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The Price of Paid Prioritization: The International and Domestic Consequences of the Failure to Protect Net Neutrality in the United States

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The International and Domestic Consequences of the Failure to Protect Net Neutrality in the United States

Arturo J. Carrillo and Dawn C. Nunziato

On 10 November 2014, President Obama reaffirmed his commitment to a free and open Internet and called on the Federal Communications Commission (FCC) to "implement the strongest possible rules to protect net neutrality."[1] In particular, the president recommended that the FCC reclassify broadband providers as telecommunications services subject to common carriage obligations. The president was responding to the No Commercially Unreasonable Practices section of the May 2014 Proposed Rules for Promoting and Protecting an Open Internet, which would have authorized broadband providers to accord differentiated treatment to Internet traffic, thereby undermining net neutrality and common carriage principles in the United States.

As written, the Proposed Rules of May 2014 would have violated international trade and human rights obligations of the United States. This is because, as a member of the World Trade Organization (WTO) and a party to the International Covenant on Civil and Political Rights (ICCPR), the United States is bound to respect principles of nondiscrimination and free expression when regulating essential communications media like the Internet. Any FCC rule that does not meaningfully protect net neutrality at all levels of interconnectivity would run afoul of these legal obligations and expose the United States to legal action by other governments and individuals prejudiced by its actions.

On March 12, 2015, the FCC adopted a new set of rules to promote and protect an open Internet.[2] In its 2015 Open Internet Order, the FCC reclassified broadband providers as common carriers subject to nondiscrimination obligations and enshrined strong net neutrality protections. The 2015 Order, contrary to its predecessors, largely meets the

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requirements of the international trade and human rights treaties to which the United States is a party. Even so, gaps in the new Rules mean that the United States may still be liable under international law for potential failures to ensure that net neutrality and non-discrimination principles are adequately protected.

In this Article, we first examine the trade and human rights obligations of the United States as they relate to net neutrality to determine the extent to which each of the two most recent approaches adopted by the FCC to promote an open Internet would comply with those obligations. We also examine the history of regulation of broadband providers as common carriers subject to nondiscrimination obligations under U.S. law. We conclude that the FCC has, by and large, successfully complied with its international trade and human rights obligations in its new Open Internet Order.

International Trade Consequences of FCC Failure to Adopt Strong Net Neutrality Rules. The United States is bound by the WTO's General Agreement on Trade in Services (GATS), and has additionally signed on to the Basic Agreement on Trade in Telecommunications Services (BATS), committing to regulating its telecommunications services on the basis of several principles that are essential to net neutrality.[3] In particular, the BATS enshrines the United States' commitment to ensure that "interconnection" in telecommunications services, including Internet service, be provided to the service suppliers of other WTO Member States on nondiscriminatory terms.[4] A failure by the FCC to meaningfully protect net neutrality would violate the terms of the BATS.[5]

The BATS integrates clear non-discrimination principles into its primary obligations. It covers packet-switched services, including broadband services, which the United States "expressly included [in the Agreement] to protect its growing IP-based services providers."[6] The BATS commitments for IP-based services include several key principles that converge with net neutrality, including transparency, anti-competitive practices, and, most importantly, fair interconnection.[7] Under the BATS, fair interconnection "will be ensured at any technically feasible point in the network" and is to be provided "under nondiscriminatory terms"; "in a timely fashion"; and at "cost-oriented rates that are transparent, reasonable, [economically feasible], and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided."[8]

What this means is that, if the FCC had retained the May 2014 Proposed Rules, or adopted similar rules allowing broadband providers to accord differentiated treatment to Internet traffic, it would have contravened the United States' legal obligations under the GATS and the BATS to ensure fair interconnection for foreign service suppliers. Such standards would have allowed broadband providers to engage in individual negotiations for paid prioritization with edge providers to create "fast" and "slow" lanes for Internet service,[9] which by definition would violate the requirement in the BATS that

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interconnection be provided on non-discriminatory terms.[10] Adopting such a rule would thus have left the United States open to the risk of a WTO complaint by other WTO member States on behalf of their disadvantaged service suppliers.[11]

Similarly, the United States would have been at odds with key trade partners in Latin America and Europe. Net neutrality is of particular importance in Latin America, where approximately 85 percent of the region by population and trade lives under a legal regime that strongly protects this principle. Over the last five years Paraguay, Chile, Mexico, Colombia, Ecuador, Peru, Argentina, and Brazil have all adopted legislation or regulation guaranteeing net neutrality. More to the point, at least 90 percent of all Latin American Internet traffic passes through Miami and would therefore be subject in some form to U.S. regulation.[12] If the FCC had not guaranteed strong protection for net neutrality, as do most of the countries in Latin America, the negative impact on trade in the region would have been severe.[13]

Rules like those proposed by the FCC in May 2014 have had the potential to hinder trade with Europe as well, another continent that is, by and large, embracing strong net neutrality protections. In April 2014, the European Parliament passed the European Commission's proposed telecoms reforms that will enable a Digital Single Market,[14] including guarantees safeguarding net neutrality and strict rules for the blocking and slowing of Internet services.[15] The Netherlands, Slovenia, the United Kingdom, and Norway, among others, have enshrined meaningful net neutrality protections through legislation or regulation,[16] and France and Germany are currently considering similar legislation.[17]

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As it turned out, the FCC chose to follow President Obama's exhortations and adopt in its 2015 Open Internet Order a framework for regulating the Internet in the United States that is strongly protective of net neutrality in several respects. First, the FCC defined the scope of its new Rules as applying to "both fixed and mobile broadband Internet access service."[18] Second, the FCC enacted three bright-line rules that go to the heart of net neutrality protections: no blocking;[19] no throttling;[20] and no paid prioritization.[21] Finally, the FCC devised a way to reach other types of conduct that may

not come under the bright-line rules by establishing its "no unreasonable interference/disadvantage standard."[22] Under this rule, ISPs cannot unreasonably interfere with or disadvantage either end users' ability to use and access broadband service or Internet content or edge providers' ability to make such content available to end users.[23]

So is the United States now in full compliance with the above-cited provisions of the GATS and BATS? Not quite, due to two gaps in coverage created by the 2015 Order. First, the FCC determined that it would not apply a bright line rule to flatly prohibit sponsored data or "zero rating" plans but would instead evaluate these on a case-by-case basis under the "no unreasonable interference/disadvantage standard."[24] Zero rating usually refers to the practice of Internet companies paying certain telecommunications to offer "free" access for their mobile network customers to the sponsoring companies' online services, which is realized by exempting traffic to the companies' sites from a subscriber's data caps or allowing customers without a data plan access to those sites.[25] Since zero rating is a deviation from net neutrality — as sponsored data is given priority over non-sponsored data – the FCC's eventual approval of any zero rating plans could prove problematic for the reasons noted above. Second, the FCC similarly ruled that none of the bright-line rules or standards relating to broadband Internet access service would apply to "Internet traffic exchange arrangements," also known as "interconnection."[26] Interconnection refers to the interface of networks with other networks in the exchange of Internet traffic.[27] The FCC decided that, "for the time being", extending robust net neutrality protections to such exchange arrangements "was not warranted."[28] Instead, interconnection disputes will be reviewed on a case-by-case basis for practices that might be construed as unreasonable or unjust[29] — a broad and vague standard.[30] As a result, the door remains open for discriminatory agreements such as those involving paid prioritization to occur within interconnection arrangements, for example, between ISPs and backbone content delivery networks (CDNs).[31]

Any dissonance in net neutrality rules between the United States and major trading partners in Latin America and Europe could set the stage for possible disputes down the road. Under WTO rules, "[a] dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations."[32] Indeed, the United States has engaged the

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WTO Dispute Settlement Body (DSB) on behalf of its own interconnection interests. In 2000, the United States made several claims against Mexico for violations of Mexico's Schedule of Commitments, which includes the BATS Reference Paper.[33] In 2004, a WTO panel concluded that Mexico had violated its GATS commitments by failing "to ensure interconnection at cost-oriented rates," failing to "prevent anti-competitive practices by firms that are major telecoms suppliers," and failing "to ensure reasonable and non-discriminatory access to and use of telecommunications networks."[34] In response to the WTO panel's findings, Mexico has now complied with the panel report to the satisfaction of both the WTO DSB and the United States.[35]

In sum, several factors under the GATS and the BATS weighed against the May 2014 Proposed Rules and in favor of enforcing strong net neutrality rules in compliance with U.S. obligations, which the United States largely, but not entirely, succeeded in doing through the adoption of the 2015 Open Internet Order. The United States has not been shy in utilizing the WTO Dispute Settlement Body to further its own telecommunications interests. Accordingly, the United States could hardly claim surprise if and when other member States follow suit to contest the new FCC rules because the 2015 Order seems to authorize zero rating plans under certain circumstances, while expressly excluding interconnection from the scope of its net neutrality protections. These gaps in the 2015 Order's net neutrality protections may eventually lead to inconsistencies with WTO nondiscrimination obligations due to foreign IP-based services and required by the aforementioned trade agreements.[36]

International Human Rights Consequences if the FCC Failed to Adopt Strong Net Neutrality Rules. If the FCC had enacted the May 2014 Proposed Rules, or others like them, that action would have also violated the United States' international human rights obligations to promote and protect freedom of expression in a non-discriminatory manner. Allowing broadband providers to accord differentiated or discriminatory treatment to Internet traffic would have impermissibly impinged on the rights of all persons to equally seek, receive, and impart information, ideas, and opinions in the media of their choice.[37] As noted in the prior section, the FCC avoided this pitfall by adopting several bright-line rules in its 2015 Open Internet Order to protect net neutrality in broadband access service. It failed, however, to extend these protections to interconnection arrangements, leaving the door open to potential abuse. It likewise failed to ban zero rating, a per se exception to net neutrality. Thus, the United States is arguably still vulnerable in the human rights arena as well.

The United States is bound to respect and protect freedom of expression in a non-discriminatory manner, inter alia, under the United Nations' ICCPR and the American Declaration of the Rights and Duties of Man (ADHR or American Declaration).[38] Both the ICCPR and ADHR enshrine freedom of expression and non-discrimination as fundamental rights that States must promote and protect.[39] Freedom of

expression is the right to seek, receive, and impart information, ideas, and opinions "through any media and regardless of frontiers."[40] It is well settled that this right is protected equally online as it is offline.[41] Accordingly, "the treatment of Internet data and traffic [cannot be] based on the device, content, author, origin and/or destination of the content, service or application."[42] States "should take all necessary steps to foster the independence of [the Internet] and to ensure access of individuals thereto."[43]

Paid prioritization and other discriminatory arrangements may act as impermissible restrictions on freedom of expression by making access to certain kinds of content or networks more or less difficult depending on whether an individual or company has economic leverage to access those preferential arrangements. Only the wealthiest companies and organizations are generally able to afford to pay for prioritization or preferential treatment to make their information and content more readily accessible to users.[44] The ability to access information — another important component of freedom of expression — may also be curtailed for those persons or entities that cannot or choose not to pay the premiums associated with prioritization or enhanced access to networks or information.

Although a State may under certain circumstances place some restrictions on freedom of expression, it may do so only if it meets certain criteria. Any proposed restrictions must (a) be "provided by law";[45] (b) for a legitimate aim such as national security, public order, or public health and morals;[46] and (c) must be proportional, necessary, and "directly related to the specific need on which they are predicated."[47] Increasing corporate profits by providing a competitive advantage to well-resourced service providers or networks is not a legitimate rationale recognized by international law for (relatively) restricting users' freedom of expression. This suggests that both sponsored data plans as well as paid prioritization at the interconnection level may run afoul of the ICCPR's and the American Declaration's freedom of expression and non-discrimination rules.

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Any failure to fulfill its human rights obligations under international law could expose the United States to denunciations by affected individuals, NGOs, and perhaps other governments, as in the trade arena. On the one hand, grievances can be aired at hearings before the Inter-American Commission of Human Rights, the body that monitors compliance by OAS member States with regional human rights agreements like the American

Declaration. On the other, advocates can denounce U.S. failures to protect freedom of expression at hearings before the United Nations Human Rights Committee, the UN authority that monitors State compliance with the ICCPR. As a State Party to that treaty, the United States is subject to a periodic review of its compliance with that treaty by the Human Rights Committee, an independent body composed of 18 international experts.[48] Both the Inter-American Commission and the UN Human Rights Committee publish their final determinations of States' compliance with the respective treaty obligations monitored.

The FCC's Regulation of Broadband Providers as Common Carriers Subject to Nondiscrimination Obligations Under U.S. Law. The FCC's March 2015 Rules mark an important step toward correcting the mistake the FCC made in 2002 when it declined to classify broadband providers as "telecommunications services" subject to common carriage obligations under the Telecommunications Act of 1996. In reclassifying broadband providers as common carriers, the FCC harmonizes the treatment of Internet forums for expression with the United States' historic treatment of other forums for communication under the long-recognized common carriage doctrine.

The common carriage doctrine imposes obligations on privately-owned speech and mass communication conduits to facilitate the expression of others and prohibits these conduits from exercising the discretion to determine which communications to facilitate and which to censor. Since the beginning of the modern communications era in the 1930s, the FCC has imposed obligations on providers of interstate communications services (like telephone and telegraph companies) to facilitate the transmission of all legal content. The United States Postal Service has also been regulated as a common carrier that is required to facilitate the transmission of all legal content and is prohibited from discriminating against such content. [49] As Ithiel de Sola Pool explains:

> [T]he law of common carriage protects ordinary citizens in their right to communicate. The rules against discrimination are designed to ensure access to the means of communication.... [T]his element of civil liberty is central to the law of [common carriage].[50]

The common carriage status of communications providers benefits members of the public by granting them access to communications conduits under a nondiscrimination principle. As Jerome Barron observed, individuals who rely on common carriers to facilitate their communications "benefit from the democratic egalitarianism that characterizes the nondiscriminatory access principle associated with common carrier law."[51]

Congress overhauled the regulation of telecommunications providers in the Communications Act of 1934,[52] which charged the newly-created FCC with regulatory authority over telecommunications providers (telegraph and telephone companies), regardless of whether they enjoyed monopoly power, and imposed common carriage reg-

ulations on such providers.[53] Under the 1934 Act, common carriers were charged with the obligation to serve as nondiscriminatory conduits for all (legal) content originated by others.[54]

Throughout the mid-twentieth century, common carriage and nondiscrimination obligations were applied to traditional conduits of communication like telephone companies. In the early 1970s, the FCC began to consider whether and to what extent to impose common carriage obligations on computer-assisted processes and services. In a series of "Computer Inquiries," the FCC essentially created two categories of computer-assisted communications services — basic services and enhanced services. "Basic" (later, "telecommunications") services, like telephone and facsimile services, were those that offered straightforward transmission services, and those offering such services were regulated as common carriers and made subject to nondiscrimination requirements.[55] "Enhanced" (later, "information services") were those in which computer processing applications were implemented to act on a subscriber's information, and providers of such services were exempt from common carriage and nondiscrimination requirements.

In its passage of the Telecommunications Act of 1996, Congress revisited the categorization of services subject to common carriage regulation that was established under the Computer Inquiries. Under the 1996 Act, "telecommunications" services were made subject to common carriage regulation (replacing the category of "basic services"), while "information services" were exempted from common carriage regulation (replacing the formerly exempt category of "enhanced services").[56] The Act defined a "telecommunication service" as "the offering of telecommunications for a fee directly to the public…regardless of the facilities used."[57] The Act maintained significant common carrier obligations on providers of "telecommunications services," while leaving "information services" providers subject to far less regulation. While the Act creates a presumption that telecommunications carriers will be treated as common carriers, it authorized the FCC to forbear from enforcing any provision of the Act if the FCC determines that such enforcement is unnecessary to guard against discrimination, to ensure just and reasonable services, to safeguard consumers, or to serve the public interest.[58] Title II of the Communications Act sets forth a complex regulatory regime imposed upon common carriers, but the essential duty imposed upon common carriers is the duty not to discriminate in the offering of their services, and in particular, not to discriminate against certain types of content in serving as conduits for the transmission of such content.

In its 2002 "Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities"[59] (hereinafter "Declaratory Ruling"), the FCC mistakenly concluded that cable modem service was an "information service" with "no separate offering of 'telecommunications service,'"[60] the latter of which would have rendered such services subject to common carriage obligations. The Commission ruled that the provision of cable broadband service did not contain a separate telecommunications service because the transmis-

sion of the data is "part and parcel" of that service and is integral to its capabilities.[61] As an "information service" with "no separate offering of telecommunications service," cable operators' provision of broadband Internet access was exempted from the common carrier regulations of Title II of the Communications Act.[62]

This flawed ruling was significant in that it reversed course on the history of the Commission's regulation of telecommunications services. Throughout the 1970s and 1980s, the FCC formulated and implemented a workable distinction between the underlying common carrier network, on the one hand, and the services and information made available over that network, on the other. The 2002 Declaratory Ruling collapsed this crucial distinction and for the first time permitted communications conduits to discriminate against the content they were charged with transmitting over their networks.

The FCC's fundamental misstep in removing common carriage and nondiscrimination obligations from broadband providers (later approved by the Supreme Court in National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.) was its determination that cable operators providing broadband Internet access were not — in whole or in part — offering "telecommunications services" and were therefore not subject to regulation as common carriers.[63] The FCC erred in refusing to recognize that broadband providers primarily offer "telecommunications services" to the public and serve as conduits for the transmission of the public's information even if they also offer some additional "information services." Because it failed to recognize the telecommunications service function offered by broadband providers, the FCC erroneously removed common carriage and nondiscrimination obligations from broadband providers and reversed nearly a century's worth of history embodying "democratic egalitarianism that characterizes the nondiscriminatory access principle associated with common carrier law."[64]

In regulating broadband providers, Congress and the FCC should be guided by the principle underlying modern communications law that liberal democracies require a well-informed citizenry, which in turn requires that citizens enjoy the freedom to communicate and to access communications conduits on a nondiscriminatory basis.

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requires that citizens enjoy the freedom to communicate and to access communications conduits on a nondiscriminatory basis. The same principles that justify regulating telephone and telegraph operators and the postal service as common carriers subject to nondiscrimination requirements – in order to "protect ordinary citizens in their right to communicate" – are equally valid when applied to broadband providers and Internet communications.[65]

The May 2014 Proposed Rules, which would have allowed broadband providers to discriminate against whatever content or applications they choose for whatever reasons they choose, were inconsistent with the historical democratic egalitarian principle of according individuals protection in their freedom to communicate. Fortunately, the March 2015 Rules correct this mistake and require broadband providers to assume, at minimum, the nondiscrimination obligations that historically have been imposed upon common carriers — the duty to facilitate and transmit in a nondiscriminatory manner any and all legal content.

Conclusion. In March 2015 the FCC adopted strong net neutrality rules prohibiting broadband service providers from according differentiated treatment to Internet traffic.[66] We trust that, as part of its analysis and justification, the FCC considered the international consequences of its actions, along with the domestic ones, to enact rules that prohibit the differential treatment of Internet traffic based on the economic status of the content creator or the end-user.

The FCC correctly achieved this goal and avoided much, but not all, exposure to international challenge before the WTO and international human rights bodies by reclassifying broadband providers as common carriers subject to nondiscrimination obligations under U.S. law. The dual issues of zero rating and interconnection as potential threats to strong net neutrality remain largely unaddressed in the 2015 Order, leaving the door open to possible future disputes. Nevertheless, what is certain is that by adopting the new Rules, the FCC took a substantial step towards ensuring meaningful compliance with the United States' international trade and human rights obligations with respect to nondiscrimination and freedom of expression.

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NOTES

1 White House, "Net Neutrality: President Obama's Plan for a Free and Open Internet," Internet, http://www.whitehouse.gov/net-neutrality (date accessed: 14 November 2014).

2 On March 12, 2015, the FCC released its latest Open Internet Order detailing new, strong net neutrality rules. *See* Rules Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, 20), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-13/pdf/2015-07841.pdf [hereinafter 2015 Open Internet Order]. *See also* Jeff Somer, *What the Net Neutrality Rules Say*, N.Y. TIMES (Mar. 12, 2015), http://www.nytimes.com/interactive/2015/03/12/technology/net-neutrality-rules-explained.html?_r=0 (discussing how the 2015 rules exceeded expectations by prohibiting blocking, throttling, and paid prioritization for *both* mobile and fixed broadband Internet access); *The Importance of Internet Neutrality to Protecting Human Rights Online*, CTR. FOR DEM. & TECH. (Oct. 1, 2013), at 4–9, https://cdt.org/files/pdfs/internet-neutrality-human-rights.pdf (detailing how net neutrality implicates human rights obligations regarding international principles on freedom of expression and nondiscrimination).

3 Office of the U.S. Trade Representative, *2014 Trade Policy Agenda and 2013 Annual Report* (Washington, D.C., 2014), annex III, *available at* http://www.ustr.gov/sites/default/files/Annex%20III_1.pdf.The BATS Reference Paper, which the United States included in its schedule of commitments, sets forth the regulatory framework for telecommunications. United States Schedule of Commitments, *Supplement 2*, GATS/SC/90/Suppl.2 (Apr. 11, 1997). Schedules of commitment are legally binding on WTO member States. World Trade Organization, "Telecommunications Services," Internet, http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm (date accessed: 14 November 2014).

4 World Trade Organization, *Telecommunications Services: Reference Paper, Negotiating Group on Basic Telecommunications* (24 April 1996), ¶ 2.1-2(a) [hereinafter Reference Paper].

5 Jennifer A. Manner with Alejandro Hernandez, "An Overlooked Basis of Jurisdiction for Net Neutrality: The World Trade Organization Agreement on Basic Telecommunications Services," *CommLaw Conspectus* 22 (2013-2014): 73.

6 *Ibid*. at 68.

7 *Ibid*. at 60, 70.

8 Reference Paper, *supra* note 4, at ¶ 2.2(a)-(b).

9 "A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices." Federal Communications Commission, *Promoting and Protecting an Open Internet, GN Docket No. 14-28* (2014) app. A § 8.7(2014), *available at* http://www.fcc.gov/document/protecting-and-promoting-open-internet-nprm [hereinafter Proposed Rules].The FCC indicated that it would determine what constitutes a commercially unreasonable practice on a case-by-case basis, relying on a "totality of the circumstances" test.*Ibid*. ¶ 116. The D.C. Circuit indicated that the "commercial reasonableness" standard provides sufficient flexibility for providers to negotiate deals--including pay-for-priority deals -- on individualized terms. *Cellco Partnership v FCC*, 700 F.3d 534 (D.C. Cir. 2012) (upholding data roaming order). Thus, the proposed No Commercially Unreasonable Practices Rule governing broadband providers would have allowed broadband providers to engage in individualized negotiations with edge providers through which broadband providers would be able to prioritize certain content and disfavor other content, creating "fast lanes" for prioritized content and "slow lanes" for all other content.

10 While the FCC's May 2014 Proposed Rules would have in principle applied equally to all service providers domestic and foreign, a decision to give priority to services or content provided by one set of suppliers who can pay for this privilege, over others who cannot, would have discriminated in effect against the latter. Such differentiated treatment of Internet traffic would have a disparate and negative impact on those foreign service providers who are unwilling or unable to pay the "fast lane" premiums, especially those from the developing world. For a discussion of the overlap between interconnection and network neutrality issues, see Marvin Ammori, "Interconnection Disputes Are Network Neutrality Issues (of Netflix, Comcast, and the FCC)," CircleID (7 April 2014), http://www.circleid.com/posts/20140407_interconnection_disputes_are_network_neutrality_issues.

11 The United States is by far the most litigious member of the Dispute Settlement Body and has been the complainant in 107 disputes and respondent in 121. World Trade Organization, "WTO Disputes By Country/Territory," http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (date accessed: 20 November 2014).*See also* Veijo Heiskanen, "The Relation of International and Municipal Law," Finnish Y.B. Int'l L. 1 (1990): 154-57; John J. Barcelo, "The Status of WTO Rules in U.S. Law," Cornell L. Faculty Publ'ns, Paper (2006): 36.

12 Thomas Sparrow, "Behind the Scenes of Latin America's 'Internet Brain'," Internet (30 January 2013), http://www.bbc.com/news/technology-21178983.

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(min. 35 – 39).

14 Foo Yun Chee, "EU Parliament Votes to End Roaming, Protect 'Net Neutrality'," Internet (3 April 2014), http://uk.reuters.com/article/2014/04/03/us-eu-telecomunications-parliament-idUKBREA320S520140403.

15 Olivia Solon, "Victory for Net Neutrality in European Parliament," Internet (3 April 2014), http://www.wired.co.uk/news/archive/2014-04/03/eu-net-neutrality-victory.

16 Reagan MacDonald & Giusy Cannella, *Net Neutrality: Ending Network Discrimination in Europe, in The Value of Network Neutrality for the Internet of Tomorrow*, Luca Beli and Primavera De Filippi eds., (2014), 47.

17 *Ibid*.; Christopher T. Marsden, *Net Neutrality: Past Policy, Present Proposals, Future Regulation? in The Value of Network Neutrality for the Internet of Tomorrow*, Luca Beli and Primavera De Filippi eds., (2014), 83-84. *But see* "Merkel challenges net neutrality by urging fast lanes for 'special services'," Internet, http://rt.com/news/211635-merkel-against-net-neutrality/ (date accessed: 25 January 2015).

18 2015 Open Internet Order, supra note 1, at par. 25.

19 *Ibid*. at par. 112."A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or nonharmful devices, subject to reasonable network management."

20 *Ibid*. at par. 119. "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade unlawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management."

21 *Ibid*. at par. 125. "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. [...] Paid prioritization refers to the management of a broadband network provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise from a third party), or (b) to benefit an affiliated entity."

22 *Ibid*. at par. 136. "Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule."

23 *Ibid*.

24 Ibid. at par. 152

25 Center for Democracy and Technology, No. 208 *Net Neutrality, Zero-Rating & Development: What's the Data?*, INTERNET GOVERNANCE FORUM, http://www.intgovforum.org/cms/wks2014/index.php/proposal/view_public/208, (hereinafter "CDT report").

26 2015 Open Internet Order, supra note 1, at par. 194.

27 *Ibid*.

28 *Ibid*. at par. 195.

29 *Ibid*. at pars. 202-205.

30 Jeremy Gillula and Kit Walsh, *The FCC is Keeping an Eye on Interconnection, But More Clarity is Needed*, ELECTRONIC FRONTIER FOUNDATION (May 5, 2015), https://www.eff.org/deeplinks/2015/04/fcc-keeping-eye-interconnection-more-clarity-needed.

31 *Ibid*.

32 "WTO Dispute Resolution Gateway," Internet,http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (date accessed: 14 November 2014).

33 World Trade Organization, "Mexico – Measures Affecting Telecommunications Services," Internet, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm (date accessed: 14 November 2014).

34 *Ibid*.

35 *Ibid*.

36 Article XIV of the GATS allows for several general exceptions that acknowledge the interests of Member States in protecting public health, public order and safety, public morals, etc. GATS: General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183. *See also* Thomas Cottier et al., *Article XIV GATS: General Exceptions, in Max Planck Commentaries on World Trade Law, WTO – Trade in Services*, Rudiger Wolfrum et al. eds., (2008) (describing the WTO legal framework for GATS general exceptions clause); Appellate Body Report, *United States – Gambling*, ¶ 291, WT/DS285/AB/R (Apr. 27, 2005) (holding that WTO case law on GATT exceptions is relevant for the interpretation of Art. XIV of GATS). It is important to note that these exceptions are substantively the same as those provided for by ICCPR Art. 19(3), discussed below. Although the US has relied on these GATS exceptions in past cases brought against it under the DBS, it would be hard-pressed to do so here for the same reasons outlined in relation to the application of ICCPR Art. 19.

37 *See, e.g.*, Universal Declaration of Human

Rights, art 19, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), available at http://www.un.org/en/documents/udhr/ [hereinafter UDHR]; International Covenant on Civil and Political Rights, art. 19, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx [hereinafter ICCPR]; American Declaration of the Rights and Duties of Man, art. 4, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *available at* https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm [hereinafter ADHR].

38 Having ratified the ICCPR, the United States is a party to that treaty. *See* Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights: United States of America*, Aug. 12, 2010, A/HRC/WG.6/9/USA/2, *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_USA_2_United%20States%20of%20America_eng.pdf. The ADHR is binding on all Member States of the Organization of American States by virtue of their membership in that Organization and ratification of the OAS Charter. Organization of American States, "Charter Signatories and Ratifications," Internet, http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm. *See also* Dawn Carla Nunziato, "The U.S. Federal Communications Commission's Proposed Rulemaking in the Matter of Protecting and Promoting the Open Internet," (15 May 2014), 3-4, *available at* http://www.osce.org/fom/119819?download=true (describing the "commitment by OSCE Participating States to freedom of expression … as protected by international instruments").

39 ICCPR, arts. 2, 19, 26; ADHR, arts. 2, 4.

40 UDHR, art. 19; ICCPR Art. 19; ADHR, art 4.

41 Human Rights Council Res. 20/8, *The Promotion, Protection and Enjoyment of Human Rights on the Internet*, 20th Sess., June 29, 2013, A/HRC/20/L.13, ¶ 1 (stating that "the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice"), *available at* http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session20/Pages/ResDecStat.aspx.

42 Joint Declaration on Freedom of Expression and the Internet, (1 June 2011), para 5(a), *available at* http://www.oas.org/en/iachr/expression/showarticle.asp?artID=848.

43 Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression*, ¶ 15, CCPR/C/GC/34 (Sept. 12, 2011), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

44 See Yancy Strickler, "FCC's 'Fast Lane' Internet Plan Threatens Free Exchange of Ideas," Internet (4 July 2014), http://www.washingtonpost.com/opinions/kickstarter-ceo-fccs-fast-lane-internet-plan-threatens-free-exchange-of-ideas/2014/07/04/a52ffd2a-fcbc-11e3-932c-0a55b81f48ce_story.html.

45 ICCPR, art 19(3).

46 *Ibid*., art. 19(3)(a)-(b).As noted already, these exceptions are substantially similar to those provided for in the GATS Article XIV, discussed *supra*.

47 Human Rights Committee, *supra* note 29, at ¶ 22; *see also* ICCPR, art. 19(3).

48 Human Rights Committee, Internet, http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx (date accessed: 23 January 2015).

49 *See*, e.g., Ithiel de Sola Pool, *Technologies and Freedom* (Belknap Press, 1983) 71-107.

50 *Ibid*. at 106.

51 Jerome A. Barron, "The Telco, The Common Carrier Model, and The First Amendment – The "Dial-A-Porn" Precedent," Rutgers Computer & Tech. L.J.19 (1993): 371.

52 47 .C. §151 (1934)

53 *See Am. Tel. & Tel. Co. v U.S.*, 299 U.S. 232 (1936).Under the Communications Act of 1934, common carriage obligations were imposed upon companies that were (1) engaged in interstate communication, (2) by wire, (3) by any entity engaged as a common carrier for hire.The Act's definition of common carrier looked to "whether the carrier holds itself out indiscriminately to a class of persons for service," regardless of whether the entity enjoyed monopoly power.

54 *Sable Communications, Inc. v FCC*, 492 U.S. 115 (1989).

55 Second Computer Inquiry, Final Decision, 77 FCC2d 384, para. 96, 47 Rad. Reg.2d (P & F) 669 (1980) [hereinafter Computer II Final Decision]; Basic service is the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."*Ibid*. at 419-20. *See also* text accompanying notes 5-7.[I think this is the first time you mention the Computer Inquiries]

56 Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Report and Order*, 16 FCCR.7418, para. 2 n.6 Comm. Reg. (P & F) 641 (2001) ("The Commission has concluded that Congress sought to maintain the basic/enhanced distinction in its definition of 'telecommunications services' and 'information services,' and that 'enhanced services' and'information services' should be interpreted to extend to the same functions.").

57 Communications Act of 1934, Section 3(44), as amended and codified at 47 U.S.C.A. Section 153(44) (West 1991).

58 See *National Cable & Telecommunications Association et al. v Brand X Internet Services et al.*, 545 U.S. 967, 975-76.

59 17 FCCR. 4798 (2002).
60 *Ibid*.
61 *Ibid*.
62 *Ibid*.
63 *See* Dawn C. Nunziato, *Virtual Freedom: Net Neutrality and Free Speech in the Internet Age*, (2009), 115-133.
64 Jerome A. Barron, "The Telco, The Common Carrier Model, and The First Amendment – The "Dial-A-Porn" Precedent," Rutgers Computer & Tech. L.J.19 (1993): 371.
65 de Sola Pool, *supra* note 38, at 106.
66 2015 Open Internet Order, *supra* note 2.