

# Liberalized Telecommunications Trade in the WTO: Implications for Universal Service Policy

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## I. TELECOMMUNICATIONS: A SERVICE SECTOR AND A BACKBONE FOR OTHER SECTORS

The telecommunications market is one of the largest markets in the world, second only to the financial services market. The International Telecommunication Union (ITU) estimated in the mid-1990s that the telecommunications market was worth about \$513 billion.<sup>1</sup> Although telecommuni-

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1. World Trade Organization, Press Brief: Basic Telecoms (Dec. 16, 1996) (quoting estimates of the ITU) [hereinafter WTO Press Brief]. The ITU is a United Nations body that makes recommendations for regulators, provides technical assistance to developing

cations service providers acquire most of their revenue from domestic demand, they are increasingly seeking international returns.<sup>2</sup>

Telecommunications has a “dual role as a distinct sector of economic activity and as the underlying transport means for other . . . activities.”<sup>3</sup> In addition to financial institutions now transferring \$2.3 trillion or more electronically every day, educators, researchers, politicians, and others use electronic means to exchange information.<sup>4</sup> The demand for telecommunications services that transmit voice and data electronically is rapidly escalating because of this interconnectedness.<sup>5</sup>

There has been a significant shift from domestic intrasufficiency to international interdependence in both the demand and supply sides of markets generally.<sup>6</sup> As consumers become more sophisticated in evaluating the world market, businesses have to maintain their comparative advantage in services by globalizing research, manufacturing products with multinational compo-

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countries, sets standards for shared telecommunications resources such as radio frequencies and the geostationary stationary orbit for satellites, and helps mediate disputes among Members. Wilson P. Dizard, *International Regulation: Telecommunications and Information*, in *INTERNATIONAL REGULATION: NEW RULES IN A CHANGING WORLD ORDER* 115, 122 (1988). The purpose of the ITU is “to harmonize the actions of nations” for the “improvement and rational use of telecommunications of all kinds.” 21 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *TRADE IN INFORMATION, COMPUTER AND COMMUNICATION SERVICES* 14 (1990) (citation omitted) [hereinafter OECD, *TRADE IN INFORMATION*].

2. 35 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *TELECOMMUNICATION INFRASTRUCTURE: THE BENEFITS OF COMPETITION* 12 (1995) [hereinafter OECD, *TELECOMMUNICATION INFRASTRUCTURE*] (noting that the U.S. company AT&T has a goal to receive at least 50% of its revenues from providing services outside of the United States by the year 2000).

3. General Agreement on Trade in Services, Annex on Telecommunications, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1B, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS* 359 (GATT Secretariat 1994), 33 I.L.M. 44, 73 (1994) [hereinafter GATS, Annex on Telecommunications]. See also Jeffrey B. Ritter & Judith Y. Gliniecki, *International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms*, 6 HARV. J.L. & TECH. 263 (1993).

4. WTO Press Brief, *supra* note 1. See also Ilene Knable Gotts & Alan D. Rutenberg, *Navigating the Global Information Superhighway: A Bumpy Road Lies Ahead*, 8 HARV. J.L. & TECH. 275 (1995) (discussing multiple uses for the Internet). Senator John Ashcroft set up the first on-line, citizen-to-government petition drive on the Internet.

5. In fact, this sector is one of the most positive contributions to the U.S. trade balance. See Fred H. Cate, *The Future of Communications Policymaking*, 3 WM. & MARY BILL RTS. J. 1, 3 (1994).

6. For example, AT&T, which must link up with other multinationals, expects to receive 50% of its revenue in foreign markets in less than five years. See OECD, *TELECOMMUNICATION INFRASTRUCTURE*, *supra* note 2.

nents, and targeting international markets.<sup>7</sup> The telecommunications industry illustrates this phenomenon.

All of these factors—the high demand for telecommunications services, the interconnectedness of telecommunications sector inputs and uses, and international dependence—created the need to avoid piecemeal and segmented telecommunications trade policy.

Some countries have responded unilaterally to the changes in telecommunications by privatizing and deregulating their domestic markets. Through privatization, the government transforms the telecommunications sector from a state owned and operated enterprise into a private enterprise, although the private enterprise can maintain a monopolistic position. Through liberalization, the government allows many enterprises to compete effectively for consumer demand.

However, the most profound impact on the global telecommunications markets will likely come from the concluded multilateral negotiations on basic telecommunications services in the World Trade Organization (WTO)<sup>8</sup> under the auspices of the General Agreement on Trade in Services (GATS).<sup>9</sup> The results of these negotiations could be the driving force behind a wave of countries liberalizing their trade laws to ease the harshness and complexity of providing telecommunications services over national borders.

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7. As the demand for telecommunications services internationalizes, “[j]oint ventures, partnerships, and other multinational teaming arrangements are increasingly becoming the principal form of commercial and industrial organization.” U.S. DEPARTMENT OF COMMERCE, U.S. TELECOMMUNICATIONS IN A GLOBAL ECONOMY: COMPETITIVENESS AT A CROSSROADS 7 (1990).

8. 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. 1140, 1144 (1994) [hereinafter WTO Agreement]. The WTO Agreement establishes an umbrella organization that will apply institutional rules to all of the multilateral trade agreements. *What Is the WTO?*, GATT FOCUS, May 1994, at 11, 12. In joining the WTO Agreement, a Member “agrees to the definitive application of the obligations of the Uruguay Round multilateral trade agreements.” Executive Summary Results of the GATT Uruguay Round of Multilateral Trade Negotiations, 58 Fed. Reg. 67,263, 67,295 (1993). However, accession to the Plurilateral Trade Agreements remains optional.

9. General Agreement on Trade in Services, Apr. 15, 1994, 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. 44 (1994) [hereinafter GATS]. The commitments, made as a result of the basic telecommunications negotiations in 1997, were officially incorporated into GATS 1994 by the Agreement’s Fourth Protocol, which was scheduled to put the commitments into force in January 1998. FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES (WTO 1997), 36 I.L.M. 354 (1997) [hereinafter FOURTH PROTOCOL TO GATS]. A protocol is a document to annex schedules of further negotiations to the original 1994 Agreement. GATS, *supra*, art. XX.

The February 15, 1997 negotiations on basic telecommunications reached significant commitments. However, these commitments on basic telecommunications cannot be considered outside of the bigger framework of the GATS in the WTO. The conclusion of the GATS in 1994 set the stage for continued negotiations on various service sectors and subsectors. Thus, while the 1997 basic telecommunications commitments specifically addressed the problems faced by those wanting to offer such services, they were annexed to, and became an integral part of, GATS, which is the foundation for all trade in services.

This Article begins in Part II by discussing the significance of the basic telecommunications commitments on liberalization, specifically showing why sector negotiations on telecommunications and even subsector negotiations on basic telecommunications were necessary. Part III outlines a history of the basic telecommunications negotiations in light of the services negotiations under GATS that preceded them. In Part IV, the Article explains how the obligations underlying all WTO trade agreements, namely most-favored-nation (MFN) status, national treatment, market access, and transparency, apply to services, and more narrowly, to the telecommunications services within the negotiations' scope. Part V specifically focuses on the resulting commitments of the basic telecommunications negotiations that the WTO Members included in their service schedules. In conclusion, Part VI addresses the potential benefits of full implementation of the recent commitments to liberalize trade in basic telecommunications services.

## II. NEED FOR GATS AND CONTINUED NEGOTIATIONS ON BASIC TELECOMMUNICATIONS SERVICES

While countries may have a variety of competing social and economic goals underlying their domestic policy for various services,<sup>10</sup> the Parties to the multilateral negotiations on trade in services put the underlying objectives of all of the WTO agreements in the forefront of the discussions. These objectives include nondiscrimination among all Members, market access, and transparency of laws and regulations. Keeping uniform objectives in all of the WTO agreements will move the multilateral trading system away from sectoralization toward a higher level of uniformity for trade rules. However, there are multiple reasons that services, generally, and telecommunications and its subsectors, specifically, needed ongoing flexibility in negotiations.

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10. For example, some objectives commonly cited for telecommunications include providing basic telephone services to rural or poor areas, servicing the broadest area possible, reducing prices for consumers, increasing consumer options, and effectuating technological upgrades.

### A. *Services Versus Goods*

Because services have received special treatment under domestic laws and are inherently different from goods, the negotiations for services in the WTO under GATS have taken a somewhat more varied approach than that taken for goods under the General Agreement on Tariffs and Trade (GATT).<sup>11</sup> However, the underlying objectives have been consistent.

Opening markets for a pair of shoes, for instance, mostly involves those tariff and non-tariff barriers faced by the exporter at the border of the destination country. Telecommunications equipment is treated in the same way; telephones made in Taiwan can be exported to the United States basically like the shoes. However, trade in telecommunications services is the transmission of an electrical signal that does not stop at national boundaries and that must be received, routed, and terminated within the foreign country in order to be successful. Negotiating open markets for trade in services is more complex for various reasons. Services are less fungible than goods because they often necessitate person-to-person contact. Also, the supply of services often requires an underlying infrastructure whereby the supplier and recipient of the services can communicate. The supplier must be given access to the foreign recipient by the foreign country's regulators, who often impose technical and quality-based licensing barriers.

### B. *Telecommunications as Distinct from Other Services*

The telecommunications sector needed separate negotiations from other service sectors because it has unique attributes as a backbone for other services and as a service itself.<sup>12</sup>

Telecommunications infrastructures, as the backbone for other sectors, can have important economic, societal, and national security implications. Telecommunications infrastructures are as significant to the competitiveness of services today as the railroads were to manufacturing during the industrial age. Telecommunications infrastructures are also key to the maintenance of a technologically advanced military; thus, the national security implications of trade in telecommunications are higher than in many other services. Additionally, the importance of telecommunications infrastructures

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11. Belgium, Canada, Luxembourg, Netherlands, United Kingdom of Great Britain and Northern Ireland, General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. No. 814.

12. Telecommunications Trade Act of 1988 § 1372, 19 U.S.C. § 3101(a)(6) (1998) (noting that telecommunications is an industry sector needing special negotiating attention).

is compounded by technology upgrades that affect the reliability and scope of their use.<sup>13</sup>

As a service sector under GATS, telecommunications needed special commitments in an annex to GATS. The provision of some services may involve only two individuals with little involvement necessitated from others. For instance, an architect can sell to a foreign buyer the blueprints for building a house.

Providing telecommunications services, however, usually requires much more interaction with other private sector individuals and government officials. For instance, in the supply of telecommunications services, the supplier might have to construct or obtain access to an international communications network for its client.<sup>14</sup> In the event that the service provider has its own network, it must buy from product suppliers the necessary infrastructure components, such as integrated circuits, cable wires, and radio and satellite-based equipment.<sup>15</sup> The voice and nonvoice information is then sent over such a backbone network, which can be an interconnection of various modes, including mobile radio,<sup>16</sup> cellular, personal communications systems

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13. For instance, just since the GATS negotiations, U.S. companies have started competitively offering direct broadcast satellite, referred to in the United States as "Direct TV." Direct TV operates on the ku-band of the spectrum, and has the capacity to link directly satellites to end-users. This will be particularly beneficial for the entertainment and media industries.

14. OECD, TELECOMMUNICATION INFRASTRUCTURE, *supra* note 2, at 12.

15. The product providers may also sell to the consumers the end-use products, such as telephones, fax machines, and computers. All of these infrastructure and end-use components have collectively been referred to as information technology (IT). *Press Brief: Information Technology Agreement*, WTO, Singapore Ministerial Conference (Dec. 1996). Although an integral part of the service sector, information technology falls under GATT. However, governments that have had a restrictive trade policy for services have also impeded market access for IT in multiple ways. OECD, TELECOMMUNICATION INFRASTRUCTURE, *supra* note 2, at 47. Negotiating the Information Technology Agreement (ITA) in the WTO was an attempt by signatories to break down one of these impediments—tariff rates. *Ministerial Declaration on Trade in Information Technology Products* (visited Nov. 1, 1998) <<http://www.wto.org/wto/new/inftech.htm>>. The ITA consists of the Declaration, an Annex that directs parties to amend their Tariff Schedules attached to GATT, and Attachments that describe the product scope. Any reductions benchmarked in the ITA are beyond the market access obligations of GATT 1994. The IT talks were conducted mostly in 1996, by the European Union, Canada, Japan, and the United States. *Press Brief: Information Technology Agreement*, WTO, Singapore Ministerial Conference (Dec. 1996). The signatories agreed to zero out their tariffs by the year 2000, on a most-favored-nation basis; therefore, all WTO Members will receive the benefits of the ITA regardless of whether they were signatories to it.

16. Mobile radio is two-way communication, but it does not occupy a single stream of transmission. Therefore, the communication will not be to the exclusion of other incoming communication or to the exclusion of other recipients picking up the transmission. An example of this communication is CB radio.

(PCS), paging,<sup>17</sup> satellite,<sup>18</sup> wireline,<sup>19</sup> and fixed wireless.<sup>20</sup> To provide such a network of services, the supplier, unlike an individual exporter of goods, has to adapt its corporate face to respond to the inherent multinational demand. Supplier alliances that have become the most competitive are those that cross borders, combine multiple types of services, and interconnect the many modes of transmission.<sup>21</sup> The potential benefits of such diversified alliances are diminished substantially, though, if these suppliers are unable to enter a foreign market and access the domestic infrastructures that are already in place and that reach the consumers.

The most significant roadblock to such access is that many of the domestic telecommunications infrastructures are owned and operated by governments. This is usually not the case with market access for goods, as governments are not traditionally dominant suppliers of goods as they are for certain services. Additionally, governments have a significant impact on service markets through their role as regulator of telecommunications services.

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17. Cellular, PCS, and paging all use frequencies on the spectrum; however, they use different bandwidth, are located at different places on the spectrum, and are regulated differently. Also, the transmission can be analog, digital (such as PCS), or both (like cellular). Analog sends the message in a steady, unbroken stream. Digital breaks up the communication, which results in more efficient use of the spectrum.

18. Satellite services also use parts of the spectrum, but at a high frequency. In addition to obtaining an allocation of frequency, satellite service providers must get an allocated orbital spot. Most of the satellite service providers transmit through regional networks that were set up by Member states of a satellite treaty. The regional satellite organizations include INTELSAT, INMARSAT, and EUTELSAT. The private networks and regional satellite organizations collectively carry over half of the international telecommunications traffic. Dizard, *supra* note 1, at 98.

19. Wireline service is the most traditional means of transmitting telephone calls. The line links a stationary point (for example, a phone jacked in a house) to a local exchange carrier. The lines generally run underground or above ground on poles. The wirelines can be copper or fiber optic.

20. Fixed wireless services are intended to have the same effect as a wireline, that is, the customer's call originates at a stationary point (for example, a phone jacked in a house) and travels to a local exchange carrier. However, the transmission is over a wireless medium, such as cellular. The difference between fixed wireless and cellular is that with cellular, the customer is mobile, not fixed. Fixed wireless service is increasingly being used to provide basic telephony to remote areas.

21. For instance, an alliance of EU and U.S. equity holders, "Global One," receives inputs from and offers various services (telecommunications, broadcasting, and entertainment) through its multiple corporate arms. "Time Warner Entertainment, USA" has U.S. and Japanese partners, and has corporate stakes in telecommunications, entertainment, computers, and trading. 44 BEN PETRAZZINI, GLOBAL TELECOM TALKS: A TRILLION DOLLAR DEAL 28 (1996).



### C. *The Uniqueness of Basic Telecommunications Services*

The obligations of GATS and the Annex on Telecommunications apply only to those telecommunications sectors that the WTO Members incorporated in their Schedules. Mostly, the Schedules contained what is commonly referred to as “enhanced telecommunications services.” The Members were not ready in 1994 to make commitments on “basic telecommunications services” because, unlike enhanced services, the supply of basic services has been by state-owned operators or state-sanctioned monopolies.

Enhanced services are those services in which the voice or nonvoice information being transferred from one point to another undergoes an end-to-end restructuring or format change before it reaches the customer.<sup>22</sup> In 1994, the Members’ Schedules generally included enhanced services, such as electronic mail, voice mail, on-line information, electronic data interchange, value-added facsimile services, code and protocol conversion, and data processing.<sup>23</sup>

Although the various countries define basic telecommunications services differently,<sup>24</sup> overall, the Members included the same basic telecommunications service subsectors in their 1997 commitments.<sup>25</sup> Basic services “are voice and nonvoice services consisting of the transmission of information between points specified by a user in which the information delivered by the telecommunications agency to the recipient is identical in form and content to the information received by the telecommunications agency from the user.”<sup>26</sup> Basic telecommunication services include voice telephone services,

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22. Enhanced services are defined as those that “add value” to the consumer’s transmission of information by upgrading its form or content or by providing for its storage and retrieval. The United States defines enhanced services as:

services, offered over common carrier transmission facilities (that is, public telecommunications transport services) which employ computer processing applications that:

- i) act on the format, content code, protocol or similar aspects of the subscriber’s transmitted information; or
- ii) provide the subscriber additional, different, or restructured information; or
- iii) involve subscriber interaction with stored information.

WTO SECRETARIAT, *The United States of America, Schedule of Specific Commitments*, GATS/SC/90, 94-1088, II.C (Apr. 15, 1994).

23. *Id.* All of these services can be transmitted over the various modes of telecommunications infrastructure. *See supra* notes 16-20 and accompanying text.

24. While the United States has an “evolving” definition of basic services, many less developed countries consider basic services to only include voice telephony. As demonstrated in the negotiations on basic telecommunications, determining what category a service falls under can have a significant economic impact on the industry. *See infra* note 230 and accompanying text.

25. It is mostly the extent of their commitments that varied. *See infra* Part V.B.

26. JONATHAN DAVID ARONSON & PETER F. COWHEY, *WHEN COUNTRIES TALK:*

packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, privately leased circuit services, or mobile services.<sup>27</sup>

The central governments of most countries regulate, own, and operate, either directly or indirectly, the telecommunications infrastructure, often naming it the Post, Telegraph and Telephone Administration (PTT).<sup>28</sup> Some countries have privatized infrastructures,<sup>29</sup> but most countries maintain nationalized telecommunications infrastructures.<sup>30</sup> Privatization alone, though, does not necessarily benefit the consumers; privatization must be accompanied by liberalization, which includes allowing meaningful competition with the dominant provider.<sup>31</sup> By 1994, because many Members were already al-

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INTERNATIONAL TRADE IN TELECOMMUNICATIONS SERVICES 86 (1988). Resale of these services was also included.

27. WTO Secretariat, *Canada, Schedule of Specific Commitments, GATS/SC/16/Suppl.3* (Apr. 11, 1997) (visited Nov. 1, 1998) <<http://www.wto.org/wto/ddf/ep/public.html>>. Many of the other Schedules, such as those of Japan, the European Communities, and the United States, contained similar listings. As for enhanced services, all of these basic services can be transmitted over the various modes of telecommunications infrastructure. See *supra* notes 16-20 and accompanying text.

28. A PTT is a governmental entity that owns, operates, and regulates postal and telecommunications services.

29. “[O]ver 25 countries have completed telecommunication restructuring efforts. Another 35 countries have begun or are currently evaluating restructuring.” 138 CONG. REC. S5769 (daily ed. Apr. 29, 1992) (statement of Sen. Pressler). Many countries, though, want to maintain some control to advance a particular policy or interest, such as raising revenue from the sale of services, providing universal service, or protecting national security. Thus, the following methods of privatization have been utilized: (1) selling ownership in some of the telecommunications infrastructure but maintaining ownership for certain sectors; (2) maintaining an equity interest in the private telecommunications company, possibly a controlling share—to either maintain control or acquire capital; or (3) including a provision in the sale contract that ensures the right of the government to ensure universal service.

30. 141 CONG. REC. S7492-S7493 (daily ed. May 25, 1995) (statement of Sen. Byrd). The teledensity rate, which is the number of phones per 100 people, generally grows twice as fast in developing countries that privatize. PETRAZZINI, *supra* note 21, at 6. However, there are exceptions to this. ITU, WORLD TELECOMMUNICATION DEVELOPMENT REPORT 1994, at 20 (1994) [hereinafter ITU, WORLD REPORT] (noting that the Turkish PTT has seen a mainline increase of about 10% above world average for private providers and revenue increases of about 78% above the average).

31. Usually, when a country takes initial steps for privatization, the sale is made to a single domestic company or a cooperative conglomerate; thus, a natural monopoly is set up in the domestic telecommunications market. While privatization increases efficiency of the public telecommunications operator (PTO), competition reduces costs for the consumers. PETRAZZINI, *supra* note 21, at 6. For instance, Japan does not have state-owned facilities, but the country has been in a slow process of opening up competition since 1985. Japanese carriers, in comparison to U.S. carriers, are charged about four times the amount per minute, had 3.3 times fewer the number of local calls, and 1.5 times fewer the number of long-distance calls. Peter Cowhey, *Building the Global Information Highway: Toll Booths, Construction Contracts, and Rules of the Road*, in THE NEW INFORMATION INFRASTRUCTURE: STRATEGIES FOR U.S. POLICY 175, 180 (William J. Drake ed., 1995).

lowing competition for the enhanced telecommunications services, they simply included those commitments in their Schedules. However, the provision of basic services, which generates significant national revenue, was still largely the subject of state owned and operated monopolies.<sup>32</sup>

Privatization of government owned and operated telecommunications infrastructures was not one of the issues for negotiation in 1994, nor in the subsequent negotiations on basic telecommunications. However, it is imperative to understand that basic telecommunications services have been traditionally supplied through the state in order to appreciate the pre-1994 commitments on basic services that states undertook as service suppliers and as market regulators.<sup>33</sup>

### III. NEGOTIATING HISTORY OF SERVICES AND BASIC TELECOMMUNICATIONS

To understand the recently concluded negotiations on basic telecommunications and to comprehend how these negotiations fit into the services framework, the history of the negotiations on services must be considered.

#### A. *Momentum for Service Negotiations*

Between 1970 and 1980, international trade in services was growing by about 19 percent annually (even though trade liberalization in service

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32. PTTs have often been described as the government "cash cows." Provision of basic services in the domestic market alone is the largest revenue generator. OECD, TELECOMMUNICATION INFRASTRUCTURE, *supra* note 2. Additionally, for countries that terminate more international calls (i.e., receive incoming calls) than they originate, they will receive, through international settlements, foreign currency which they can use for any purpose. See *infra* notes 196-206 and accompanying text (providing an explanation of the current international settlement system and its relationship to the WTO basic telecommunications negotiations).

33. Thus, there are four common patterns:

- (1) Countries in which the government is the network owner and operator, the policy maker, and the regulator. Developing and nonmarket economy countries often reflect this model.
- (2) Countries in which the ownership and operation of the networks are privatized but where the government, through one entity, makes the policy for and regulates the industry. This includes such countries as Germany, France, and Japan.
- (3) Countries that have private PTOs, and where the government sets policy but that delegates regulation authority to an independent body that either reports to the government (such as in the United Kingdom and Australia) or acts as an independent commission (such as in the United States and Canada).
- (4) Countries that have a private industry but little or no industry regulator. This is the case in New Zealand, which sets only technical standards. ITU, WORLD REPORT, *supra* note 30, at 68.

markets was much further behind the liberalization of trade in goods),<sup>34</sup> and such trade accounted for an estimated 50 percent of Gross Domestic Product (GDP) in emerging economies and 70 percent of GDP in developed countries.<sup>35</sup> Realizing the vast market potential, U.S. service providers in the 1970s began to lobby for negotiations on information services and related sectors.<sup>36</sup>

During the 1980s, though, the momentum for negotiations really began to stimulate action in multilateral fora. The Organization for Economic Cooperation and Development (OECD) Trade Committee, after being urged by the United States, compiled a report which showed that trade in services, even though substantial, could be further facilitated by multilateral negotiations on trade barriers.<sup>37</sup> Also, a GATT report found that trade in certain services was linked to trade in goods.<sup>38</sup>

Among the GATT Members, there was disagreement about whether services should be an issue for negotiation. However, it was generally agreed that within the context of GATT, the issue of service barriers and the work of other international bodies on services should be further explored.<sup>39</sup> Additionally, the United States suggested that each GATT Party prepare a national study on its domestic service sectors.<sup>40</sup>

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34. Jimmie V. Reyna, *Services*, in 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 2342 (Terence P. Stewart ed., 1993).

35. PETRAZZINI, *supra* note 21, at 11.

36. Reyna, *supra* note 34, at 2343. Congress responded by: requiring trade in services to be a specific objective of future negotiations, including the Tokyo and Uruguay Rounds; allowing the President to use the section 301 procedures on countries that maintained restrictive trade measures in services; and making trade barriers a part of the USTR's annual report on foreign trade barriers. *Id.* at 2343-45 (citing the Trade Act of 1974, 19 U.S.C. § 2411 (1990); the Trade and Tariff Act of 1984, 19 U.S.C. § 2102 (1990); and Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901 (1990)).

37. *Id.* at 2345.

38. *Id.* (citing the *Report of the Consultative Group of Eighteen to the Council of Representatives*, GATT Doc. No. L/5210, reprinted in GATT B.I.S.D. (28th Supp.) at 71, 74 (1980-81)).

39. *Id.*

40. *Id.* at 2346. This suggestion was reinforced by the GATT Ministerial Declaration of 1982. *Id.* The Declaration also stated that the Parties should share the results of their studies and determine whether to take action on their findings. *Id.* (citing *Ministerial Declaration*, Adopted on November 29, 1982, GATT Doc. No. L/5424, reprinted in GATT B.I.S.D. (29th Supp.) at 9, 21 (1982)). Some of the reports, once completed, showed "that in 1979 the growth rate of service industries outpaced the growth rate of all other sectors in both developed and developing countries, and that in 1980, forty-eight percent of all workers in the reporting countries were employed in service industries." *Id.* at 2347 (basing the information on the 14 reports that had been submitted by 1985) (citation omitted). The U.S. and the U. K. reports called for negotiations for services similar to those for goods in order to avoid segmentation of the service markets. *Id.* at 2347-48 (citation omitted).

### B. *Ministerial Declaration of 1986 on Services*

In 1985 and 1986, as the Contracting Parties<sup>41</sup> made plans for a new round of negotiations, twenty-five OECD Members pushed to include services in the Uruguay Round (1986-1994), while twenty-three developing nations resisted.<sup>42</sup> After some compromise on the part of each side, the 1986 Ministerial Declaration on the Uruguay Round was released. The Declaration set the objectives for negotiations in two general areas: trade in goods and trade in services.<sup>43</sup>

Negotiations in [services] shall aim to establish a multilateral framework of principles and rules for trade in services, including an elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations.<sup>44</sup>

### C. *Initial Service Negotiations*

The Group of Negotiations on Services (GNS) was formed to oversee the negotiations, which included setting the items to be negotiated in light of the objectives and setting a time line for the negotiations.<sup>45</sup> An initial issue that had to be settled was how these negotiations would relate to other international bodies. The GNS determined that most telecommunications-related

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41. Note that this Article will refer to the Members of the WTO in different ways. "Members" is only used to refer to countries after the conclusion of the Uruguay Round. The reference to "Contracting Parties," however, is used to reference the parties to GATT before the formation of the WTO, and is used when the countries act individually, for example, implementing the commitments made during the Tokyo Round into domestic law. The reference to "CONTRACTING PARTIES" is used when the parties to GATT, prior to 1994, act as a whole, for example passing an amendment to GATT.

42. Reyna, *supra* note 34, at 2354-55. The United States went so far as threatening to begin its own separate bilateral negotiations in place of the multilateral round of negotiations unless services were included. *Id.*

43. *Id.* at 2359. The topics to be negotiated included: "Trade Related Investment Measures (TRIMS); Functioning of the GATT System (FOGS); Trade Related Aspects of Intellectual Property Including Trade in Counterfeit Goods (TRIPS); Tropical Products; MTN Agreements and Arrangements; Agriculture; Subsidies and Countervailing Measures; Natural Resources; Tariffs; Non-Tariff Measures; Safeguards; Textiles and Clothing; GATT Articles; Dispute Settlement; [and] Negotiations on Trade In Services." *Id.* at 2358 n.113 (citation omitted).

44. *Id.* at 2359 (quoting *Ministerial Declaration on the Uruguay Round*, GATT Doc. No. MIN.DEC, (Sept. 20, 1986), at 10).

45. *Id.* Both the GNS and the Group of Negotiations on Goods (GNG) reported to the Ministerial-level Trade Negotiations Committee (TNC). *Id.*

organizations and agreements do not attempt to liberalize fully trade in the sense of the Contracting Parties' objectives,<sup>46</sup> and they often contain exceptions for many of the service sectors considered by the Contracting Parties.<sup>47</sup> Another issue was whether the results of the service negotiations would be under GATT or in a separate agreement. By 1989, it was agreed that the GATS would be negotiated apart from, but in tandem with, GATT, and that crossover between concessions and cross-retaliation would not be permitted between the goods and service sectors.<sup>48</sup>

Although still controversial, some other issues were addressed in a 1988 report adopted by the Ministerial Trade Negotiations Committee: (1) the definition of services would include cross-border movement of services, consumers, and essential factors of production;<sup>49</sup> (2) the coverage of the framework agreement, GATS, should be as broad as possible in its scope;<sup>50</sup> (3) the framework agreement, similar to GATT, should contain MFN and national treatment principles;<sup>51</sup> and (4) the specific needs of developing countries should be addressed, such as their access to distribution channels, information, and markets for their exports of interest.<sup>52</sup>

The examination of specific sectors began in 1989. In the context of the telecommunications discussions, a major issue that emerged was whether

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46. *Id.* at 2361. The OECD and the UN Conference on Trade and Development (UNCTAD) had sectoral arrangements for some services, but mostly they facilitated exchange of information and set technical standards, so in that regard they reduced non-tariff barriers. Some bilateral friendship, commerce, and navigation (FCNs) agreements and bilateral investment treaties (BITs) cover services. However, FCNs generally address individual rights under property, tax, customs, and shipping laws and regulations, and BITs protect against unlawful entry and expropriation. *Id.* at 2399 (citing GATT, *Horizontal Agreements that Address Matters Pertaining to Services* (Apr. 3, 1991)).

47. *Id.* at 2400.

48. *Id.* at 2362.

49. *Id.* at 2369 (citation omitted). Some countries wanted the definition to include movement of capital and establishment of operations in the foreign market, while others wanted to focus on the movement of labor. *Id.* at 2362-63.

50. *Id.* at 2369 (citation omitted). Developing countries wanted the agreement to apply to all service sectors to ensure that the sectors they were primarily interested in did not get excluded from the negotiations. The United States determined that financial and telecommunications services should be negotiated separately. *Id.* at 2362-65.

51. *Id.* at 2369 (citation omitted). The Contracting Parties did not, however, commit to apply MFN and national treatment to trade in services without reservations. They knew that trade in services is inherently different from trade in goods. *Id.* at 2365-66. *See, e.g., supra* Part II.A.

52. *Id.* at 2369-70 (citation omitted). While the United States pointed out that any liberalization would benefit LDCs' trade in services, *id.* at 2366 (citation omitted), it was conceded that any agreement on services would, like the GATT, have to accommodate the needs of LDCs through technology transfers, phase-in periods for obligations, and special export opportunities. *Id.* at 2367 (citing General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XXXVI [hereinafter GATT]).

the negotiations would include both basic and enhanced services. In several countries, the latter were already open to competition, but basic services were, for the most part, subject to at least one of the following: heavy regulation, monopolization, or state ownership.<sup>53</sup>

*D. Two Framework Draft Texts and Sectoral Negotiations*

In 1990, the Chairman released two draft texts for a framework services agreement—one in July and one in December. Additionally, there were further sectoral negotiations.

The July Draft Text added to the 1988 TNC report but largely resembled the structure and substance of GATT, although the entire text was “subject to further consideration.”<sup>54</sup> First, on the issue of the agreement’s scope, the July Draft Text said that “all” sectors would be included and subject to national treatment unless otherwise specifically excluded or exempted by a party in its Schedule.<sup>55</sup> Second, the Parties exempted government procurement from the obligations even though there were different positions about how long it should be exempted, and they agreed to try to avoid the distorting effects of subsidies but disagreed on when they should phase out subsidies.<sup>56</sup> Finally, there remained sharp disagreement over application of the MFN principle.<sup>57</sup> The United States at first wanted to withdraw MFN status from the framework agreement because, as a country that had a relatively open market in all sectors, the United States would be put at a disadvantage by free riders that had some sectors closed.<sup>58</sup> Ultimately, the United States agreed to have the MFN principle included under the condition that the negotiations must also achieve sufficient market access and application of national treatment in all sectors.

The Parties were to outline in their respective Schedules their undertakings and limitations on market access and their reservations on national treatment.<sup>59</sup> Some Parties did not want the MFN principle to apply to basic telecommunications, while others wanted it to apply to avoid turning the service negotiations into a lot of “sectoral reciprocity” arrangements.<sup>60</sup>

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53. *Id.* at 2372.

54. *Id.* at 2382 (quoting *Draft Multilateral Framework For Trade In Services*, GATT Doc. No. MTN.GNS/35 (July 23, 1990), at 1 [hereinafter *Draft Framework*]).

55. *Id.* (citing *Draft Framework*, *supra* note 54, at 5, 13). The text, however, did specifically exclude government procurement, subsidies, and incentives from requirements of national treatment. *Id.* at 2386-87.

56. *Id.* at 2384-86.

57. *Id.* at 2383 (citing *Draft Framework*, *supra* note 54, at 6).

58. *Id.* at 2393.

59. *Id.* at 2387-88 (citing *Draft Framework*, *supra* note 54, at 15).

60. *Id.* at 2392 (citing GATT Secretariat, *Report by the Chairman of the Sectoral Ad*

The December Draft Text noted that there was still disagreement over the application of MFN.<sup>61</sup> However, the text did contain a sectoral annex on telecommunications and an annex on basic telecommunications, in addition to other sectoral annexes.<sup>62</sup>

*E. The Dunkel Draft of a Service Framework Agreement*

In December 1991, the Dunkel Draft was released, which represented another year of negotiations.<sup>63</sup> Most importantly, the Dunkel Draft put forth an MFN article that represented a new consensus on the issue. MFN was to be applied to all service sectors; reservations inconsistent with MFN could only be taken on specific commitments and only under the specified conditions listed in an annex for MFN exemptions.<sup>64</sup>

The Contracting Parties decided that the Dunkel Draft would not be final as further negotiations were needed on several issues.<sup>65</sup> However, the U.S.-EC clash over agriculture subsidies at the beginning of 1992 caused a stalemate in the service negotiations.<sup>66</sup> Additionally, several countries objected to the U.S. proposal to take an MFN exemption to basic telecommunications, the EU proposal to take an MFN exemption to audiovisual, and the general quality of developing countries' offers on services.<sup>67</sup> Finally, by the end of November 1992, just before the annual meeting, the United States and the European Community reached an agreement on agriculture, and the

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*Hoc Working Group to the GNS*, MTN.GNS/W/110, at 2 (Nov. 6, 1990)).

61. This issue stalled the negotiations through the spring of 1991, and at times, the issue of agriculture created a negotiation roadblock between the European Union and the United States, *id.* at 2395, even though it had been agreed that the Parties would not resort to cross-over between concessions in goods and services. *Id.* at 2362.

62. *Id.* at 2395.

63. *Id.* at 2411-12 (citing *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. No. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel Draft]).

64. *Id.* at 2413 (citing Dunkel Draft, *supra* note 63, at 7). These conditions included the following: "1. A description of the measure, 2. The treatment under the measure which is inconsistent with Article II (MFN) of the Agreement, 3. The intended duration of the treatment, [and] 4. The conditions which create the need for an exemption." *Id.* (citing Dunkel Draft, *supra* note 63, at 32). Additionally, exemptions would be reviewed every five years to determine if they still would be needed. *Id.* (citing Dunkel Draft, *supra* note 63, at 33). No new exemptions would be permitted unless they were adopted by a two-thirds vote of the Contracting Parties under the waiver procedures. *Id.* (citation omitted).

65. *Id.* at 2418.

66. *Id.* at 2422.

67. *Id.* at 2419-22. The United States intended to take an MFN exemption for basic services unless basic services were liberalized in other countries' offers, specifically those of the European Community, Canada, and Japan. *Id.* at 2422.



United States suggested a two-year extension of the negotiations on basic telecommunications.<sup>68</sup>

*F. The 1994 General Agreement on Trade in Services*

The U.S. recommendation was taken and the Parties concluded the services agreement in 1994. GATS is divided into six parts, with a total of twenty-nine articles and eight annexes.<sup>69</sup> These articles and annexes lay out a framework on which the Members have made their specific sectoral commitments.<sup>70</sup> The annexes specify more narrow commitments for certain sectors and commit the Parties to continued negotiations in other sectors.

*G. The Continued Negotiations on Basic Telecommunications Services*

The Annex on Negotiations on Basic Telecommunications of GATS ensures the Parties that basic telecommunications were not a part of the GATS commitments unless the Member specifically included commitments on basic telecommunications in its Schedule.<sup>71</sup> Therefore, the Members were not required to take Article II MFN exemptions on basic telecommunications at the time of the GATS entry.<sup>72</sup> However, the Annex states that the exemptions would have to be taken at the conclusion of the negotiations on basic telecommunications that are directed in the Annex.<sup>73</sup>

When the WTO Members turned their attention to basic telecommunications, an initial issue was the scope of the negotiations. The Members decided at the outset that they would include all basic telecommunications services.<sup>74</sup> The Members later determined that this would consist of all local,

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68. *Id.* at 2422. However, the European Community maintained that it would take an exception for audio-visual services under the cultural exception. *Id.* at 2424.

69. GATS, *supra* note 9. Briefly, Part I, Article I, contains the scope and definition of services. Part II, Articles II through XV, contains the general obligations and disciplines. Part III, Articles XVI through XVIII, contains the specific commitments. Part IV, Articles XIX through XXI, contains provisions for progressive liberalization. Part V, Articles XXII through XXVI, contains the institutional provisions. Part VI, Articles XXVII through XXIV, contains the final provisions. The annexes cover the following: Article II (MFN) exemptions, movement of natural persons, air transport services, financial services (on which there are two annexes), maritime transport services, telecommunications, and future negotiations of basic telecommunications.

70. *See infra* Part IV (discussing the substance of GATS).

71. 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 (GATT Secretariat 1994), 33 I.L.M. 44, 77 (1994) [hereinafter GATS, Annex on Negotiations on Basic Telecommunications].

72. *Id.* para. 1.

73. *Id.* para. 1(a)-(b).

74. Decision on Negotiations on Basic Telecommunications, Ministerial Decisions and

long-distance, and international services for public and private use; facilities-based and resale services; and services over all networks, such as satellite, cable, wireless, mobile, and cellular.<sup>75</sup>

At Marrakesh, the Ministers decided that the negotiations on basic telecommunications would work toward “progressive liberalization of . . . ‘basic telecommunications.’”<sup>76</sup> Of note, is the absence in the Annex and the Ministers’ Decision of any language about progressive or eventual privatization. The United States emphasized that it is not trying to pressure other sovereigns through the WTO negotiations to privatize their telecommunications industries.<sup>77</sup> However, many Members expected a high level of cooperation on liberalization.

There were nineteen original negotiating Members, counting the European Union as one.<sup>78</sup> The Parties negotiated through the Negotiating Group on Basic Telecommunications (NGBT).<sup>79</sup> The negotiations began in May 1994, and the first deadline was set for April 30, 1996.

U.S. Trade Representative Mickey Kantor had promised that the deal would fail unless enough countries made sufficient offers to cover a “critical mass” of the world telecommunications market. He did not define exactly what constituted a “critical mass,” but by the end of April, effective competitive opportunities did not exist in over 90 percent of the world market.<sup>80</sup> The deadline was not met.<sup>81</sup>

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Declarations, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 439, 461 (GATT Secretariat 1994), 33 I.L.M. 136, 144 (1994) [hereinafter Decision on Negotiations on Basic Telecommunications].

75. WTO, *Report of the Group on Basic Telecommunications, S/GBT/4* (Feb. 15, 1997) (visited Nov. 1, 1998) <<http://www.wto.org/wto/ddf/ep/public.html>> (attaching notes of the Chairman, para. (1)(a)-(c)).

76. Decision on Negotiations on Basic Telecommunications, *supra* note 74, para. 1.

77. The conference report on the 1988 Telecommunications Act makes it clear that it is not a U.S. objective for foreign governments to privatize their telecommunications sectors:

The bill contains no stated or implied requirement for the denationalization of telecommunications monopolies or for the elimination of vertical integration within foreign telecommunications industries. Rather, the bill assumes that specific negotiating objectives for each country will be established within the context of the *existing market structure* of that country, with a view to achieve the bill’s general negotiating objectives.

H.R. CONF. REP. NO. 100-576, at 641 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1674 (emphasis added).

78. Included were: “Australia, Austria, Canada, Chile, Cyprus, European Communities and their Member States, Finland, Hong Kong, Hungary, Japan, Korea, Mexico, New Zealand, Norway, Slovak Republic, Sweden, Switzerland, Turkey, [and the] United States.” Decision on Negotiations on Basic Telecommunications, *supra* note 74, para. 4.

79. GATS, Annex on Negotiations on Basic Telecommunications, *supra* note 71.

80. For the Information Technology Agreement (ITA), a “critical mass” was defined as at least 90% of the relevant market. A “critical mass” would include all OECD countries

The Council for Trade in Services did, however, make significant progress in April 1996 by adopting a Reference Paper.<sup>82</sup> The Reference Paper, if agreed to by a Member, was to be attached to that Member's Schedule of Commitments as an "additional commitment." Members could incorporate the Reference Paper as a whole and still take particular exceptions to some of its provisions.<sup>83</sup> For basic telecommunications services, the Reference Paper is a framework to address many of the regulatory concerns service providers would have when entering a market that is not privatized or fully liberalized.

The NGBT Members agreed to continue negotiations under the Group on Basic Telecommunications (GBT) and to extend the deadline for commitments on basic telecommunications until February 15, 1997. Also, the Members of the WTO adopted the Fourth Protocol to the GATS, which remained January 1, 1998, as the date of implementation for the Schedule of Commitments.<sup>84</sup>

By the time of the Singapore Ministerial Conference in December 1996, there were still issues of controversy that the Reference Paper had not addressed. These "outstanding issues" included the following:

ways to ensure accurate scheduling of commitments—particularly with respect to the supply of services over satellites and to the management of radio spectrum; potential anti-competitive distortion of trade in international services; the status of intergovernmental satellite organizations in relation to GATS provisions; and the extent to which basic telecommunications commitments include transport of video and/or broadcast signals within their scope.<sup>85</sup>

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and some developing countries.

81. Several reasons have been cited for the failure of the negotiations. The USTR said the negotiations failed because market access was not committed to by enough Members to constitute a "critical mass" of the telecommunications market. PETRAZZINI, *supra* note 21, at 13. Some have said it was because the satellite sector was not satisfied with the clarity of the scope of the negotiations on satellites, while others claim it was the fault of the long-distance carriers that wanted better interconnection commitments. In the United States, Congress seemed to be preoccupied with other governments' commitments on foreign ownership. Surely, it was a combination of all of these interrelated factors.

82. WTO, Negotiating Group on Basic Telecommunications, Reference Paper, Apr. 24, 1996, 36 I.L.M. 367.

83. Fifty-four of the countries adopted the Reference Paper and its regulatory principles in full. Three countries (including Brazil) committed to adopt it at a later date. Eight countries adopted some of the principles (including India, Pakistan, Malaysia, the Philippines, and Venezuela), and three countries (including Ecuador) did not make any regulatory commitments.

84. The Fourth Protocol also kept the telecommunications agreement open for signature until November 1997. FOURTH PROTOCOL TO GATS, *supra* note 9.

85. WTO, *Report of the Group on Basic Telecommunications, S/GBT/4* (Feb. 15, 1997) (visited Nov. 1, 1998) <<http://www.wto.org/wto/ddf/ep/public.html>>.

The issue of spectrum management was one of the last and most controversial issues to be decided. Ultimately, a substance and technology-neutral approach was taken.<sup>86</sup> It was decided that no commitments would apply to satellite services unless satellite services were included in a Member's Schedule of Commitments. Accounting rate reform was not an issue on the negotiating table, but it received considerable discussion among developed and developing countries throughout the negotiations.

Between April 1996 and February 1997, there were fifty-three participants and twenty-four observer nations. By the deadline, sixty-nine nations had made market liberalization offers, and all of these countries combined accounted for approximately 90 percent of the world's telecommunications revenues.<sup>87</sup> The second deadline, February 15, 1997, was met.<sup>88</sup> By November 1997, the Parties had to show they were legislatively and technically capable of implementing their offers, and at that point, they could improve their February 1997 offers.<sup>89</sup>

#### IV. 1994 GATS OBLIGATIONS AND COMMITMENTS

In GATS, the Members sought to expand trade in services through "progressive liberalization" and "higher levels of liberalization."<sup>90</sup> Liberalization essentially encompasses the multiple concessions that would potentially allow higher levels of competition in the services markets and that would keep those markets competitive.

The GATS sets out the "scope" of how services can be supplied, called the "modes of supply." Unlike GATT, GATS separates the means of liberalization and the Member's commitments into two Parts—the "General Obligations" and the "Specific Commitments." The "General Obligations," such as MFN treatment, transparency, and non-tariff barriers, apply to all service

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86. See *infra* Part V.C.2.a (discussing the "scarce resource" exception to the basic telecommunications commitments as it relates to spectrum management).

87. FOURTH PROTOCOL TO GATS, *supra* note 9. See also *supra* note 1.

88. See *infra* Part V (discussing the substance of the concluded negotiations).

89. Between February and November 1997, the United States worked with several developing countries to determine whether they were ready to submit offers and with several other participants of the negotiations to obtain better offers. By the end of November, countries were supposed to adopt the necessary laws or regulations to implement the February commitments. No U.S. laws needed to be changed, but the FCC did have to revise its regulations to comply with the U.S. commitments on foreign ownership. 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, 10 Comm. Reg. (P & F) 750 (1997) [hereinafter *Foreign Participation Report and Order and Order on Reconsideration*]. For a brief summary of how FCC regulations had to change, see Glenn S. Richards & David S. Konczal, *A New World Order Comes to Telecommunications*, 15 CABLE TV & NEW MEDIA L. & FIN., Dec. 1997, at 1.

90. GATS, Annex on Telecommunications, *supra* note 3.

sectors. The “Specific Commitments,” such as national treatment and market access, apply only to those service sectors that Members include in their Schedules. Various exceptions to the obligations that apply to all service sectors, similar to some exceptions contained in GATT, are outlined within GATS. These are different than the sector-specific exemptions that Members list in their Schedules. GATS includes institutional provisions, such as authorization for dispute settlement. Finally, GATS contains commitments to continue negotiations on various issues important to all services. Also, in 1994, GATS attached an annex of obligations specifically for the telecommunications sector.<sup>91</sup>

The Members’ individual Schedules, which contain their sectoral commitments and exemptions, are an integral part of the agreement. At the time GATS entered into force, the Members had fairly narrow commitments in their Schedules for telecommunications. However, following the conclusion of the 1997 negotiations, the basic telecommunications services commitments supplemented the original GATS Schedules. Thus, GATS now covers the basic telecommunications sector of those WTO Members that participated in the ongoing GBT negotiations.<sup>92</sup>

#### A. *Scope*

The GATS defines “trade in services” as the supply of a service through four different modes.<sup>93</sup> Telecommunications services can be supplied or traded through all of the four modes: cross-border supply,<sup>94</sup> movement of customers,<sup>95</sup> commercial presence abroad,<sup>96</sup> and presence of natural

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91. There is also an annex that commits the parties to negotiate further on basic telecommunications. *See infra* Part IV.G.

92. The discussion of GATS, therefore, will focus on its application to basic telecommunications generally.

93. The “supply of a service” is defined to include “the production, distribution, marketing, sale and delivery of a service.” GATS, *supra* note 9, art. XXVIII(b).

94. GATS, *supra* note 9, art. I, para. 2. “Cross-border supply,” as defined in GATS, is the most utilized mode of telecommunications trade. For instance, this would be the carrying of voice telephony over a network that transcends national borders. ITU, *WORLD REPORT*, *supra* note 30, at 26. Some countries bound themselves to the other modes of supply, but not to this mode. For example, Hong Kong, in its 1994 Schedule of Commitments on value-added services, did not bind itself to giving market access or national treatment for cross-border supply even though it made commitments for all of the other modes. *See* WTO Secretariat, *Hong Kong, Schedule of Specific Commitments*, GATS/SC/39, 94-1037, at 11 (Apr. 15, 1994).

95. GATS, *supra* note 9, art. I, para. 2. “Movement of customers” is of growing importance to telecommunications services as advances in mobile communications technology allow geographic flexibility and movement of the consumer equipment unit, such as use of mobile telephones linked to roaming satellites or use of a calling card. ITU, *WORLD REPORT*, *supra* note 30, at 26.

persons abroad.<sup>97</sup> The GATS Members must ensure that any measures taken by central, regional, and local authorities, and by nongovernmental bodies<sup>98</sup> that affect a service supplier's ability to supply services through one of these modes is in accordance with the obligations of GATS.<sup>99</sup> Members are exempt, however, from applying GATS obligations to those service suppliers that are supplying the service "in the exercise of governmental authority."<sup>100</sup>

### B. General Obligations

The overall objective of the GATS, to liberalize trade in services, is similar to the objective of GATT, to liberalize trade in goods. However, the general obligations that the Parties must undertake in GATS, such as applying MFN treatment to foreign service suppliers, ensuring transparency,

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96. GATS, *supra* note 9, art. I, para. 2(c). "Commercial presence" is defined as any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person [such as a corporation, trust, partnership, joint venture, or association], or (ii) the creation or maintenance of a branch or a representative office within the territory of a Member for the purpose of supplying a service.

*Id.* art. XXVIII(d), (l). This is of growing importance as foreign countries liberalize their rules of access, such as lifting foreign ownership restrictions and allowing competitive telecommunications interconnection. An example of the commercial presence abroad would be a telecommunications company incorporated and established in the United States that has a subsidiary in Hong Kong to offer domestic services in Hong Kong.

97. *Id.* art. I, para. 2(c). In the case where there is commercial presence abroad, this would be of significance for managerial and technical operations. However, when labor is the only interest abroad, presence of natural persons abroad may be significant in those instances where a developing country is receiving technology transfers or is implementing a program of temporary privatization to effect upgrades in technology or infrastructure. For instance, in Build-Operate-Transfer (BOT) arrangements, the foreign investor would need to place its natural persons in the foreign country in order to operate temporarily the facility. ITU, *WORLD REPORT*, *supra* note 30, at 26.

98. GATS, *supra* note 9, art. I, para. 3(a). The nongovernmental bodies must be acting with delegated power of the government. *Id.* para. 3(a)(ii).

99. "[M]easures by Members affecting trade in services" is defined by GATS to encompass measures with regard to:

- (i) the purchase, payment or use of a service;
- (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
- (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

*Id.* art. XXVIII(c).

100. *Id.* art. I, para. 3(b). The GATS states, though, that measures affecting trade in services must conform to GATS obligations when the measures would cover a governmental supplier that is either supplying the services on a commercial basis or supplying the services in competition with another supplier. *Id.* art. I, para. 3(c). Therefore, under the Parties' negotiations of basic telecommunications services, this provision would subject PTTs to GATS principles unless the Parties specifically exempted their domestic PTT from the obligations.

and reducing non-tariff barriers, are quite unique in many respects in their application to services.

### 1. Most-Favored-Nation Treatment

Article II of GATS requires that Members “accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.”<sup>101</sup> Under the MFN obligation, all countries, whether they have state-owned or privatized infrastructures, should allow access to their market on a nondiscriminatory basis between service providers from different countries. For instance, MFN would require the United States to be country-neutral to all Members of the WTO that wanted to provide services in the U.S. market—regardless of the level of openness of those countries’ markets to U.S. service providers. Countries would be in violation of the MFN principle for telecommunications if they, for instance, acted discriminatorily when granting licenses to operate or own networks, giving interconnection rights, setting access fees, and assigning radio frequencies to wireless services.

While the concessions made as a result of the basic telecommunications negotiations are similar to those made in a plurilateral agreement (in that only those Members that were part of the negotiations are bound), MFN is not granted on a “conditional” basis as with the plurilateral agreements. Thus, all Members that made basic telecommunications commitments are bound to grant the benefits of those commitments on an MFN basis to all WTO Members regardless of those Members’ participation in the basic telecommunications negotiations.<sup>102</sup> In effect, all Members to the WTO receive the benefits of the telecommunications negotiations,<sup>103</sup> but not all Members are bound by the resulting negotiations.

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101. *Id.* art. II, para. 1.

102. The structure of GATS itself creates the classic “free-rider” problem. FOURTH PROTOCOL TO GATS, *supra* note 9. As noted, however, a Party can take an MFN exception. The exception is taken for a particular telecommunications sector and not with regard to another Party; although, this is not looked upon favorably. For instance, the United States was concerned about Canada’s level of openness to U.S. investors in Canadian satellite services. Thus, the United States took an MFN exception for direct satellite broadcasting, generally, as opposed to taking an exception for Canada. Canada and the European Union have already threatened to take the matter before the WTO’s Dispute Settlement Body. *See infra* Part IV.F (discussing dispute settlement for the GATS).

103. There is one exception to this. While a Member may always deny the entire package of benefits in GATS to a non-WTO Member, it can also deny GATS concessions to a WTO Member against which it has invoked nonapplication of all of the WTO agreements. WTO Agreement, *supra* note 8, art. XIII.

There is a caveat, though. The MFN provision in GATS can be excepted.<sup>104</sup> All countries guarantee MFN treatment in all service sectors,<sup>105</sup> but they are authorized to accord particular countries less than MFN treatment as long as they list these exemptions in their MFN Article II Schedule in accordance with the requirements of the Annex on Article II Exemptions.<sup>106</sup> The GATS requires that the exempting Member notify the Council on Trade in Services of all MFN exemptions it takes, state a date of termination of the exemptions that should not exceed ten years,<sup>107</sup> make the exemptions, subject to a five-year review by the Council for Trade in Services,<sup>108</sup> and make the exemptions subject to future negotiations.<sup>109</sup> This divergence from GATT's MFN application,<sup>110</sup> which does not allow such exemptions reiterates that the "fungibility of goods" concept does not apply equally to services. It also recognizes that as the Contracting Parties continue their negotiations beyond the Uruguay Rounds, they are taking more of a sector-by-sector approach.

MFN treatment can also be excepted in GATS by according some Parties more favorable treatment through arrangements similar to the Cus-

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104. GATS, *supra* note 9, art. II, para. 1.

105. MFN reservations should be distinguished from market access and national treatment reservations. *See infra* Part IV.C (regarding the latter reservations). MFN treatment must be accorded to all listed and unlisted sectors unless the MFN exemption is taken. However, market access and national treatment must only be accorded to those listed sectors, and even then, particular reservations can be taken.

106. GATS, Annex on Article II Exemptions, Apr. 15, 1994, WTO Agreement, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 352, para. 1 (GATT Secretariat 1994), 33 I.L.M. 68 (1994) [hereinafter GATS, Annex on Article II Exemptions]. The individual Member's Schedule on Article II exemptions became an integral part of the Annex on Article II Exemptions. *Id.* Any new MFN exemptions after the date of entry into force of GATS will have to be taken in accordance with the waiver procedures of Article IX, para. 3 of the WTO Agreement, *supra* note 8; GATS, Annex on Article II Exemptions, *supra*, para. 2. In that case, a three-fourths vote by the WTO Members in favor of the MFN exemption would have to be obtained by the exempting Member. WTO Agreement, *supra* note 8, art. IX, para. 3(a); GATS, Annex on Article II Exemptions, *supra*, para. 3.

107. *See* GATS, Annex on Article II Exemptions, *supra* note 106, paras. 5-6. The provision states that "[i]n principle, such exemptions should not exceed a period of 10 years." *Id.* para. 5 (emphasis added). However, many countries listed their MFN exemptions as "indefinite." The United States, for instance, listed indefinite on every MFN exemption it took. GATS, *The United States of America, Final List of Article II (MFN) Exemptions*, GATS/EL/90, 94-1153 (Apr. 15, 1994).

108. *See* GATS, Annex on Article II Exemptions, *supra* note 106, para. 3. The Council will review the exemptions to determine "whether the conditions which created the need for the exemption still prevail." *Id.* para. 4(a).

109. *Id.* para. 6.

110. GATT, *supra* note 52, art. I.



toms Territory and Free Trade Area that are authorized in GATT.<sup>111</sup> These provisions in GATS and GATT apply to, for instance, the more favorable treatment that Canada, Mexico, and the United States accord each other under the North American Free Trade Agreement (NAFTA).<sup>112</sup>

## 2. Transparency

As with GATT, transparency is a core principle of GATS. Article III requires that each Member publish all international agreements to which it is a party that affect trade in services as well as “all relevant [domestic] measures of general application which pertain to or affect” the provision of services.<sup>113</sup> The Members must also notify the Council for Trade in Services about any new measures that “significantly affect trade in services.”<sup>114</sup> Although, Members are not obligated to publish any information that is confidential.<sup>115</sup>

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111. GATS, *supra* note 9, art. V. *See also id.* art. XXIV. The arrangement should be to liberalize further trade in services between the Parties by eliminating substantially all policies that are not national treatment consistent (except in those cases where exceptions are included in the GATS text, such as balance of payments, security, safeguard, and general exceptions) for “substantial sectoral coverage.” GATS, *supra* note 9, art. V, para. 1(a)-(b). The GATS Article V provision, unlike the comparable GATT provision, defines “substantial sectoral coverage.” It states: “This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.” *Id.* n.1. GATS covers those sectors that the parties are able to negotiate sectorally through the annexes; thus it includes, *inter alia*, movement of natural persons, air transport, financial services, maritime, and telecommunications. Additionally, these services are supplied through the four modes outlined in Article I. Thus, two Members of GATS could not enter into a bilateral arrangement that covered only basic telecommunications services supplied cross-border. It would have to be multi-sector and through multiple modes of supply. Except that in Article V *bis*, arrangements on the labor sector are permitted.

112. Chapter 13 in NAFTA covers enhanced services, but it does not cover basic services. The enhanced services provisions require reasonable and nondiscriminatory access to public telecommunications networks, transparency in information affecting access to public networks and services, rates for public telecommunications transport services that reflect economic costs, assurances that public network monopoly providers do not engage in anti-competitive conduct, elimination of investment restrictions for enhanced services, and transparency and nondiscrimination in licensing or authorization requirements for the provision of enhanced services. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605, 653 (1993). In addition to the telecommunications chapter, NAFTA contains chapter 12, which calls on NAFTA members to eliminate “prohibitive incorporation or licensing requirements.” *Id.* ch. 12, art. 1210.

113. GATS, *supra* note 9, art. III, para. 1.

114. *Id.* para. 3.

115. *Id.* art. III *bis*.

### 3. Other Non-tariff Barriers

Non-tariff barriers to the services sectors are often prohibitive. Articles VI and VII lay the guidelines for Members to identify and negotiate the reduction of specific service sector non-tariff barriers, such as criteria for licensing, anticompetitive business practices, and activities of monopoly providers. The Members to the basic telecommunications negotiations set out guidelines in these areas.

Article VI requires Members to ensure that “measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner”;<sup>116</sup> to ensure that licensing schemes or other such qualification requirements are administered in a manner that is fair to the applicants and are based on standards that do not nullify specific sectoral commitments;<sup>117</sup> and to put in place, when practicable, a mechanism for review of administrative decisions that affect a provider’s ability to supply services.<sup>118</sup>

Article VII addresses licensing criteria as technical barriers to trade.<sup>119</sup> This GATS Article on “recognition” distinguishes between the substance of the criteria and the procedure by which the criteria are implemented. Article VII does not attempt to dictate what the specific criteria or standards for operation must be, so it is less strict than the technical barriers to trade limits under the GATT.<sup>120</sup> The Article allows Members to impose autonomously their standards and criteria for denying certifications or licenses.<sup>121</sup> Thus, the substance of the policies can be discriminatory if the discriminatory policies are included in the Member’s Schedule.<sup>122</sup> After ten years, when these discriminatory practices are to be phased out, the discriminatory policies potentially could be refashioned into a statement of “technical integrity” for the Members’ services.<sup>123</sup> Article VII encourages Members to recognize as sufficient the criteria already met by a service supplier under another Member’s

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116. *Id.* art. VI, para. 1.

117. *Id.* art. VI, paras. 3, 5(a). When determining whether a Member’s licensing and qualification requirements or technical standards are being used to nullify a commitment, standards of international organizations will be considered, *id.* para. 5(b), as well as the disciplines on standards that are established by bodies of the Council on Trade in Services. *Id.* para. 4.

118. *Id.* art. VI, para. 2.

119. This provision is somewhat comparable to GATT’s provisions on technical barriers to trade.

120. GATS, *supra* note 9, art. VII.

121. *Id.*

122. GATS, Annex on Telecommunications, *supra* note 3, para. 5(e)(iii).

123. *Id.* para 5(e)(ii).

standards.<sup>124</sup> Preferably, Members should agree, in a multilateral forum, to use internationally recognized criteria for licensing.<sup>125</sup> However, where this option is not practical, Members may enter into bilateral arrangements for mutual recognition criteria,<sup>126</sup> or a Member may continue to set its standards unilaterally.<sup>127</sup> Procedurally, however, the criteria for the licensing or certification of a service supplier cannot be applied in such a way that would discriminate between countries or that would constitute a disguised restriction on trade.<sup>128</sup>

Although most of the obligations of GATS concern measures taken by Members that affect trade in services, Article IX addresses business practices that restrict trade in services. Members are not obligated to end such restrictive business practices, but they are required to consult with another Member that complains about such practices and to “accord full and sympathetic consideration” to that Member’s request.<sup>129</sup>

Granting a monopoly share of a service market to a domestic supplier is generally inconsistent with the goal of market liberalization, but such practice is common for the basic telecommunications service sector. Although the Members recognize that the elimination of monopoly suppliers in these sectors is a decision that individual countries should have the sovereign right to make based on their national objectives and their domestic anti-competition policy, the Members have committed not to let these monopolies become an additional barrier. Therefore, the Members allow monopolies to stay in place, but subject their operation to certain obligations. Any monopoly supplier of a service<sup>130</sup> must, within its relevant market of monopolization, comply with the Members’ general obligations and specific sector commitments,<sup>131</sup> and, outside its monopolized market, it must not abuse its

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124. GATS, *supra* note 9, art. VII.

125. *Id.* para. 5.

126. *Id.* para. 1. When the bilateral arrangement is used, the parties to the arrangement must notify the Council for Trade in Services of the arrangement, *id.* para. 4(b), and they should allow other interested Members to become party to the recognition arrangement. *Id.* para. 2.

127. *Id.* para. 1.

128. *Id.* art. VI, para. 3.

129. *Id.* art. IX, para. 2.

130. A “monopoly supplier of a service” is “any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service.” *Id.* art. XXVIII(h). Also, the obligations on any “monopoly supplier of a service” apply as well to those “exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.” *Id.* art. VIII, para. 5.

131. *Id.* art. VIII, para. 1.

monopoly position or act inconsistent with any of the Members' commitments.<sup>132</sup>

#### 4. Obligations to Developing Countries

When making specific commitments on market access and national treatment for telecommunications, the Members are to give special consideration to developing countries, taking into account their need for technology and their ability to access information networks and export markets.<sup>133</sup> Additionally, developed countries should provide, whenever possible, technical and other information to service suppliers in developing countries.<sup>134</sup>

#### C. Specific Commitments

GATS Specific Commitments—market access and national treatment—are incorporated in a different Part of the Agreement than the General Obligations because the Members are bound only by these two principles if they make an affirmative commitment in their Schedule to be bound.<sup>135</sup> Whereas, for the General Obligations, Members are bound by the principles for all service sectors, unless otherwise excepted in their Schedules.

##### 1. Market Access

The market access commitment compliments MFN and national treatment obligations. The principles of MFN and national treatment state that *if* a country allows others to enter its borders and to operate in its market, it should do so on a nondiscriminatory basis. The principle of market access goes one step further and states that a country *should* allow the highest possible access to its market, for instance, by not imposing certain types of quotas or quantitative restrictions.

The market access principle applies to services differently than it does to goods. Under GATT, market access encourages tariffication, which is the transfer of non-tariff barriers into tariff barriers, and then it requires the overall reduction or phasing out of tariffs. This principle applies easily to goods, and specifically to telecommunications equipment, as unreasonable packaging requirements, content requirements, technical standards, and so on, may be set up by a country as trade barriers. These barriers, assuming they are not legitimate quality concerns, can be quantified in tariff schedules,

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132. *Id.* para. 2.

133. *Id.* art. IV, para. 1(a)-(c).

134. *Id.* para. 2(a)-(c).

135. *See infra* Part IV.H.

and as the country's market becomes more competitive, the tariffs can be reduced. Market access, as applied to services, includes allowing a country to provide services through the four modes of supply in Article I, such as cross-border supply and commercial presence abroad. Thus, market access is one of the most important and pervasive issues facing service providers.

Article XVI does not require Members to open their service markets to foreign service suppliers. It only states that when a Member undertakes sector-specific market access commitments in its Schedule, they must be within certain parameters. For instance, when a Member undertakes market access for a service, it will be assumed that there will not be any limits on the ability of a foreign service supplier to enter the domestic service market.<sup>136</sup> With regard to a specific sector to which market access commitments were made, a Member would have to exclude specifically any of these market access elements that it wanted to except.<sup>137</sup>

Before the conclusion of the 1997 Negotiations, Members' individual market access concessions were fairly narrow for the telecommunications sector.<sup>138</sup> However, market access for basic telecommunications is now required for those Members that made February 15, 1997 offers.<sup>139</sup>

## 2. National Treatment

The principle of national treatment requires a country to grant foreign service-providers treatment no less favorable than it grants its own domestic service suppliers.<sup>140</sup> For basic telecommunications, this means that foreign suppliers must have the opportunity to receive the same access to the public networks as a national provider, regardless of whether that provider is public or private.<sup>141</sup>

A problem arises, however, when the national treatment principle is applied to privatized and state-owned systems. In the United States, where the telecommunications service markets are private, national treatment ap-

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136. *Id.* art. XVI, para. 2(a)-(f).

137. *Id.* para. 2.

138. *See infra* Part IV.H (discussing the substance of the Members' 1994 Schedules of Commitments).

139. *See infra* Part V.B (discussing the 1997 Market Access Commitments for basic telecommunications).

140. GATS, *supra* note 9, art. XVII.

141. *Id.* para. 1. However, the Article notes that the national treatment commitments should "not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers." *Id.* n.10. This is noted, surely, because of the difference between goods, which are generally fungible, and services, which carry with them more personal and tailorable characteristics that a domestic provider may be more cognizant of with regard to domestic consumers.

plies as it does for products under GATT—neutral application of internal regulations, taxes, and standards. Under the principle of national treatment, the United States should apply regulations nondiscriminatorily inside the United States to services provided by U.S. and foreign providers.

National treatment will mean something different for countries in which the government is a market participant in addition to the market regulator. Even as a market participant, the government, in theory, should apply all internal laws, regulations, taxes, and standards neutrally among all market participants. If the government taxed other providers, would it have to tax itself? There are serious implications to the application of national treatment in a market that is dominated by a government-operated service provider that is supplying services on a commercial basis or supplying the service in competition with another supplier.<sup>142</sup>

These telecommunications-specific problems prompted many of the GATS Members to take national treatment exceptions to their commitments. In GATS, unlike GATT, the national treatment requirements are not mandatory.<sup>143</sup> A country has to undertake the national treatment commitments in its Schedule sector by sector in order to be bound by the principle, and a Member is not responsible for the inherent disadvantages that a foreign supplier faces in the Member's market due to consumer preferences for domestic supply.<sup>144</sup> Even after undertaking the commitments of national treatment, a Member can specify conditions or qualifications to such commitments.<sup>145</sup>

### 3. Additional Commitments

Besides market access and national treatment, the Members of sectoral negotiations can, on a unilateral basis or in multilateral concessions, include other commitments to liberalize trade in services in their Schedules.<sup>146</sup> In addition to the specific ongoing negotiations on the four service sectors listed in the GATS Annexes, the Agreement calls for a comprehensive round of negotiations on services.

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142. *See supra* note 100.

143. GATS, *supra* note 9, art. XVII.

144. *Id.* n.10.

145. *Id.* para. 1. *See infra* Part V.B (discussing the 1997 basic telecommunications commitments and limitations on national treatment).

146. GATS, *supra* note 9, art. XVIII. *See infra* note 221 and accompanying text (discussing the additional commitments in the Members' Schedules).

#### D. *GATS Exceptions to Obligations*

##### 1. General Exceptions

There are exceptions in Article XIV of GATS, similar to those in Article XX of GATT, that allow countries to adopt measures inconsistent with an obligation as long as the measures are not disguised restrictions on trade and they are: “(a) *necessary* to protect public morals or to maintain public order; (b) *necessary* to protect human, animal or plant life or health; [or] (c) *necessary* to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . .”<sup>147</sup>

The Members included these exceptions in GATS because they recognized that Members may have national policies that necessitate restrictive trade measures for the purpose of protecting the public. Members have often tried to use the comparable GATT exceptions to restrict trade that they perceived would have negative health or environmental impacts, while the challengers of those measures have frequently viewed the measures as economic protectionism intended to protect domestic suppliers against foreign competition. The first sentence of the preamble of the Agreement Establishing the World Trade Organization sets forth this classic environmental-economic conflict that underlies many of the disputes under GATT, Article XX.<sup>148</sup> There are probably few environmental reasons for adopting restrictive trade measures for services; however, there are numerous instances in which a Member may adopt such measures on the basis that it is protecting social morality and order. Thus, societal-economic conflicts may arise out of GATS, Article XIV.

How GATT, Article XX has been interpreted may give some indication of how GATS, Article XIV will be interpreted, as their preambles and specific exceptions are similar. In addition to the specific requirements of each exception found in GATT, Article XX(a)-(g), the statutory language in the preamble of Article XX sets forth several explicit requirements—the restrictive measure being challenged cannot be arbitrary or unjustifiable, and

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147. GATS, *supra* note 9, art. XIV (emphasis added). The “public order” exception could be implicated when a “genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” *Id.* n.5.

148. It states that Members’ “relations in the field of trade and economic endeavor should be conducted with a view . . . [to expand] the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development . . . .” WTO Agreement, *supra* note 8, preamble. The 1994 inclusion of the sustainable development objective is the first time that a multilateral trade agreement has recognized sustainability as a guiding principle. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *The GATT Uruguay Round Agreements: Report on Environmental Issues* ES-3 (1994).

the measure cannot be a disguised restriction on trade.<sup>149</sup> Of most significance, though, is each exception's requirement that the restrictive trade measures be "necessary" for the enumerated purpose. For instance, GATT, Article XX(b) allows a party to institute restrictive trade measures if the measures are necessary to protect the life or health of plants or animals. "Necessary" has been interpreted as requiring that there is not an alternative measure consistent with GATT that the asserting party could reasonably be expected to employ, and that the criteria that will implicate the restrictive measures be predictable by third parties.<sup>150</sup> As seen by the failure rate of Parties invoking this exception, including the United States, the requirement that the measure be "necessary" is strictly interpreted against the invoking Member.

Thus, if this definition of necessary is applied to the GATS Article XIV exceptions, then the exceptions will rarely be used successfully if the means of implementing, for instance, a domestic universal service policy, are inconsistent with the general GATS obligation of MFN treatment and non-tariff barriers. The exception's application to national treatment and market access, however, would be limited to those sectors that a Member included in its Schedule of Commitments.

## 2. Security Exceptions

GATS, Article XIV *bis* allows a Member to withhold information or take actions that are necessary to its essential security interests.<sup>151</sup> This provision is similar to the generally applicable national security exception in GATT<sup>152</sup> that "is so broad, self-judging, and ambiguous" that it can be used essentially for whatever a country desires.<sup>153</sup>

Some countries that have fought the trend to liberalize their telecommunications service sectors cite national security concerns. In the case of basic telecommunications, the national security issue often appears to be little more than a means to restrict the level of control that a foreign service investor achieves, to further national social policy objectives, and to protect domestic suppliers, which often include the government-owned supplier.

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149. GATT, *supra* note 52, art. XX.

150. "United States - Section 337 of the Tariff Act of 1930," L/6439, adopted on Nov. 7, 1989, § 5.26.

151. GATS, *supra* note 9, art. XIV *bis*.

152. GATT, *supra* note 52, art. XXI.

153. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 204 (1989) (referring to an instance in which a country claimed that it had to maintain restrictive measures for shoe facilities because "an army must have shoes!"). However, the GATT national security exception has been rarely used. *Id.* at 204-05.



### 3. Safeguards for the Balance of Payments

Members have an option in the International Telecommunication Convention and in GATS, Article XXII to take a balance of payments exception, which allows Members to suspend their telecommunications service obligations.<sup>154</sup> However, this is not a likely tool for protectionism because when this exception is taken, it has to be done under fairly strict guidelines.<sup>155</sup>

#### *E. Issues for Further Negotiation*

GATS encourages the WTO Members to continue negotiations on specific commitments under the Agreement.<sup>156</sup> Article XIX of GATS calls for a general round of negotiations on services, beginning January 1, 2000, and sets out the parameters for these negotiations. Also, further negotiations are scheduled for specific topics, which are set out in the GATS Articles covering such topics. For instance, Article XV states that subsidies will be an area for further negotiation. The same applies to Article XIII on government procurement and Article X on emergency safeguard measures.<sup>157</sup> In order to facilitate the commitments to liberalize their services markets, Members can negotiate further on a bilateral, plurilateral, or multilateral basis.<sup>158</sup>

#### 1. Subsidies

The Members did agree in GATS to continue negotiations on the issue of subsidies.<sup>159</sup> By way of comparison, the Members have a subsidies framework that has been the subject of numerous rounds of negotiations for goods. The GATT subsidies provisions contain both the substantive and

154. See International Telecommunication Convention, Nov. 6, 1982, art. 20, S. TREATY DOC. NO. 99-6, at 35 (1985). See also GATS, *supra* note 9, art. XXII.

155. Restrictive trade measures implemented inconsistent with the GATS obligations:

- (a) shall not discriminate among Members;
- (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;
- (d) shall not exceed those necessary to deal with the circumstances [that necessitated the exception to be taken];
- (e) shall be temporary and be phased out progressively as the situation [that necessitated the exception to be taken] improves.

GATS, *supra* note 9, art. XII, para. 2.

156. See *id.* arts. X, XIII, XV.

157. The Members do not include any substantive limits on themselves for taking emergency safeguards. They must simply notify the Council on Trade in Services if they take any safeguard measure. *Id.* art. X, para. 2. They commit to negotiate the issue within three years of GATS' entry into force. *Id.* para. 1.

158. *Id.* art. XIX, para. 4.

159. *Id.* art. XV, para. 1 n.7.

dispute resolution provisions for subsidies and are now mandatory for all WTO Members.<sup>160</sup> Essentially, when a Member believes that it is being injured by another Member that is granting a subsidy for a product, it may seek a remedy. Various GATT Articles can be utilized based on the type of subsidies that are being granted (prohibited subsidies,<sup>161</sup> actionable subsidies,<sup>162</sup> or non-actionable subsidies<sup>163</sup>) and on the type of remedy that the complaining party wishes to seek (unilateral retaliation<sup>164</sup> or action authorized through the WTO<sup>165</sup>). A mechanism for dispute settlement and surveillance with regard to subsidies and countervailing measures is in place.<sup>166</sup>

As with the negotiations on goods, Members recognized that subsidies, in some instances, distort the effects on trade in services, and all Members, therefore, should strive to avoid giving subsidies.<sup>167</sup> At the same time, the

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160. *Id.* arts. VI, XVI, XXIII.

161. The Agreement on Subsidies and Countervailing Measures contains the procedures for obtaining authorization for countermeasures against a prohibited subsidy, an actionable subsidy, and a nonactionable subsidy, in Parts II, III, and IV, respectively. Part II Prohibited Subsidies (also called "red light" subsidies) are those such as export subsidies, de facto export subsidies, and subsidies contingent upon the use of local content. Multilateral Agreements on Trade in Goods, Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 264 (GATT Secretariat 1994), 33 I.L.M. 44 (1994) [hereinafter 1994 Subsidies Agreement].

162. Part III Actionable Subsidies (also called "yellow light" subsidies) are those that cause injury to an industry of another party of GATT, nullify or impair the benefits of another party of GATT, or cause serious prejudice. *Id.* art. 5.

163. Part IV Non-actionable Subsidies (also called "green light" subsidies) include certain government assistance for industrial research and pre-competitive development activity, for regional development, and for the adaptation of existing equipment to new environmental requirements. *Id.* art. 8.

164. Unilateral action, such as countervailing duties (CVDs), originate in GATT Article VI. Article VI allows a country to levy a CVD "for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise." GATT, *supra* note 52, art. VI, para. 3. The Agreement entered into force January 1, 1980. The 1994 Subsidies Agreement "contains a definition of subsidy (*i.e.*, either a financial contribution or any form of income or price support where a benefit is conferred) and introduces the concept of 'specificity' (*i.e.*, only subsidies specific to an enterprise or industry or groups thereof would be subject to discipline)." Terence P. Stewart, *Uruguay Round Outlines* (1994) (on file with author).

165. Multilaterally authorized action, such as countermeasures, originate in GATT Article XVI. Article XVI states that if a party maintains one of the various types of subsidies, it shall give notice of the extent, nature, and effect of the subsidy. Thus, if another party to GATT contends that the authorized subsidy is having harmful effects or hindering the objectives of GATT, it can proceed to Article XVI's dispute settlement in GATT. For example, if an export subsidy allows the exporting country to capture more than an equitable share of the world market, then the subsidy would extend its authorization under Article XVI. See GATT, *supra* note 52, art. XVI, sec. B, para. 3.

166. WTO, GATT ACTIVITIES 1993, at 77 (1994).

167. GATS, *supra* note 9, art. XV, para. 1.

only remedy is “sympathetic consideration.”<sup>168</sup> Because the service sectors have traditionally been state owned, the subsidies provision in GATS, not surprisingly, is weak.

When the state owns and operates the public telecommunications network, it will often subsidize cross-sectors of the telecommunications markets. For example, it may use its revenues from the basic service sectors to subsidize those markets that it has opened up to competition, such as enhanced services.

It may be harder to negotiate specific reductions in telecommunications subsidies because unlike in goods, where the subsidy is often a direct payment or financial incentive, the subsidies to service providers will likely be favorable licensing and interconnection arrangements. These types of subsidies are difficult to detect and hard to assess in value.

## 2. Government Procurement

The largest purchaser in a domestic market of basic telecommunications services is often the government for its official uses. The Plurilateral Agreement on Government Procurement would apply only if the government is a Member to this Agreement.<sup>169</sup> The Procurement Agreement formerly applied only to goods, but services were added to its scope. However, most countries, with the exception of the United States, have included enhanced services in their Schedule of Commitments but have excluded basic telecommunications services. This Agreement requires a government, when purchasing goods and services for its own use as opposed to commercial use, to apply the principles of nondiscrimination<sup>170</sup> and transparency<sup>171</sup> and not to develop specifications that are performance based, rather than design or description based.<sup>172</sup>

Although this agreement is plurilateral at this time, the Singapore Ministerial meeting may have set the stage for negotiations on a multilateral basis.<sup>173</sup> Additionally, with regard to services, the GATS notes that its obli-

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168. *Id.* para. 2.

169. Plurilateral Trade Agreements, Agreement on Government Procurement, art. III, Apr. 15, 1994, WTO Agreement, Annex 4, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 438 (GATT Secretariat 1994), 33 I.L.M. 44 (1994) [hereinafter 1994 GPA]. This agreement entered into force January 1, 1996, *id.* art. XXIV, para. 1, and superseded the 1979 Agreement on Government Procurement, T.I.A.S. 10,403, 1235 U.N.T.S. (1979).

170. 1994 GPA, *supra* note 169, art. III.

171. *Id.* art. XVII.

172. *Id.* art. VI, para. 2.

173. The Members stated at the Singapore Ministerial Meeting that they agreed to:

[1] establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on

gations do not apply to governments as consumers<sup>174</sup> and states that negotiations should begin on the issue of government procurement of services on a multilateral basis beginning in 1997.<sup>175</sup>

#### F. Consultation and Dispute Settlement

Articles XXII and XXIII are the consultation and dispute settlement provisions of GATS and can be implicated in various scenarios. If a Member believes that another Member is violating one of its obligations in the GATS framework, one of the Annexes, or in its Schedule of Commitments, then that Member can invoke the dispute settlement procedure under the WTO.<sup>176</sup> Article XXIII, however, only provides a basic outline of authority and rights; it does not establish the procedural formalities for dispute settlement. The current rights and obligations are set out in the Dispute Settlement Understanding (DSU) of the WTO, which is referenced by GATS, Article XXIII.<sup>177</sup>

Dispute settlement procedures have developed over a period of time through practice and various rounds of negotiations.<sup>178</sup> To address directly some of the problems of the pre-Uruguay Round dispute settlement procedures,<sup>179</sup> the Members of the WTO made various changes that indicate their

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this study, to develop elements for inclusion in an appropriate agreement; and

- [2] direct the Council for Trade in Goods to undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplifications of trade procedures in order to access the scope for WTO rules in this area.

WTO Ministerial Conference, *Singapore Ministerial Declaration*, 36 I.L.M. 218, No. 21-22, at 226 (Dec. 13, 1996).

174. GATS, *supra* note 9, art. XIII, para. 1.

175. *Id.* para. 2.

176. "If any Member should consider that any other Member fails to carry out its obligations or specific commitments under [GATS], it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the [Dispute Settlement Understanding]." *Id.* art. XXIII, para. 1.

177. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 404 (GATT Secretariat 1994), 33 I.L.M. 1226 (1994) [hereinafter 1994 Dispute Settlement Understanding].

178. The Tokyo Round produced the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. GATT B.I.S.D. (26th Supp.) at 210 (1980). Later, in 1982, the GATT Ministerial Declaration on Dispute Settlement was released. GATT B.I.S.D. (29th Supp.) at 13 (1983).

179. Principle defects with the pre-Uruguay Round dispute settlement process have been summarized as follows: (i) disuse; (ii) delays in the establishment of panels; (iii) delays in appointing panel members; (iv) delays in the completion of panel reports; (v) uncertain quality and neutrality of panelists and panel reports; (vi) blocked panel reports; and (vii) non-implementation of panel reports. William J. Davey, *Dispute Settlement in GATT*,

willingness to take more of a legal rather than diplomatic approach to dispute settlement. Currently, Members have recourse to the Dispute Settlement Body (DSB) without the ability of one party to block panel formation,<sup>180</sup> without the consensus requirement that applied before 1994,<sup>181</sup> with strict time limitations,<sup>182</sup> with a right of appeal,<sup>183</sup> with the possibility of a cross-retaliation remedy,<sup>184</sup> and with the option of arbitration on the issue of retaliation.<sup>185</sup>

In addition to these provisions in the DSU, GATS has a special provision for the Part III commitments, including national treatment, market access, and any additional commitments listed in its Schedule. If commitments under Part III are being nullified or impaired, then the dispute settlement

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11 *FORDHAM INT'L L.J.* 51, 81-89 (1987). Another problem was the fact that under the Tokyo Rounds each agreement had its own procedures, allowing the Parties to forum shop. See John H. Jackson, *GATT Machinery and the Tokyo Round Agreements*, *TRADE POLICY IN THE 1980s* at 159, 180-81 (W.R. Cline ed., 1983). See also UNITED STATES INT'L TRADE COMM'N, *REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND THE TOKYO ROUND AGREEMENTS: REPORT TO THE COMMITTEE ON FINANCE* (1985).

180. The DSB must establish a panel no later than the second time it considers a panel request, unless there is a consensus against establishment. 1994 Dispute Settlement Understanding, *supra* note 177, art. 4.

181. A Member can no longer block adoption of a panel report, authorization of retaliation, or time limitations for each step. The panel report has to be adopted by the DSB between 20 to 60 days after circulation to Parties unless a Party appeals or there is a consensus not to adopt the report. *Id.* art. 16. Parties can state in writing their objections to the report, but this will not have the effect of unilaterally blocking the report. *Id.*

182. Overall, it is now possible to adopt a panel report within 14 months or less.

183. Either party is authorized to make an appeal to the Appellate Body. 1994 Dispute Settlement Understanding, *supra* note 177, art. 17. The appeal is limited to issues of law covered in the panel report, and the DSB must adopt the Appellate Report within 30 days unless there is a consensus not to adopt the report. *Id.* The total time for the appeal is not to exceed 90 days. *Id.*

184. This is a significant addition to the 1994 agreement. The Multilateral Trade Agreements have been "packaged," and a Member that accedes to the WTO must accede to each agreement, including GATS. The preferred retaliatory action is within the same agreement and the same sector, such as among types of telecommunications services. If this is not possible, then retaliation may be effected within the same agreement but in a different sector, such as between telecommunications and financial services. Then, if those two alternatives are not possible, retaliation can be authorized within a different agreement, such as between telecommunications services and goods.

185. The findings of arbitration are to be adopted by the DSB and implemented unless the DSB rejects by consensus the arbitration findings. 1994 Dispute Settlement Understanding, *supra* note 177, art. 25. The arbitration procedure is available only for the issue of when a Party must comply with panel and DSB recommendations. It is not for the issue of whether the Party is ultimately liable to comply with the recommendations because "liability"—or noncompliance under the terms of GATT—is locked in by adoption of an unfavorable panel or appellate report.

procedures of the DSB are invoked, but before retaliation can be authorized, the Parties must try to determine a “mutually satisfactory adjustment.”<sup>186</sup>

### G. Annex on Telecommunications

Telecommunications services were added in an Annex to GATS.<sup>187</sup> The Annex gives telecommunications service providers reasonable and non-discriminatory access to and use of telecommunications services within the borders of WTO Members that have made telecommunications commitments.<sup>188</sup> This translates into the ability of foreign service providers to enter a country and interconnect to its public network for the purpose of offering telecommunications services to the public in that market.

#### 1. Obligations

The obligations in the Annex expand the obligations of GATS specifically for telecommunications. There are commitments regarding transparency, access to public networks, and treatment of developing countries. However, by the terms of the Annex, these obligations apply only to services for which Members have scheduled a market access commitment.<sup>189</sup>

The transparency provision outlines what telecommunications information should be made publicly available: all tariff and non-tariff conditions of service, licensing requirements, conditions for interconnection, technical interconnection specifications, and standards affecting access and use of public networks.<sup>190</sup>

Access to public telecommunications transport networks includes the right to attach interface equipment with the public network, interconnect to the network, offer services to consumers, and establish an intracorporate network.<sup>191</sup> Such access should be accorded on MFN and national treatment terms.<sup>192</sup> Finally, Members with more developed telecommunications sys-

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186. GATS, *supra* note 9, art. XXIII, para. 3 (referencing Article XXI for procedures of mutually satisfactory adjustments).

187. GATS, Annex on Telecommunications, *supra* note 3. See also GATS, Annex on Negotiations on Basic Telecommunications, *supra* note 71; see *supra* Part III.G (discussing the Annex in context of the negotiating history of basic telecommunications).

188. Statement of Administrative Action, Apr. 15, 1994, WTO Agreement, *reprinted in*, URUGUAY ROUND AGREEMENTS ACT, H.R. 5110, 103d Cong., 2d Sess., H. Doc. 103-316, at 656 (1994).

189. GATS, Annex on Telecommunications, *supra* note 3, para. 2(c)(i). See *infra* Part IV.H (discussing the commitments made in the individual Schedules).

190. *Id.* para. 4.

191. *Id.* para. 5(b)(i)-(iii).

192. *Id.* para. 5(a) & n.15.

tems are encouraged to give technical information and special consideration to developing countries.<sup>193</sup>

## 2. Exceptions

In line with a government's right to regulate its domestic basic telecommunications market, it may need to put certain limitations on its obligations so that it is able to ensure the security and confidentiality of message content, to protect the technical integrity of the public network, to provide or continue to provide universal services, and to maintain efficient technical operations.<sup>194</sup>

## 3. Relation to International Organizations

The Members recognize that there are several international organizations that set telecommunications standards.<sup>195</sup> Most of the standard setting is regulatory in nature as it addresses the need for interconnectability among different types of information, such as voice, video, and data, over different types of networks, such as land-line, satellite, and radio.<sup>196</sup> For instance, the International Telecommunication Union (ITU) sets standards for shared telecommunications resources such as radio frequencies and the geostationary stationary orbit for satellites.

Additionally, the Members "recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union."<sup>197</sup> The shared jurisdiction of the WTO and the ITU over basic telecommunications became an issue when the United States tried to negotiate the accounting rate system in the WTO,<sup>198</sup> which was put in place by the ITU standards-setting body.<sup>199</sup>

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193. *Id.* para. 6.

194. *Id.* para. 5(d)-(f).

195. *Id.* para. 7(a). GATS also has a provision recognizing that, with regard to all service sectors, Members should consult and cooperate with the United Nations and other intergovernmental organizations that have jurisdiction over services. GATS, *supra* note 9, art. XXVI.

196. Dizard, *supra* note 1, at 128.

197. GATS, Annex on Telecommunications, *supra* note 3, para. 7(b).

198. The settlement rate system sets out procedures for setting the rate for originating the call (the collection charge) and the rate for terminating the call (the accounting rate) and the procedures for the originating and terminating PTOs to balance their transactions (the settlement payment). Essentially, the originating and terminating PTOs bilaterally negotiate a price that reflects a share cost of 50:50, and then when they balance their accounts, the PTO that originated the most calls pays to the terminating PTO the difference. ITU, *WORLD REPORT*, *supra* note 30, at 27.

199. *Id.*

The United States argued in the WTO basic telecommunications negotiations that the procedures for setting accounting rates and paying settlements were undercutting its benefits achieved in GATS. Undoubtedly, the accounting rate system, which was developed when the market for basic telecommunications services was generally government owned worldwide and monopolized, has a significant negative impact on U.S. service providers, which operate under laws and regulations that allow for private ownership and relatively open competition compared to other Members,<sup>200</sup> and which, on balance, are injured by new technologies that allow others to circumvent the settlement rate system.<sup>201</sup>

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200. The rates were set without consideration to the actual cost of the transmission or finishing of the call, neither were they, with a lack of competition in the market, forced toward marginal cost. The success of the system was prefaced on the following assumptions: (1) "collection charges were approximately equal for the same call made in different directions and were applied in a relatively simple manner without off-peak rates"; (2) "incoming and outgoing traffic was approximately in balance for each main bilateral relationship between countries"; (3) "collection charges were substantially higher than accounting rates"; and (4) "bilateral relationships were conducted by monopoly partners." *Id.* However, many operators are lowering off-peak tariffs. There is a large deficit of termination of calls for some developed countries that have competitive collection pricing such as the United States. In some cases, the collection charge is less than the accounting rate. Furthermore, the liberalization of both domestic and international markets has made the assumption about monopoly negotiators obsolete. *Id.*

201. For instance, the following are some of the ways that the antiquated settlement rate system can be circumvented:

- (1) Private networks—Use of private networks by large corporations can undercut the settlement balance for the PTOs. For example, Toyota, which originates many calls, could lease or buy a private line, and thereby, AT&T would not get the settlement benefit of terminating all of those calls made to the United States.
- (2) International Simple Resale (ISR)—Some calls that normally would have gone over the public networks go over another's private line; thus, the long-distance carriers and the foreign terminating carrier lose business. For example, General Motors (GM) makes a large volume of calls to Japan, so it leases a circuit between a phone in the United States and a phone in Japan. GM can sell space on its private, leased line by allowing another to connect to GM in Japan and make local calls. In the United States, the burden of proof is on GM to show that Japan gives reciprocal resale accessibility. Only the United Kingdom, Canada, and Sweden have been certified as giving reciprocity.
- (3) Call-back services—Since international calling prices are high in many countries, a consumer, for instance, will call a U.S. call-back service operator that terminates his call, calls him back, and calls the destination of the call. For example, if X in Paris wants to call Detroit, Michigan, and his call-back service is in Baltimore, Maryland, he will call his call-back service in Baltimore, the service will call him back and call Detroit. Thus, X will be charged by the Baltimore call-back service for two calls—the one to Paris and the one to Detroit. Even though there are two calls, it may be less expensive than one call from Paris directly to Detroit. X could also use this service to call a local number in Baltimore or an overseas number to, for example, Tokyo. The FCC allows the Baltimore company to provide these call-back services, unless it is proven that the foreign government expressly prohibits it. Thus, the burden of proof is



Settlement rate reform has been discussed in the ITU, but there has been sharp disagreement among many developing and developed countries.<sup>202</sup> Several proposals have been put on the negotiating table,<sup>203</sup> but possibly the proposal most “consistent with the trade principles of market access, most favored nation (MFN) status, non-discrimination and transparency” is the proposal to give each country the option to set a random high fee or to base its fee on cost.<sup>204</sup>

Understanding that the position of many developed countries is to see reform in the settlement system, several developing countries took formal exceptions to the MFN principle in their February 15, 1997 GATS basic telecommunications offer, maintaining their bilaterally negotiated rates.<sup>205</sup> According to some negotiators, however, the exceptions were unnecessary

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not on the U.S. call-back service provider as it is for a U.S. ISR provider.

- (4) Internet services—Voice telephony offered by Internet service providers (ISPs) is not part of the settlement system. Thus, this traffic travels over the traditional telecommunications networks as “free-rider” traffic. ISPs offer flat-rate voice telephony, which puts them at a direct competitive advantage to traditional PTOs.

202. Developing countries have advanced a position that would keep the accounting rate inflated above actual cost of termination and that would replace the 50:50 settlement balance with an unequal ratio in their favor. For instance, a ratio of 55:45 could be set so as to reflect the higher costs for these countries to terminate a call due to their lag in technology and infrastructure. ITU, *WORD REPORT*, *supra* note 30, at 27. Developed countries that have moved toward liberalization would like to see actual cost of termination reflected in the rate structure.

203. Briefly, these include:

- (1) Sender Keeps All—Each carrier sets consumer collection rates and keeps 100%. This allows new entrants, but it does not encourage operators to receive calls because no compensation is given to allow incoming calls over their system.
- (2) Facilities-based Payments—The originating PTO pays whoever owns the terminating facilities a fee based on the cost to use whatever infrastructure is needed to terminate. This would still require bilateral negotiation, which has a detrimental effect on those countries whose markets are liberalized and does not address the circumvention problems.
- (3) Volume-based Payments—The more volume that is sent, the less the terminating PTO will charge the originating PTO. This would disadvantage significantly developing countries, which may originate a high ratio but undoubtedly will not originate a high volume. Additionally, ISR and call-back services would circumvent the volume terminations.
- (4) Cost-based Payments—Rates would progressively be reduced to reflect actual cost of termination. By itself, this solution would do little to address the problems of transparency and inefficiency.
- (5) Uniform Call Termination Fee—All PTOs declare a settlement rate that is the same regardless of where the call originates. *Id.* at 28.

204. *Id.*

205. *WTO Deal Includes U.S. MFN Exemption on Some Satellite Services*, *INSIDE U.S. TRADE*, Feb. 18, 1997 [hereinafter *WTO Deal*].

because settlement rate regulation and dispute settlement remain under the full jurisdiction of the ITU.<sup>206</sup>

#### H. *Schedule of Specific Commitments*

Any sector-specific commitments on market access or national treatment must be in a Member's Schedule, which is an integral part of GATS.<sup>207</sup> By listing a service sector in its Schedule, a Member makes a binding commitment to allow foreign suppliers into its market and to treat them the same as its domestic suppliers. Thus, if any sector-specific reservations will be taken, the Member must include those in its Schedule as well. All undertakings are assumed to be immediately implemented after the Schedules take effect January 1, 1998. Thus, any limits on immediate implementation of undertakings upon this date must be included in the Schedule as a limitation.<sup>208</sup>

Each Member's Schedule of Commitments consists of four columns, one for each of the following: a list of sectors and subsectors, limitations on market access for the listed sectors, limitations on national treatment for each sector, and additional commitments on each sector.

There are twelve general categories of service sectors of which communications is one.<sup>209</sup> These are broad categories whose scope can be expanded or minimized by Members. Additionally, Members may leave any of the categories out of their Schedules. For instance, the United States listed in its "communications services" sector several subsectors, including land-based courier services, telecommunications, and audiovisual services.<sup>210</sup> Specifically for telecommunications, the United States only includes "enhanced telecommunications services" as defined by FCC regulations.<sup>211</sup>

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206. *Id.*

207. GATS, *supra* note 9, art. XX.

208. *Id.* para. 1.

209. In order to ensure that inconsistencies between Members' Schedules do not become an additional barrier to trade, the WTO identified twelve sectors that Members should use as a framework for listing their sectoral commitments. At the time GATS was adopted, these included: (1) business, (2) communication, (3) construction and engineering, (4) distribution, (5) education, (6) environment, (7) financial, (8) health, (9) travel and tourism, (10) recreation, culture, and sports, (11) transportation, and (12) other.

210. WTO Secretariat, *The United States of America, Schedule of Specific Commitments*, GATS/SC/90, 94-1088, at 44-49 (Apr. 15, 1994).

211. *Id.* The Schedule gives a U.S. regulation citation, and it incorporates the definition into the text of the Schedule. Most other countries incorporate a definition as well; although, they do not always reference their domestic legislation. *See, e.g.*, GATS Secretariat, *Hong Kong, Schedule of Specific Commitments*, GATS/SC/39, 94-1037, at 11 (Apr. 15, 1994).

The limitations on the market access column must contain any limitations on the number of service suppliers, the value of service transactions or assets, the number of service operations, the quality of service output in terms of quotas (based on an economic needs test), the number of natural persons needed for operations, the types of legal entities or joint ventures, and the percentage of foreign capital shareholding or investment.<sup>212</sup> Such limitations must be listed for each of the four modes of supply: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.<sup>213</sup> The United States, for instance, has no limitations listed for the first three modes of supply of enhanced services.<sup>214</sup> For the presence of natural persons mode of supply, the United States lists its commitment as “unbound, except as indicated in the horizontal section.” By listing itself as unbound, the United States does not make any sector-specific commitments for enhanced telecommunications services.<sup>215</sup> However, the horizontal commitments, which are listed at the beginning of a Member’s Schedule, apply to all of the sectors in the Schedule. Many countries listed movement of persons in their horizontal commitments.<sup>216</sup> Ultimately, when reviewing the sectoral commitments of the United States on enhanced services, the horizontal commitments must be referenced for the fourth mode of supply, movement of natural persons.<sup>217</sup>

The limitations on national treatment column follows the same general format as the market access column. For each mode of supply of enhanced telecommunications services, the United States listed that its limitations are “none.”<sup>218</sup> Hong Kong, however, lists “none” only for commercial presence and is “unbound” on the other three modes of supply.<sup>219</sup>

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212. GATS, *supra* note 9, art. XVI, para. 2(a)-(f).

213. *See supra* notes 94-97.

214. The most liberal offer will read “none” in the column of limitations on market access. GATS Secretariat, *Hong Kong, Schedule of Specific Commitments*, GATS/SC/39, 94-1037, at 11 (Apr. 15, 1994) (listing “none” in the “consumption abroad” mode of supply).

215. Note that sometimes, “unbound” is used when it is not technically feasible to make a commitment on a mode of supply for a particular service. *See, e.g.*, GATS, *The United States of America, Schedule of Specific Commitments*, *supra* note 210, at 76.

216. In its horizontal commitments, the United States, for instance, made a commitment to allow for temporary entry and stay of natural persons within specified categories. *Id.* at 1-7.

217. Many countries also made horizontal commitments on foreign investment, so, when reviewing the sectoral commitments, the horizontal commitment on foreign investment would likely have to be referenced for the third mode of supply, commercial presence.

218. GATS Secretariat, *The United States of America, Schedule of Specific Commitments*, *supra* note 210, at 45.

219. GATS Secretariat, *Hong Kong, Schedule of Specific Commitments*, *supra* note 211, at 11.

The last column is for commitments in addition to the General Obligations contained in the GATS framework agreement and the Specific Commitments listed in the Schedule. Listing any additional commitments in this column is optional, but the types of commitments made generally concern licensing and standards.<sup>220</sup>

Once a commitment is made in a Member's Schedule, it cannot be withdrawn unless the commitment was one that did not benefit any other Member or the withdrawing Member gives a compensatory adjustment in the case that there was a benefit withdrawn under Article XXI, Modification of Schedules.<sup>221</sup> If compensation is not given under this provision, the injured Member can request consultation with the withdrawing Member or utilize the dispute settlement mechanisms of the WTO DSB, which can result in required compensation.<sup>222</sup>

### V. 1997 GATS COMMITMENTS

The continued negotiation on basic telecommunications was an effort by some Members to include these services in their Schedule of Commitments. The February 15, 1997 conclusion showed that the effort was successful. Thus, for each Member that participated in the continued negotiations, the following apply to its basic telecommunications services sectors: the obligations of GATS 1994,<sup>223</sup> the 1994 Annex on Telecommunications,<sup>224</sup> any 1997 limitations to MFN for basic telecommunications that it annexed to its 1994 List of Article II Exemptions,<sup>225</sup> any 1997 commitments or limitations on market access and national treatment for basic telecommunications that it annexed to its 1994 Schedule of Specific Commitments,<sup>226</sup> and any additional commitments made in its 1997 Schedule.<sup>227</sup>

First, the Parties generally agreed that the scope of the continued negotiations would be basic services provided through the four modes of supply.<sup>228</sup> Next, they added in their individual Schedules, their reservations and clarifications to how MFN, national treatment, and market access would ap-

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220. GATS Secretariat, *The United States of America, Schedule of Specific Commitments*, *supra* note 210, at 17-36 (outlining the state-specific requirements for the supply of legal services regarding competency, licensing, association with U.S. lawyers, etc.).

221. GATS, *supra* note 9, art. XXI, para. 2(a).

222. *Id.* art. XXII (concerning consultation), art. XXIII (concerning dispute settlement).

223. *See supra* Part IV.A-B.

224. *See supra* Part IV.G.

225. *See infra* Part V.A.

226. *See infra* Part V.B.

227. *See infra* Part V.C.

228. *See supra* Part II.C (discussing what constitutes basic telecommunications services), notes 94-98 and accompanying text (discussing the four modes of supply).

ply to the various types of basic telecommunications services as supplied through the four modes. Additionally, most of the exceptions were taken with regard to commitments on market access. Most Members also undertook the commitments in the Reference Paper on regulatory principles by incorporating the Paper into their Schedules under the “additional commitments” column.

A. *List of Article II (MFN) Exemptions for Basic Telecommunications*

The Annex on Basic Telecommunications allowed the Parties to delay taking their Article II exemptions on basic telecommunications until the conclusion of the negotiations; however, the exemptions followed the same format as the 1994 exemptions and were attached to the 1994 Schedule of Exemptions.<sup>229</sup> Most of the developed countries did not take broad MFN exemptions. The United States did take an MFN exemption on digital audio services and one-way satellite transmission of direct broadcast satellite (DBS) television services.<sup>230</sup> Although the U.S. Article II exemption applies to “all” countries, it was based on the “[n]eed to ensure substantially full market access and national treatment in certain markets.”<sup>231</sup> Such a need was seen with regard to Canada, which has various measures that limit U.S. service providers.<sup>232</sup>

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229. See *supra* notes 106-09 (outlining the required elements of the exemptions).

230. DBS is a ku-band frequency that can accommodate a broad range of basic and enhanced services. The United States argued that direct broadcasting services are basic services and fell under the negotiations on basic telecommunications that concluded in 1997. The United States believed that satellite services were not contemplated at the conclusion of the Uruguay Round, as much of the DBS technology has been developed since 1994, and that even if they were contemplated, they are basic services, the subject of the 1997 agreement, not enhanced services, which fell under the 1994 GATS. Canada and the European Union argued that they are enhanced services and fell under the Uruguay Round of GATS negotiations that concluded in 1994. Specifically, Canada and the European Union argued that these services came under the United States’ Uruguay commitments on television and radio services. *WTO Deal, supra* note 205. Canada and the European Union at one point threatened to take the matter before the WTO dispute settlement body. See generally *supra* Part IV.F (discussing dispute settlement for services).

231. WTO Secretariat, *The United States of America, List of Article II (MFN) Exemptions, Supp. 2, GATS/EL/90/Suppl.2* (Apr. 11, 1997) (visited Nov. 1, 1998) <<http://www.wto.org/wto/ddf/ep/public.html>>.

232. The United States will keep its limits for Canada on foreign investment and services in satellite as long as Canada maintains its restrictions, which it claims are content-based to preserve its public order and culture. *WTO Deal, supra* note 205. Canada’s use of this argument as a basis to deny U.S. companies necessary licenses to provide satellite services shows the potential reach and economic impact. Taking the MFN exception allows the United States to provide market access on a reciprocal basis, and in essence, reflects the other reservations of the parties in their satellite offers. The U.S. Federal Communications Commission has already taken steps to open U.S. satellite services to foreign

Some developing countries took exemptions, stating as a basis their need to develop their domestic sectors. Brazil took an exemption for DBS, while Argentina, at the last minute, took a broad MFN exemption on all satellite services.<sup>233</sup>

### B. *Schedule of Specific Commitments for Basic Telecommunications*

The 1997 Schedules of Commitments on basic services structurally resemble the 1994 Schedules of Commitments on services because, when finalized, they are incorporated into the 1994 charts. Therefore, the 1997 Schedules contain four columns: sectors covered, limitations on market access, limitations on national treatment, and additional commitments.

Although most Members listed the same types of basic services as being covered by their Schedule of Commitments,<sup>234</sup> some Members broke down the basic service subsectors based on where the services are provided,<sup>235</sup> and some further based them on who is providing them.<sup>236</sup> The

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participation. See John R. Schmertz, Jr., & Mike Meier, *U.S. Implements Market-Opening Commitment of WTO Basic Telecom Agreement by Adopting New Standard for Foreign Participation in U.S. Satellite Services Market*, 4 INT'L L. UPDATE 10 (1998).

233. WTO Secretariat, *Communication from Argentina, List of Article II (MFN) Exemptions, GATS/EL4* (Apr. 11, 1997) (visited Nov. 1, 1998) <[http://www.wto.org/wto/ddf/ep/](http://www.wto.org/wto/ddf/ep/public.html)

public.html>. This exemption was particularly egregious to many of the negotiating Parties. By the deadline, February 15, 1997, most of the Parties had finished their negotiations and signed the agreement. However, Argentina, that day, pulled its entire offer, then put it back on the table. But at 9:45 that night, Argentina announced it would keep a tight grip on all satellite services. Argentina had launched its first satellite system, Nahuelsat, at the beginning of the month, to offer ku-band (used for DBS) and V-sat (used mostly to network multinational corporations' internal communication). PanAm Sat had an offer being considered by the government to offer ku-band services to Argentina, and Hughes had just applied for a license to begin offering services in 1998; in other countries, Hughes is offering ku-band, which has the capacity to handle one of the largest and most popular packages of services, including voice telephony, data transmission, cable television, and Internet access. Argentina negotiators, when pressured by the United States, said that they would consider a bilateral reciprocity agreement. However, as those in the industry have pointed out, most of the U.S. satellite market is already open. Interview with Loretta L. Dunn, Vice President of Trade & Commercial Policy, Hughes Electronics (Mar. 3, 1997) (having participated in the Geneva negotiations on telecommunications, 1995-97). In Argentina's proposed reciprocity agreement to be negotiated, it is believed that it will use the satellite market as leverage in two other unrelated disputes (intellectual property, and textiles and footwear) it is currently engaged in with the United States. *WTO Deal*, *supra* note 205.

234. See *supra* notes 24-25 and accompanying text.

235. For instance, they can be provided in the domestic market and in the international market. See, e.g., WTO Secretariat, *Argentina, Schedule of Specific Commitments, Supp. I, GATS/SC/4/Suppl.1* (Apr. 11, 1997) (visited Nov. 1, 1998) <<http://www.wto.org/wto/ddf/ep/public.html>>.

limitations for both market access and national treatment are made according to the four modes of supply, often with reference to horizontal commitments made in the 1994 Schedule.

For market access, many of the Members did not list limitations for cross-border supply and consumption abroad. However, some Members, especially developing countries, did include phase-in periods for their commitments.<sup>237</sup> Most of the Members included limitations on commercial presence by limiting foreign investment levels. By the conclusion of the negotiations, forty-seven countries had committed to at least phase-in authorization for 100 percent foreign ownership or control of most telecommunications services and facilities;<sup>238</sup> ten countries opened up to foreign investment in certain sectors;<sup>239</sup> and ten countries would not permit foreign control.<sup>240</sup> As in the 1994 Schedule of Commitments on enhanced services, the basic services commitments on market access for presence of natural persons are generally unbound except as stated in the horizontal section.<sup>241</sup>

There are very few limitations on national treatment for the four modes of supply. A few countries, however, require board members of public tele-

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236. For instance, Japan has different commitments based on whether the service provider has itself established telecommunications circuit facilities. *See, e.g.*, WTO Secretariat, *Japan, Schedule of Specific Commitments, Supp. 2, GATS/SC/46/Suppl.2* (Apr. 11, 1997) (visited Nov. 1, 1998) <<http://www.wto.org/wto/ddf/ep/public.html>>.

237. For example, Argentina listed November 8, 2000, as the implementation date for some of its commitments on cross-border supply, consumption abroad, and commercial presence. *See* WTO Secretariat, *Argentina, Schedule of Specific Commitments, Supp. 1*.

238. Twenty-four of those offers were made after the April 1996 deadline, which no doubt, would not all have been achieved if the talks had concluded at that time. This category of countries made the commitment—the market (all sectors, private and public, local and long-distance, and at 100%) is open, unless otherwise reserved. Most of the 47 countries have committed to open their markets beginning Jan. 1, 1998; although, some made commitments that the markets will be opened on other dates in the future, from 1999 to 2004. A few exceptions to this liberalization were taken, e.g., excluding PTTs, local services, and 49% limits to any one foreign entity. The United States took an exception for common carrier radio licenses, apparently to comply with section 310(a) of the Telecommunications Act of 1996. WTO Secretariat, *The United States, Schedule of Specific Commitments, Supp. 2*, at 2-3.

239. Of note, were limited offers from: Hong Kong, which will only liberalize in resale, call-back, and closed user groups; Brazil, which only liberalized on nonpublic services; and Pakistan, which liberalized only in telex and fax, but no voice. Several countries allowed 100% in nonpublic or closed user group services; these have been referred to as intra-nets. Also, many countries opened up satellite and cellular services, and some will allow competition for resellers. International and long-distance services ended up being more open than local, as well.

240. Nevertheless, they did set percentages, ranging from 25 to 40, that foreign entities could invest; they just cannot obtain a controlling share. Some of the notably poor offers came from Brazil and Pakistan. Some countries did not make market access commitments at all, including India and Indonesia.

241. *See supra* notes 214-18 and accompanying text.

communications operators (PTOs) to have a domestic nationality for commercial presence and reference the horizontal commitments for presence of natural persons.<sup>242</sup>

The additional commitments for basic telecommunications are substantial. Most countries made a commitment to undertake the obligations contained in a "Reference Paper," which they attached to their Schedules without reservation.

### C. *Reference Paper*

Many commitments on the regulation of the basic telecommunications services industry were agreed upon multilaterally and were set out in a Reference Paper, which was adopted by the negotiating group in April 1996. Adopting the Reference Paper was an attempt by the Members to address some of the specific domestic barriers that service providers are most frequently faced with when they attempt to access the network of domestic PTOs.

In the telecommunications industry, often it is not feasible for new entrants to build their own networks because even though the variable costs are generally low, the fixed costs are extremely high.<sup>243</sup> Thus, new entrants must be allowed to interconnect to the existing network of the dominant provider. There must be competitive-based principles in place that regulate the relationship between these new entrants and the dominant provider.

Another requirement for robust competition is regulatory reform. While deregulation and competition are partners in market-oriented economies for most sectors, an adequate regulatory framework is needed for basic telecommunications to break up monopolistic powers, decrease burdens on entering competitors, and prevent anticompetitive activity. Additional elements of liberalization are transparency of the rulemaking and complaint processes and independence of government regulators. Coexistence of transparency and independence in the regulatory regime promotes public trust and effective competition. Regulatory reform should also include the development of a fair appeal process for agency determinations regarding licenses and access charges.

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242. See, e.g., WTO Secretariat, *Japan, Schedule of Specific Commitments, Supp. 2*, at 2 (requiring board members and auditors of the domestic and international supplier to have Japanese nationality and binding presence of natural persons to horizontal commitments).

243. Fixed costs would include construction of the base facilities and the international networks that have the ability to serve private consumers and businesses; additionally, the network may interconnect with other networks so interface technology would be needed. Fixed costs would include development of the software to use the systems. Therefore, the variable costs are only the hook-up expense of adding an additional user and the cost of the disks that hold the operating software.



It appears that many of the commitments of the Reference Paper are modeled after U.S. telecommunications and antitrust laws and practices. A comprehensive approach to regulatory reform was needed, in part, because the laws and regulations covering telecommunications in most countries are anticompetitive in nature as the telecommunications market has historically been monopolized by the state. Additionally, unlike goods where the provider does not have much interaction with regulators beyond the country's borders, the service provider has significant interaction with regulators once inside the borders of a country.

### 1. Commitments

The Reference Paper sets the framework for licensing procedures, interconnection to the public network, competition policy, transparency, and independence of regulators. Some of the Parties adopted the Reference Paper in whole, and others took some exceptions to elements of the Reference Paper, which were also attached in their Schedules.

#### *a. Licensing*

In the licensing process, new entrants often face both technical and procedural barriers. The technical barriers are loosely addressed in GATS. The Recognition provision of GATS, Article VII, says that the domestic body with the authority to review a license application should not use technical or nontechnical criteria as a "disguised restriction" on trade in services.<sup>244</sup> The Reference Paper further requires the domestic regulatory body to provide the criteria, terms and conditions, and reasons for the denial of a license application.<sup>245</sup>

#### *b. Interconnection*

Facilities competition exists when new entrants, which can meet a reasonable and objective set of standards, are allowed to interconnect to the public network and provide services to end users in competition with the PTOs. To have full facilities competition, however, new entrants must be given interconnection rights broader in scope than simply interconnection to the public networks. Optimal market access depends on multiple options: interconnecting to private and public networks, leasing available circuits, sharing leased circuits, interconnecting between leased and switched net-

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244. GATS, *supra* note 9, art. VII, paras. 1, 3.

245. WTO, Agreement on Telecommunications Services, Reference Paper, para. 4, 36 I.L.M. 354, 367 (Apr. 24, 1997) [hereinafter Reference Paper]. See *The United States Schedule of Specific Commitments*, containing the Reference Paper.

works, and reselling transmission capacity.<sup>246</sup> Additionally, the terms of interconnection must provide adequate technical interface, provide adequate usage and supply conditions, and be based on competitive tariffs.<sup>247</sup>

The Reference Paper sets the interconnection framework. Interconnection must be done on nationally based MFN principles.<sup>248</sup> The technical standards and specifications, and other conditions must be transparent and reasonable, and they must regard economic feasibility.<sup>249</sup> Rates should be cost-oriented, transparent, and reasonable,<sup>250</sup> and they should regard economic feasibility and be unbundled.<sup>251</sup> Transparency is a requirement for the terms of interconnection as well as for the concluded interconnection contracts.<sup>252</sup> An independent domestic body should be made available for commercial dispute settlement. Benefits of full facilities competition include lower prices and increased service quality.<sup>253</sup>

By way of example, these liberalized interconnection rules are especially important to the international cellular market, which has had an appreciable impact on communications technology. Cellular service providers, which provide radio-based services, "depend heavily on local exchange carriers and interexchange carriers to connect the land line system with the cellular system."<sup>254</sup>

*c. Anticompetitive Practices*

Rules on licensing and interconnection fit hand-in-hand with antitrust laws that prohibit market participants from limiting access to an essential facility and thus keeping out competition.

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246. OECD, TRADE IN INFORMATION, *supra* note 1, at 22.

247. *Id.*

248. Reference Paper, *supra* note 245, para. 2. However, there is an automatic exemption for a limited time, for LECs to other LECs, and there is an automatic exemption until ordered otherwise by state regulators, for rural carriers to LECs. *Id.* n.1

249. *Id.* para. 2.

250. *Id.*

251. *Id.* Unbundling of services is when the PTO allows the applicant, for a right of interconnection, to acquire only those services that it needs to service its potential customers.

252. *Id.* Historically, these agreements were viewed as private contracts and were never transparent. However, without transparency, there is no way to know if new entrants or foreign entrants are being discriminated against.

253. Countries with the longest history of liberalized interconnection rules have the lowest prices and correspondingly high quality of service. OECD, TELECOMMUNICATION INFRASTRUCTURE, *supra* note 2, at 32-36 (listing the United States, the United Kingdom, and Japan).

254. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1159 (4th ed. 1997).

The essential facilities doctrine has impacted the use of telecommunications infrastructure in the United States. The essential facilities doctrine prevents a business from extending its “monopoly power from one stage of production to another, and from one market into another.”<sup>255</sup> This doctrine may arise in the context of the telecommunications industry because the start-up businesses that put the infrastructure in place may exclude competitors from offering their services over the infrastructure.

In a suit between MCI and AT&T, MCI prevailed on its claim that AT&T, by denying it access to the telephone network, was monopolizing an essential facility. To prevail, MCI showed: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”<sup>256</sup> This U.S. test was adopted almost verbatim in the Reference Paper.<sup>257</sup> Additionally, the Reference Paper incorporates the U.S. antitrust concept of market power.<sup>258</sup>

To avoid anticompetitive effects, the Members are to ensure competitive safeguards, by preventing the dominant supplier from (1) engaging in anticompetitive cross-subsidization; (2) using information with anticompetitive results; and (3) withholding technical information that is necessary for an entrant to compete.<sup>259</sup>

Finally, nondiscrimination safeguards are supposed to be implemented by Members. Safeguards are rules that prevent the dominant carrier from abusing its market power against potential entrants. Abusive actions would include: the cross-subsidization of competitive service with revenues from noncompetitive public network services; the overcharging of competitors for access to the Public Telecommunications Network (PTN); and discrimination in giving access to or information about the PTN. Additionally, interconnection regulations control the access to the network for the origination or termination of telecommunications services. Interconnection may be network-to-network or network-to-service provider. If the terms of interconnection are subject to private party negotiations, the interconnection policies

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255. *MCI Comm. Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983). The doctrine originated in the Sherman Act § 2, 15 U.S.C. § 2 (1994).

256. *MCI Comm. Corp.*, 708 F.2d at 1132-33.

257. The network is “exclusively or predominantly provided by a single or limited number of suppliers, and cannot feasibly be economically or technically substituted in order to provide a service.” Reference Paper, Definitions, *supra* note 245.

258. “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.” *Id.*

259. *Id.* at para. 1.2.

must force the dominant carrier to negotiate in an open, economical, and cost-based manner.<sup>260</sup> Some countries are taking a sector-by-sector approach for these commitments.<sup>261</sup>

Cross-sector subsidization is a significant barrier to full and fair competition. In many countries, service providers use a certain clientele to subsidize another—long-distance and international services to subsidize local services, urban customers to subsidize rural customers, and businesses to subsidize residential consumers. Usage revenue can also be used to subsidize network upgrades, and revenue from one sector, such as cellular, can be used to subsidize another, like wire-line. Finally, telecommunications service fees can be used by a PTT to subsidize unrelated telecommunications infrastructure costs, or even nontelecommunications obligations of the government.

The Reference Paper sets out the general prohibition on cross-sector subsidization, but it does not set the specific initiatives that have to be taken in order to ensure competition. However, a fully competitive policy would require service providers to keep separate accounts<sup>262</sup> and would allow tariff rebalancing.<sup>263</sup>

*d. Transparency*

Never before have the Parties to the WTO negotiated successful transparency for a market that is as pervaded by government participation and regulation as the telecommunications equipment and service market. The regulation-related obligations are much more specific under the concluded Agreement on Basic Telecommunications than under GATT and GATS.<sup>264</sup> Often, the transparency required for trade in goods is only that a country publish its import tariff schedule and those other potential non-tariff barriers

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260. The FCC can mandate that a common carrier provide interconnection if it deems access to be in "the public interest."

261. For instance, cellular telephony is being liberalized quickly, while voice services are often either state-controlled or monopolized.

262. Where the need to keep markets competitive exists, companies must keep separate accounts for their operations in different telecommunications segments. Otherwise, the consumers' demands of a company in one account, that may be rather inelastic, may be forced to cross-subsidize the consumers of a sector where their demand is relatively elastic or where the competition is relatively high.

263. Tariff rebalancing is when: (1) fixed charges are raised relative to usage charges, particularly in the case of line rentals; (2) local charges are raised, for example, by decreasing the size of the local call zone; (3) long-distance and international calls are reduced with a greater use of off-peak tariffs; and (4) service providers are allowed to reduce rates for high-volume users. ITU, WORLD REPORT, *supra* note 30, at 68.

264. See *infra* Part V.C (discussing the negotiating objective of comprehensive regulatory reform).

(NTBs) at the border. Transparency for telecommunications includes making available regulations and tariff schedules that govern the provision and utilization of services,<sup>265</sup> an activity inherently within the borders of a country.

*e. Independence of Regulators and Review of Decisions*

There needs to be independence between the telecommunications regulators and the telecommunications service providers. While the rules must be accessible to the private sector, the regulators must be detached, that is, have no economic or political interest in the outcome of making rules, granting and renewing licenses, reviewing supplier agreements, resolving disputes, and applying sanctions.<sup>266</sup> The Reference Paper further requires “the regulatory body [to be] separate from, and not accountable to, any supplier of basic telecommunications services.”<sup>267</sup>

GATS requires the Members to “maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.”<sup>268</sup> The Reference Paper requires that an effective appeal procedure be in place and that the decisions be “impartial with respect to all market participants.”<sup>269</sup>

2. Exceptions

In addition to the exceptions in GATS,<sup>270</sup> there are two telecommunications-specific exceptions to the commitments in the Reference Paper—scarce resources and universal service.<sup>271</sup> The inclusion of the exceptions in the Reference Paper does not, however, encourage use of the exceptions by the Parties. In fact, their inclusion was probably more out of an anticipation by the Members that countries, wishing to minimize competition in their domestic market, would use either of these rationales to retract their liberalization offers. Using either rationale for restrictive trade measures would cover many more policies than would an exception such as the national security exception; therefore, the Members sought to outline their limited use.

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265. Reference Paper, *supra* note 245, para. 2.

266. In many countries, the regulator and the provider of services have both been the same state-operated entity.

267. Reference Paper, *supra* note 245, para. 5.

268. GATS, *supra* note 9, art. VI, para. 2.

269. Reference Paper, *supra* note 245, para. 5.

270. *See infra* Part IV.D (discussing the five general exceptions: public morals; public health; GATS consistent domestic laws; national security; and balance of payments).

271. Reference Paper, *supra* note 245, paras. 6 & 3, respectively.

a. *Scarce Resources*

This provision is intended for allocations of resources such as radio spectrum. The commitments of the Reference Paper, including licensing and interconnection, apply to all sectors, including spectrum management, but this paragraph will allow Parties to make their initial decisions about spectrum allocation apart from the underlying principles of GATS, that is, they can be discriminatory. Those decisions, though, must be *carried out* in a nondiscriminatory manner. Thus, the scarce resources exception ensures only that procedures for allocation are *carried out* in an objective, timely, transparent, and nondiscriminatory manner.<sup>272</sup>

In effect, the provision may allow a country effectively to cut out new entrants for certain telecommunications sectors. For instance, a country may have a spectrum width of thirty-five for a particular service. It could reserve twenty for its PTT, keep five for noninterference, and auction off ten, which would have to be divided nondiscriminatorily among all new entrants. This creates a technical problem for the new entrants that can affect both their ability to provide services and the quality of those services.

b. *Universal Service*

A common reason cited for failure to liberalize the telecommunications sector is that some goals of universal service, such as providing basic telephone services to rural or low-income areas, would not be met in a fully-competitive environment.<sup>273</sup> Under the Reference Paper, each country can define its own objectives for universal service.<sup>274</sup>

Conceivably, steps taken to implement an aggressive universal service program that has the government taking the lead role could run contrary to most of the commitments in the Reference Paper, including licensing, interconnection, allocation of spectrum, and independence of the regulatory body. The Member can take action, however, to implement such a program, and the action will not be considered anticompetitive *per se*, as long as it is ad-

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272. The complete provision reads:

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

*Id.* para. 6.

273. The OECD asked countries what justified maintaining monopoly telecommunications facilities and services, and the most common response was that liberalization would not meet the goals of universal service. OECD, COMMUNICATIONS OUTLOOK 1993, at 121-23 (1993).

274. Reference Paper, *supra* note 245, para. 3.

ministered in a neutral manner and is “not more burdensome than *necessary*.”<sup>275</sup> If *necessary* is interpreted in the same way it has been interpreted for the GATT, Article XX exceptions,<sup>276</sup> then the universal service exception will rarely be used successfully. Under GATT’s Article XX test of *necessary*, the means of implementing a domestic universal service policy could not be inconsistent with the underlying GATS principles of MFN treatment, transparency, national treatment, and market access. Presumably, though, the strict GATT test would apply only to the restrictive trade measures inconsistent with a general obligation of GATS that has not been excepted in a Schedule or with a specific commitment that has been included in a Schedule.

Universal service is one of the most significant issues driving domestic basic telecommunications policy. It is an especially pressing goal for developing countries.<sup>277</sup> One of the most significant challenges faced by developing and emerging countries is their lack of comprehensive infrastructure that will provide, at a minimum, basic services.<sup>278</sup> There are traditional ways of addressing this hurdle, namely, maintaining government operation of the infrastructure or subsidization of the services. Alternatively, there are some newly emerging ways to address the need for basic services, such as encouraging multinational conglomerates to finance telecommunications projects in developing countries or allowing revenue from liberalized international trade in services to finance the developing country’s domestic market need for telecommunications infrastructure.

Countries are essentially on their own when they keep policies in place that make the government the sole provider of basic telecommunications services. In order to implement a universal service program domestically, a government could take a variety of approaches, but most of these will not be consistent with the spirit of GATS or the 1997 Telecommunications Commitments. For instance, owning the telecommunications infrastructure and cross-subsidizing the economically disadvantaged classes in society is not consistent with the Reference Paper, and socializing a private market through tax-funded subsidies may not be consistent with future negotiations on subsidies under GATS.

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275. *Id.* (emphasis added).

276. *See supra* Part IV.D.1 (discussing GATS’ general exceptions in the context of GATT’s general exceptions).

277. Fifty percent of the world’s population has never used a telephone, and 50% of the people worldwide live two hours from the nearest telephone. Larry Irving, *Telecommunications Policy Reform: Competition and Consumer Protection*, 29 TELECOMM. 26 (1995).

278. Another significant change is the absence of a well-developed regulatory framework; although, it is less significant since there are many and varying models for developing countries to consider.

Another option is for foreign conglomerates to finance the infrastructure costs. To address the financial hurdle faced by such projects, the ITU, in partnership with the private sector, established WorldTel.<sup>279</sup> WorldTel functions much like an international development bank that finances telecommunications and information technology projects. Equity partners of the bank are other financial organizations, the private sector, and institutional investors.<sup>280</sup> However, these resources are not widely available to the majority of countries, and WorldTel projects will not set the stage for a comprehensive telecommunications policy to meet consumer demands for basic and enhanced services.

A third option is to deregulate the market domestically, while negotiating market access and nondiscrimination internationally. Essentially, counting on market supply to meet the broad spectrum of technical and social demands will result in more universal service of basic telecommunications by promoting economic efficiency and technological advancement.

## VI. BENEFITS OF LIBERALIZED TELECOMMUNICATIONS TRADE TO DOMESTIC INTERESTS

The liberalization and regulatory reform of the GATS framework and the subsequent 1997 commitments in basic telecommunications will increase benefits to domestic consumers by allowing more cooperation and opening up competition between the cross-sectors of the telecommunications industry. As long as the antitrust laws are enforced in line with preventing anti-competitive behavior and supporting new entrants, then technology innovation and development should surge. However, the universal service goal is to ensure that basic services are provided to those without them, not to ensure that the most advanced services are provided to those that already have the basic services.

There is possibly a Pareto improvement to be made between domestic universal service policy and liberalized trade policy.<sup>281</sup> Technology innova-

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279. The ITU is a 184-country organization essentially responsible for global standardization, regulation, planning, and coordination of telecommunications policies.

280. AT&T and Ameritech, both U.S. companies, were among the 30 initial investors that financed a feasibility study on the commercial viability of the WorldTel concept. As a result, seed capital is being sought to begin some pilot projects through WorldTel.

281. A Pareto improvement in economics is a net increase in benefit without the offsetting decrease. Ultimately, these Pareto improvements can reach the Pareto optimum. In a fully competitive domestic market, for example, one in which the limited resources are being fully employed and there is no international trade, then this is not possible. *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 136 n.1 (15th ed. 1995) (noting that the concept of a Pareto improvement was first proposed by and was named after Vilfredo Pareto (1848-1923), an Italian economist). However, when markets begin to specialize based on what they produce most efficiently, and they trade with other markets, it becomes



tion and free trade can ultimately stand in good company with social benefits and diversity of services, if free trade, for example, trading on the basis of comparative advantage through lower tariffs, fewer non-tariff barriers, and fewer restrictions on foreign ownership, allows technology to surge ahead of social demand. That is, trade liberalization allows market forces to induce prosperity. Prosperity, in turn, increases the capital base for social benefits and diversity through technological innovation and more efficient resource use.<sup>282</sup> However, this argument is based on the assumption that a long-run equilibrium between technological growth and socially diverse innovation is acceptable.<sup>283</sup>

This assumption is true in economic terms, but may not be true in political or social terms. Some argue that the invisible hand of market forces is attached to an insufficiently socially conscious body.<sup>284</sup> This body is the democratic political system that often adheres to the most organized public interest. However, this long-run versus short-run argument becomes unconvincing if, during economic expansion, firms comply with the socially beneficial provisions in telecommunications regulations by internalizing the costs, and in turn, the expense of internalization is ameliorated by trade incentives through fewer non-tariff barriers and more cost-based tariffs. Thus, a more open international market absorbs the costs of the social benefits because of its high potential for expansion rather than that internalized cost being passed on to domestic consumers. The implementation of these trade benefits can be incorporated into the tariff schedules and, in a sense, “insti-

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possible. This is because of the concept of comparative advantage. *Id.* at 678-86. When trade opens and each country concentrates on its area of comparative advantage, everyone is better off. Workers in each region can obtain a larger quantity of consumer goods for the same amount of work when people specialize in the areas of comparative advantage and trade their own production for goods in which they have a relative disadvantage. When borders are opened to international trade, the national income of each and every trading country rises. *Id.* at 681. *See also* PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS* 11-63 (4th ed. 1997).

282. DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 64, 66 (1994) (citing the Brundtland Report).

283. Contrast this equilibrium with another: the often-touted conflict between economic growth and environmental benefits. “[T]he time lags between economic growth and increases in environmental spending may be substantial.” *Id.* at 64 (quoting the position of environmentalists). Consider, for example, the amount of time between the “industrial revolutions” and the “environmental revolutions” in the United States and Europe. However, the industrial revolutions began when society was generally unconcerned with the environment. The telecommunications revolution is occurring in the 1990s when society generally is concerned about social diversity and access.

284. This is what environmentalists have argued in the trade and environmental conflicts. They say that in the short run, “the invisible hand of market forces is attached to an insufficiently environmentally conscious body.” *Id.*

tutionalized.”<sup>285</sup> Thus, in the short run, firms can comply with social policies because of the offsetting benefits from trade liberalization.<sup>286</sup> To ensure fairness, the Members’ Schedules must reflect reciprocal market access.<sup>287</sup>

The domestic legal framework that incorporates, as a part, some cost sharing for the furtherance of socially beneficial domestic policy would increase universal access benefits for some. Any detriment to those who are bearing the costs of it would be offset by the benefits that are obtained from GATS commitments on telecommunications that reduced trade barriers on services. Thus, this domestic/international arrangement could increase access to basic and enhanced services for some without decreasing universal service to any. Ultimately, it will increase both enhanced and basic telecommunications services for all—the Pareto improvement of domestic social goals and international free trade.

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285. Many pro-trade commentators have argued that setting stringent trade policy up front in an institutionalized context, instead of allowing countries to react to market changes with protectionist policies, actually strengthens trading markets and national sovereignty. “The World Trade Organization will expand the sovereignty of American citizens by reducing the power of interest groups to manipulate trade policy.” *Id.* at 93 (quoting Joe Cobb of the Heritage Foundation (1994)).

286. “By enshrining the principles of liberal trade in an international regime, the creators of the GATT . . . elevated the commitment to freer trade to a nearly ‘constitutional’ level. . . . [This] provides a mechanism for addressing the collective-action problem that plagues domestic trade policymaking and thereby enhances society’s overall economic well-being, promotes international stability, and serves the long-term public interest.” *Id.* at 76.

287. One of the complaints of the generalized system of preferences (GSP), which is a system whereby developed countries formulate tariff schedules for developing countries that are more favorable than the MFN schedules, is that the developing countries fail to give reciprocal market access. See HON. ROBERT W. NEY, GENERALIZED SYSTEM OF PREFERENCES, H.R. DOC. NO. 104-167 (1995) (arguing to renew the GSP program, but pointing out that U.S. ceramic tile manufacturers are still denied reciprocal market access to foreign markets). Ney suggests that nonreciprocal access always has adverse effects. It harms the exporters in developed countries when they are denied access to the developing country’s markets, for example, the U.S. GSP position. *Id.* Nonreciprocal access harms the exporters in developing countries when the developed country responds with other trade measures to control imports such as discriminatory product standards, packaging, or testing, for example, the EU GSP position. *Id.*