in other areas of trade policy. The Singapore regulator took the view that this year's section 1377 report warranted an official public response. Perhaps the Australian government believes that trade enforcement action by the US on the telecommunications issues raised, is simply implausible.

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<sup>48</sup> Foreign ownership in Telstra is restricted by Part 2A Div 4 of the Telstra Corporation Act (*Cth*) 1991. The maximum foreign ownership limits are 35 percent in total by all foreigners and a limit of 5 percent applicable to each foreign person. Note that these limits apply to Telstra shares not held by the Commonwealth, i.e. the present effective limit is around 17.5 percent in total. Div. 8 and 9 prescribe additional rules: central management and control of Telstra must ordinarily be exercised within Australia; Telstra must ensure that it maintains a substantial business and operational presence in Australia, and must remain incorporated in Australia; Telstra's chairperson must be an Australian citizen, as must be a majority of its directors.

However, the Australian government would be less sanguine if US investors owned a significant portion of Telstra's equity – a real prospect following T3. In that case it would not be US-owned competitors, but US shareholders of Telstra, that may be petitioning the USTR to provide 'advice' to the Australian government on how it should, for example, structure its universal service arrangements. Should we then expect that the Australian government will continue to be consistent with its long-established pattern of declining to publicly respond to the USTR reports?

## Appendix A: Country-specific phase of USTR section 1377 reports, 1996 – 2001

[**Note:** This information was collated from public USTR sources including its media releases and other background documents. The text below refers to alleged trade barriers in each of the named countries.]

Mexico ( 1996, 1998, 1999, 2000, 2001)

In 1996, USTR threatened to invoke NAFTA dispute settlement regarding Mexico's unwillingness to accept test data from other parties' laboratories or test facilities relating to product safety to certify telecommunications equipment. Agreement was reached in April 1997 to resolve the dispute.

During 1998-2001, USTR cited Mexico for its discriminatory in-bound international surcharge; regulations covering the dominant carrier; rules for universal service, interconnection and international service. USTR threatened WTO action if those issues continued to be unresolved. This led to the 'Telmex' decision discussed in section 9 of the paper.

Korea (1996, 1997)

Korea was identified under Section 1374 as a Priority Foreign Country in 1996. Negotiations concluded in July 1997 with commitments by Korea to ensure that US equipment suppliers would be treated fairly in areas including procurement, equipment certification and type approval, protection of intellectual property and technology transfer.

Japan (1996, 1997, 1999, 2000, 2001)

USTR used the threat of 1377 identification to extract commitments in 1996 on procurement of personal handyphone system (PHS) equipment as well as procurement by the NTT PHS subsidiary.

In three reviews since Japan's WTO commitments came into force, USTR used Section 1377 to influence the formulation of new Japanese rules for international service and Japan agreed to eliminate a premium charged to competitors for calls to certain NTT customers. In 2000, Japan was cited for its failure to implement cost-oriented interconnection rates.

Canada (1998, 2000)

Under the 1998 review, Canada eliminated restrictions that prevented US-based carriers from enjoying the same opportunities for transmitting Canadian international long distance traffic as enjoyed by carriers based in third countries.

In the 2000 review, USTR identified Canadian subsidization of local phone service that was unfair.

Taiwan (1998, 2001)

Following a 1996 bilateral agreement, USTR used the 1377 review to reach agreement on interconnection rates charged by the dominant carrier Chunghwa Telecommunications that were significantly above cost and posed a major competitive impediment in the wireless services market. Taiwan agreed to mandate cost-based interconnection rates.

USTR also cited Taiwan's telecommunications regulations that impose serious limitations on the competitive offering of telecommunications services, undermining the ability of new entrants to compete in Taiwan's market. These measures were inconsistent with Taiwan's bilateral market access agreement as part of its WTO accession.

South Africa (2000, 2001)	USTR cited South Africa for failure to restore access to facilities of the dominant carrier, Telkom, for competitive suppliers of value added telecommunications services.
Israel (2000)	Prior to the conclusion of the 1377 review, Israel committed to remove its discriminatory access fee on calls to and from the United States and Canada by the end of 2001.
European Union (1999)	As part of the 1999 review, unnecessary and potentially discriminatory standards-setting and licensing activities by the EU and Member States with regard to 3G mobile services were identified, with the purpose of allowing suppliers of all competing US technologies greater access to European and global markets.
Germany (1999, 2000)	<p>As part of the 1999 review, the German regulator issued decisions that curbed or prevented anticompetitive abuses by the dominant carrier, Deutsche Telekom.</p> <p>In the 2000 review, USTR identified a backlog of requests, excessive license fees and regulatory transparency concerns.</p>
United Kingdom (2000)	USTR identified the 1999 announcement by UK regulator, Ofcom, that the UK's dominant telecommunications service provider, BT would have an exclusive right to supply Digital Subscriber Lines (DSL) over its network until as late as July 1, 2001. The European Commission required Member States regulators to require unbundling and line sharing for competitive entry of DSL service.

Peru (2000)	As part of the 2000 review, Peru's regulator decided to begin a process for resolving interconnection complaints of new entrants.
Colombia (2001)	USTR cited Colombia for its refusal to license new providers of international telecommunications services.

## Appendix B: 'Matrix' or issue-specific phase of USTR section 1377 reports, 2002 onwards

[Note: This information was collated from public USTR sources including its media releases and other background documents. The text below refers to alleged trade barriers in each of the named countries.]

Mobile Interconnection Rates: USTR cited the growing EU (2002) evidence of mobile operators in the EU and Japan charging Japan (2002) fixed telecommunications carriers wholesale rates to interconnect their calls that were significantly above cost.

High Mobile Termination Rates: USTR cited allegations Switzerland (2003, 2004, 2005, 2006) that wholesale mobile terminating access rates are excessive, resulting *inter alia* in US consumers who make international Germany (2003, 2004, 2005, 2006) calls terminating on these mobiles being overcharged. Japan (2003, 2004, 2005, 2006) Mexico (2005, 2006) Peru (2005, 2006) Australia (2003, 2004) New Zealand (2004)

Provisions and Pricing of Leased Telecom Lines: USTR EU (2002) cited delays in obtaining leased lines for US companies and Switzerland (2002, 2003, 2004) high prices for those lines as discriminatory, bolstering the dominance of the former monopoly operators. Provisioning Mexico (2003) delays were cited in Germany while excessive pricing was Germany (2003, 2004, 2005, 2006) cited for Belgium, France, Ireland, Spain and Switzerland France (2003) Australia (2003) Singapore (2003, 2004, 2005, 2006)

India (2004, 2005,  
2006)

Independent Regulator: Lack of an independent regulator with adequate authority was cited as a priority matter and a necessary condition for adequate implementation of WTO commitments (Reference Paper).

China (2003, 2004)  
France (2003, 2004)  
Germany (2003)  
India (2003)  
Japan (2003, 2004)  
Mexico (2003, 2004)  
South Africa (2003,  
2004)  
Switzerland (2003)

Fixed Line Interconnection Rates: USTR cited high interconnection rates for fixed lines as excessive in Japan where those rates were raised by 12 percent, an increase not supported by cost data. The Dominican Republic was also cited for a 50% increase over the commercially negotiated rates previously in effect.

Japan (2003)  
Dominican Republic  
(2003)

Discriminatory and/or Unjustified Standards: USTR cited mandatory single-technology standards. USTR referenced binding provisions in FTAs with Singapore, Chile, Australia, CAFTA and Morocco which addressed this issue.

China (2004)  
Japan (2004)  
Korea (2004)

Excessive Regulatory Requirements, including Licensing Fees: Requirements such as high capital requirements and licensing fees hinder US telecommunications providers' ability to compete effectively in overseas markets.

China (2005)  
Colombia (2005)  
India (2005)

Burdensome Testing and Certification Requirements: USTR cited mandatory testing and certification of terminal

Mexico (2005)  
Korea (2005)

equipment as burdensome and, in the case of Korea, would seek a mutual recognition arrangement.

Limitations on Technology Choices: USTR urged that China (2005) governments adopt voluntary international standards rather than mandatory standards for maximum choice of technologies. Korea (2005)

Universal Service-Related Programs: Universal service programs were cited because of concerns that they would constitute unreasonable barriers to access and use of networks. Programs cited were e-Learning programs in Jamaica (2006); Japan's program to address high-cost regions; and India's access deficit charges (ADC) which cross-subsidizes local service with revenue generated by long distance calls. India (2006)

## Appendix C: Individual country issue mop-up in section 1377 reports, 2002 onwards

[**Note:** This information was collated from public USTR sources including its media releases and other background documents. The text below refers to alleged trade barriers in each of the named countries.]

- Australia (2002, 2006) USTR indicated that it would monitor whether the ACCC acted impartially toward competitors to Telstra, described as Australia's government-owned telecom operator. The 2006 review cited Telstra's allegedly dominant role and its claimed attempt to undermine the authority of the ACCC. USTR argues that Telstra has worked to minimize the scope of safeguards designed to ensure that Telstra offers competitors access to key parts of its networks on terms equivalent to those Telstra offers itself. In addition, USTR raises concerns about averaging and pricing of ULLS by Telstra.
- Brazil (2002, 2003) USTR urged Brazil to undertake commitments for basic telecommunications services in the WTO services negotiations of the Doha Round.
- USTR also cited in its 2003 review access to leased lines and regulatory transparency, to be addressed in the WTO services negotiations.
- Colombia (2002) Colombia had still not implemented its WTO basic telecom obligations.
- India (2002, 2003, 2006) USTR identified weak enforcement powers of India's telecom regulator and apparent conflicts of interest arising out of the government ownership of India's telecom operators. In the 2006 review, although complimenting India on positive steps taken, USTR cited concerns about the NLD and ILD Guidelines, specifically restrictions on remote management of telecom networks

- and on the routing of traffic, and the transfer of accounting, user, and network infrastructure information, outside of India.
- Japan (2002, 2004, 2005) USTR identified unnecessary regulations designed for the monopoly era as significant barriers to new entrants and questioned the independence of Japan's regulator particularly with respect to NTT. In the later reviews, USTR cited interconnection rate increases by NTT East and West and the lack of transparency in allocating new spectrum to mobile wireless providers.
- Peru (2002) USTR raised concerns about the undue influence of Peru's dominant carrier over Peru's telecom regulator and the transparency of the regulatory process.
- South Africa (2002, 2003, 2004) USTR raised South Africa's regulatory regime which appears to disadvantage competitors to South Africa's monopoly supplier of basic telecom services (Telkom). The 2003 review added the potential failure of South Africa to meet its WTO commitments on resale of basic telecommunications services.
- Antigua and Barbuda (2003) During the review process, the Government of Antigua and Barbuda resolved a dispute regarding implementation of its WTO commitments relating to access to its mobile wireless market.
- Canada (2003) Inadequate access to high-speed data transport services was cited during the 2003 review which was addressed by the regulator prior to the review's conclusion.
- China (2003, 2004, 2006) USTR cited China's value-added services sector to be monitored to ensure that China offers national treatment in the scope of services available to foreign-affiliated suppliers. The 2004 review added China's failure to finalize its Telecom law and excessively high capitalization requirements.
- Korea (2003) USTR cited Korea's goal of mandating a national

- standard for the delivery of mobile internet services (“WIPW”). USTR will seek global commitments in the WTO allowing for choice of technology and will seek commitments in the bilateral FTA negotiations.
- Mexico (2003, 2005) In addition to the ‘Telmex’ case, Mexico was cited for ineffective regulatory oversight. Mexico’s regulatory authority failed to prohibit discrimination by the former incumbent Telmex in numbering plans and interconnection quality. In the 2005 review, USTR cited persistently high off-net interconnection charges by Telmex.
- Austria (2004) USTR cited timely management of interconnection disputes with some lasting more than five years. The lack of effective dispute resolution possibly contributes to high interconnection rates which are the highest in Europe.
- Egypt (2006) During the 2006 review, USTR argued that Telecom Egypt (TE) was discriminating among foreign carriers seeking to interconnect with its network. As a result TE negotiated an agreement with a US telecommunications carrier. Nevertheless, USTR cited the lack of transparency in those interconnection agreements.
- Germany (2006) USTR cited Germany’s apparent endorsement of an investment safe harbour as a condition for innovation and as justification for broad deregulation of DT.

## Appendix D: Network functionalities removed by the FCC from the mandatory UNE list since 1999

1. Operator services and directory assistance [UNE Remand Order]
2. Local circuit switching for enterprise (medium and large business) customers [TRO]
3. Local circuit switching for mass market (residential and small business) customers [TRRO]
4. High-frequency portion of the loop, known as line-sharing [TRO]
5. Dark fibre loops [TRRO]
6. OCn loops [TRO]
7. Greenfield Fibre-To-The-Home Loops [TRO]. In a subsequent ruling, the FCC broadened the definition of FTTH to include Fibre-To-The-Curb provisioning arrangements as well as FTTH/FTTC arrangements to predominantly residential multi-dwelling units. See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293 (paras. 9-19) (2004) (Reconsideration Order).
8. Overbuild Fibre-To-The-Home Loops [TRO], although the ILEC remains obligated to either (i) keep the home-run copper loop in place or (ii) provide the access seeker with a 64 KBPS channel over the FTTH loop in places where the ILEC chooses to retire the copper loop.
9. The packetised (broadband) functionalities on Hybrid Fibre/Copper Loops, sometimes known as Integrated Digital Loop Carrier systems [TRO], although the ILEC still must unbundle the TDM (narrowband) functionality of hybrid loops. The ILEC is not required to separately unbundle the fibre subloop on a hybrid fibre/copper loop.
10. DS1 loops served by an ILEC wire centre containing at least 60,000 business lines and four or more fibre-based collocators [TRRO]. A competing carrier cannot obtain more than 10 (ten) DS1 loops per location.
11. DS3 loops served by an ILEC wire centre containing at least 38,000 business lines and four or more fibre-based collocators [TRRO]. A competing carrier cannot obtain more than 1 (one) DS3 loop per location.

12. Entrance facilities, which are the dedicated circuits (DS1 or DS3) linking a competing carrier's network to the ILEC's network [TRO].
13. OCn interoffice dedicated transport [TRO].
14. DS1 interoffice dedicated transport connecting two Tier 1 ILEC wire centres [TRRO]. The FCC distinguishes between Tier 1, Tier 2 and Tier 3 wire centres based on the number of fibre-based collocators in the wire centre or the number of business lines served out of the wire centre. No competing carrier may have more than 10 DS1 transport circuits on a given route where there is no unbundling obligation for DS3 transport.
15. DS3 interoffice dedicated transport connecting wire centres where both wire centres are either Tier 1 or Tier 2 wire centres [TRRO]. No competing carrier may have more than 12 DS3 transport circuits on a given route.
16. Dark fibre interoffice dedicated transport connecting wire centres where both wire centres are either Tier 1 or Tier 2 wire centres [TRRO].
17. Shared interoffice transport [TRO/TRRO]
18. Signalling and call-related databases [TRO/TRRO]