

“Wildly Enthusiastic” About the First Multilateral Agreement on Trade in Telecommunications Services

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I. INTRODUCTION

Traditionally, telecommunications services have been provided by national monopolies. In a sign that monopolies are a thing of the past, the World Trade Organization's (WTO)¹ Fourth Protocol to the General Agreement on Trade in Services (WTO Basic Telecom Agreement or Basic Telecom Agreement)² entered into force on February 5, 1998. The Basic Telecom Agreement was concluded on February 15, 1997, with sixty-nine WTO Members³ agreeing to open to foreign competition for the first time some or all of their basic telecommunications services markets. These sixty-nine Members represent over 90 percent of the world's basic telecommunications revenues. Telecommunications services is a huge and growing market, with 1997 revenues expected to exceed \$725 billion.⁴ A telecom trade agreement came after two unsuccessful attempts to negotiate multilateral commitments on basic telecommunications under the auspices of the WTO. It was an achievement warmly welcomed by consumers and suppliers of basic telecommunications services.⁵ In fact, many in U.S. industry declared themselves to be "wildly enthusiastic."⁶

1. The WTO was created by the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 2 (GATT Secretariat 1994), 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

2. As described below, the commitments undertaken as a result of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS. FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES (WTO 1997), 36 I.L.M. 354, 366 (1997). These commitments are colloquially referred to as the WTO Basic Telecom Agreement, although they are not technically contained in a stand-alone agreement.

3. Actually, the 69 WTO Members represent 70 contracting parties, as the European Union is bound in addition to its 15 Member states. The 69 WTO Members represent governments or separate customs territories with full autonomy in the conduct of their external commercial relations. See WTO Agreement, *supra* note 1, art. XII. Hong Kong, one of the parties to the WTO Basic Telecom Agreement, remains a WTO Member by virtue of its status as a separate customs territory of the People's Republic of China and may participate in relevant international organizations and international trade agreements, such as the WTO. See *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, art. 116 (last modified Apr. 30, 1997) <<http://www.info.gov.hk/hkma/system/basiclaw.html>>.

4. U.S. DEPARTMENT OF COMMERCE, U.S. INDUSTRY AND TRADE OUTLOOK 1998: TELECOMMUNICATIONS SERVICES 30-1 (1998).

5. Anne Swardson & Paul Blustein, *Trade Group Reaches Phone Pact: Experts Say Deal Will Result in Cheaper Long Distance Rates*, WASH. POST, Feb. 16, 1997, at A33.

6. On February 13, two days before the negotiations were to conclude, representatives of the private sector in Geneva, who were there to observe the concluding days, greeted the U.S. negotiating team at its morning industry briefing with signs saying "wildly enthusiastic."

This Article describes the results of the negotiations on basic telecommunications, the history of the negotiations, the difficult issues that negotiators faced, and how those issues were resolved.

II. THE RESULTS OF THE NEGOTIATIONS

The results of the negotiations can be measured in a number of ways. The most obvious is the quantity and quality of commitments made by the countries involved. Sixty-nine countries made commitments to open their markets for some or all basic telecommunications services to foreign competition.⁷ Fifty-two countries guaranteed access to their markets for international services and facilities, with five more countries open for selected international services. In almost all of those countries, international services have been provided by a monopoly that will face competition for the first time.⁸ Fifty-six countries agreed to open markets for all or selected services provided by satellites.

Not only have monopolies ended for the first time in many countries, but the competitors providing basic telecom services can be 100 percent owned by foreigners in forty-four countries. Another twelve countries agreed to allow foreign ownership or control of certain basic telecom services, while thirteen countries guaranteed to allow some degree of foreign ownership in their basic telecom services markets.

To make these commitments of market access and foreign ownership and control fully realizable, fifty-three countries agreed to adopt as binding commitments the “Reference Paper,” a set of procompetitive regulatory principles.⁹ For the first time in a multilateral setting, countries agreed to abide by competition rules.

The second way to measure the achievement of these negotiations is by the size of the markets that will be open to competition. In this respect, the results are particularly impressive. Prior to implementation of the results of these negotiations, only 17 percent of the top twenty telecom markets were open to competition.¹⁰ As of the date of entry into force of the WTO Basic

7. A country-by-country summary of commitments is attached. The summary also includes commitments to provide market access for value-added telecommunications services. *See infra* note 23.

8. Competition in international voice telephone services, prior to January 1, 1998, existed in the United States, United Kingdom, Sweden, Chile, New Zealand, Japan, Australia, and Finland.

9. The Reference Paper was never formally issued as a WTO document. *See* Reference Paper, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 436 (WTO 1997), 36 I.L.M. 354, 367 (1997) [hereinafter Reference Paper]. For a description of the Reference Paper, *see infra* Part IV.B.

10. *See* Rules and Policies on Foreign Participation in the U.S. Telecomm. Market, *Report and Order and Order on Reconsideration*, 12 F.C.C.R. 23,891, para. 7, 10 Comm.

Telecom Agreement, 92 percent of major markets are covered by commitments to remove restrictions on competition and foreign entry.¹¹ Consumers will also benefit. The Clinton Administration estimates that the average cost of international phone calls will drop by 80 percent—from one dollar per minute on average to twenty cents per minute over the next several years.¹²

III. THE HISTORY

A. *The GATS*

There is actually no free-standing WTO Basic Telecom Agreement, but a series of commitments that compose part of the General Agreement on Trade in Services (GATS),¹³ one of the trade agreements included within the WTO Agreement.¹⁴ The GATS establishes binding multilateral rules covering treatment of foreign services and service suppliers and government regulation of trade in services. The GATS combines elements of both trade and investment agreements. As described below, some of the substantive obligations of the GATS apply automatically to all WTO Members; other obligations only apply in the event that a Member undertakes specific sectoral commitments. These sectoral commitments are included in a Member's individual Schedule of Commitments, which is annexed to the GATS.¹⁵ Thus, the extent of a WTO Member's obligations can only be established by reference to the text of the GATS and the Member's Schedule.

B. *Negotiations over Basic Telecommunications Services*

Basic telecommunications was one of the four service sectors left unresolved by the Uruguay Round.¹⁶ As with financial services,¹⁷ the stumbling

Reg. (P & F) 750 (1997) [hereinafter *Foreign Participation Order*].

11. *Id.*

12. *The WTO Telecom Agreement: Results and Next Steps: Hearings Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 16 (1997) (statement of Hon. Charlene Barshefsky, U.S. Trade Representative).

13. General Agreement on Trade in Services, WTO Agreement, Annex 1B, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 325 (GATT Secretariat 1994), 33 I.L.M. 1167 (1994) [hereinafter GATS].

14. Other agreements include the General Agreement on Tariffs and Trade, the Trade-Related Investment Agreement, the Agreement on Agriculture, and the Understanding on Dispute Settlement.

15. A "protocol" is the device used to annex Schedules of Commitments and lists of MFN exceptions of individual WTO Members to the GATS, making them integral parts of the GATS. GATS, *supra* note 13, art. XX.

16. The other sectors were financial services, maritime, and movement of persons. The "Uruguay Round" refers to the trade negotiations begun at Punta Del Este, in 1986, and concluded formally in Marrakesh, Morocco in April 1994.

block was the “free-rider” problem, created by the structure of the GATS itself. The GATS requires that WTO Members provide “Most-Favoured-Nation” treatment (MFN)¹⁸ to like services and service suppliers from other WTO Members, regardless of the commitments undertaken by any individual Member. This obligation precludes a WTO Member from discriminating among services or service suppliers of other Members. It means that a Member that commits to open its market for a certain service cannot close its market on a selective basis to like services or service suppliers from any WTO Member.

The other essential obligations envisioned by the GATS are “market access”¹⁹ and “national treatment.”²⁰ The application of these obligations is subject to negotiation on a sector-by-sector basis and is contained in individual Schedules of Commitments.²¹ As a result, not all WTO Members have the same level of commitments with respect to market access or national treatment.

The automatic application of the MFN principle creates imbalance in those service sectors where many countries are unwilling to make market access commitments. It was apparent in mid-1992 that there would be a lack

17. Kenneth Freiberg, World Trade Organization: Second Protocol to the General Agreement on Trade in Services (GATS) and Related Decisions, *Introductory Note*, 35 I.L.M. 199 (1996).

18. GATS, *supra* note 13, art. II.

19. *Id.* art. XVI. This provision requires WTO Members to “accord services and service suppliers of any other [WTO] Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule,” and to refrain from imposing certain types of quantitative restrictions, economic needs tests, or local incorporation requirements in those services sectors where the WTO Member has undertaken specific market access commitments. *Id.* A quantitative restriction is a cap on the number of permitted suppliers. An economic needs test is a limitation on the number of service suppliers based on an assessment of whether the market will be able to absorb new service suppliers without harm to existing service suppliers.

20. *Id.* art. XVII. Article XVII is a nondiscrimination rule that requires a WTO Member to treat like services and service suppliers from other WTO Members no less favourably than it treats its own services and service suppliers. *Id.* Article XVII states that:

[i]n the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Id.

21. Under the GATS, *id.* art. XX, each WTO Member negotiates a Schedule of Commitments covering the different services sectors. If a WTO Member agrees to make market access commitments in any particular service, that Member must list quantitative restrictions and discrimination in favor of domestic firms that it wishes to maintain. According to GATS, *id.* art. XIX, such restriction or discrimination is subject to negotiations during the original negotiations or subsequent rounds.

of market access and national treatment commitments in the basic telecommunications sector.²² Only a few WTO Members, including the United States, were willing to make market access commitments in basic telecommunications services as part of the Uruguay Round of negotiations. The scope of commitments was limited. A few WTO Members undertook commitments only in a single subsector, such as facsimile services, or only through limited technological means, such as cellular telephone services.²³ As a result, Members of the services negotiating group began to discuss the possibility of extending negotiations in this sector beyond the general deadline of December 1993.²⁴

IV. THE NEGOTIATING GROUP ON BASIC TELECOMMUNICATIONS

At the conclusion of the Uruguay Round, trade ministers agreed to extend the period of negotiations regarding commitments in basic telecommunications.²⁵ The Decision on Negotiations on Basic Telecommunications established a “Negotiating Group on Basic Telecommunications” (NGBT) to carry out comprehensive negotiations on basic telecommunications, with a final report to the Council for Trade in Services²⁶ due on April 30, 1996. The Ministerial Decision on Negotiations stated that “[n]egotiations shall be entered into on a voluntary basis with a view to the progressive liberalization of trade in telecommunications transport networks and services” and that they “shall be comprehensive in scope, with no basic telecommunications

22. GATS, Negotiating Group on Basic Telecommunications, *Negotiations on Basic Telecommunications, Note by the Secretariat*, TS/NGBT/W/1/Rev.1, para. 2 (June 10, 1994) [hereinafter *June 1994 Note*]. The *June 1994 Note* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

23. *Id.* para. 9. As a result of the Uruguay Round, about 60 WTO Members, including all major U.S. trading partners, made market access commitments for Value-Added Telecommunications Services (VATS). VATS includes electronic mail, voice mail, on-line information and data base retrieval, electronic data interchange, enhanced facsimile services, code and protocol conversion, and on-line information and data processing. A number of WTO Members made commitments for VATS in their Schedules submitted as part of the basic telecommunications negotiations, bringing the total number of WTO Members with commitments in VATS to 69.

24. *Id.* para. 2.

25. The postponement was contained in a “Ministerial Decision on Negotiations on Basic Telecommunications” taken at the time the WTO Agreement was signed. Decision on Negotiations on Basic Telecommunications, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 461 (GATT Secretariat 1994) [hereinafter *Ministerial Decision on Negotiations*].

26. The Council for Trade in Services is composed of all WTO Members and is charged with facilitating the operation of the GATS and furthering its objectives. See GATS, *supra* note 13, art. XXIV.

excluded *a priori*.”²⁷ At the same time, negotiators suspended application of the MFN principle in this sector.²⁸ This meant that during the period of negotiations and until new commitments entered into force, WTO Members were not bound to provide MFN treatment in the basic telecommunications sector. Even more important, WTO Members retained the ability to take an MFN exemption at the conclusion of the negotiations, if that Member considered that the overall set of market access commitments remained insufficient.²⁹ During the negotiating period, Members agreed to observe a “stand-still,” and not to take any measures in telecommunications services that would improve their negotiating position.³⁰

The NGBT began work in May 1994 with seventeen WTO Members participating.³¹ Negotiators viewed the process as one that should lead to radical departures from existing telecommunications services regimes—the provision of these services on a competitive basis.³² Issues to be addressed included scheduling, competitive safeguards, use of frequencies, accounting rates, and regulatory issues such as the maintenance of an independent regulator.³³ As one of the first items of business, the negotiators agreed that they lacked sufficient information about the telecommunications services markets of Members needed to develop requests for market access. In July

27. Ministerial Decision on Negotiations, *supra* note 25, paras. 1, 2.

28. The “Annex on Negotiations on Basic Telecommunications,” an Annex to the GATS, suspended the MFN obligation until April 30, 1996, or the date of implementation of any agreement on basic telecommunications set by the NGBT. In the absence of the agreed-upon suspension contained in the Annex on Negotiations, the MFN obligation would have automatically applied in the basic telecommunications sector as it does in all other services sectors. In addition, if a WTO Member decided that it wanted to take an MFN exemption at a later date, it would have to obtain agreement of three-fourths of WTO Members to do so. *See* GATS, Annex on Negotiations on Basic Telecommunications, WTO Agreement, Annex 1B, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 364, para. 2 (GATT Secretariat 1994), 33 I.L.M. 1196 (1994) (referring to art. IX, para. 3 of the WTO Agreement on waivers from WTO obligations).

29. The “Annex on Article II Exemptions,” which is part of the GATS, allows a WTO Member to schedule limited exemptions to its MFN obligations. GATS, Annex on Article II Exemptions, WTO Agreement, Annex 1B, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 352 (GATT Secretariat 1994), 33 I.L.M. 68 (1994).

30. *June 1994 Note*, *supra* note 22, para. 3.

31. Ministerial Decision on Negotiations, *supra* note 25, para. 5. The original Members were Australia, Canada, Chile, the European Union and its Member States, Finland, Hong Kong, Hungary, Japan, Korea, Mexico, New Zealand, Norway, the Slovak Republic, Sweden, Switzerland, Turkey, and the United States.

32. GATS, Negotiating Group on Basic Telecommunications, *Report of the Meeting of 6 May 1994*, TS/NGBT/1, para. 5 (June 10, 1994). The *Report of the Meeting of 6 May 1994* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

33. *Id.* para. 9.

1994, the Secretariat of the WTO distributed a questionnaire to “explore each government’s regulatory environment regarding the supply of basic telecommunications networks and services.”³⁴

A. *Scheduling Issues*

Negotiators focused on scheduling issues in the early stages of the negotiations. These included questions relating to how to schedule services such as call-back or country direct;³⁵ whether accounting rates³⁶ are “measures” of Members for purposes of the GATS;³⁷ and whether a “public interest” test must be scheduled as a market access limitation.³⁸ Negotiators agreed on the fundamental principle of a “positive list” approach to scheduling.³⁹ This means that a participant need only list those services of categories in which it is making a commitment. In the telecommunications sector, it

34. GATS, Negotiating Group on Basic Telecommunications, *Questionnaire on Basic Telecommunications, Note by Secretariat*, TS/NGBT/W/3 (July 15, 1994). The *Questionnaire on Basic Telecommunications* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998). Although responses were requested for September 1994, the bulk of responses were submitted in late 1994 and early 1995. The questionnaire covered definitions, market structure, the extent and conditions under which competitive supply of basic telecommunications is permitted, and regulatory issues. *Id.*

35. GATS, Negotiating Group on Basic Telecommunications, *Review of Outstanding Issues, Note by Secretariat*, TS/NGBT/W/2, para. 4 (July 8, 1994) [hereinafter *1994 Secretariat Note*]. The *1994 Secretariat Note* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998). Call-back is a method of providing international services. Typically, a call is placed by the originating caller overseas to the call-back provider’s switch located in the United States. The switch then automatically returns the call, and upon completion, provides the caller with a U.S. dialtone. All traffic is thus originated at the U.S. switch, and the calls are billed at U.S. tariffed rates, which are usually much lower than those of the originating country.

36. The current international accounting rate system was developed as part of a regulatory tradition in which international telecommunications services were supplied through a bilateral relationship between national monopoly carriers. The “accounting rate” refers to a rate negotiated between two carriers on a particular international route which is intended to allow each carrier to recover the cost of the respective facilities each has provided for terminating an international call. Most operating agreements provide that the two carriers split the accounting rate 50:50. At settlement, each carrier nets the number of minutes of communication it originated against the number of minutes originated by the other carrier. The carrier that originated the larger number of minutes reimburses the other carrier an amount calculated by multiplying the net difference in minutes generally by one-half the accounting rate. Each carrier’s portion of the accounting rate is referred to as the settlement rate. *Matter of Int’l Settlement Rates, Report and Order*, 12 F.C.C.R. 19,806, 9 Comm. Reg. (P & F) 1 (1997) [hereinafter *Benchmarks Order*]; *Cable & Wireless v. FCC, Memorandum Opinion, Order and Certificate*, 12 F.C.C.R. 21,692, 10 Comm. Reg. (P & F) 1137 (1997).

37. *1994 Secretariat Note*, *supra* note 35, para. 11.

38. *Id.* para. 21.

39. *June 1994 Note*, *supra* note 22, para. 6(ii).

was necessary to distinguish between subsectors—such as international, long-distance, or local-voice telecommunications services—and technologies, such as cellular services.⁴⁰ Negotiators concluded that it was not necessary to schedule specific ways of offering a particular type of telecommunications service, such as call-back.⁴¹ If a Member committed to allow international service to be provided, it was not necessary to describe the ways in which that service could be provided. Alternatively, if a Member made no commitment on international service, then it was not necessary to specifically exclude particular ways in which international service could be provided.⁴²

Questions relating to accounting rates occupied negotiators’ attention in the first year of the NGBT.⁴³ Negotiators addressed the question of whether accounting rates set by international service providers were “measures” of a WTO Member for purposes of the GATS and, therefore, subject to the discipline of the GATS. This would include, among other things, the obligation to provide MFN treatment. The GATS defines “measures by Members” as measures taken by governmental authorities or nongovernmental bodies in the exercise of powers delegated by a governmental authority.⁴⁴ Since accounting rates differ dramatically from route to route, imposition of an MFN obligation would have a dramatic effect on the operation of almost all international service providers.⁴⁵

The argument that accounting rates are “measures of a Member” is based on the fact that accounting rates are negotiated between operators, and, according to the International Telecommunication Regulations, opera-

40. This distinction and the “positive list” approach were further clarified by the Chairman of the negotiating group in January 1997. See *infra* note 118 and accompanying text.

41. See *infra* note 137 and accompanying text for a discussion of scheduling issues.

42. Nonetheless, some Members who made no commitments on international services also specifically excluded call-back. See *Indonesia, Schedule of Specific Commitments*, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 234 (WTO 1997), GATS/SC/43/Suppl.2 (Apr. 11, 1997); *Pakistan, Schedule of Specific Commitments*, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 311 (WTO 1997), GATS/SC/67/Suppl.2 (Apr. 11, 1997). The Schedule of Specific Commitments for Indonesia and Pakistan can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

43. Settlement rates under the current international accounting rate system remain significantly above the cost of terminating international telephone calls and have been the subject of much multilateral and bilateral discussion, as well as specific actions in the United States. See *Benchmarks Order*, *supra* note 36, at paras. 2, 15.

44. GATS, *supra* note 13, art. I, para. 3(a).

45. For example, accounting rates for U.S. carriers range from \$0.12 per minute with the United Kingdom to \$1.25 with Jamaica. Federal Communications Commission, Consolidated Accounting Rates of the United States (June 1998).

tors make these agreements as “administrations or recognized operating agencies (RPOAs).”⁴⁶ Administrations and RPOAs are defined by the Constitution of the International Telecommunication Union (ITU) as a governmental department and an entity designated by a governmental department, respectively.⁴⁷ Since most international carriers are either part of or owned by the government or have been designated by a government as an operating agency, the acts of these carriers would constitute “measures of a Member.”

The contrary argument is that the designation of a RPOA does not confer any governmental authority on the operators, so operators cannot be deemed to “exercise powers delegated by” any governmental body, as required by the GATS definition.⁴⁸ Although the ITU Constitution refers to a RPOA “authorized” by a government, the “authorization” can refer to any process a particular country uses to designate private entities to participate directly in the work of the ITU.⁴⁹ Negotiators never reached consensus on how to treat accounting rates, and as a result, a number of WTO Members took MFN exceptions for application of accounting rates.⁵⁰ Their action leaves open the question of whether the vast majority of WTO Members that did not take MFN exceptions are vulnerable to charges that their interna-

46. International Telecommunication Regulations, Dec. 9, 1988, S. TREATY DOC. NO. 102-13, art. I, para. 1.5 (1991). The term “recognized operating authority” was changed to “recognized private operating agency” in the 1992 version of the ITU Constitution and Convention in Geneva.

47. Constitution and Convention of the International Telecommunication Union, Dec. 22, 1992, S. TREATY DOC. NO. 104-34, Annex, paras. 1002, 1008 (1996).

48. See Matter of Int’l Comm. Policies Governing Designation of Recognized Private Operating Agencies (POAs), *Notice of Inquiry*, 95 F.C.C.2d 627 (1983). In fact, the concept of a RPOA arose from the attempt of the ITU to allow U.S. private carriers to participate directly in the work of the ITU. *Id.* para. 24.

49. *Id.*

50. For example, India took an MFN exception for “measures including the application of different accounting rates for different operators/countries covered by International Telecommunication Services Agreements between Videsh Sanchar Nigam Limited [the government operator] and various foreign operators.” *India, List of Article II (MFN) Exemptions*, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 232 (WTO 1997), GATS/EL/42/Suppl.1 (Apr. 11, 1997). The following countries took similar exceptions: Antigua and Barbuda, *List of Article II (MFN) Exemptions*, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 14 (WTO 1997), GATS/EL/2 (Apr. 11, 1997); Bangladesh, *List of Article II (MFN) Exemptions*, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 40 (WTO 1997), GATS/EL/8 (Apr. 11, 1997); Pakistan, *List of Article II (MFN) Exemptions*, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 321 (WTO 1997), GATS/EL/67/Suppl.1 (Apr. 11, 1997); Sri Lanka, *List of Article II (MFN) Exemptions*, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 395 (WTO 1997), GATS/EL/79 (Apr. 11, 1997); and Turkey, *List of Article II (MFN) Exemptions*, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 431 (WTO 1997), GATS/EL/88/Suppl.2 (Apr. 11, 1997). The preceding list of Article II (MFN) Exemptions can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

tional service providers cannot maintain differential accounting rates. Negotiators, however, reached a “gentlemen’s agreement” not to bring the issue of discriminatory accounting rates to WTO dispute settlement for at least a few years.⁵¹

B. *The Reference Paper*

Early in the negotiations, negotiators recognized the need to develop a set of competitive safeguards against anticompetitive practices.⁵² These safeguards would be measures designed to ensure that monopolies or former monopolies of basic telecommunications could not exploit their dominant position to distort market forces and impede the ability of competitors to supply networks or services for which commitments would be made. In addition, negotiators discussed the desirability of establishing or maintaining independent regulators, with “independent” understood to mean that regulatory functions have been removed from the purview of the basic telecommunications operators and assigned to a separate body.⁵³ In December 1994, U.S. negotiators convened a meeting of selected delegates to initiate a dialogue on regulatory objectives. This select group met regularly thereafter to draft what became the “Reference Paper,” the core regulatory obligations that would bring major changes to telecommunications services.⁵⁴

The process of drafting the Reference Paper began with the United States distributing a paper entitled, “Procompetitive Regulatory and Other Measures for Effective Market Access in Basic Telecommunications Services.” In this paper, the United States stated that it was

51. *Report of the Group on Basic Telecommunications*, S/GBT/4, 36 I.L.M. 354, 369 para. 7 (1997), states:

It is the understanding of the Group that: the application of such accounting rates would not give rise to action by Members under dispute settlement under the WTO; and that this understanding will be reviewed not later than the commencement of the further Round of negotiations on Services Commitments due to begin not later than 1 January 2000.

52. *1994 Secretariat Note*, *supra* note 35, para. 15.

53. *Id.* para. 16.

54. This group was known as the “Room A Group,” after the room at the WTO where it first met. Subsequent meetings, informally chaired by the chief Japanese delegate to the NGBT, met at the Japanese Embassy. The hospitality of the Japanese and the informal leadership of the Japanese “chair” contributed significantly to the successful drafting of the Reference Paper. Initial participants represented the United States, Australia, New Zealand, Japan, Korea, and the European Union. Later sessions were attended by representatives of Brazil, Singapore, Chile, Mexico, and the Philippines, in addition to the original participants.

[E]ssential that, for purposes of progressive liberalization of trade in basic telecommunications services, market access commitments must be accompanied by commitments to:

- set disciplines for interconnection of competing basic telecommunications suppliers;
- provide competition safeguards on dominant carriers;
- ensure transparency of regulatory processes; and
- guarantee the independence of regulators.⁵⁵

When the United States submitted its draft offer in the negotiations in July 1995, it included a detailed set of regulatory principles that it promised to adhere to if the negotiations succeeded.⁵⁶ The U.S. principles included requirements for dominant carriers to provide fair and economical interconnection at nondiscriminatory, publicly-tariffed, cost-based rates—this to be accomplished in a manner that permits service suppliers to buy only the facilities or services they actually need to provide basic telecommunications service—and to provide equal access, including dialing parity. The United States also offered to require number portability, publish accounting rates, and administer universal service obligations in a transparent, competitively neutral manner. The U.S. offer also contained commitments relating to preventing a dominant operator from abusing its market power, permitting public comment on regulatory decisions, and maintaining a regulator who was independent from any operator or any government agency that exercises control over an operator.

Based on contributions from Canada, Australia, and the European Union, Japan developed a composite set of regulatory principles in October 1995 for discussion by the Room A Group. The composite text did not refer to obligations of a “WTO Member” because the negotiators decided they were developing a “Reference Paper” and not something binding on any Member. As a result, negotiators wrote the Reference Paper in the passive voice without any statement as to who would carry out the obligations.⁵⁷

55. WTO, Negotiating Group on Basic Telecommunications, *Communication from the United States, Pro-competitive Regulatory and Other Measures for Effective Market Access in Basic Telecommunications Services*, S/NGBT/W/5 (Feb. 9, 1995). The *Effective Market Access Communication from the United States* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

56. WTO, Negotiating Group on Basic Telecommunications, *Communication from the United States, Draft Offer on Basic Telecommunications*, S/NGBT/W/12/Add.3 (July 31, 1995) [hereinafter *July 31 Draft Offer*]. The *July 31 Draft Offer* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

57. Since New Zealand does not have a separate telecommunications regulator, it objected to efforts to have the document refer to a “regulator” as the responsible entity.

Negotiators circulated a draft of the Reference Paper to all NGBT participants in December 1995 and January 1996.⁵⁸ The Chairman of the NGBT described the Reference Paper at the January 1996 meeting “as a tool to help participants arrive at an understanding of the kinds of commitments they might undertake on regulatory matters.”⁵⁹

In fact, the Reference Paper never answers the question of what entity will carry out the obligations contained in it or how those obligations specifically will be carried out. To accommodate the different political and legal structures of WTO Members, negotiators agreed that the Reference Paper would focus on effective outcomes, rather than the means or processes by which those outcomes would be achieved. Negotiators agreed that the principles needed to be sufficiently flexible to accommodate differences in market structures and regulatory philosophies among the various participants. No single uniform regulatory system should be imposed. In some countries, the obligations in the Reference Paper would be carried out by a government ministry of telecommunications or justice; in others, there may be a regulatory agency; still others may assign responsibilities to a mixture of government agencies. Some countries may rely on antitrust law, while others may develop a complicated set of regulatory principles. The objective was to ensure certain results, a level playing field for new entrants, not to determine the means by which the results would be achieved. A description of the terms of the Reference Paper follows.

Definitions

Users mean service consumers and service suppliers.⁶⁰

A definition of “users” was essential to define the scope of the interconnection obligation. It is extremely broad, covering the end-user or retail customer, be it a natural person or a juridical person, and also any intermediary service supplier, such as a reseller of telecommunications services provided by others. The terms “service consumer” and “service supplier” were chosen because they are defined terms in the GATS.⁶¹

58. WTO, Negotiating Group on Basic Telecommunications, *Report on the Meeting of 15 December 1995*, S/NGBT/11, para. 5 (Dec. 22, 1995); WTO, Negotiating Group on Basic Telecommunications, *Report on the Meeting of 26 January 1996*, S/NGBT/12, para. 6 (Feb. 14, 1996) [hereinafter *Report on the Meeting of 26 January 1996*]. These reports can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

59. *Report on the Meeting of 26 January 1996*, *supra* note 58, para. 6.

60. Reference Paper, *supra* note 9.

61. “‘Service consumer’ means any person that receives or uses a service.” GATS, *supra* note 13, art. XXVIII(i). “‘Service supplier’ means any person that supplies a service.” *Id.* art. XXVIII(g). GATS defines “person” as a “natural person or a juridical person,”

Essential facilities mean facilities of a public telecommunications transport network or service that

- (a) are exclusively or predominantly provided by a single or limited number of suppliers; and
- (b) cannot feasibly be economically or technically substituted in order to provide a service.

A *major supplier* is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

- (a) control over essential facilities; or
- (b) use of its position in the market.⁶²

These two definitions describe the type of telecommunications service provider that could act anticompetitively and, therefore, should be subject to competitive safeguards and interconnection obligations. The U.S. regulatory principles had referred to a “dominant operator,” defined as an operator with market power.⁶³ However, this was a U.S. term of art not used elsewhere. Australia proposed that each WTO Member would identify the relevant carriers in its Schedule, but this idea was rejected. Everyone agreed that the definition could not be limited to a single supplier, that is, solely to a monopoly provider, because the disciplines would cease as soon as there was a new entrant. Negotiators decided to focus on the control of facilities as the operative way of defining the relevant carriers. The Canadian delegation offered a definition of “essential facilities” as facilities that “are available only on a monopoly basis (*de facto* or *de jure*); cannot be economically or technically substituted; and are required by a competitor for the supply of a service.”⁶⁴

Some thought this definition was too narrow and would not cover former monopolies now subject to some competition. So the reference to *de facto* or *de jure* monopoly was replaced by “exclusively or predominantly provided by a single or limited number of suppliers.”⁶⁵ This was conditioned, as Canada had suggested, by a further requirement that the facilities

each of which are further defined in art. XXVIII(k) and (l), respectively.

62. Reference Paper, *supra* note 9.

63. The U.S. paper defined market power as “the ability to charge prices above a competitive level. In basic telecommunications services, market power is particularly relevant with respect to control over bottleneck facilities for interconnection to public telecommunications transport networks.” See *July 31 Draft Offer*, *supra* note 56.

64. Informal Communication from Canada—Regulatory Principles (Nov. 15, 1995) (on file with author).

65. Reference Paper, *supra* note 9.

“cannot feasibly be economically or technically substituted in order to provide a service.”⁶⁶ Negotiators agreed that both parts of the definition were necessary or else facilities would be deemed essential even though they were easily duplicated by new carriers. The relevant facilities were narrowed to those of a “public telecommunications transport network or services,” terms that are defined broadly in the GATS Annex on Telecommunications.⁶⁷

The European Union argued that it was not control over essential facilities that should define interconnection obligations or competitive safeguards, but rather market power. The European Union suggested assigning interconnection responsibilities to suppliers with significant market power. This is a term of art in EU directives where it is defined as carriers with more than 25 percent market share.⁶⁸ Others believed that such a definition was overbroad and would impose obligations on carriers that could not act anticompetitively. There was agreement that some carriers that did not control essential facilities (for example, because duplication of those facilities was economical) could still act anticompetitively and hinder market access by new entrants. Therefore, negotiators agreed to include a concept of market power, applying the interconnection obligations and competitive safeguards to incumbent carriers that can “materially affect the terms of participation (having regard to price and supply) either as a result of control of essential facilities or through use of market power.”⁶⁹ In other words, these types of carriers are referred to as “major suppliers.”

This term should not be taken literally but should be read only in light of its definition. Major suppliers must be able to exercise market power in the relevant market, whether as a result of their control of essential facilities or as shown by their ability to raise prices and restrict output in the relevant market. Market share is not the sole determining factor. While AT&T may literally be a major supplier of international voice telecommunications services in the United States, in the view of U.S. officials based on decisions by the FCC,⁷⁰ it is not a “major supplier” for purposes of the Reference Paper

66. *Id.*

67. See GATS, Annex on Telecommunications, WTO Agreement, Annex 1B, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 359, para. 3(b)-(c) (GATT Secretariat 1994), 33 I.L.M. 1192-93 (1994) [hereinafter GATS, Annex on Telecommunications].

68. Directive 97/33/EC of the European Parliament and of the Council on Interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), 1997 O.J. (L 199) 32 [hereinafter EU Interconnection Directive].

69. Reference Paper, *supra* note 9.

70. Motion of AT&T Corp. to be Declared Non-Dominant for Int'l Serv., *Order*, 11 F.C.C.R. 17,963, 3 Comm. Reg. (P & F) 111 (1996); Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 F.C.C.R. 3271, 1 Comm. Reg. (P & F) 63

obligations. It is also important to remember that a carrier can be a “major supplier” in its home market and international routes terminating in its home market, but not for other markets where it cannot exercise market power.

1. *Competitive safeguards*

1.1 *Prevention of anti-competitive practices in telecommunications*

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 *Safeguards*

The anti-competitive practices referred to above shall include in particular:

- (a) engaging in anti-competitive cross-subsidization;
- (b) using information obtained from competitors with anti-competitive results; and
- (c) not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.⁷¹

Initially, the United States proposed a fairly detailed set of competitive safeguards, promising to: (1) prohibit dominant carriers from cross-subsidizing nonregulated services, (2) requiring certain dominant carriers to adopt structural separation or cost accounting safeguards, and (3) requiring a dominant carrier to make publicly available network information necessary to facilitate interconnection or the supply of competitive telecommunications services.⁷² There was general agreement that prevention of cross-subsidization and misuse of information, as well as transparency requirements, was essential to promote competition and allow new entrants into the market. Much of the discussion focused on how detailed the obligations would be. In line with the idea of establishing broad principles, the negotiators agreed to a general principle—Members should adopt measures to prevent anticompetitive behavior—and an illustrative, but not an exclusive list, of the types of behavior that would be anticompetitive.

Paragraph 1.1 requires a Member to have in place measures that prevent joint or collusive behavior as a result of the reference to “suppliers who, alone or together, are a major supplier.”⁷³ This provision, for example, requires that a WTO Member have laws or regulations to prohibit joint re-

(1995).

71. Reference Paper, *supra* note 9, paras. 1.1, 1.2.

72. *July 31 Draft Offer*, *supra* note 56.

73. Reference Paper, *supra* note 9.

fusals to engage in resale or provide interconnection. It also means that a Member must have measures in place to prevent anticompetitive cross-subsidization and misuse of information. Finally, it requires that measures be in place to require timely disclosure of technical and commercial information.⁷⁴

The phrasing of paragraph 1.1, however, does not require a Member to pursue anticompetitive conduct or to ensure a particular result. In other words, it does not require a Member to guarantee that anticompetitive conduct will not occur or to stop such conduct. The language in paragraph 1.1 is very different from that used in other contexts in which positive measures have been required in order to ensure particular results.⁷⁵ For example, the obligations regarding interconnection in paragraph 2 are phrased as “will be ensured,” meaning that not only do measures have to be in place with respect to interconnection, but WTO Members must carry them out.⁷⁶ Failure to adopt or maintain measures that would prevent anticompetitive conduct could be cause for dispute settlement, but failure to enforce those measures would not.

The Reference Paper does not define the specific measures that must be adopted in order to carry out the provisions of paragraph 1. Negotiators intended, however, that Members adopt specific measures to address the issues listed in paragraph 1.2. Preventing anticompetitive cross-subsidization may mean requiring the structural separation of various lines of business of a major supplier, such as fully separate subsidiaries. Prevention may be accomplished by requiring nonstructural accounting separation. Similarly, protecting proprietary information may mean adopting prohibitions on unauthorized release of competitors’ business and marketing plans, trunking configurations, peak usage, network architecture, and equipment types, supported by adequate penalties. In addition, Members need to adopt measures to require public availability of technical and commercial information, such as standards, network changes, additions or deletions, processing requests, timing changes, and billing arrangements.⁷⁷

74. *Id.*

75. *Cf.* GATS, Annex on Telecommunications, *supra* note 67, para. 2(a) n.14 (“This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers of public telecommunications transport networks and services by whatever measures are necessary.”); North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., ch. 13, art. 1305, 32 I.L.M. 605, 655 (1993) (Each “party shall ensure that the monopoly does not use its monopoly position to engage in anticompetitive conduct in [certain] markets.”).

76. Reference Paper, *supra* note 9, para. 2.2.

77. *Id.* para. 1.2.

2. *Interconnection*

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.⁷⁸

Paragraph 2.1 defines the scope of the interconnection obligations contained in the Reference Paper.⁷⁹ Negotiators agreed that the definition needed to be very broad in order to cover all types of services. The definition refers to “linking *with* suppliers” rather than “linking *of* suppliers” to reinforce the idea that paragraph 2 obligations guarantee access to the networks or services necessary to provide services.⁸⁰ The phrase “where specific commitments are undertaken” limits the interconnection obligation to those services for which a WTO Member has scheduled commitments. For example, if a country has made no market access commitment for international voice telephony services, then it assumes no interconnection obligations with respect to providers of international services.

The definition, however, is written broadly enough to cover all possible services. The European Union suggested that interconnection be defined as the “physical and logical” linking of two suppliers, explaining that logical linking was intended to include interconnection to data bases and advanced network functionalities. Negotiators concluded, however, that “linking” without any modifiers was broader and covered all contingencies, including satellite links, leased lines, closed user groups, facilities-based service and resale, and some not yet created.

Paragraph 2 builds on obligations already existing in the GATS Annex on Telecommunications. Paragraph 5 of the Annex requires that a Member ensure that any service supplier of another Member is accorded access to and use of public telecommunications transport networks and services on reasonable and nondiscriminatory terms and conditions for the supply of a service included in its Schedule.

2.2 *Interconnection to be ensured*

78. *Id.* para. 2.1.

79. Originally this definition was included in the definitions section. At the insistence of the EU Delegation, it was moved to paragraph 2.

80. As with the definition of “essential facilities,” the interconnection obligation is aimed at providers of “public telecommunications transport network” and “public telecommunications transport service.”

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.⁸¹

Paragraph 2.2 sets the standard that WTO Members must ensure major suppliers meet in providing interconnection. As noted above, the introductory sentence is written as an absolute obligation: “interconnection . . . will be ensured.”⁸² The obligations are extremely detailed as described below. With the caveat that interconnection need only be provided at “technically feasible points” in the network,⁸³ a major supplier has three sets of obligations regarding interconnection:

- (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates.⁸⁴

This is the interconnection version of a national treatment and MFN obligation. It requires the major supplier to treat other telecommunication services and suppliers as it treats its own services and affiliated service suppliers, as well as treating all nonaffiliated telecommunication services and service suppliers equally and without discrimination.⁸⁵ The obligation prohibits a major supplier from favoring its own subsidiaries or affiliates over other suppliers. Paragraph 2.2(a), thus, requires a major supplier not to discriminate in location, information, ordering procedures, ordering intervals, provisioning intervals, billing arrangements, maintenance and testing, characteristics of interconnection, credit terms, and warranties or guarantees.

- (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier

81. Reference Paper, *supra* note 9, para. 2.2.

82. *Id.*

83. The interconnection obligations imposed on incumbent local exchange carriers by the Telecommunications Act of 1996 (Communications Act) also apply at any technically feasible point within the carrier’s network. Telecommunications Act of 1996, § 101(a), § 251(c)(2)(B), 47 U.S.C. § 251(c)(2)(B) (1998).

84. Reference Paper, *supra* note 9, para. 2.2(a).

85. This paragraph was based on the EU Interconnection Directive, *supra* note 68, arts. 6(a) and 7, para. 2, but was broadened to define nondiscrimination by inserting the references to treatment provided affiliates and nonaffiliates.

need not pay for network components or facilities that it does not require for the services to be provided.⁸⁶

This text achieved the U.S. negotiating objectives of imposing broad interconnection requirements on dominant carriers in a manner consistent with the Telecommunications Act of 1996. Many of its obligations derive from the Telecommunications Act⁸⁷ and the EU Interconnection Directive.⁸⁸ This one sentence encompasses many requirements. Interconnection must be timely. The terms and conditions under which interconnection is provided must be transparent and reasonable. The technical standards and specifications for interconnection must be transparent. Rates for interconnection must be cost-oriented,⁸⁹ transparent, and reasonable. Reasonableness in this respect will be judged in economic terms. Interconnection elements must be "unbundled." The wording here is taken directly from Article 7, paragraph 4 of the EU Interconnection Directive and also tracks the Telecommunications Act.

Originally, New Zealand and Australia had proposed qualifying all elements of the interconnection obligation by requiring it to be provided to the extent that it is technically and economically feasible. The United States suggested that such a qualification provided too much leeway and asked whether New Zealand and Australia could consider putting language elsewhere as a narrower qualification. As a result, the negotiators added a reference to "economic feasibility" with respect to rates and dropped the reference to technical feasibility.

The negotiators did not try to define the scope of the many obligations contained in this paragraph. Thus the meaning of "timely," "cost-oriented,"

"sufficiently unbundled," "reasonable," "unbundled," and "economic feasibility" will only be determined in dispute settlement. By using concepts taken from the Telecommunications Act and the EU Interconnection Directive, at least some of the negotiators hoped that the interpretation of these words, as in the United States and Europe, could be precedents for interpretation in the WTO context.⁹⁰

86. Reference Paper, *supra* note 9, para. 2.2(b).

87. *See generally* 47 U.S.C. § 251 (1998).

88. EU Interconnection Directive, *supra* note 68, arts. 4, para. 2, 6(a), 7, paras. 2, 4.

89. Negotiators decided to use "cost-oriented," instead of "cost-based" because of the difficulty of determining actual costs in most countries. U.S. negotiators also favored "cost-oriented" because it is the term used in section 271 of the Telecommunications Act of 1996, 47 U.S.C. § 271 (1998).

90. Obviously, the scope of interconnection obligations in the United States is the subject of fierce debate and unending litigation. The FCC's Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, *First Report and Order*, 11 F.C.C.R. 15,499, 4 Comm. Reg. (P & F) 1 (1996), established nationwide pricing rules for

- (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.⁹¹

Negotiators rejected an attempt to require unbundling only where technically feasible. This seemed to be an excuse to deny interconnection. Instead, negotiators agreed that technical feasibility was not an issue. Negotiators assumed that there were standard interconnection points that were normally available, and as long as a service supplier was willing to pay the additional cost, it could obtain interconnection at other points in the network.

Next, the Reference Paper imposes additional obligations with respect to interconnection to make sure that new entrants seeking it will have the information necessary to obtain interconnection.

2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.⁹²

This paragraph requires that procedures for obtaining interconnection must be publicly available so that all parties know their rights and obligations. A number of the negotiators had proposed originally that this paragraph require not only the availability of the procedures, but also a time frame in which the major supplier had to conclude interconnection negotiations. Canada and the United States, as well as the European Union, suggested the need to set a timetable or reasonable time limits for interconnection. Negotiators, however, decided that it would not be possible to set a time limit. Rather, they circumscribed the ability of a major supplier to delay interconnection indefinitely by inserting the word “timely” in paragraph 2.2(a) and in a later provision dealing with settlement of interconnection disputes.

interconnection between new entrants and incumbent local exchange carriers. These rules were invalidated by the U.S. Court of Appeals for the Eighth Circuit and are now being considered by the U.S. Supreme Court. *Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998). The scope for interpretation of the interconnection obligations can vary. For one interpretation see Coalition of Service Industries, *Statement on the WTO Group on Basic Telecommunications Reference Paper* (Oct. 1997) (visited Nov. 1, 1998) <http://www.itu.int/intset/indu/csi_stat.htm>.

91. Reference Paper, *supra* note 9, para. 2.2(c).

92. *Id.* para. 2.3.

2.4 *Transparency of interconnection arrangements*

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.⁹³

This paragraph adds transparency to the interconnection process and prevents a major supplier from negotiating wildly different interconnection arrangements with different new entrants. It makes more concrete the requirements in paragraph 2.2(a) and (b) that terms, conditions, and rates be transparent and nondiscriminatory. In its draft offer of July 1995, the United States had stated that dominant carriers would be required to provide interconnection at publicly-tariffed rates.⁹⁴ In the negotiation of the Reference Paper, the United States sought a requirement that the actual interconnection agreements negotiated by carriers be publicly available. Other negotiators thought it sufficient to require publication of a standard set of interconnection terms, conditions, and rates. Some objected that interconnection agreements are confidential business documents that should not be available to the public.⁹⁵ To address the different approaches, negotiators agreed that a major supplier would have to make publicly available either its interconnection agreements or a reference interconnection offer.⁹⁶

2.5 *Interconnection: dispute settlement*

A service supplier requesting interconnection with a major supplier will have recourse, either:

- (a) at any time or
- (b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reason-

93. *Id.* para. 2.4.

94. *July 31 Draft Offer*, *supra* note 56.

95. Article XX of the EU Interconnection Directive, *supra* note 68, has an exception for confidential business information. In fact, negotiators agreed that Article III *bis* of the GATS would allow a Member to protect confidential information, the "disclosure of which would . . . prejudice legitimate commercial interests of particular enterprises, public or private." GATS, *supra* note 13, art. III *bis*. So an additional provision protecting confidential business information in interconnection agreements was not necessary.

96. The Commission requires that interconnection agreements be publicly available and has noted a number of times that it does not believe that the existence of a reference interconnection offer is sufficient to prevent discrimination. *See* 47 C.F.R. § 43.51 (1996); *see, e.g.,* *Cable & Wireless v. FCC*, *Memorandum Opinion, Order and Certificate*, 12 F.C.C.R. 21,692, para. 32, 10 Comm. Reg. (P & F) 1137 (1997).

able period of time, to the extent that these have not been established previously.⁹⁷

Article VI of the GATS requires governments to offer suppliers of all services an avenue for recourse of administrative decisions. This provision, however, could not be used to seek redress for interconnection decisions made by private carriers. Negotiators all agreed on the necessity for a domestic enforcement mechanism and a time frame in which interconnection had to be provided.⁹⁸ This avenue for redress is separate from WTO dispute settlement. The issues included what entity would be charged with dispute settlement, what would be the scope of dispute settlement, how long would it take to conclude, and what would be the result of dispute settlement. Paragraph 2.5, as finally agreed, represented a number of compromises. Dispute settlement can be done by any “independent domestic body,” not just a regulator. This took into account the situation in New Zealand, for example, which does not have a telecommunications regulator but rather depends on domestic courts. In determining the timing in which a dispute can be brought, each Member can decide whether a service supplier seeking interconnection can resort to the domestic body at any time or only after a reasonable period of time that has been established and made known.

The domestic body is charged with “resolving disputes” regarding terms, conditions, and rates, a phrasing that gives the independent body more leeway than the original wording that stated the body “[c]an impose appropriate terms, conditions and rates.”⁹⁹ The manner of resolving disputes can be by reference to terms, conditions or rates already established, or based on the facts presented to it. Finally, while the negotiators did not want to require a time limit on private interconnection negotiations, they did require that the domestic body resolve the interconnection dispute “within a reasonable period of time.” As with the terms used in paragraph 2.2, there is no definition of a “reasonable” period of time. Some of the negotiators did note, however, that the four years needed to resolve the interconnection dispute between Telecom New Zealand and the new entrant, Clear, was not reasonable.

3. *Universal service*

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a trans-

97. Reference Paper, *supra* note 9, para. 2.5.

98. Article 9, paragraph 2 of the EU Interconnection Directive, *supra* note 68, is similar.

99. Earlier draft of Reference Paper (on file with author).

parent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.¹⁰⁰

This paragraph provides for general obligations with regard to universal service, without defining the scope of universal service or the specific mechanism to be employed to achieve it. The first sentence makes very clear that each WTO Member will define the scope of universal service according to its own needs. The second sentence tracks the U.S. proposal that universal service be provided in a transparent, nondiscriminatory and competitively neutral manner and that it be as little of a burden as possible to provide the required service. Negotiators did not intend the phrase, "[s]uch obligations will not be regarded as anti-competitive *per se*," to limit the scope of obligations but merely to respond to India's concern that any universal service system could be attacked as anticompetitive regardless of the way it was implemented.

The European Union proposed limiting the costs to be shared by operators to the net cost for covering a basic telecommunications services package, rather than the historical costs. A number of delegations opposed this idea on the grounds that it prescribed a Member's freedom to set universal service obligations. India argued strongly that the universal service obligation be limited to "non-discriminatory and transparent," but other delegations said that was not sufficient.¹⁰¹

Some negotiators argued that a paragraph on universal service was unnecessary because universal service was a form of domestic regulation, already covered by the general obligations of GATS Article VI. But representatives of many least developed countries thought reference to universal service was essential. In fact, this paragraph adds valuable clarification in order to eliminate any doubt that the kinds of disciplines included in Article VI cover universal service.¹⁰²

4. *Public availability of licensing criteria*

Where a licence is required, the following will be made publicly available:

100. Reference Paper, *supra* note 9, para. 3.

101. In fact, India limited its obligations on universal service in its Schedule of Specific Commitments. See *INDIA, Schedule of Specific Commitments*, FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES 224 (WTO 1997), GATS/SC/42/Suppl.3 (Apr. 11, 1997). The *India Schedule of Specific Commitments* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998) (Universal service obligations will "be administered in a transparent and non-discriminatory manner.").

102. See Lee Tuthill, *The GATS and New Rules for Regulators*, 21 TELECOM POL'Y 783, 790 (1997).

- (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence and
- (b) the terms and conditions of individual licences.

The reasons for the denial of a licence will be made known to the applicant upon request.¹⁰³

This paragraph adds to the existing obligations in GATS Article III. Article III requires that, where an authorization is needed, authorities should inform the applicant of the decision within a reasonable period of time after an application is completed and, at the request of the applicant, provide information concerning the status of the application without undue delay. Article III is limited in its application to situations in which a license is required. As a result of paragraph 4, WTO Members must ensure that, if a license is required, they will make publicly available all licensing criteria and the terms and conditions of all individual licenses. The reasons for denying a license application must be made known to the applicant. In addition, the paragraph requires each Member to establish a time period that is “normally” required to reach licensing decisions.¹⁰⁴ It does not require a Member to set a deadline by which it must make licensing decisions. A WTO Member does not violate its commitments if it occasionally exceeds the “normal” period. Most of the demands for a standard licensing period came from European and Japanese negotiators and were directed toward curbing the ability of the FCC to hold license applications for months without action or explanation.¹⁰⁵

This paragraph changed significantly during the negotiations, losing a number of elements. The United States originally proposed requiring Members to make publicly available information concerning new or revised laws, regulations and administrative guidelines, and allowing public comments prior to adoption. It also proposed requiring Members to solicit public comment on license applications as the FCC does. Other delegations pointed out that GATS Article III contains a requirement that new measures be made publicly available. Consequently, part of the U.S. proposal was unnecessary. No other delegation supported the idea of public comment, so eventu-

103. Reference Paper, *supra* note 9, para. 4.

104. The FCC established a “normal” processing time of 90 days in the *Foreign Participation Order*, *supra* note 10, para. 328.

105. The Japanese were particularly upset by an application by KDD America, Inc., for authority under section 214 of the Communications Act to resell non-interconnected private lines between the United States and various international points, which was filed in August 1995. It was granted in part in March 1996, and the remainder in September 1996. KDD America, Inc., *Order, Authorization and Certificate*, 11 F.C.C.R. 10,828 (1996); KDD America, Inc., *Order, Authorization and Certificate*, 11 F.C.C.R. 11,329 (1996).

ally the United States agreed to delete the requirement. A number of delegations suggested phrasing aimed at invalidating the FCC's use of public interest criteria in licensing. Japan suggested adding a sentence that "no criteria that are not made publicly available in advance will be used to refuse or to select licensees."¹⁰⁶ The European Union suggested that public interest objectives should not be used to refuse licenses.¹⁰⁷ These suggestions were rejected by negotiators as unnecessary since GATS Article VI already governed licensing conditions.

5. *Independent regulators*

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.¹⁰⁸

This paragraph addresses the potential for conflict of interest that arises when the body regulating the telecommunications industry is also the major telecommunications operator. The text achieves part of the U.S. goal for independence of the regulator. It requires that the regulator be separate from, and not accountable to, any operator. It does not require that the regulator be independent of any government ministry. In fact, paragraph 5 allows the government telecommunications ministry to be the regulator.

The second sentence imposes on the regulator the obligation to be impartial with respect to all market participants. This adds to the obligations of regulators contained in GATS Article VI—to administer all measures of general application in a reasonable, objective, and impartial manner. Paragraph 5 requires impartiality in particular situations "with respect to all market participants."¹⁰⁹ This specifically imposes a requirement not to favor the local incumbent.

6. *Allocation and use of scarce resources*

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly avail-

106. Reference Text on Regulatory Principles in Basic Telecommunications Services, Japanese text dated Dec. 15, 1995 (on file with author).

107. EU fax dated Dec. 14, 1995 (on file with author).

108. Reference Paper, *supra* note 9, para. 5.

109. *Id.*

able, but detailed identification of frequencies allocated for specific government uses is not required.¹¹⁰

Negotiators realized that access to scarce resources is essential to gaining market share. This text imposes some discipline on allocation of frequencies, numbers, and rights of way, among other scarce resources. The requirement for transparency and nondiscrimination repeats obligations already imposed by GATS Article III and general obligations of MFN and national treatment. The obligation to act in an objective and timely manner, however, is new. Some negotiators argued that “timely” should be deleted because it implies that a Member would have to allocate scarce resources quickly. The general consensus, however, was that “timely” describes the manner in which a particular decision is made and did not require allocation of all resources.

The final sentence requires that Members make publicly available current frequency allocations, other than those used for specific government uses. Most likely, GATS Article III would impose the same requirement, but negotiators felt it important to reiterate the transparency requirement with regard to frequency allocation. Similarly, GATS Article III and Article XIV would allow Members to protect frequencies assigned for sensitive government operations. But negotiators preferred to reiterate the ability to protect government use.

C. *Making the Reference Paper Binding*

Negotiators considered a number of ways to make the regulatory principles in the Reference Paper binding obligations and therefore subject to WTO dispute settlement. In January 1996, the United States distributed a paper describing the ways in which these commitments could be made binding.¹¹¹ The paper stated that a cover note to a Schedule of Commitments would not create a binding obligation, and the status of headnotes and footnotes in a Schedule was unclear. Amendment of the text of the GATS or of the Annex on Telecommunications to include the regulatory principles would certainly make them binding, but amendment was not a feasible alternative. Pursuant to Article X of the WTO Agreement, an amendment affecting Members’ rights and obligations under the GATS only becomes effective

110. *Id.* para. 6.

111. WTO, Negotiating Group on Basic Telecommunications, *Communication from the United States, Scheduling Regulatory Principles*, S/NGBT/W/18 (Jan. 23, 1996). The *Scheduling Regulatory Principles Communication from the United States* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

upon ratification by two-thirds of WTO Members.¹¹² Thus, the United States and others concluded that the most feasible way to ensure that the regulatory principles would be binding was to include them as "additional commitments" permitted by GATS Article XVIII.¹¹³ As a result, most delegations agreed to include the Reference Paper in their Schedules in the additional commitments column.

D. Results of the NGBT

The NGBT produced market access offers by many countries. But the quantity and quality of those offers, as of April 30, 1996, were not sufficient to enable the United States to make a final commitment to provide unlimited market access in the basic telecommunications sector. At that time, forty-seven countries had submitted offers.¹¹⁴ Of those, only eleven had offered to provide open market access for all domestic and international services and facilities, allow 100 percent foreign investment, and adopt the procompetitive regulatory principles contained in the Reference Paper.¹¹⁵ While a number of countries in Latin America and Europe had made offers, these offers were limited to only certain services, contained significant investment restrictions, or set a date of implementation significantly beyond the agreed-

112. WTO Agreement, *supra* note 1, art. X.

113. GATS, *supra* note 13, art. XVIII states: "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters."

114. Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Czech Republic, Dominican Republic, Ecuador, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, India, Ireland, Israel, Italy, the Ivory Coast, Japan, Korea, Luxembourg, Mauritius, Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Peru, the Philippines, Poland, Portugal, Singapore, Slovak Republic, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom, United States and Venezuela.

115. The 11 were Austria, Denmark, Finland, Germany, Iceland, Luxembourg, the Netherlands, New Zealand, Sweden, United Kingdom and United States.

upon implementation date of January 1, 1998.¹¹⁶ In addition, there were few offers from Asia, one of the most dynamic regions of the world.¹¹⁷

In addition to the absence of a critical mass of offers to solve the free-rider problem, two other issues remained unresolved on April 30—the first related to the need for a safeguard regarding international services, and the second to the scope of offers for satellite services.

Rather than removing its offer of market access and taking an MFN exemption, the United States urged a further period of negotiation. As a result, negotiators agreed that there should be further time to modify or supplement Schedules while maintaining the agreed-upon timetable for implementation. On April 30, 1996, the NGBT transmitted its final report¹¹⁸ to the Council on Trade in Services. The Report included Schedules of Commitments (from forty-seven countries) and Lists of Article II Exemptions (from one country),¹¹⁹ a draft “Fourth Protocol to the General Agreement on Trade in Services,”¹²⁰ and a “Decision on Commitments in Basic Telecommunications.” The Fourth Protocol set the implementation date for January 1, 1998.¹²¹ On that date, Scheduled Commitments would go into effect and the MFN suspension would end.

116. For example, France maintained a limit of 20% foreign ownership in radio networks. WTO, Negotiating Group on Basic Telecommunications, *Communication from the European Communities and their Member States, Draft Offer on Basic Telecommunications*, S/NGBT/W/12/Add.10 (Oct. 16, 1995). Chile offered to bind access only to long-distance and international but not local services. WTO, Negotiating Group on Basic Telecommunications, *Communication from Chile, Draft Offer on Basic Telecommunications*, S/NGBT/W/12/Add.16 (May 6, 1996). Spain’s market access commitments would not be effective until 2003. WTO, Negotiating Group on Basic Telecommunications, *Communication from the European Communities and their Member States, Draft Offer on Basic Telecommunications*, S/NGBT/W/12/Add.10 (Oct. 16, 1995). The *Draft Offers on Basic Telecommunications* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

117. Only Japan, Korea, Hong Kong, Thailand, and the Philippines made offers. None of those countries offered 100% market access or national treatment.

118. WTO, Negotiating Group on Basic Telecommunications, *Report of the Negotiating Group on Basic Telecommunications*, S/NGBT/18 (Apr. 30, 1996), 36 I.L.M. 354, 362 (1997).

119. India claimed an MFN exception for the application of variable accounting rates for terminating international traffic in its market. WTO, Negotiating Group on Basic Telecommunications, *Communication from India, List of Article II Exemptions*, S/NGBT/W/19 (Apr. 26, 1996). The *India List of Article II Exemptions* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

120. The original protocol was adopted in April 1994 at the conclusion of the Uruguay Round. The Second Protocol annexed the results of negotiations on financial services in 1996. WTO: Second Protocol to the General Agreement on Trade in Services (GATS) and Related Decisions, 35 I.L.M. 199 (1996).

121. This date was later extended to February 5, 1998. See *infra* text accompanying note 170.

The Council on Trade in Services then decided to establish a group on basic telecommunications to continue negotiations and created a “window” between January 15 and February 15, 1997, during which WTO Members could “supplement or modify” their Schedules or lists of Article II exemptions annexed to the Protocol.¹²² A Member which had not done so previously could also submit a list of Article II exemptions during that window.¹²³ Finally, Members who had not submitted Schedules of Commitments could do so at anytime.¹²⁴ In essence, the negotiating period was extended until mid-February 1997—an additional ten months.

V. THE GROUP ON BASIC TELECOMMUNICATIONS

The Group on Basic Telecommunications (GBT) began extended negotiations in July 1996.¹²⁵ In addition to obtaining improved market access commitments and additional adherents to the Reference Paper, the GBT needed to resolve outstanding questions relating to satellite services and international services.

A. *Satellite Services*

1. Scope of Commitments

Shortly prior to the conclusion of the NGBT, negotiators recognized that the scope of offers for satellite services was not clear. Although Members had adopted a “positive list” approach to scheduling, offers varied tremendously in their approach to satellites. The United States draft offer referred to a variety of satellite services—domestic/international satellite services and satellite link capacities, satellite earth stations, international switching, and other international gateway facilities. In other Schedules, however, such as those of Japan, New Zealand and Norway, the word “satellite” did not appear.¹²⁶ Yet, through bilateral consultations, it was clear that these countries intended to grant market access and national treatment to satellite services. Other countries revealed that they had not considered

122. WTO, *Decision on Commitments in Basic Telecommunications*, S/L/19 (Apr. 30, 1996), 36 I.L.M. 354, 365, para. 3. (1997).

123. *Id.*

124. *Id.* para. 6.

125. WTO, Negotiating Group on Basic Telecommunications, *Report of the Meeting of 19 July 1996*, S/GBT/M/1 (Sept. 11, 1996). This *Report* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

126. An analysis prepared by the United States delegation of the 34 Schedules tabled at the end of April 1996 showed that 18 Schedules made no mention of satellite services at all, while the rest referred to satellites in a variety of ways.

satellite services in drafting their offers, while others categorically stated that their offers did not include satellite services.

To resolve this evident confusion and other questions relating to scheduling that had arisen,¹²⁷ the Chairman of the GBT issued “Notes for Scheduling Basic Telecom Services Commitments.”¹²⁸ The document contains assumptions “applicable to the scheduling of commitments” and was intended to ensure “the transparency of [Members’] commitments and to promote a better understanding of the meaning of commitments.”¹²⁹ The note makes clear that unless a Schedule otherwise indicates, the listed telecom services include local, long-distance, and international, provided either on a facilities basis or through resale, and delivered through any technological means (e.g., all types of cable, wireless, satellites).¹³⁰ It also makes clear that the subsector “private leased circuit services” covers the provision of any type of network capacity for use in supplying other listed telecom services.¹³¹

2. Spectrum Limitations

Through the initial negotiations, negotiators had considered the question of how to deal with technical constraints on the number of suppliers—an issue of particular concern in the satellite sector, but also in other wireless sectors. The issue arose because the amount of radio spectrum available for use is naturally limited. It is not physically possible to allow unlimited use of spectrum without causing interference that would render the service inoperable. Spectrum managers, in addition to considering physical limitations, also need to provide for government uses and technological advancements that may make spectrum use more efficient. The question was whether nondiscriminatory limitations on the number of suppliers, established strictly because of limited radio spectrum, needed to be scheduled as a market access limitation in order to be maintained.¹³² Article XVI, paragraph 2 of the GATS lists the types of market access limitations that can be maintained if they are scheduled as limitations. Paragraph 2(a) of that list specifies “limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or

127. Members’ offers also varied in their treatment of the type of technology over which a service can be delivered (e.g., wire-based or radio-based) and whether service could be provided through resale.

128. WTO, Negotiating Group on Basic Telecommunications, *Note by the Chairman, Revision, Notes for Scheduling Basic Telecom Services Commitments*, S/GBT/W/2/Rev.1 (Jan. 16, 1997), 36 I.L.M. 354, 371 (1997).

129. *Id.*

130. *Id.* para. 1.

131. *Id.* para. 2.

132. 1994 Secretariat Note, *supra* note 35, para. 5.

quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.”¹³³

Some delegations argued that GATS Article XVI, paragraph 2(a) did not apply to allocation or assignment of spectrum because the limitations were strictly technical. In that sense, they are not limitations on market access, but are instead covered by the obligations of Article VI.¹³⁴ Article VI, paragraph 4 requires that measures used to determine which suppliers will be licensed to use spectrum need to be based on “objective and transparent criteria” and “not more burdensome than necessary to ensure the quality of the service.”¹³⁵ Others pointed out, however, that as technology changes, the number of suppliers that can use limited spectrum may increase. Accordingly, numerical limits on suppliers may represent market access barriers rather than technical limitations.¹³⁶ In the absence of answers to these questions, by the end of April 1996, the offers of twenty-six Members contained entries in the market access limitations column indicating that commitments for radio or wire-based services were “subject to the availability of spectrum.” These words, for example, were contained in the U.S. offer and were meant to allow limiting the number of suppliers if spectrum was not available or for spectrum management purposes.

The insertion of these words, while providing spectrum managers comfort, raised further questions. The first was whether the entry was sufficient to maintain limits on the number of suppliers because of scarce spectrum. A WTO panel would only allow the limitation to be effective if it were a legitimate Article XVI market access limitation. If the panel found it were not a “numerical limit,” as referred to in Article XVI, a Member might not be able to limit the number of suppliers. If a panel found the limitation to be a valid one, it might also read the words to impose an obligation to allow suppliers to use any available spectrum, notwithstanding any spectrum management policies held by the Member. These contrary results led the Chairman of the GBT to issue a clarifying note on which Members could rely.

The Chairman’s Note, *Market Access Limitation on Spectrum Availability*,¹³⁷ recognized the importance of protecting legitimate spectrum management policies but noted that insertions in the market access column of the words “subject to spectrum availability” might not achieve that goal. The Chairman noted that “[s]pectrum/frequency management is not, *per se*, a

133. GATS, *supra* note 13, art. XVI, para. 2.

134. *Id.* art. VI.

135. *Id.* para. 4.

136. *Id.* art. VII.

137. WTO, Group on Basic Telecommunications, *Chairman’s Note, Market Access Limitations on Spectrum Availability*, S/GBT/W/3 (Feb. 3, 1997), 36 I.L.M. 354, 372 (1997).

measure which needs to be listed under Article XVI” of the GATS.¹³⁸ Rather, it is subject to Article VI and other relevant provisions of the GATS. In addition, for those countries incorporating the Reference Paper as additional commitments, spectrum/frequency management would be subject to paragraph 6 of the Reference Paper. Therefore, the Chairman suggested that such words be deleted from Schedules. Most Members who had the words in their Schedules in April 1996 removed them by the conclusion of the negotiations in February 1997. As a result, spectrum management decisions will be judged by the standards of GATS Article VI and paragraph 6 of the Reference Paper and by whether they conform to the obligation to provide national and MFN treatment—decisions will need to be objective, transparent, reasonable, and nondiscriminatory. Decisions obviously made to favor a national champion will be subject to dispute settlement, while decisions based strictly on technical issues, such as interference with existing licensees, will not be challengeable.

3. International Satellite Organizations

In the course of determining the treatment to be accorded satellite services and providers, negotiators needed to determine the status of two major satellite service providers—the International Telecommunications Satellite Organization (INTELSAT) and the International Maritime Satellite Organization (Inmarsat). INTELSAT was created in 1971 by treaty for the purpose of providing fixed satellite service for voice, data, and audio communications.¹³⁹ Inmarsat was created in 1979, also by treaty, to provide maritime communications, and where practicable, aeronautical, and land mobile communications.¹⁴⁰ These two organizations (known as “international or intergovernmental satellite organizations” or “ISOs”) are the original global satellite systems.¹⁴¹ INTELSAT and Inmarsat are both in the process of reorganization and privatization of some operations, which will bring them into competition with privately-owned satellite service providers.

Negotiators had to answer two questions regarding ISOs: whether the ISOs themselves received the benefit of WTO commitments and whether private companies affiliated with an ISO did. In both cases, the answer

138. *Id.*

139. See Agreement Relating to the International Telecommunications Satellite Organization “INTELSAT,” Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532. INTELSAT currently has 141 signatories.

140. See Convention on the International Maritime Satellite Organization (INMARSAT), Sept. 3, 1976, 31 U.S.T. 3, T.I.A.S. No. 9605. Inmarsat currently has 77 signatories.

141. A number of global satellite systems are currently being developed, with deployment of the first system occurring in November 1998.

turned on whether the entity was a “service supplier of a WTO Member,” since GATS obligations are framed in those terms.¹⁴² Under GATS Article XVIII, “service supplier” means any person that supplies a service, while “person” means either a natural person or a juridical person.¹⁴³ A juridical person of another Member means a legal entity duly “constituted or otherwise organized under the law of that other Member, and . . . engaged in substantive business operations in the territory of that Member or any other Member.”¹⁴⁴ There was general consensus among negotiators that the ISOs themselves were not “service suppliers of a Member” since they were created by treaty and not “organized or constituted” under the laws of a particular Member.¹⁴⁵

Affiliates of ISOs, however, were “service suppliers of a Member” and derived benefit from WTO commitments. Even though these affiliates were likely to be entities created by an ISO, in which an ISO and ISO signatories maintain ownership interests, they would be incorporated under the laws of a WTO Member. As such, they met the definition.¹⁴⁶

B. *International Services*

The issue of market access for the provision of international telecommunications services bedeviled the negotiations. The United States, in particular, was concerned that competitive markets would face serious market distortions from carriers from WTO Members that did not make or effectively implement full market access commitments in international services.

¹⁴⁷ The United States argued that distortion was possible in two ways. The first would arise from “one-way bypass” of the accounting rate system. Carriers from closed markets would have the ability to exacerbate the traffic imbalance (and, therefore, the settlement payments) of carriers from competitive markets by providing service into the competitive market over private lines.¹⁴⁸ This is because traffic sent over resold private lines is outside the accounting rate system. Carriers from competitive markets would not

142. See, for example, GATS, *supra* note 13, art. II, stating that: “each Member shall accord immediately and unconditionally to services and service suppliers of any other Member . . .”; also see GATS, *supra* note 13, art. XVII, stating that: “each Member shall accord to services and service suppliers of any other Member”

143. *Id.* art. XXVIII(g), (j).

144. *Id.* art. XXVIII(m)(i).

145. The FCC reached this same conclusion in Amendment of the Comm’n’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and Int’l Satellite Servs. in the United States, *Report and Order*, 12 F.C.C.R. 24,094, para. 14, 10 Comm. Reg. (P & F) 587 (1997) [hereinafter *Disco II Order*].

146. See *id.* para. 136.

147. See *Benchmarks Order*, *supra* note 36, para. 3.

148. *Id.* para. 242.

have the same opportunity to engage in similar traffic routing in the opposite direction because there is only one carrier that can terminate traffic.

One-way bypass, according to the United States, would further exacerbate U.S. outpayments under the current accounting rate system. Many more calls are originated in the United States for settlement purposes and the U.S. settlement deficit grew steeply from 1990 to 1996. “In 1996, the U.S. settlement deficit totaled \$5.4 billion, double what it was in 1990.”¹⁴⁹

The second method of distorting competition would arise from the ability of a carrier from a closed market to cross-subsidize its affiliate in a competitive market. Although the parent and affiliate would have to exchange traffic under the accounting rate system, any payments made to the parent would be intracorporate transfers and not real “costs” to the affiliate. The affiliate in the competitive market could therefore engage in a price squeeze by charging lower rates for international services than other carriers in the competitive market.¹⁵⁰

At the April 1996 meeting of trade ministers from the Quad countries,¹⁵¹ the FCC presented a detailed description of the effect of one-way bypass of the accounting rate system on competitive markets and succeeded in convincing Quad partners that this concern was a real one. There was consensus that protection of conditions of competition in the licensing Member’s market was a legitimate licensing objective,¹⁵² but no consensus on whether a WTO Member could refuse to issue a license to prevent one-way bypass. There was little agreement on the seriousness of the cross-subsidization or price squeeze potential. Attempts to draft principles for a licensing condition to address the problem failed during the first round of negotiations. Further discussions during the second round produced no results either. Each Member was thus left to address the potential for competitive distortions in its market as it wished, within the confines of its GATS obligations.¹⁵³

149. *Id.* para. 13.

150. *Id.* para. 208.

151. The Quad countries are Japan, the European Union, the United States, and Canada.

152. GATS, *supra* note 13, Article VI says nothing about the policy objectives which may be pursued through the imposition of a licensing requirement. The purpose of Article VI is to ensure that where licensing conditions are imposed, they do not operate as unnecessary barriers to trade. *See* Tuthill, *supra* note 102, at 788.

153. The United States chose to address the issue by reiterating its ability to condition or deny any license relating to radio communications, submarine cables, or earth stations on a nondiscriminatory basis, as necessary, that pose a very high risk to competition in the U.S. market. *See Foreign Participation Order*, *supra* note 10, para. 13; *Disco II Order*, *supra* note 145, para. 7.

C. U.S. Commitments

As the leader of the negotiations, the United States submitted a market-opening offer in July 1995.¹⁵⁴ This offer provided unlimited market access and national treatment in all basic telecommunications sectors, except intrastate (local) services, and included additional commitments of pro-competitive regulatory principles. Pending legislation on intrastate services, the United States offered to bind the status quo.¹⁵⁵ The initial U.S. offer maintained restrictions on access to submarine cable landing licenses,¹⁵⁶ restrictions on access to INTELSAT and Inmarsat,¹⁵⁷ and limitations on foreign investment in common carrier radio licenses.

As a result of passage of the Telecommunications Act of 1996,¹⁵⁸ the United States improved its offer in February 1996 to include unlimited access to the intrastate market.¹⁵⁹ Prior to the April 30, 1996 deadline, the United States revised its offer to clarify that indirect foreign ownership was permitted, even though restrictions remained on direct foreign ownership.¹⁶⁰

Further improvements in the U.S. offer, made in conjunction with improvements in the offer of the European Union, came in November 1996. The United States removed the restriction on access to submarine cable landing licenses. As a result, the United States committed to provide market access and national treatment to all basic telecommunications services. This included local, interexchange (long-distance within and between states), and international services, delivered through any network technology (wire-based, radio-based, satellite networks, and cable television). Service could

154. *July 31 Draft Offer*, *supra* note 56.

155. The initial U.S. offer was submitted prior to the passage of the 1996 Telecommunications Act.

156. The Submarine Cable Landing Act, 47 U.S.C. § 34 (1998), authorizes the President to license foreign owners of submarine cables landing or operating in the United States. This authority was delegated to the FCC by Exec. Order No. 10,530, 19 Fed. Reg. 2709 (1954).

157. Satellite Communications Act of 1962, 47 U.S.C. §§ 701, 751 (1998).

158. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

159. WTO, Negotiating Group on Basic Telecommunications, *Communication from the United States, Draft Offer on Basic Telecommunications*, S/NGBT/W/12/Add.3/Rev.1 (Feb. 26, 1996). The *Draft Offer* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998).

160. WTO, Negotiating Group on Basic Telecommunications, *Communication from the United States, Conditional Offer on Basic Telecommunications (Revision)*, S/NGBT/W/12/Add.3/Rev.2 (Apr. 30, 1996). The *Conditional Offer* can be found at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov. 1, 1998). Restrictions on direct foreign ownership in common carrier radio licenses are contained in 47 U.S.C. § 310 (1998).

be provided either on a facilities basis or through resale of existing facilities.¹⁶¹ All types of basic services were included:

Voice	Data
Telex	Telegraph
Facsimile	Private leased circuits
Satellite	Mobile (PCS, cellular and paging) ¹⁶²

The U.S. offer limited direct ownership of a common carrier radio license (wireless services) by a foreign government, a non-U.S. citizen, or a non-U.S. corporate entity to 20 percent. One hundred percent indirect ownership through U.S. holding companies is allowed. There are no restrictions on nationality of officers or directors in the licensee or its parent companies. COMSAT retains its monopoly access to INTELSAT and Inmarsat. The United States included the Reference Paper as “additional commitments.”¹⁶³

In response to inadequate market access offers from some countries and in order to maintain a balance of commitments regarding types of telecommunications services, the United States excluded from its scheduled coverage one-way satellite transmission of direct-to-home, direct broadcast services and digital audio radio services, and submitted an MFN exception¹⁶⁴ for those services.

D. Results of the Group on Basic Telecommunications

The GBT resulted in significant improvements in market access commitments and in the number of WTO Members adopting the regulatory principles in the Reference Paper. Annexed to the “Report of the Group on Basic Telecommunications”¹⁶⁵ are Schedules from fifty-five Members (sixty-nine countries, as the Member States of the European Communities are counted as one country) and nine lists of Article II exemptions.¹⁶⁶ The Report noted that these Schedules and lists would be attached to the Fourth Protocol to the GATS in replacement of those attached on April 30, 1996.¹⁶⁷

161. Laura B. Sherman, World Trade Organization: Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services), *Introductory Note*, 35 I.L.M. 354, 359 (1997).

162. *Id.*

163. *Id.*

164. Communication from the United States, *List of Article II (MFN) Exemptions*, S/NGBT/W/9 (Feb. 15, 1997).

165. WTO, Negotiating Group on Basic Telecommunications, *Report of the Group on Basic Telecommunications*, S/GBT/4 (Feb. 15, 1997), 36 I.L.M. 354, 369 (1997).

166. *Id.* Of these 69 countries, 55 included the Reference Paper in their Schedules. Forty-eight countries had submitted Schedules by April 30, 1996, with 33 including the Reference Paper.

167. *Id.* para. 9.

Commitments were scheduled to go into effect on January 1, 1998, a little more than ten months from the conclusion of the negotiations. This extended period was necessary for WTO Members to carry out domestic ratification procedures and to bring laws and regulations into conformity with scheduled commitments. Many WTO Members considered the WTO Basic Telecom Agreement as a treaty or international agreement, requiring legislative action. The United States considered the WTO Basic Telecom Agreement as an extension of the WTO Agreement, the conclusion of which was foreseen by Congress when it approved the WTO Agreement.¹⁶⁸ The United States also did not need congressional action to implement its scheduled commitments, as these commitments were consistent with existing law.¹⁶⁹

The Fourth Protocol noted that if all Members had not signed the Protocol by November 30, 1997, those who had signed would decide whether the effective date of January 1 should be changed. By November 30, 1997, only fifty WTO Members had signed the Fourth Protocol.¹⁷⁰ These Members met a number of times in December but failed to reach agreement on a date for entry into force.¹⁷¹ Finally, on January 26, 1998, the Council on Trade in Services¹⁷² agreed that commitments would be effective on February 5, 1998, and that WTO Members who had not yet signed the Fourth Protocol could do so by July 31, 1998. As of that date, Brazil, Ghana, Guatemala, Papua New Guinea, and the Philippines had not yet signed.¹⁷³ As a result, these WTO Members are not bound by their scheduled commitments.

168. See Uruguay Round Trade Agreements, 19 U.S.C. § 3555(b) (1998) (setting objectives for conclusion of negotiations on basic telecommunications services).

169. On November 26, 1997, the FCC adopted new rules governing foreign participation in the U.S. telecommunications market consistent with U.S. WTO obligations. See *Foreign Participation Order*, *supra* note 10, and *Disco II Order*, *supra* note 145. These orders became effective on February 9, 1998. See Rules and Policies on Foreign Participation in the U.S. Telecomm. Market, *Order*, 13 F.C.C.R. 6219, 6220 (1998).

170. Although there were 69 Schedules of Commitments, 70 WTO Members had to sign the Fourth Protocol, as the European Union signs for itself and each of the Member States signs separately.

171. They did agree to extend the date to July 31, 1998, until which WTO Members could sign the Fourth Protocol. As a result, 13 more WTO Members signed after December 31, 1997.

172. The ability of the WTO Members who had signed the Fourth Protocol to decide on entry into force expired on December 31, 1997. As a result, the Council on Trade in Services, composed of all WTO Members and charged with facilitating the operation of the GATS and furthering its objectives, made the decision. See GATS, *supra* note 13, art. XXIV.

173. Even though the deadline of July 31, 1998, has passed for signing the Fourth Protocol, WTO Members are free at any time to improve their scheduled commitments. So the six WTO Members who failed to sign the Fourth Protocol can still bring their commitments into effect by submitting a Schedule to the Council on Trade in Services for adoption.

Number 1]

“WILDLY ENTHUSIASTIC”

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VI. CONCLUSION

Implementing the WTO Basic Telecom Agreement will be no less challenging than negotiating it was. Effective competition needs more than simple deregulation or market opening contained in WTO Member Schedules of Commitments. It will be some time before the real effect of the agreement can be measured, but the successful conclusion of the negotiations is evidence that liberalization is inevitable.

SUMMARY OF SCHEDULED COMMITMENTS WTO BASIC TELECOMMUNICATIONS AGREEMENT

All commitments are effective as of February 5, 1998, unless otherwise noted. Unlimited foreign investment permitted unless otherwise noted. Asterisk denotes that the WTO Member has not ratified the Fourth Protocol, and therefore its commitments are not binding.

Antigua & Barbuda—Market access and national treatment for enhanced service suppliers (including Internet), mobile, PCS, trunked radio, and closed user groups. Mobile and fixed satellite transport services may be provided through arrangements with exclusive operator. Market access and national treatment for all other services as of 2012. Adopted the Reference Paper. MFN exemption for treatment accorded to CARICOM members with regard to terrestrial-based mobile services.

*Argentina**—Market access and national treatment for domestic data and telex, domestic and international fax, paging, trunked radio and leased circuits (with a preference given to existing supplier until November 8, 2000). Duopoly for cellular; access for PCS to be decided in “the light of present and future needs.” Market access and national treatment for all other services as of November 8, 2000, including those provided via non-geostationary, non-fixed satellite services. Adopted the Reference Paper. MFN exemption for access to geostationary fixed satellite systems.

Australia—Market access and national treatment for all services. Majority Australian ownership required in Vodafone. Foreign ownership in Telstra of up to 35 percent of initial sale (11.7 percent of total equity) allowed, with a limit of 5 percent per individual or associated group of foreign investors. Also, limits on the amount of individual foreign ownership in Optus.

Austria—Market access and national treatment for all services. Adopted the Reference Paper.

Bangladesh—Two private operators provide local and long-distance services in competition with government operator. Four licenses issued for cellular. All service suppliers must use facilities of government operator, including VSAT and gateway earth station services. No regulatory commitments. MFN exemption on accounting rates.

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Barbados—Market access and national treatment for enhanced services (including Internet) and VSAT services; market access and national treatment for mobile terrestrial and satellite services as of January 1, 1999; all other services reserved to exclusive suppliers until January 1, 2012. Adopted the Reference Paper.

*Belgium**—Market access and national treatment for all services. Adopted the Reference Paper.

Belize—Market access (but no national treatment) for trunked radio services and teleconferencing as of January 1, 2003, and for enhanced services and paging as of January 1, 2008. Trunked radio services and paging must be provided through joint venture with Belizean national. Adopted the Reference Paper.

Bolivia—Market access and national treatment for local data, telex, telegraph, fax, closed user groups, and mobile services (cellular, paging, PCS, mobile satellite). Market access and national treatment for all domestic long-distance and international voice and data services as of November 28, 2001. Local service limited to existing companies. Adopted limited set of regulatory principles.

*Brazil**—Market access and national treatment for enhanced services, paging and nonpublic domestic and international services for closed user groups. Duopoly for analog/digital cellular mobile service. One hundred percent foreign ownership of nonpublic service providers; 49 percent limit on cellular and satellite service suppliers until July 20, 1999, thereafter none. Commitment to bind outcome of future reform legislation which is expected to cover public and nonpublic services within one year of enactment. Use of foreign-licensed GSO space segment facilities allowed whenever they offer better technical, operational or commercial conditions. MFN exemption for telecommunications services supplied for distribution of radio or television programming for direct reception by service consumers. No regulatory commitments.

Brunei—Local service reserved for up to ten years after privatization of government operator. Two operators have exclusivity in international services until 2010. New licenses in cellular may be issued in 2010. Adopted the Reference Paper.

Bulgaria—Market access and national treatment for closed user groups and VSAT (not connected to the public switched network), data, paging, mobile data. Market access and national treatment as of January 1, 2003, for resale of public voice, telegraph/telex, and cellular voice. Market access and national treatment for all other services and facilities on January 1, 2005. Adopted the Reference Paper.

Canada—Market access and national treatment (with a limit of 46.7 percent foreign ownership) for all services except fixed satellite services, international services and submarine cables. Market access and national treatment for international services as of October 1, 1998, but subject to routing restrictions in favor of Canadian facilities until January 1, 2000 (except for fixed satellite services between Canada and points in the United States); market access and national treatment for fixed satellite services in 2000, with 100 percent foreign ownership, and submarine cable landings as of October 1, 1998, with 100 percent foreign ownership. One hundred percent foreign ownership also permitted for resellers. No routing requirements on mobile satellite services between points in Canada and between Canada and points in the United States. Routing requirements on all satellites end as of March 1, 2000. No date fixed for end to routing restrictions on Canada to Canada points (other than by satellite). Licenses to operate earth stations for provision of Canada-United States fixed satellite service may be limited until March 1, 2000. Adopted the Reference Paper.

*Chile**—Market access and national treatment for long-distance and international wireline and wireless (including satellites). No commitment on local service or one-way transmission by satellite of direct-to-home, direct broadcast satellite and digital audio services. Adopted the Reference Paper.

Colombia—Market access and national treatment for private networks for voice and data, paging, trunked radio, geostationary satellite and local public voice services. Long-distance and international services subject to an economic needs test. Market access and national treatment for cellular services as of September 1, 1999, and PCS as of January 1, 2000, but subject to an economic needs test. Seventy percent foreign ownership permitted for all services. Adopted the Reference Paper.

Cote D'Ivoire—Market access and national treatment for data, fax, telegraph, private circuits, mobile (voice and data), and PCS. Open for all satellite services except domestic and international public voice service. Market

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access and national treatment for local, long-distance, and international voice and telex as of January 1, 2005. Adopted the Reference Paper.

Czech Republic—Market access and national treatment for closed user groups, domestic and international data, telex, telegraph, fax, leased circuits and domestic mobile services; market access and national treatment for domestic and international voice services as of 2001. Adopted the Reference Paper.

Denmark—Market access and national treatment for all services. Adopted the Reference Paper.

Dominica—Market access and national treatment for nonpublic data, fixed and mobile satellite systems, enhanced services and teleconferencing. Adopted the Reference Paper.

Dominican Republic—Market access (but no national treatment) for all services (but must establish a commercial presence). Adopted the Reference Paper.

Ecuador—Market access and national treatment for domestic cellular services. No regulatory commitments.

El Salvador—Market access and national treatment for all services. Adopted the Reference Paper.

Finland—Market access and national treatment for all services. Adopted the Reference Paper.

France—Market access and national treatment for all services. Indirect investment is unlimited, but there is 20 percent direct foreign investment limit for radio-based networks and 20 percent foreign investment limit on investment in France Telecom. Adopted the Reference Paper.

Germany—Market access and national treatment for all services. Adopted the Reference Paper.

Ghana—Duopoly for domestic and international voice. Market access and national treatment for data, telex/telegraph, fax, closed user groups (not connected to public switched network), Internet access services (excluding

voice), teleconferencing, trunked radio, domestic fixed satellite and global mobile satellite services but must provide through joint ventures with Ghanaian nationals. Adopted the Reference Paper.

Greece—Market access and national treatment for all services other than public voice telephony and facilities-based services which will be open in 2003. Adopted the Reference Paper.

Grenada—Market access and national treatment for closed user groups, enhanced services, and mobile and fixed satellite services through arrangements with the incumbent operator. Market access and national treatment for all other services as of January 1, 2006. Adopted the Reference Paper.

*Guatemala**—Market access and national treatment for all services. Adopted the Reference Paper.

Hong Kong—Local wireline and wireless network services limited to current four providers. Market access and national treatment for switched resale, international data and fax by resale, call-back, resale-based virtual private network service (not connected to the public switched network), mobile satellite services, and self-provisions of external satellite circuits by a company or closed user group permitted. Adopted the Reference Paper.

Hungary—Market access and national treatment for data, telex/telegraph, fax, leased circuits, satellite services (other than public voice). Market access and national treatment for international and long-distance public voice as of January 1, 2003, and local public voice as of January 1, 2004. Mobile services limited to three operators until 2003. Paging limited to three operators. One hundred percent foreign ownership permitted except 75 percent limit for Matav and Antenna Hungaria Rt. Adopted the Reference Paper.

Iceland—Market access and national treatment for all services. Adopted the Reference Paper.

India—Duopoly for local and long-distance wireline. Duopoly for cellular, and 25 percent foreign investment limit. No resale allowed. Additional licenses may be issued based on economic needs test. GSM technology mandated for cellular services. Adopted some of the Reference Paper but with numerous changes. MFN exemption for accounting rates.

Indonesia—Public switched voice, circuit switched data, and teleconferencing service, limited to provision by PT Telkom and five regional joint operation scheme operators. Long-distance exclusive to PT Telkom. Packet-switched public data provided by three operators on a nonexclusive basis. Domestic telex/telegraph services must be provided through joint venture or joint operation. Mobile cellular and PCS—selection of new operators is subject to economic needs test and frequency availability and must be through joint venture (and in case of PCS, with state-owned company). Paging—new operators subject to economic needs test, frequency availability, and public interest test and a joint venture or joint operation is required. Duopoly for international public switched voice, circuit switched data, teleconferencing services, and Internet access services (until 2005). Duopoly for domestic and international satellite services and international telex/telegraph. Call-back prohibited. Thirty-five percent foreign ownership. Adopted the Reference Paper.

Ireland—Market access and national treatment for all services other than public voice telephony and facilities-based services which will be open as of January 1, 2000. Mobile operators may interconnect with networks other than the state-controlled company to supply international services from January 1, 1999. Adopted the Reference Paper.

Israel—Market access and national treatment for private networks, cellular, paging, satellite voice and data, and international fax, with limit of 80 percent foreign investment for cellular. Market access and national treatment for all other services as of January 1, 2002, with limitation of 74 percent foreign ownership. Permits 80 percent foreign investment for wireless service providers. Adopted the Reference Paper.

Italy—Market access and national treatment for all services, with limitation on foreign investment in Stet. Adopted the Reference Paper.

Jamaica—Market access and national treatment for enhanced services, digital mobile services, international voice, data and video transmission services to firms involved in information processing located within free zones. Exclusivity for all other services until September 2013. Adopted the Reference Paper.

Japan—Market access and national treatment for all services, with a 20 percent limit on foreign investment in KDD and NTT. Adopted the Reference Paper.

Korea—Market access and national treatment for all services. Foreign investment limitations—33 percent investment limit on facilities until January 1, 2001, then 49 percent (with individual shareholdings limited to 33 percent for wireless and 10 percent for wireline); 20 percent for Korea Telecom until January 1, 2001, then 33 percent with individual shareholdings limited to 3 percent; 49 percent for resellers until January 1, 2001, 100 percent thereafter. Adopted the Reference Paper.

Luxembourg—Market access and national treatment for all services. Adopted the Reference Paper.

Malaysia—Market access and national treatment for all services only through acquisition of up to 30 percent of the shares of existing licensed public telecom operators. No resale permitted. Made some regulatory commitments.

Mauritius—Market access and national treatment for fax, paging, private mobile radio, GMPCS and telecommunications equipment rental, sales and maintenance services. Market access and national treatment for other services markets by 2004 with no foreign investment restrictions other than company registration requirement. No regulatory commitments.

Mexico—Market access and national treatment for all services except for requirement to use Mexican satellites for the provision of domestic services until 2002. One hundred percent foreign ownership for cellular services; 49 percent for all other services. Adopted the Reference Paper.

Morocco—Market access (but no national treatment) for domestic packet switched data, frame relay, mobile, paging, PCS and closed user groups. Market access to “point-to-point voice telephone service” as of January 1, 2002. Made some regulatory commitments.

Netherlands—Market access and national treatment for all services. Adopted the Reference Paper.

New Zealand—Market access and national treatment for all services; except limit of 49.9 percent foreign investment in New Zealand Telecom. Adopted the Reference Paper.

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Norway—Market access and national treatment for all services. Adopted the Reference Paper.

Pakistan—Market access and national treatment for domestic data, VSAT, telex, fax, video conferencing, telemedicine, tele-education terminal end services. Market access (but no national treatment) for other services until 2004. Made some regulatory commitments. MFN exception on accounting rates.

*Papua New Guinea**—Will review exclusivity for all telecom services two years prior to expiration of license in 2002. Adopted the Reference Paper.

Peru—Market access and national treatment for local data, telex/telegraph, fax, private leased circuits, cellular, PCS, paging, trunking services, and mobile data. Market access and national treatment for all other services as of June 1999. Adopted the Reference Paper.

*Philippines**—Market access and national treatment for facilities-based services except satellites, subject to a limit of 40 percent foreign ownership. No commitment on resale or leased circuits/closed user groups. Adopted some of the Reference Paper.

Poland—Market access and national treatment for local public voice (wire-line), domestic and international data, international fax, cellular, pan-European paging systems, and international private leased circuits. Market access and national treatment for telex and telegraph as of January 1, 2000. Market access and national treatment for cellular and mobile satellite services as of January 1, 2003. Market access and national treatment for all other services as of January 1, 2004. Limit of 49 percent foreign investment in international and domestic long-distance services including cellular. Adopted the Reference Paper.

Portugal—Market access and national treatment for resale of all services. Market access and national treatment for alternative facilities services as of January 1, 1999. Market access and national treatment for public voice telephony, telex and telegraph as of January 1, 2000. Adopted the Reference Paper.

Romania—Market access and national treatment for nonpublic voice, data, telex/telegraph, fax, paging, and VSAT (not connected to psn). Market access for analog cellular as of April 1, 2002. Market access and national

treatment for all other services as of January 1, 2003. Adopted the Reference Paper.

Senegal—Market access and national treatment for all services (except cellular and mobile satellites) as of 2006, although may be earlier due to government commitment to consider additional access in 2003. Three cellular providers as of 1998. Adopted the Reference Paper.

Singapore—Market access and national treatment for local and international resale, resale of cellular mobile and paging services, paging, mobile data and trunked radio. Market access and national treatment for all other services as of April 1, 2000. Limit of 74 percent (combined direct and indirect) foreign investment. Adopted the Reference Paper.

Slovak Republic—Market access and national treatment for data, telex/telegraph, fax, private leased circuits, paging, trunked radio, domestic mobile and PCS (excluding analog cellular voice) and closed user groups (not connected to the psn). Market access and national treatment for all other services as of January 1, 2003. Adopted the Reference Paper.

South Africa—Market access and national treatment for paging, PCS and trunked radio services. Duopoly for local, long-distance, international, data, telex, fax, and private leased circuits services as of January 1, 2004. Duopoly for mobile but will license one more supplier within two years. No commitment on satellite-based services but will schedule commitments within one year of adoption of legislation in this area. Limitation of 30 percent foreign ownership. Liberalization of resale services to take place between 2000 and 2003. Government will consider feasibility of additional suppliers of public switched services and satellites services by December 31, 2003. Government will consider feasibility of additional cellular suppliers by December 31, 1998. Adopted the Reference Paper.

Spain—Market access and national treatment for all services from December 1, 1998. Foreign investment limit for the government-owned firms (Telefonica and Retevision). Adopted the Reference Paper.

Sri Lanka—Market access and national treatment for data, paging and mobile cellular but number of operators limited. Duopoly for international services allowed as of January 1, 2000. Foreign ownership in excess of 40 percent requires government approval. Adopted the Reference Paper. MFN exception for accounting rates.

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Sweden—Market access and national treatment for all services. Adopted the Reference Paper.

Switzerland—Market access and national treatment for all services. Adopted the Reference Paper.

Suriname—Market access and national treatment for local data, closed user groups, mobile data, paging, and trunked radio services. Market access and national treatment for other services as of January 1, 2003. Adopted the Reference Paper.

Thailand—Market access and national treatment for all services as of January 1, 2006. Foreign investment limited to 20 percent. No regulatory commitments.

Trinidad & Tobago—Market access and national treatment for enhanced services, trunked radio, cellular, PCS, and mobile satellite services. Market access and national treatment for all other services as of 2010. Adopted the Reference Paper.

Tunisia—Market access and national treatment for telex, packet-switched data, and teleconference services as of January 1, 1999; mobile telephone, paging, teleconferencing, and frame relay from January 1, 2000, and local voice telephony as of January 1, 2003. Foreign ownership limited to 49 percent (10 percent in Tunisia Telecom). No regulatory commitments.

Turkey—Market access and national treatment for mobile, paging, and private data networks, with a limitation of 49 percent foreign ownership. Market access and national treatment for all other services as of January 1, 2006. Adopted some regulatory commitments on regulatory principles. MFN exception for accounting rates and fees for transit land connections and use of satellite ground stations.

United Kingdom—Market access and national treatment for all services. Adopted the Reference Paper.

United States—Market access and national treatment for all services except direct-to-home, direct broadcast satellite, and digital audio transmission services, with a limit of 20 percent direct foreign investment in radio licenses. Adopted the Reference Paper. MFN exception for one-way satellite

transmission of direct-to-home, direct broadcast satellite and digital audio transmission services.

Venezuela—Market access and national treatment for all services as of November 27, 2000. Adopted some of the Reference Paper.