

CHAPTER EIGHT

A REVIEW OF THE WTO REGIME FOR TELECOMMUNICATIONS SERVICES^A

Marco Bronckers and Pierre Larouche***

SECTION ONE: THE INCLUSION OF TELECOMMUNICATIONS SERVICES IN THE WTO

In 1986, at the start of the Uruguay Round, there were few precedents and little discussion of liberalization in telecommunications. By way of illustration,¹ the United States was in the aftermath of the AT&T break-up, and the EC had not taken any internal liberalization measures yet, and national telecommunications operators (“TOs”) were still firmly entrenched throughout the EU (with the exception of the UK). The European Commission did not publish its first policy paper on the telecommunications sector until 1987, with proposals for a partial liberalization.² There is reason to ask then why telecommunications was included in the trade policy framework.

First, the WTO provided a *suitable forum* for negotiations. In 1986, a number of developed countries felt that the traditional forum for international telecommunications negotiations, the International Telecommunications Union (“ITU”), was not an appropriate place in which to discuss liberalization initiatives. The vested interests in the ITU, *i.e.*, governments, most of which control the national TO, were used to discussing technical issues, such as radio frequency allocation, in a spirit of cooperation. Some felt that the

^A This chapter brings our analysis of the WTO Telecommunications Agreement, first published in 31 J. WORLD TRADE 4–48 (No. 3, 1997), up to date to July 2006. It gives further details about implementations, interpretations in WTO dispute settlement proceedings, and recent negotiating proposals, notably from the perspectives of the EC and the US.

* Professor of WTO and EC External Trade Relations Law, University of Leiden; Partner, WilmerHale, Brussels.

** Professor of Competition Law and Director, Tilburg Law and Economics Center (TILEC), Tilburg University.

¹ See Jill Hills, *Deregulating Telecoms—Competition and Control in the United States, Japan and Britain* (1986).

² See European Commission, *Green Paper on the Development of the Common Market for Telecommunication Services and Equipment*, COM(87)290 final (Brussels, June 30, 1987).

introduction of competition, and the advent of many private suppliers of telecommunications services, did not fit into this tradition.³

Developed countries also perceived that developing countries had too much influence in the ITU.⁴ In view of the ITU's role in discussions on the North-South dialogue and the "New International Economic Order" in the 1970s, developed countries did not expect that deregulation and liberalization could become a high priority for the ITU.

Second, it was felt by developed countries that the *negotiating techniques* of the GATT were appropriate for the objectives they pursued: the global framework would give them more opportunity to achieve results, since cross-sectoral deals might be struck.⁵

Having unsuccessfully resisted the inclusion of services in the Uruguay Round, the developing countries did manage to put services on a separate track in an attempt to prevent cross-linkages between traditional GATT issues and services.⁶ In fact, there were not many trade-offs amongst different service sectors. These circumstances undoubtedly led to more protracted negotiations on telecommunications. As explained below, no agreement on basic telecommunications could be reached by 1994 for signature as part of the WTO Agreement. This issue was accordingly entrusted to an *ad hoc* negotiating group. While an agreement was ultimately signed, no benefits could therefore be derived from including telecommunications in a global trade round.

Third, the original GATT appeared to provide a *tested framework* for negotiations on the liberalization of telecommunications services. The GATT framework for goods contained some fundamental liberalization principles (MFN, national treatment, tariff bindings, etc.). These tested principles might provide a road map to the telecommunications negotiators and could reinforce the commitments ultimately agreed.

Fourth, the proponents of including telecommunications in the Uruguay Round were attracted by the dispute settlement procedures available in the GATT. While these procedures could be criticized, they were at least used and thus helped to further trade liberalization. In contrast, the dispute settlement provisions of the ITU have not been used once since 1947.⁷

³ See Andreas Tegge, *Die Internationale Telekommunikations-Union: Organisation und Funktion einer Weltorganisation im Wandel* 63–70 (1994) and Peter Holmes, Jeremy Kempton and Francis McGowan, *International Competition Policy and Telecommunications—Lessons from the EU and prospects for the WTO*, 20 *Telecommunications Policy* 755, 757–8 (1996).

⁴ See Tegge, *id.*, at 54–59.

⁵ Dissatisfaction with traditional UN fora for international negotiations was not limited to the telecommunications sector. For similar reasons, the developed countries also insisted that intellectual property be included in the Uruguay Round. They were unhappy about the agenda pursued by developing countries in the World Intellectual Property Organisation (WIPO), and thought they could achieve more by linking different issues to trade. See Marco C.E.J. Bronckers, *The Impact of TRIPS: Intellectual Property Protection in Developing Countries*, 31 *CMLRev* 1245, 1246–1251 (1994).

⁶ See Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System* 249 (2d ed., 2001).

⁷ See Tegge, *supra* note 3, at 148–9.

SECTION TWO: A BRIEF OVERVIEW OF THE WTO
TELECOMMUNICATIONS NEGOTIATIONS

The WTO telecommunications negotiations lasted from 1986 to 1997.⁸ In the first few years, discussions centered on the outlines of a general agreement on services.

I. *From 1986 to the Conclusion of the GATS in 1994*

Sectoral discussions on telecommunications began in 1989. Since the United States was the most advanced country in terms of telecommunications liberalization at the time, it will come as no surprise that their perspective and their agenda initially dominated the talks. For instance, as will be discussed further below, at the insistence of the United States a distinction between basic and value-added services was introduced to structure the discussions.⁹ Negotiations on value-added or enhanced services went relatively easily.

However, difficulties arose with respect to basic telecommunications services. On the one hand, many U.S. operators were eager to be able to enter foreign markets and invest abroad, since they felt comparatively more advanced than their foreign competitors.¹⁰ On the other hand, the United States was reluctant to open its market, the largest in the world, as long as other markets were dominated by legal monopolists which could thwart the efforts of U.S. firms abroad and also potentially engage in anti-competitive practices affecting the U.S. market (at least the market for international communications). The United States argued that it was not going to open its market as long as its telephone operators (AT&T, etc.) were not granted reciprocal access to markets of similar size to the United States. This became known as the issue of *critical mass*: without a sufficiently large number of market access commitments from its trading partners, the United States was unwilling to make a move.¹¹

In the end, the Uruguay Round produced a framework agreement on trade in services.¹² WTO Members gave specific market access commitments in a

⁸ See generally Ben Petrazzini, *Global Telecoms Talks: A Trillion Dollar Deal* (1996) and on the history and outcome of the negotiations, Jonathan D. Aronson, *Telecom Agreement Tops Expectations*, in *Unfinished Business: Telecommunications after the Uruguay Round* 15 (Gary C. Hufbauer and Erika Wada, eds. 1997).

⁹ See *infra* notes 17–23 and 265–266 and the accompanying text for a discussion of the relevance of this distinction.

¹⁰ This eagerness subsided somewhat as a result of the major changes brought to the U.S. market by the Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, which modified in depth the Communications Act of 1934, 47 U.S.C. § 151 and ff. Since the second half of the 1990s, U.S. operators have refocused part of their energies on the domestic market again.

¹¹ See Holmes *et al.*, *supra* note 3, at 764.

¹² For a concise introduction to the GATS and other elements of the WTO regime see Peter van den Bossche, *The Law and Policy of the World Trade Organization* (2005).

variety of sectors.¹³ With respect to telecommunications services, a number of countries made commitments, but they were mostly limited to so-called value-added services only (see below). No agreement was reached on basic telecommunications. A Decision on Negotiations on Basic Telecommunications was taken at the end of the Uruguay Round, whereby a Negotiating Group on Basic Telecommunications was created (“NGBT”) with a mandate to conclude an agreement by April 30, 1996. WTO Members agreed to a standstill during the upcoming round of telecommunications negotiations; they would not seek to improve their negotiating position or leverage by the introduction of new measures.¹⁴ An Annex on Negotiations on Basic Telecommunications was also attached to the GATS in order to extend the time limit for filing exemptions to Article II of the GATS (most-favored nation treatment) in the telecommunications sector until the end of the telecommunications negotiations.

II. *The 1996 Breakdown*

Negotiators were fairly relaxed about this seemingly generous extension of the deadline. They realized that rapid technological developments were helping to undermine national restrictions. By simply waiting, they felt they were still making progress towards liberalization.

Nevertheless, telecommunications negotiations broke down in the spring of 1996, when the United States bowed out. The United States explained their refusal to conclude an agreement by claiming that a critical mass of market access commitments, notably from developing countries, had not been reached.¹⁵

Members of the NGBT agreed however to extend the deadline in order to try to salvage the negotiations. The effect of both the Decision on Negotiations on Basic Telecommunications and the Annex on Negotiations on Basic Telecommunications were extended in substance to February 15, 1997 by the Decision on Commitments in Basic Telecommunications of April 30, 1996.¹⁶ The NGBT was turned into the Group on Basic Telecommunications (“GBT”).

¹³ The commitments of high-income countries covered about half of their service sectors; those of developing countries as a group (including Eastern European countries in transition) only eleven percent. See Bernard M. Hoekman, *Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services*, in *The Uruguay Round and the Developing Countries* (Will Martin and L. Alan Winters eds. 1996).

¹⁴ *Decision on Negotiations on Basic Telecommunications*, par. 7.

¹⁵ According to U.S. calculations, over 40 percent of world telecom revenues and over 34 percent of global international traffic were not covered by acceptable offers. The United States was particularly disappointed about the offers from ASEAN countries and India, about continuing foreign ownership restrictions in some EU countries and Canada, and the lack of improvement in Latin-American offers. See Statement of Ambassador Charlene Barshefsky on Basic Telecom Negotiations (USTR, April 30, 1996).

¹⁶ *Decision on Commitments in Basic Telecommunications*, WTO/S/L/19 (April 30, 1996).

In contrast to the NGBT, where some countries were participants and others observers, the GBT was open to all WTO Members as participants.

III. *The 1997 End Game*

Between April 1996 and the new deadline of February 15, 1997, a lot of effort was spent on improving existing offers and obtaining new offers. The United States and the EU were particularly looking for concessions in the Asia-Pacific region. As a result of this pressure, but also because of their own perception that deregulation would be in their own interest, several countries in the region presented revised or new liberalisation offers. In November 1996, the United States and the EU also improved their offers, as further enticement to the others.

At the end, 32 of the 34 offers that had been tabled in April 1996 were revised, and 21 new offers were submitted, bringing the total number of schedules of commitments to 55, accounting for 69 countries (the fifteen countries of the EU being included in a single schedule). On February 15, 1997, an agreement was reached between the participants on these commitments. The 55 schedules were attached to a brief document which became the Fourth Protocol to the GATS. The Fourth Protocol entered into force on February 5, 1998.

SECTION THREE: THE COMMITMENTS RELATING TO TELECOMMUNICATIONS SERVICES IN THE WTO

The results of the telecommunications negotiations must be seen against the background of the GATS, as described in other Chapters, in particular the scheduling techniques peculiar to the GATS (“horizontal” and “vertical” commitments, modes of supply, listing of restrictions in schedules, etc.).

I. *The Specific Commitments Concerning Telecommunications Under the GATS*

This section reviews the commitments already contained in the GATS at the time the WTO Agreement was signed (1994), followed by the commitments of the Fourth Protocol of February 15, 1997. First, however, it is important to explain the distinction that has been drawn between “basic” and “value-added” telecommunications.

A. *The Distinction Between Basic and Value-added Telecommunications*

As a preliminary matter, a distinction between “basic” and “value-added” telecommunications has unfortunately been introduced in the GATS framework. “Basic” and “value-added/enhanced” telecommunications are essentially U.S. regulatory categories introduced for the purposes of delineating FCC

jurisdiction in the course of the *Computer* inquiries.¹⁷ In the United States, basic services are defined as “the... offering of transmission capacity for the movement of information”,¹⁸ while enhanced services are “any offering over the telecommunications network which is more than a basic transmission service”.¹⁹ The FCC exerts jurisdiction under Title II of the Communications Act over the former but not the latter. The distinction is thus a technical one, whereby basic services are those where the service provider offers little more than a clear communications path to the customer. It does not reflect any inherent difference between the two groups of services.²⁰ The distinction is rather a way to draw a line between what the FCC perceived as a competitive sector and one that still required regulation.

The distinction between basic and value-added services is not present to the same extent in all telecommunications regulatory frameworks. In the EC, this distinction is no longer made.²¹

In the original outline for services schedules, telecommunications services were divided into fifteen sub-headings. These are still reflected in the schedules, as can be seen in the model schedule in the Annex. Later, the distinction between basic and value-added services was made by separating the sub-headings into two groups for the purposes of negotiation, the latter being treated in the original GATS, the former being left for further negotiations within the NGBT (and later the GBT).²² The Decision on Negotiations on Basic Telecommunications defines “basic telecommunications” as “telecommunications transport networks and services”, a definition which comes closer to the U.S. approach.²³ NGBT and GBT participants were, however, unable to agree on a more precise definition of basic services, and in fact did not incorporate a definition of basic services in their respective schedules. Whilst the United

¹⁷ These inquiries aimed at ascertaining the scope of FCC jurisdiction as regards then emerging telecommunications services which also relied on data processing (*e.g.*, electronic mail). See *Second Computer Inquiry*, Docket 20828, Final Decision, FCC 80-189, 77 FCC 2d 384 (April 7, 1980) and subsequent modifications, *Third Computer Inquiry*, CC Docket 85-229, Report and Order, FCC 86-252, 104 FCC 2d 958 (May 15, 1986) and subsequent modifications.

¹⁸ *Second Computer Inquiry*, *supra* note 17, at ¶ 93.

¹⁹ *Second Computer Inquiry*, *supra* note 17, at ¶ 97.

²⁰ The difficulties related to the application of the basic/enhanced services distinction led the FCC to examine alternative means of delineating its jurisdiction in the *Third Computer Inquiry*, *supra* note 17.

²¹ The historical evolution of the regulatory categories in the run-up to liberalization in the EC is described in Pierre Larouche, *Competition Law and Regulation in European Telecommunications* 1-30 (2000).

²² The sub-heading “Other” (2.C.o) was used by some countries in their original GATS schedule, by others in their schedule to the Fourth Protocol, in order to cover services which they felt were not adequately addressed by other sub-headings. For instance, many countries have included “Mobile Services” under “Other” in their schedule to the Fourth Protocol, although mobile services are theoretically covered by commitments made under the other sub-headings under 2.C. Chairman’s Note for Scheduling Basic Telecom Services Commitments, S/GBT/W/2/Rev.1 (January 16, 1997), at par. 3.

²³ *Decision on Negotiations on Basic Telecommunications Services*, par. 1.

States uses the sub-headings as an exhaustive list of what is covered under “telecommunications services”, the EC and its Member States see these sub-categories as illustrations of a broader definition, which is included at the beginning of their commitments.

Now that commitments have been made for both basic and value-added telecommunications, a full set of commitments is present and there is no need to distinguish further between the two categories if no substantive consequences are attached to the distinction. Nevertheless, the basic/value-added distinction appears in the Reference Paper agreed by the GBT. This distinction stems from the idiosyncrasies of U.S. telecommunications regulation, may cause complications, and may have outlived its usefulness given that no substantive consequences are attached to the distinction. It could be eliminated from the GATS framework.²⁴

B. Commitments Contained in the GATS at the Time of Signature of the WTO Agreement (1994)

The GATS, as concluded in 1994, already contained a number of commitments relating to telecommunications.

1. GATS Schedules

Fifty-six of the original GATS schedules included specific commitments on telecommunications on behalf of 67 WTO Members, among which were the U.S., as well as the EU and its Member States (twelve at the time submitting a single schedule). Forty-four of these schedules (accounting for 55 Members) were limited to value-added or enhanced telecommunications services,²⁵ including the schedules of the most important countries in the international telecommunications market. The major countries in the international telecommunications market did not make any notable limitations to their commitments on value-added services.

2. The Annex on Telecommunications

An Annex on Telecommunications (“AT”), attached to the GATS, concerns “access to and use of public telecommunications transport networks and services”.²⁶ The AT is based on the recognition that telecommunications are an essential tool for other economic activities, such as banking.²⁷ It therefore set forth certain principles to make sure that concessions on other services would not be frustrated by a lack of progress on telecommunications negotiations. In other words, the AT can be seen as a general insurance policy

²⁴ See, *infra*, text at notes 264–266.

²⁵ *I.e.*, sub-headings 2.C.h to 2.C.n, as shown in the model schedule in the Annex.

²⁶ AT, par. 2.(a). See on the AT in general Lee Tuthill, *Users’ Rights?: The Multilateral Rules on Access to Telecommunications*, 20 *Telecommunications Policy* 88 (1996).

²⁷ AT, par. 1.

for suppliers of other services that they would have access to the requisite telecommunications networks and services in WTO countries.

The AT does not contain or lead to any market access or national treatment obligation. It is not to be interpreted to require WTO Members to allow the provision of telecommunications services beyond the commitments they have already made in their respective schedules.²⁸ The AT is only applied once a WTO Member has offered specific commitments in a given service sector.²⁹ It is therefore comparable to the general GATS obligations which apply in addition to the specific commitments made in schedules.³⁰

The central provision of the AT binds each Member to “ensure that any service supplier of any other Member is accorded access and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions”.³¹ This obligation is further specified as follows:

- Access to and use of leased lines is guaranteed, with the right to attach equipment to the network, to connect leased lines to the public network or the leased lines of a third party, and to choose the protocol to be used in the supply of a given service³²
- Public networks and services must be available for the transport of information³³
- Restrictions on access and use must be necessary to ensure public availability of the network or service, network or service integrity or the enforcement of the commitments made in the GATS schedule.³⁴

The AT imposes some obligations regarding the transparency of tariffs and other terms and conditions relating to public telecommunications transport networks and services.³⁵ It is also of interest to note that developing countries can claim an exception to the AT in order to strengthen their domestic tele-

²⁸ AT, par. 2.(c). This was confirmed in the Report of the WTO Panel, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (2004), ¶ 7.291, 7.293 (hereinafter cited as *Telmex Report*).

²⁹ AT, par. 5(a), applies only to “the supply of a service included in [a Member’s] Schedule.”

³⁰ Tuthill, *supra* note 26, at 94.

³¹ AT, par. 5.(a). The structure of par. 5 is complex, but it is construed quite ably in the *Telmex Report*, ¶ 7.299–7.309. Par. 5(a) itself was interpreted at length in ¶ 7.310–7.343. The panel finds that the termination rates for international traffic into Mexico were not “reasonable” within the meaning of par. 5(a), even though “reasonable” may imply some departure from cost-orientation (¶ 7.344, with the panel contrasting “reasonable” under the AT with “cost-orientation” for interconnection rates under the RP).

³² AT, par. 5.(b). In the *Telmex Report*, Mexico was found to have breached its obligations under that provision as well: ¶ 7.347–7.389.

³³ AT, par. 5.(c).

³⁴ AT, par. 5.(e). Examples of possible restrictions are listed at par. 5(f).

³⁵ AT, par. 4.

communications infrastructure or their participation in international negotiations on telecommunications.³⁶

To ascertain whether a service supplier from “WTO Member B” can rely on the AT in “WTO Member A”, regard must be had to the GATS schedule of Member A. The AT is attached as a “bonus” to specific commitments in a given sector. For an insurance provider from Member B, therefore, the mere fact that Member A has given a commitment in the insurance sector entitles that provider to the benefits of the AT, irrespective of the commitments of Member A in the telecommunications sector.

For instance, when Member A enters into specific commitments in the insurance sector while not making any specific commitments on telecommunications services, the AT generally gives insurers from Member B the right to access and use whatever public telecommunications transport networks and services are offered in Member A. In the rare case where the TO of Member A chooses not to offer leased lines, the insurer from Member B would not obtain much (more or less only the right to access and use the public telecommunications network). In most countries, however, leased lines will be offered by the TO. The insurer from Member B could then rely on the AT to obtain leased lines on non-discriminatory terms and to connect them to the public network in Member A.

In most cases, the AT will enable foreign suppliers of services for which a WTO Member has undertaken specific commitments to use their own telecommunications equipment, in combination with those leased lines, in order to self-provide their telecommunications needs. Indeed, WTO Members are bound to allow the basic operations required to put together a private telecommunications network³⁷ and to permit cross-border information movements for “intra-corporate communications” purposes.³⁸ The definition of “intra-corporate communications” is fairly narrow³⁹ expressly excluding any services offered to unrelated companies or customers.

There are some gaps in the coverage of the AT, which made it unsuitable as a regulatory basis for the liberalization of “basic” telecommunications.⁴⁰

³⁶ AT, par. 5.(g).

³⁷ AT, par. 5.(b).

³⁸ AT, par. 5.(c).

³⁹ Especially when compared to the “closed user group” notion used in the EC to delineate private and public voice telephony ahead of full liberalization: *See* the definition of “voice telephony” in Directive 90/388 of June 28, 1990 [1990] OJ L 192/10, as amended. This definition and the correlated notion of “closed user group” are explained in detail in European Commission, Communication on the status and implementation of Directive 90/388 on competition in the markets for telecommunications services [1995] OJ C 275/2 at 4–8. The definition of “intra-corporate communications” at paragraph 3.(d) of the AT in fact closely corresponds to the concept of “corporate networks” once defended by Germany as a correct implementation of Directive 90/388 and found by the Commission in this Communication at 7–8, 16 to be too narrow and unduly limitative of the scope of liberalized services.

⁴⁰ *See* the testimony of Jeffrey M. Lang, the head of the U.S. delegation to the NGBT and GBT, before the U.S. Congress (May 9, 1996).

The Reference Paper used in the NGBT and GBT contains heavier commitments as regards “major suppliers”, notably on interconnection (points of interconnection, timeliness, cost-oriented rates, unbundling); at the same time, the AT’s scope is not limited to “major suppliers” and its obligations are also couched in more general terms (“access to and use of” networks and services).⁴¹

C. *Commitments in the Fourth Protocol*

The NGBT and GBT negotiations were aimed at specific commitments in the field of basic telecommunications. The Annex depicts a “model schedule” after the entry into force of the Fourth Protocol.

1. Market Access and National Treatment Commitments⁴²

Fifty-five schedules of specific commitments were attached to the Fourth Protocol, accounting for 69 countries, with the EC and its Member States presenting a single schedule. From these 55 schedules:⁴³

- Forty-seven schedules (for 61 countries) contained commitments to liberalize at least partially the provision of voice telephony. Two countries only committed to liberalize voice services to closed user groups. International voice services were liberalized in 42 schedules (56 countries), national long-distance services in 37 schedules (41 countries), and local services in 41 schedules (55 countries). A large number of commitments (for 25 countries), were phased in after the entry into force of the Fourth Protocol: for instance Spain (December 1998), Ireland, Portugal, Argentina and Singapore (2000), and Greece (2003);
- Forty-nine schedules (63 countries) included commitments on data transmission services, 41 schedules (55 countries) on leased lines, 46 schedules (60 countries) on cellular/mobile telephony services, 45 schedules (59 countries) on other types of mobile services (mobile data, paging), 37 schedules (51 countries) on mobile satellite services or transport capacity and 36 schedules (50 countries) on fixed satellite services or transport capacity.

OECD Members, with the exception of Switzerland and Turkey, liberalized all of the services mentioned above.

One of the key objectives of the United States in this round of discussions

⁴¹ *Telmex Report*, ¶¶ 7.331–7.332.

⁴² See also the analysis made by William J. Drake and Eli Noam, *Assessing the WTO Agreement on Basic Telecommunications*, in *Unfinished Business: Telecommunications after the Uruguay Round 27*, at 41–4 (Gary C. Hufbauer and Erika Wada eds. 1997). A few representative individual schedules are analysed by Isabelle Gavannon, *International Telecommunications Trade: A Progressive Liberalization* *Int’l Bus. L.J.* 711 (1997).

⁴³ The numbers given below are taken from an unofficial compilation prepared by the WTO Secretariat.

was to obtain commitments from WTO Members on foreign investment in local telecommunications services providers. Of the 55 schedules annexed to the Fourth Protocol, 42 (covering 56 countries) contained a commitment to permit foreign ownership or control of all telecommunications services and facilities. According to the U.S. Trade Representative, these 56 countries account for 97 percent of the total basic telecommunications services revenue of WTO Members.⁴⁴

Nonetheless, certain significant WTO Members retained a foreign investment limit, notably India, South Africa, Turkey and many of the “Asian tigers” (Indonesia, Malaysia, the Philippines and Thailand). Others left foreign investment limits on certain services, including important players such as Brazil, Canada, France, Israel, Mexico and Portugal. Moreover, certain countries retained limits on foreign participation in the local incumbent TO, including Australia, Japan and New Zealand.

A number of issues arose with respect to the scheduling of commitments. First, there was discussion on whether to differentiate according to whether competition would take place only at the services level (or resale) or also at the infrastructure level (“facilities-based competition”). The key issue is whether, and if so how much, control should be retained over the construction of infrastructure. Many countries—especially developed ones—have a well-established telecommunications infrastructure. Since it is not necessary to construct a parallel infrastructure everywhere, competition could have been limited to resale only (although creating resale opportunities always require extensive regulation). On the other hand, certain countries—mostly developing ones—wanted to promote the expansion of their telecommunications infrastructure and were only inclined to allow facilities-based competition. Ultimately, it was agreed in the GBT that market access commitments would extend both to facilities-based and resale competition.⁴⁵

Second, many countries participating in the telecommunications negotiations conditioned their market access offers on the availability of frequencies. This could be seen as a factual statement reflecting the scarcity of a natural resource, or a broad reservation that allowed national or political preferences and thereby undermined market access commitments. To avoid any misunderstanding, it was indicated that frequency availability ought not to be mentioned in the market access commitments, since it is covered by the general GATS framework for domestic regulation.⁴⁶

⁴⁴ *Annex to the Statement of Ambassador Charlene Barshefsky on Basic Telecom Negotiations* (February 15, 1997), available at <http://www.ustr.gov>.

⁴⁵ As noted in the *Telmex Report*, ¶ 7.55–7.68, a member must expressly indicate in its schedule if its commitments are limited to facilities-based or non-facilities based (resale) supply only.

⁴⁶ Art. VI GATS. See *Chairman’s Note on Market Access Limitations on Spectrum Availability*, S/GBT/W/3 (February 3, 1997).

Finally, the privatization of State-owned enterprises is a matter that falls outside the purview of the GATS.⁴⁷ Accordingly, neither the GATS nor the Fourth Protocol contained any provision on the privatization of State-owned TOs. Hence, even if many States made commitments to open their markets to foreign investment, a local TO may remain beyond the reach of a foreign investor as long as the State does not decide to privatize it. A State remains free not to privatize a State-owned local TO fully, so in practice foreign participation in the local TO can be limited.

Since the conclusion of the Fourth Protocol and up to July 2006, six signatories (Guatemala, Honduras, Morocco, Pakistan, Switzerland and Venezuela) have improved their commitments. Furthermore, seventeen new WTO members (Albania, Armenia, Cambodia, China, Croatia, Estonia, Georgia, Jordan, the Kyrgyz Republic, Latvia, Lithuania, Macedonia, Moldova, Nepal, Oman, Saudi Arabia and Taiwan) have made commitments on basic telecommunications in the course of their initial schedule of specific commitments.

2. Additional Commitments on Regulatory Principles:

The Reference Paper

The most remarkable feature of the Fourth Protocol is undoubtedly that almost all participating countries (but for Ecuador and Tunisia) agreed to enter into additional commitments concerning regulatory principles to be applied in the telecommunications sector. These principles are derived from a brief Reference Paper (“RP”),⁴⁸ which was prepared by a group of countries in the run-up to the April 1996 deadline. Some countries (Bolivia, India, Malaysia, Morocco, Pakistan, the Philippines, Turkey and Venezuela) did not adopt the whole of the Reference Paper, while others (Bangladesh, Brazil, Mauritius and Thailand) have agreed to follow it at a later point in time.

The purpose of the RP is twofold: to provide the requisite safeguards in domestic law for market access and foreign investment commitments to be truly effective, and to anchor these safeguards in the WTO system and hence make failure to implement them challengeable under the WTO Dispute Settlement Understanding.

As noted in the introduction, until recently the telecommunications sector in most countries operated under a legal monopoly regime whereby one or a few operators held the exclusive right to provide telecommunications services. Whenever liberalization occurs, the former monopoly operator is by definition almost always the dominant player on the market. It is in many ways advantaged, if only because its network is already in place and it has a strong

⁴⁷ Rachel Frid, *The Telecommunications Pact Under the GATS—Another Step Towards the Rule of Law*, 24:2 *Legal Issues of Economic Integration* 67, at 80 (1997).

⁴⁸ The Reference Paper was circulated by the WTO together with the results of the GBT. Like many other documents discussed here, it can be found at <http://www.wto.org>. It is also annexed to this chapter.

customer base. Usually, it also wields more political clout than any entrant, although this often means that it will be burdened with certain obligations that it would not otherwise have incurred based on free market principles (whether they are called universal service obligations or otherwise). The RP contains a core of principles designed to ensure that the advantages of the former monopoly operator are not used to the detriment of new entrants on the telecommunications markets.

The RP has been interpreted for the first time in the *Telmex* Report, issued in April 2004. The US alleged that Mexican international telecommunications policy infringed WTO law in three respects:

- (i) Mexico failed to ensure that the tariffs of Telmex, the incumbent operator, for terminating international communications in Mexico were cost-oriented, thereby breaching its commitment under the RP to ensure “cost-oriented rates” for interconnection;⁴⁹
- (ii) Mexico forced Telmex to negotiate such termination tariffs for all other operators and imposed a “proportionate return” system on incoming traffic, thereby failing to prevent anti-competitive practices, in contravention of the RP;⁵⁰ and
- (iii) Mexico failed to ensure access and use of its public networks and services on reasonable and non-discriminatory terms and conditions, contrary to the AT.⁵¹

The analysis below will refer to salient findings in this report.

(a) Legal nature

The RP could be characterized as a policy document, a common framework during the negotiations leading up to the 1997 agreement guiding the parties’ individual commitments. As such, parties were free to deviate from the RP, to select particular issues from it and to rephrase certain obligations in their individual Schedules.⁵² While most WTO Members participating in the Telecommunications Agreement ultimately agreed to follow the RP, a number of them did make slight or more important modifications when formulating their additional commitments.⁵³ Accordingly, the starting point of a legal analysis

⁴⁹ RP, ¶ 2.2.b)

⁵⁰ RP, ¶ 1. “Proportionate return” is discussed in greater detail *infra* notes 239–241 and accompanying text.

⁵¹ AT, par. 5.

⁵² See Lee Tuthill, *The GATS and New Rules for Regulators*, 21 Telecommunications Policy 783, 786 (1997).

⁵³ For a fascinating overview of how a number of Asian countries, some without any developed system of competition law, have implemented the Reference Paper in varying ways see Ted Ringrose, *The Impact on Asian Telecommunications Markets*, in Trade & Telecoms 103, 106–108 (Mark Clough ed. 2001).

of a WTO Member's additional commitments is the language each country has used when incorporating the RP in its own GATS Schedule. For ease of reference, and given that many WTO Member States did incorporate the RP more or less verbatim in their schedules of commitments, the following analysis discusses the RP rather than individual country schedules.

(b) *Scope*

As indicated in the heading "Scope", the RP applies to basic telecommunications services. This is probably a consequence of the mandate of the NGBT and GBT. As already noted, the distinction between basic and enhanced or value-added services does not serve much purpose in the GATS context. On its face, the RP could apply just as well to all telecommunications services, however characterized. It makes almost no practical difference that the *obligations arising* under the RP are only imposed on suppliers of basic services, since the markets for value-added or enhanced services are usually competitive. On the other hand, there is no reason why providers of all types of telecommunications services should not benefit from the *rights* that will be granted to suppliers when WTO Members implement the RP.

The RP is divided into six headings. The first two (competitive safeguards and interconnection) apply to the regulation of "major suppliers", while the last four (universal service, licensing, independence of the regulator and allocation of resources) deal with general regulatory issues.

(c) *The regulation of "major suppliers"*

The first two headings of the RP concern "major suppliers" of telecommunications services within a given country. The RP defines a "major supplier" as one: (i) with a power "materially [to] affect the terms of participation (having regard to price and supply)"; (ii) flowing from one of two alternative situations, namely control over essential facilities *or* the position on the market; and (iii) in the relevant market for basic telecommunications services. Each of these elements is examined in turn.

- (i) The precise nature of the power to affect the terms of participation in the market is not clear. On its face, it would appear to mean quite a radical influence on the market, namely the power to exclude or control the participation of market actors. The RP is therefore concerned with suppliers that have a particularly strong position on the market. This may or may not correspond with the definition of dominance or monopoly power in the domestic competition laws of individual signatories of the RP.⁵⁴

⁵⁴ The ECJ, for instance, in its judgment of 9 November 1983, Case 322/81, *Michelin v. Commission* [1983] ECR 3461 defined a dominant position as the possibility "to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers." In the *Telmex* Report, ¶ 7.153–7.155, the issue is left open, since in view of the fact that Telmex was legally required to negotiate the terms of

- (ii) In order for a supplier to qualify as a major supplier, the power mentioned above must come from control over essential facilities *or* a position on the market. The introduction of “essential facilities” as an alternative criterion is noteworthy. Elsewhere, the so-called “doctrine of essential facilities” has generally been presented as a special case of a dominant or monopoly position, an approach that is not without its share of problems.⁵⁵ In this respect, the RP acknowledges that control over facilities must be seen as a problem analytically separate from that of large market positions (since they can be evidenced by a high share of a relevant market).

The RP defines essential facilities as the parts of a public telecommunications transport network or service (a) that are exclusively or predominantly provided by one or a few suppliers, *and* (b) for which there is no economically or technically feasible substitute. Condition (a) is worded somewhat loosely in that a facility could be deemed essential even if it were provided on a competitive basis by a few suppliers. Condition (b) seems to echo the widespread view that an especially high level of non-substitutability must be shown to establish that a facility is essential.⁵⁶ Nevertheless, it is open to question whether the “essential facilities doctrine” as formulated in the RP, has the same meaning as in competition law.⁵⁷ Indeed, while under a normal competition law approach the burden of proving “essentiality” is quite high, the RP is part of the GATS commitments, which are meant to enable market access. It could be that a lower threshold (*i.e.*, a facility economically and technically necessary for a newcomer from another country to access the market) would suffice to conclude that a firm controls an essential facility for the purposes of the RP.

- (iii) The use of “relevant market” must be taken as a reference to competition law where this concept is well known.⁵⁸ The wording of the RP does not require that the major supplier itself be active on the relevant market; it can very well exert the power in question from an upstream, downstream or neighboring market.⁵⁹ It may seem in theory that a major

termination of international calls into Mexico on behalf of all terminating carriers in Mexico, it “patently” had the ability to materially affect the terms of participation in the market.

⁵⁵ For a discussion of the doctrine in the main jurisdictions where it has been used, see Sally Van Siclen, *Background Note* in Oecd, *The Essential Facilities Concept*, Competition Policy Roundtables No. 5, OCDE/GD(96)113, at 7–10. See also John Temple Lang, *Defining Legitimate Competition: Companies’ Duties to Supply Competitors and Access to Essential Facilities*, 18 *Fordham Int’l L.J.* 437 (1994) and Larouche, *supra* note 21 at 165–217.

⁵⁶ See Van Siclen, *id.*, at 12. For the EC, see ECJ, 26 November 1998, Case C-7/97, *Oscar Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791.

⁵⁷ See Marco Bronckers, *The WTO Reference Paper on Telecommunications: A Model for WTO Competition Law?*, in *New Directions in International Economic Law* 371, 385–386 (Bronckers & Quick eds. 2000).

⁵⁸ Indeed this is how the RP is construed in the *Telmex* Report, ¶ 7.152. The panel defined the relevant market as “termination of telecommunications services—voice, switched data and fax—in Mexico”.

⁵⁹ Giving rise to the same type of situation as was considered by the ECJ, November 14, 1996, Case C-333/94, *Tetra Pak v. Commission*, [1996] ECR I-5951.

supplier would have no incentive to use such a disciplinary power were it not itself active on the relevant market or intent on being so, and that accordingly there should be no competition or regulatory concern if the major supplier is not active on the relevant market. In practice, given the difficulties that have surrounded market definition in the telecommunications sector, at least in Europe,⁶⁰ it is more convenient not to burden the inquiry further by requiring that the major supplier also be present on the relevant market.

While the definition of a “major supplier” in the RP is framed in relatively indeterminate terms, the WTO panel in the *Telmex*-case had no trouble finding that the incumbent telecoms company Telmex was a “major supplier”.⁶¹

(d) *Competitive safeguards*

As a general principle, the RP contains a commitment to enact appropriate measures to prevent anti-competitive practices by major suppliers.⁶² In the specific case of service providers holding a monopoly or exclusive/special rights, the obligations of the RP complement those of the GATS.⁶³ To the extent that anti-competitive practices are not defined but for the specific examples given in the RP, it would appear that WTO Members could meet their commitment to enact appropriate measures either through the application of general competition law, or in the absence thereof, through a specific regulatory provision for the telecommunications sector whereby a set of defined practices is forbidden.⁶⁴

The RP lists three examples of anti-competitive practices: (i) cross-subsidization, (ii) use of information obtained from competitors, and (iii) withholding technical and commercial information.⁶⁵

- (i) Cross-subsidization is not defined, but for the qualification “anti-competitive”. Generally, cross-subsidization consists in the use of profits derived

⁶⁰ See Pierre Larouche, *Relevant Market Definition in Network Industries*, 1 *Journal of Network Industries* 407 (2000).

⁶¹ *Telmex* Report, ¶ 7.146–7.159. Later on, the panel also found that Telmex and all the other Mexican gateway operators *together* constituted a “major supplier”: ¶ 7.228.

⁶² RP, par. 1.1.

⁶³ GATS, Article VIII.

⁶⁴ Note that the panel in the *Telmex* Report left open whether a country’s competition laws could qualify as “appropriate measures” within the meaning of the RP. The panel did not consider it necessary to examine this issue, as Mexico had not claimed that its general competition laws were applicable to Telmex’ disputed conduct: see ¶ 7.266. Yet the panel did have occasion to highlight an instance where a country’s competition laws might not be considered an “appropriate measure”. This would be the case where a country’s competition laws would tolerate the “anti-competitive practices” of a “major supplier” on the grounds that the contested behavior of this supplier was mandated by governmental regulation. See *infra* notes 73–75 and accompanying text on Mexico’s appeal to the “sovereign compulsion defense”.

⁶⁵ RP, par. 1.2.

from one area of operations in order to finance another (presumably loss-making) area. It is a common business practice. It can become anti-competitive when the operations in the profit-making area are conducted pursuant to exclusive or special rights or when the major supplier in question holds a dominant position in the profit-making area. As experience in the EU shows, it can be quite difficult to translate a complaint about unfair or “cross-subsidized” prices into violations of general competition law.⁶⁶ If cross-subsidization is to be prevented, an appropriate regulatory framework must be developed. In order to be able to monitor whether any cross-subsidization occurs, one of the first regulatory elements required is that the major supplier in question implement an appropriate accounting system, with regular reporting and disclosure requirements.⁶⁷ Given the size and service portfolios of large telecommunications companies, it is otherwise almost impossible to prove that cross-subsidization has occurred. Furthermore, some cost-allocation key must be found, a very thorny issue as mentioned below in relation to interconnection. The RP is silent on these regulatory issues, which leads one to doubt the effectiveness of the general commitment to prevent cross-subsidization.

- (ii) TOs typically operate at many levels in the telecommunications sector. They will, for instance, both supply leased lines to data communications providers in order to enable them to complete their network, and at the same time offer data communications in competition with those providers. In such a case, in the course of supplying leased lines to its competitor, a TO is likely to obtain information from the competitor which is often precise enough to identify the customers of the competitor or to guess the intentions of a competitor. If that information is relayed to the retail division of the TO, it can be used for anti-competitive purposes (although the RP does not specify what “anti-competitive purposes” means).⁶⁸ Here

⁶⁶ See from an EC law and economics perspective, e.g., Phedon Nicolaides, *Effective Competition in Network Industries: An Assessment of Commission Decision 2001/354 imposing a fine on Deutsche Post for abusing its dominant position in parcel delivery*, 22 Eur. Comp. L.Rev. 390 (2001); Mats A. Bergman, *A prohibition against losses? The Commission's Deutsche Post decision*, 22 Eur. Comp. L.Rev. 351 (2001); Larouche, *supra* note 21 at 235–9; Leigh Hancher & José Buendia Sierra, *Cross-subsidization in EC Law*, 35 CMLRev. 901 (1998).

⁶⁷ See the requirements imposed in Directive 97/33 (ONP-Interconnection) of June 30, 1997 [1997] OJ L 199/32, Art. 7(5) and Annex V (now replaced by Directive 2002/19 (Access Directive) of 7 March 2002 [2002] OJ L 108/7, Art. 13(3) and (4)). In a further step, in case of persistent problems, accounting or even structural (legal) separation might be required, as was done in the EC, under certain circumstances, for firms holding both telecommunications and cable TV networks in Directive 1999/64 of June 23, 1999 [1999] OJ L 175/39, amending Directive 90/388, *supra* note 39, (now Directive 2002/77 of September 16, 2002 [2002] OJ L 249/21, Art. 8). See also Frid, *supra* note 45, at 84–5.

⁶⁸ The risks for competition associated with the movement of confidential information amongst divisions and subsidiaries was a major concern of the U.S. Department of Justice in *U.S. v. MCI*, Civil Action 94.1317, Consent Decree filed on June 15, 1994, and *U.S. v. Sprint Corporation*, Civil Action 95.1304, Consent Decree filed on July 13, 1995. In these two cases, stringent requirements were imposed in this respect.

as well, structural measures, such as the legal separation of business divisions operating in different markets may be necessary, although the RP does not mention this point.

- (iii) Since the RP defines anti-competitive practices in absolute terms (by giving examples) and not in terms of non-discrimination, it would appear from the text of the RP that a major supplier could be forced to disclose technical and commercial information to third parties that want to provide a certain service, even if neither the major supplier nor any other party is already providing that service. Such far-reaching consequences, if they were intended, can only be explained by the high degree of market power of the “major suppliers” within the meaning of the RP.

While appreciating the many questions raised by the competitive safeguards included in the RP, one should not underestimate the capacity of WTO panels and the Appellate Body to provide answers. For instance, in the *Telmex Report*, the WTO panel found that the three practices listed in the RP are merely examples, and that the term “anti-competitive practices” also includes other practices, in particular horizontal practices related to price-fixing and market-sharing agreements.⁶⁹ The panel reached this conclusion in the light of the ordinary meaning of the term anti-competitive practices as found in dictionaries, the use of this term in the competition legislation of WTO Members, related provisions of international instruments concerning competition policy, as well as the object and purpose of the RP.⁷⁰

We submit that the panel conclusions are persuasive. Price-fixing and market-sharing arrangements are considered hard-core violations of competition laws around the world; leaving them outside of the scope of “anti-competitive practices” would have curtailed the RP’s impact considerably.⁷¹ It would have transformed the RP’s examples of anticompetitive practices into three isolated instances.

⁶⁹ *Telmex Report*, ¶ 7.232.

⁷⁰ See *Telmex Report*, ¶ 7.230, 7.235–7.237. Here as well, much as it did for the definition of “major supplier”, the panel turns to competition law to construe the terms of the RP that appear to originate from it. In the absence of any WTO or other international agreement on competition law, the panel looks into domestic laws (especially those of the US and the EU) and non-binding international instruments (such as those of the OECD). Yet the reference to the Havana Charter (predecessor to the GATT and the WTO) at ¶ 7.236 appears politically somewhat insensitive. After all, the Havana Charter was never ratified, following US opposition in the early 1950s. The Charter’s competition law chapter reportedly went too far for American business. Now the Charter is used to lend support to a US complaint about anticompetitive practices in another country. See *infra* note 97 and accompanying text.

⁷¹ For a rather more critical view see Philip Marsden, *WTO decides its first competition case, with disappointing results*, *Competition Law Insight* 3, 8 (No. 16, May 2004). See also the critique of Damien J. Neven and Petros C. Mavroidis, *El mess in Telmex: a comment on Mexico-measures affecting telecommunications services*, 5 *World Trade Review* 271–296 (No. 2, 2006). A more benevolent view of the panel’s analysis is given in Eleanor M. Fox, *The WTO’s First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 *J. Int’l Econ. L.* 271–292 (No. 2, 2006).

The panel found that the two elements of Mexican telecommunications policy at issue did constitute anti-competitive practices. The requirement that Telmex negotiate termination rates for international traffic on behalf of all its competitors on that market amounted to price-fixing, while the “proportionate return” policy amounted to market-sharing.⁷²

The panel then endorsed the US complaint that Mexico maintained measures that require Mexican telecommunications operators to participate in these anti-competitive practices. In so doing, the panel adroitly countered a clever Mexican appeal to the so-called “sovereign compulsion defense” in many competition laws. Pursuant to this defense, a firm can defend itself by showing that its allegedly anti-competitive conduct was in fact mandated by legislation.⁷³ Mexico argued that since its laws required Telmex and its competitors to engage in otherwise anti-competitive practices, these practices fell outside the scope of the RP.⁷⁴ The panel answered that the GATS obligations, including the RP, were designed to limit the regulatory powers of the WTO Members. A WTO Member cannot hide behind its domestic law in order to erode unilaterally its international commitment to prevent major suppliers from continuing anticompetitive practices.⁷⁵

However sensible and convincing, the panel’s reasoning is geared to fit an unusual set of facts. One might recall at the outset that the RP provisions at stake are concerned with “major suppliers”; in competition law terms, their scope extends to “dominance” issues. The anti-competitive practices in question (price-fixing and market-sharing), however, pertain more to the “cartel” or “collusion” side of competition law. As regards dominance, the pricing of a dominant firm should become an issue only if it is excessive or predatory; similarly, any measures designed to enforce a certain market share should be problematic only if exclusionary. Yet the panel did not find that the high level of Telmex’s termination rates as such constituted an anti-competitive practice from a dominant firm (or “major supplier”).⁷⁶ Elsewhere in the report, the panel faulted the high rates on the basis of a regulatory concept specific to the RP, holding that these rates were not “cost-oriented”.⁷⁷ But in finding that Telmex had engaged in “anti-competitive practices”, the panel focused on the collusive or cartel-like nature of Telmex behaviour, *i.e.*, price-fixing and market-sharing, which was required by Mexican legislation. The panel

⁷² See *Telmex Report*, ¶ 7.257–7.264.

⁷³ *Ibid.*, ¶ 7.244.

⁷⁴ Interestingly enough, the EC supported this Mexican argument: *ibid.*, ¶ 7.241.

⁷⁵ *Ibid.*, ¶ 7.244.

⁷⁶ The panel did find, without much explanation, that Telmex and its competitors together formed a “major supplier”: *ibid.* ¶ 7.228. However, there is no indication in the report of a “collective dominant position” or anything similar, based on a study of the characteristics of the market. See for instance, CFI, 6 June 2002, Case T-342/99, *Airtours v. Commission* [2002] ECR II-2585 for an illustration of the intricacies involved in showing that a number of firms collectively hold a dominant position.

⁷⁷ See *infra* notes 90–91 and accompanying text.

recognized that the Mexican measures are “exceptional”⁷⁸ and cannot justify a “sovereign compulsion defence”. Indeed the panel’s findings do not reveal much about how a future WTO panel might deal with rather more typical “dominance” issues involving “major suppliers”. Furthermore, whether State regulation making a certain tariff compulsory—as opposed to explicitly ordering one firm to fix prices for the whole market—would also fall foul of the RP is still debatable.

(e) Interconnection

The provisions on interconnection constitute another key part of the RP. In large part, they also seek to prevent anti-competitive behavior by a major supplier, and they are accordingly closely linked to the provisions discussed above. Interconnection is defined as the “linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier”.⁷⁹

This definition closely resembles the standard U.S. and EC definitions. In the United States, interconnection is defined as the “physical linking of two networks for the mutual exchange of traffic”,⁸⁰ while in the EC, it is the “physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same of another undertaking, or to access services provided by another undertaking”.⁸¹ In contrast to customer access, interconnection is granted between telecommunication service providers. It occurs not at network termination points, but rather at more central points of the network,⁸² and it offers a quite different and more extensive range of possibilities (such as calls between users of both networks).

In the *Telmex* Report, the panel elaborated at some length on the meaning of interconnection in the RP, as Mexico had argued that this term did not cover the cross-border supply of telecommunications services. The panel rejected this argument and found that international interconnection was included in the substantive scope of the RP.⁸³

⁷⁸ *Ibid.*, ¶ 7.267.

⁷⁹ RP, par. 2.1.

⁸⁰ Interpretation given by the FCC to the interconnection obligation of the local exchange carriers (LEC) pursuant to the new Telecommunications Act of 1996, *supra* note 10, 47 U.S.C. § 251(c)(2), in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96–98, First Report and Order, FCC 96–325, 61 Fed. Reg. 45476 (August 8, 1996) at ¶ 47.

⁸¹ Directive 2002/19, *supra* note 59, Article 2(b). The *Telmex* panel relied on the EC definition to construe the RP: *Telmex* Report, ¶ 7.111.

⁸² For instance directly to a local switch.

⁸³ *Telmex* Report, ¶ 7.96–7.143.

The RP enumerates the parameters of the obligation to ensure interconnection, namely:⁸⁴

- Interconnection must be made at any technically feasible point.
- The terms, conditions and rates must be “non-discriminatory”, and the quality of interconnection, “no less favorable” than that provided to subsidiaries, affiliates or third parties.⁸⁵
- Interconnection must be provided in a timely fashion.
- The rates must be cost-oriented (and not necessarily cost-based). Both at the national and international level, cost-orientation has proven to be a most difficult issue. While as a principle it looks very reasonable on paper, its application is rife with practical difficulties.⁸⁶ Since telecommunications firms are typically multi-service firms with a high level of common costs, cost allocation plays a central role.⁸⁷ There is a wide choice of theoretically acceptable formulae, including fully-distributed costs (“FDC”), long-run incremental costs (historic or forward-looking, the famous “FL-LRIC” standard) or stand-alone costs (“SAC”). In the case of interconnection between fixed networks, FL-LRIC has tended to prevail in national laws,⁸⁸ but even so at a practical level its implementation is rarely ever uncontroversial. The RP does not indicate anything beyond the general cost-orientation principle.⁸⁹ In *Telmex*, the panel found, on the basis of a survey of ITU Recommendations and domestic laws and regulations, that “cost-oriented” under the RP should be assessed on a long-run incremental cost (LRIC)

⁸⁴ RP, par. 2.2.

⁸⁵ See Mark Naftel and Lawrence J. Spivak, *The Telecoms Trade War* 111 (2000). It is interesting to note (see also Miriam Gonzalez Durantes, *The European Perspective*, in Trade & Telecoms 51, 66 (Mark Clough ed. 2001)) that the EC introduced a footnote to the Reference Paper in its commitments on this point, stating that “different terms, conditions and rates may be set in the Community for operators in different market segments, on the basis of non-discriminatory and transparent national licensing provisions, where such differences can be objectively justified because these services are not considered ‘like services’”. Another footnote just before goes in the same direction. These reservations echo the substance of Directive 97/33, *supra* note 59, Art. 7(3) (now superseded by Directive 2002/19, without any equivalent provision). For an analysis of the practical consequences of this apparently uncontroversial statement, see Larouche, *supra* note 21, at 76–85.

⁸⁶ See the overview of costing issues in telecommunications in Larouche, *supra* note 21, at 239–46.

⁸⁷ Unless one decides to ignore or avoid common cost allocation difficulties and allow pricing at marginal cost or according to the Efficient Component Pricing Rule (“ECPR”). *Id.*

⁸⁸ *Id.* at 244. In other contexts, *e.g.*, cross-subsidization within a firm, other standards, such as FDC, might appear more appropriate, potentially leading to contradictions: for instance, interconnection could be priced according to FDC internally in order to avoid cross-subsidization, but at FL-LRIC towards third parties in order to encourage entry on the market. In that case, there is a contradiction if the party giving interconnection is otherwise under a non-discrimination obligation as between its own subsidiary and third-party competitors of that subsidiary.

⁸⁹ See James Ibbetson, *World Trade Organization and Basic Telecommunications Services*, in Trade & Telecoms 31, 48 (Mark Clough ed. 2001).

basis, allowing for a reasonable rate of return.⁹⁰ Since Mexico did not provide any cost data on Telmex itself, the panel relied on the four different methods put forward by the United States to show that Telmex could not be charging cost-oriented rates, and found that Mexico was in breach of its commitments under the RP.⁹¹

- The terms, conditions and rates must be transparent and reasonable, having regard to economic feasibility;
- There must be “sufficient” unbundling, so that there is no need to “pay for network components or facilities” that are not required. Similar provisions are found in the U.S. Telecommunications Act of 1996⁹² and EC Directive 2002/19.⁹³ Such provisions are difficult to apply unless the regulatory authority intervenes to provide a classification of network components in order to make the obligation more concrete.⁹⁴ The RP does not contain any provisions on this subject. A related question is whether the provisions of the RP imply an obligation to unbundle the local loop.⁹⁵ If the experience of the EC can be taken as a guide, access to an unbundled local loop does not truly qualify as interconnection (given that the local loop does not as such constitute a network, but rather a single component thereof). A more specific legal instrument is needed to cover such a case.⁹⁶
- Interconnection must also be provided upon request at points other than those provided to the majority of users, subject to charges for additional facilities.

⁹⁰ *Telmex Report*, ¶ 7.166–7.185. Whereas elsewhere the panel referred to domestic competition laws to construe terms with a clear competition law lineage, here the panel turned to the ITU, as well as domestic telecommunications regulation, for the interpretation of terms which pertain more to the regulatory than the competition law arena.

⁹¹ *Ibid.*, ¶ 7.186–7.216. These involved comparisons with: domestic Mexican rates for comparable services, “grey market” prices between the US and Mexico, rates on other international routes and rates used between Mexican operators under the “proportionate return” system.

⁹² *Telecommunications Act of 1996*, *supra* note 10, 47 U.S.C. § 251(c)(3).

⁹³ Directive 2002/19, *supra* note 67, at Art. 9(2), formerly in Directive 97/33, *supra* note 67, at Art. 7(4).

⁹⁴ In the United States, this was done by the FCC in the Local Competition Order, *supra* note 62, at ¶ 97–409. However, in *AT&T Corp. v. Iowa Utilities Board* 525 U.S. 366 (1999), the Supreme Court found that the FCC was mistaken on that issue and had put the incumbents under too heavy an unbundling obligation. Later on, in a Third Report and Order in the Local Competition proceeding, FCC 99–238 (November 5, 1999), the FCC went back on its first order. Subsequently, the courts quashed that order again (*United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002)). A third attempt by the FCC (Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003)) was also quashed (*United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)). The FCC went on to issue yet another order on narrowband issues: FCC, *Triennial Review Remand Order*, CC Docket No. 01–338, FCC 04–290 (4 February 2005), which this time was upheld (*Covad Communications Co. v. FCC* (DC. Cir. 16 June 2006)).

⁹⁵ See Naftel and Spivak, *supra* note 85, at 112.

⁹⁶ Regulation 2887/2000 of December 18, 2000 [2000] OJ L 336/4.

Unless otherwise noted above, the parameters contained in the RP broadly follow the regulatory framework in place in the United States and the EC, although the RP does not contain much detail.

The RP contains provisions on transparency.⁹⁷ Even though the RP imposes a general duty of non-discrimination and the public availability of interconnection agreements or standard offers,⁹⁸ some negotiation would still be needed for newcomers to obtain interconnection agreements (with prolonged discussions as to what terms and conditions are non-discriminatory). The RP does not go as far as the U.S. Telecommunications Act of 1996, which forces local exchange carriers to offer to other telecommunications carriers the same terms and conditions as those offered under existing interconnection agreements.⁹⁹ The RP also requires the creation of dispute settlement mechanisms in case of disagreement with a major supplier on the terms, conditions and rates for interconnection.¹⁰⁰

(f) Universal service

The RP does not provide any definition or parameters for universal service, expressly leaving this question to each WTO Member. Parties to the Fourth Protocol do, however, agree that their rules on universal service will be transparent, non-discriminatory, competitively neutral and not unduly burdensome.

The application of universal service schemes has also given rise to some friction at the international level. In the EC, Member States must include a specific set of services in the universal service obligations that they impose on one or more service providers.¹⁰¹ Member States may then set up a cost recovery mechanism for the extra costs associated with universal service, in the form of an industry fund.¹⁰² These costs are to be recovered from the other providers of public networks and services in the country in question (therefore excluding international operators merely delivering traffic for termination).¹⁰³ The U.S. approach to universal service, in contrast, provides for a larger class of services that can be funded via a universal service mechanism. Moreover, that mechanism consists of a supplementary charge on access to local networks.¹⁰⁴ This charge is due irrespective of where the other end of the call is,

⁹⁷ RP, par. 2.3 and 2.4.

⁹⁸ RP, par. 2.2 and 2.4 respectively.

⁹⁹ Telecommunications Act of 1996, *supra* note 10, 45 U.S.C. § 252(i).

¹⁰⁰ RP, par. 2.5 RP.

¹⁰¹ Directive 2002/22 of March 7, 2002 [2002] OJ L 108/51, Art. 3–7, replacing Directive 98/10 of February 26, 1998 [1998] OJ L 101/24, Art. 5–8. These are access to the PSTN, directory services, public payphones and specific measures for disabled users.

¹⁰² Directive 2002/22, *id.*, Art. 13.

¹⁰³ Directive 2002/22, *id.*, Art. 13(4).

¹⁰⁴ See FCC, Federal-State Joint Board on Universal Service, CC Docket 96–45, Report and Order, FCC 97–157 (May 8, 1997). This order provides that the universal service program

i.e., international operators must also pay it when they access local networks to terminate international calls. In other words, foreign telecommunications operators (and their customers) are contributing to universal service in the United States. The EC has voiced its dissatisfaction with this aspect of U.S. telecommunications law.¹⁰⁵

(g) *Licensing*

The RP contains commitments on the public availability of licensing criteria, time periods required to decide on a license application and terms and conditions of individual licenses.¹⁰⁶ Reasons are to be given when licenses are denied. The provisions in the RP concerning licensing are limited, and some major issues are not addressed:

- The RP does not attempt to define the situations in which a license can be required, nor does it outline the terms and conditions that should or should not be found in a license. Licensing can become a substantial barrier to cross-border trade, since a service provider can be subject to fairly different (and sometimes incompatible) licensing conditions from one country to the other, even if each country applies an even-handed licensing process. Moreover, when the scope of activities for which a license is required is defined broadly and the time period for issue of a license is relatively long, new market entrants are penalized by having to wait while the incumbent catches up. The RP does not address these issues. The GATS general proportionality rule could, however, perhaps be used to keep disproportionate licensing requirements in check.¹⁰⁷ Conceivably, the provisions of the AT dealing with permissible conditions on access and use, though not dealing with licensing conditions, could be used to supplement the proportionality principle in this respect.¹⁰⁸
- There is no provision for the mutual recognition of licenses in the RP. The GATS merely encourages the mutual recognition of licenses, while it does contain a non-discrimination obligation.¹⁰⁹ In the telecommunications sector in particular, it is very important to be able to operate globally, *i.e.*, at both the international and domestic levels. A regional operator wanting to serve the Mercosur area, for instance, would likely have to obtain licenses from each and every country. It is however understandable that the RP

shall support, *inter alia*, schools and libraries as well as health care providers in addition to the traditional universal service target group (rural and low-income users).

¹⁰⁵ See EC, Report on United States barriers to trade and investment 52 (2001), available at <<http://europa.eu.int/comm/trade/bilateral/usa/usa.htm>>. See Naftel and Spiwak, *supra* note 85, at 363–9.

¹⁰⁶ RP, par. 4.

¹⁰⁷ GATS, Art. VI, discussed *infra* notes 143–158 and accompanying text.

¹⁰⁸ AT, par. 5.(e) and (f).

¹⁰⁹ GATS, Art. VII.

does not touch upon this issue, since even within the EU, agreement on the mutual recognition of telecommunications licenses has proven elusive. At the same time, the EC has now put in place a mutual recognition regime for electronic commerce services, which shows that mistrust amongst countries in this area is not insurmountable.¹¹⁰

- The RP only contains an obligation to provide reasons when a license is denied, but not in cases when a license is granted with conditions that the applicant may not desire.

(h) *Independence of the regulatory authority*

Pursuant to the RP, signatories to the Fourth Protocol are bound to guarantee the separation of the regulatory authority from any supplier of basic telecommunications services, as well as the regulatory authority's impartiality.¹¹¹ There is however no provision in the RP analogous to the requirement in EC law that, when the TO is state-owned or state-controlled, the regulatory authority should also be structurally separated from the government department that exercises ownership and control functions over the TO.¹¹² Indeed, when the local TO is State-owned but autonomous, two sometimes distinct sets of interests may conflict with the regulatory authority: the interests of the TO itself as a business, and the interests of the government as the owner of the TO. Even if the regulatory authority is independent from the TO as a business, it can still conflict with the interests of the government as owner, for instance when privatization is taking place.

The RP is silent on some important issues as well, such as the circumstances in which recourse to an independent authority must exist (except in the case of interconnection disputes), or the standing requirements for foreign entities before the independent authority.

(i) *Allocation and use of scarce resources*

The RP includes commitments to allocate and use frequencies, numbers, rights of way and other scarce resources in an objective, timely, transparent and non-discriminatory manner, with a reservation for national security interests applicable to the secrecy of certain frequency allocations.

(j) *Overall assessment*

Some observers believe that the most important achievement of the Fourth Protocol lies in the RP.¹¹³ While we believe that the immediate impact of the

¹¹⁰ Directive 2000/31 of June 8, 2000 on electronic commerce [2000] OJ L 178/1.

¹¹¹ RP, par. 5. See Frid, *supra* note 47, at 81–3.

¹¹² Directive 2002/21 of March 7, 2002 [2002] OJ L 108/33, Art. 3(2), replacing Directive 90/387 (ONP—Framework Directive) of June 28, 1990 [1990] OJ L 192/1 (as amended), Art. 5(a)(2), second dash.

¹¹³ See Drake and Noam, *supra* note 42, at 44–5, as well as Naftel and Spivak, *supra* note 85, at 106–7.

RP should not be overstated, this document does provide a breakthrough at the international level. The RP reflects recognition that monopolized sectors cannot be liberalized with the stroke of a pen. Additional commitments are needed, in terms of both regulatory supervision as well as competition law principles. It is admirable that the negotiators of the RP recognized this point. One also has to appreciate how difficult it was for the negotiators to achieve something meaningful in this regard, as they were forced to explore areas that had long been politically fenced off.

As already noted, some of the RP's commitments concern licensing and other rules addressed to WTO governments, concerning for instance the way they allocate scarce resources like frequencies and telephone numbers. Since they are addressed to governments, these are commitments one would expect in a typical WTO Agreement. The RP also contains rules that effectively impose obligations on certain private entities, notably to open some of their production facilities (their public networks) to competitors from abroad. Reference is made to the so-called interconnection obligations. Moreover, WTO governments are supposed to take "appropriate measures" to prevent powerful suppliers of telecommunications services from engaging in "anti-competitive practices." The RP also gives examples of such practices.

It is highly unusual to find rules in the WTO that seek to govern private activities.¹¹⁴ Indeed, the rules of the RP stand in marked contrast to the few provisions scattered throughout the WTO agreements where competition law is mentioned. Some of these provisions give WTO governments the authority to intervene if they believe that private entities are engaged in competition law violations.¹¹⁵ Other provisions, notably in the GATS agreement, envisage that Members will consult each other about anti-competitive practices. However, none of these provisions forces governments to intervene or take action against private anti-competitive behavior.¹¹⁶ The governments have discretion to do so. In contrast, the Reference Paper does envisage obligations for governments to prevent anti-competitive practices, which would in turn impose obligations for private parties (*i.e.*, the major suppliers of telecommunications services) as well. This is a significant innovation in the WTO package of agreements.

¹¹⁴ Rare examples would be the Agreement on Government Procurement, and the Agreement on Pre-shipment Inspection, which cover both government and privately owned entities.

¹¹⁵ See TRIPS, Art. 8, 31(c) and 40(2). These provisions are discussed by Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (2d ed., 2003).

¹¹⁶ GATS, Art. IX. Pursuant to Art. VIII of the GATS, WTO Members must guard against abuses by monopoly service providers, yet the scope of this obligation would seem to be limited. It ties the prohibited behavior of the private entity to the GATS prohibitions addressed to governments. This provision, therefore, prevents a government from shirking its GATS obligations through a transfer of responsibility for essentially governmental action to a private entity, which it controls by means of a governmental monopoly.

Indeed, the competition law principles found in the RP are the first competition laws ever introduced in the WTO.¹¹⁷ This is the undoing of an old taboo. In the early 1950s, competition law was one of the factors that sank the genuine predecessor of the WTO, the International Trade Organization (“ITO”). It was the intention of the negotiators that the ITO would succeed the GATT and become the third international economic organization beside the IMF and the World Bank in the post-war UN-system. However, the Havana Charter was never even presented to the U.S. Congress for ratification because of the strong opposition there. The chapter on competition law in the ITO-Treaty was one of the major stumbling blocks, since—however modest—this chapter went too far for American business.¹¹⁸ History repeats itself—in recent years the United States resisted European proposals to negotiate a general agreement on competition law in the WTO. In November 2001, at the Ministerial Meeting in Doha, a decision was taken in principle to start negotiations on some form of competition law agreement in the WTO after the next ministerial meeting in Cancun.¹¹⁹ However, the Cancun Ministerial Meeting ended in failure. The EU agreed to drop competition law from the relaunched negotiations in the summer of 2004. Nevertheless, at some point the Reference Paper, and its interpretations in WTO dispute settlement, may help to break the ice by opening this controversial subject to multilateral negotiations.¹²⁰

Meanwhile, there is a need for much clarification. Many of the RP principles are formulated vaguely and/or are incomplete. There is no definition of basic terms such as “anti-competitive cross-subsidization”, “anti-competitive results” and “non-discrimination”. Nor is there a benchmark against which these terms are to be interpreted: is the goal to increase market access for foreign suppliers, or to improve effective conditions of competition in the host country? This can make quite a difference. WTO panels already have had occasion to distinguish between competition and trade law approaches.¹²¹

¹¹⁷ Of interest as well is the fact that WTO Members have agreed to review before January 1, 2000 whether the limited WTO agreement relating to investment ought to be complemented by provisions on competition policy, as part of a general review of this Agreement: see Art. 9 TRIMS. This review was not completed by the agreed deadline, nor were there any relevant developments to report by July 2006.

¹¹⁸ See Bernard M. Hoekman & Petros C. Mavroidis, *Competition, Competition Policy and the GATT*, 17 *World Economy* 121, 137–139 (1994).

¹¹⁹ See para. 23–25 of the Doha Ministerial Declaration, available at www.wto.org.

¹²⁰ *But see* Fox, *supra* note 71, at 291 (arguing that the informal networking model of the ICN [“International Competition Network”], established in 2002, is increasingly successful, rendering a WTO competition regime more remote).

¹²¹ Thus, panels have defined markets more broadly in trade than in competition law. In their view, trade law addresses the “potentiality to compete”, whereas competition law is designed to protect “the actual mechanisms of competition”. Report of the WTO panel, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R (1998), at para. 10.81 (confirmed on appeal). See also Report of the WTO panel, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R (1999), at para. 7.87 (confirmed, and modified on other grounds, on appeal).

It is also notable that the RP, while stipulating that an independent agency is supposed to hear private complaints about interconnection, remains silent on whether this agency should also be competent to hear private complaints about anticompetitive practices of the “major suppliers” of telecommunications services. While government-to-government complaints always remain a possibility in this area of WTO law, experience shows that private enforcement of competition law principles is indispensable to their effectiveness.¹²²

Key regulatory concepts have also not been well developed in the RP.¹²³ In general, the RP avoids the “heavier” regulatory issues that are no less essential to ensure a level playing field: transformation of TOs into private law companies (including privatization), accounting standards for TOs, the definition of the network and service components to be unbundled, universal service, services for which individual licenses may be required or not, terms and conditions attached to licenses or the recognition of foreign licenses.

The fact that the commitments in the Reference Paper are open-ended and allow many different interpretations has been hailed as the “real value” of the RP,¹²⁴ on the theory that no WTO Member could claim that only one interpretation is the valid one. Ultimately, it would be up to WTO panels and the Appellate Body to decide the specific interpretations of those commitments.¹²⁵ We could not disagree more. If the commitments undertaken on the basis of the Reference Paper are supposed to be legally binding, then they must be intelligible to all interested parties, their interpretation must be predictable, and their enforcement should not be seen either to “add to or diminish” the rights and obligations of WTO Members.¹²⁶ In the words of the *Telmex* panel:¹²⁷

WTO negotiators sometimes praise the political wisdom of resorting to “constructive ambiguity” as a diplomatic means of enabling consensus on WTO rules.¹²⁸ The limited legal task of dispute settlement findings is very different. It is to decide on the legal claims, in a particular dispute, based on the “ordinary meaning” of the WTO provisions concerned in their context and in light of the “object and purpose” of the agreement.

¹²² These points have been developed in Bronckers, *supra*, note 57.

¹²³ See also M. Fredebeul-Klein and A. Freytag, *Telecommunications and WTO Discipline*, (1997) 21 *Telecommunications Policy* 477, at 480–3, 489–60.

¹²⁴ See Gonzalez Durantes, *supra* note 85, at 71–75 who presents this as the “European perspective” on the Fourth Protocol.

¹²⁵ *Id.* at 72.

¹²⁶ See DSU, Art. 3.2. See Marco Bronckers, *Better Rules for a New Millennium: A Warning against Undemocratic Developments in the WTO*, 2 *J. Int'l Econ. L.* 647 (1999); Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harvard Int'l L.J.* 333 (1999).

¹²⁷ *Telmex* Report, ¶ 7.4.

¹²⁸ The panel refers here to a publication by former WTO Director-General Mike Moore, *A World Without Walls—Freedom, Development, Free Trade and Global Governance* 111 (2003).

In other words, the primary responsibility to clarify and improve the RP rests with the WTO membership, at the negotiating table. The same is true for the elaboration of competition law principles. If the WTO membership fails to assume this responsibility, dispute settlement on the basis of the RP remains a second-best solution to make the necessary progress.¹²⁹ The overall admirable work of the panel in the *Telmex* Report has given a boost to the credibility of the RP. This report has also underlined the useful role that competition law principles can play in opening markets that were hitherto closed.

3. Residual Importance of the Annex on Telecommunications after the Fourth Protocol

As a result of the successful conclusion of the GBT negotiations (especially the agreement on the RP), the AT has lost much of its significance. Yet the more salient obligations under the RP are in some respects more limited than those of the AT, as noted in the *Telmex* Report,¹³⁰ where the panel made concurrent findings under both the AT and the RP. The AT therefore remains relevant:

- When a given WTO Member has not made any commitments under the Fourth Protocol;
- When a given WTO Member has made commitments under the Fourth Protocol but has not or not fully committed to the principles contained in the RP. In this case, the AT could provide some protection to suppliers of basic telecommunications services;
- When a WTO Member has made commitments under the Fourth Protocol, including the RP in full, for issues falling outside of the scope of the RP, because no “major supplier” is involved or because the problems do not concern “interconnection” but another form of “access to and use of” public networks and services;
- When a WTO Member has given commitments in a service sector other than telecommunications, for foreign service suppliers in that sector in their dealings with the incumbent TO; and
- When a WTO Member has given commitments on value-added telecommunications services, for suppliers of these services, since as mentioned above, the RP only applies to basic telecommunications services.

The latter two points could prove particularly interesting, in the converged environment in which the sector is heading, for providers of content distributed over telecommunications networks.

¹²⁹ Obviously, it remains the prerogative of the WTO membership to exclude certain questions from being solved through WTO dispute settlement. For an example see TRIPS, Art. 6 (regarding the question of parallel imports).

¹³⁰ See *Telmex* Report, ¶ 7.331–7.332.

III. *The General GATS Obligations that Apply to the Telecommunications Sector*

With the Fourth Protocol, the GATS now contains a complete set of specific commitments on telecommunications. In addition, as mentioned above, certain general obligations of the GATS come into play only when specific commitments are made for a given sector, relating essentially to domestic regulation.¹³¹ The application of these general obligations to the telecommunications sector, in light of specific commitments, is reviewed below.¹³² For the sake of convenience, the MFN obligation,¹³³ which can apply independently of any specific commitment, is also reviewed.

A. *The Most-Favored-Nation (“MFN”) Obligation*

In general, the MFN obligation applies to every measure concerning trade in services,¹³⁴ and it would accordingly apply to measures concerning telecommunications services as well.¹³⁵ Essentially, it binds WTO Members to treat services and service suppliers from other WTO Members no less favorably than like services and service suppliers from any other country. However, the GATS Annex on Negotiations on Basic Telecommunications provided that the MFN obligation would only enter into force for basic telecommunications after the market access negotiations were completed or appeared to remain unsuccessful.¹³⁶ With the Fourth Protocol, the MFN obligation now applies to basic telecommunications as well.

WTO Members are allowed to apply measures in derogation of the MFN obligation, provided that they were identified during the negotiations and listed in an annex to the GATS. These derogations are then subject to periodical review and must in principle be terminated at the latest ten years after the entry into force of the WTO Agreement, *i.e.*, on January 1, 2005.¹³⁷ The Annex on Negotiations on Basic Telecommunications has similarly extended the deadline for so-called “Article II Exemptions” on basic telecommunications until the conclusion of the negotiations. Indeed, Article II Exemptions were also negotiated within the NGBT and GBT at the same time as specific commitments. Nine countries submitted Article II Exemptions (mentioned below when relevant).

The effects of the MFN obligation were felt mostly in countries where telecommunications are operated by the State or by a legal monopoly. It must

¹³¹ GATS, Art. VI. The obligations relating to freedom of payments and transfers (Art. XI and XII GATS) are of less immediate relevance and will not be discussed here.

¹³² See also Drake and Noam, *supra* note 42, at 45–6.

¹³³ GATS, Art. II. On transparency see Frid, *supra* note 47, at 83–4.

¹³⁴ See GATS, Art. II:1.

¹³⁵ Although the precise significance of MFN for telecommunications is not yet well established: Holmes *et al.*, *supra* note 3, at 762. See also Tuthill, *supra* note 52, at 788–9.

¹³⁶ See *Annex on Negotiations on Basic Telecommunications*, par. 1.

¹³⁷ See GATS, Art. II:2, in conjunction with Annex on Article II Exemptions, par. 3 and 6. See Hoekman and Kostecki, *supra* note 6, at 252.

indeed be emphasized that the MFN obligation, like virtually all WTO obligations,¹³⁸ rests only on States and their agencies. For instance, to the extent a government still negotiates accounting rates to settle international telephone calls, a sending country would be entitled to claim the most favorable rate a terminating country has offered to any other country—regardless of whether that other country is a WTO Member. Accordingly, five countries (Bangladesh, India, Pakistan, Sri Lanka and Turkey) submitted MFN exemptions for differential accounting rates concluded in separate bilateral agreements with other countries.¹³⁹

To the extent private or privatized TOs handle international relations (including the negotiation of accounting rates), they are not directly bound to observe the MFN obligation. Two exceptions may exist. First, since most TOs will qualify as major suppliers for the purposes of the RP, the commitments on anti-competitive practices may well apply to differential treatment in international relations (*e.g.*, discriminatory accounting rates). Domestic law restrictions on discrimination then become relevant, to the extent they do not already apply independently of the RP commitments.¹⁴⁰ Second, if a TO enjoys legal monopoly rights or exclusive or special rights, a government may be forced to intervene under the GATS if the TO acts in a manner inconsistent with MFN by charging discriminatory prices on the basis of nationality (*e.g.*, differing accounting rates despite comparable distances or traffic volumes).¹⁴¹

Once a complete set of specific commitments relating to telecommunications is in place, the general MFN obligation of the GATS also creates a so-called *free rider* problem. Indeed, even if only 69 of the 130 WTO Members made specific commitments on telecommunications at the time of the Fourth Protocol, the benefit of these commitments must be extended to all WTO Members pursuant to the MFN obligation. Even among the 69 countries that participated in the NGBT and GBT, the commitments are by no means symmetrical. If Canada, for example, limited foreign ownership of facilities-based service providers to 46.7 percent (direct and indirect), a country such as the Netherlands, which fully removed all restrictions must allow Canadian investors to buy a majority in a facilities-based telecommunications provider. These free rider effects explain why a critical mass of acceptable offers was considered to be so important. If the free rider effect was thought by a Member to be too substantial, an Article II Exemption could still be used, but only on a temporary basis. The United States, for one, “retaliated” against the perceived shortcoming of the Canadian commitment mentioned above by

¹³⁸ See *supra* notes 93–95 and accompanying text.

¹³⁹ See the discussion *infra* notes 211–224 and accompanying text.

¹⁴⁰ See *e.g.*, Art. 82(c) EC, prohibiting a dominant supplier from charging discriminatory prices to its customers, which cause competitive harm.

¹⁴¹ Pursuant to GATS, Art. VIII.

filing an Article II Exemption on foreign ownership of U.S.-based companies active in certain satellite services.¹⁴²

B. *Domestic Regulation*

While the GATS recognizes the right of WTO Members to regulate,¹⁴³ it also imposes certain obligations relating to domestic regulation.¹⁴⁴ For instance, for telecommunications services these obligations apply to licensing schemes,¹⁴⁵ universal service obligations, frequency allocation, numbering, and access/interconnection regulations.

The GATS obligations regarding domestic regulation distinguish between “committed services” (*i.e.*, services for which specific commitments have been made) and other services. All measures affecting services generally must be published.¹⁴⁶ Moreover, for committed services, any new law or regulation, or amendment of existing rules, which significantly affects the trade of services in that sector must be notified to the WTO, though prior consultation is not required.¹⁴⁷ Furthermore, in committed sectors, the WTO Member concerned must administer all regulations of general application in a reasonable, objective and impartial manner.¹⁴⁸

Furthermore, WTO Members are also bound to institute review procedures before independent instances for administrative decisions affecting trade in services.¹⁴⁹ A service supplier who files an application to operate in a WTO Member in a “committed sector” is entitled to a decision within a “reasonable period of time”. At “any time” when so requested the WTO Member shall “without undue delay” inform the applicant of the status of

¹⁴² Direct-to-home (“DTH”), direct broadcasting (“DBS”) and digital audio services. A potentially more damaging consequence of this Article II Exemption could be that the commercial subsidiaries of international satellite organizations (“ISOs”) are prevented from offering DTH and DBS in the United States. Even though the United States explicitly undertook not to apply this Article II Exemption against operators from the EU, the EC and its Member States protested. See the press release of the Council meeting of February 14, 1997, PRES/97/39.

¹⁴³ See the fourth recital of the GATS’ preamble.

¹⁴⁴ GATS, Art. VI. See also Tuthill, *supra* note 52, at 789–92.

¹⁴⁵ Provided that the total number of suppliers is not limited, in which case the licensing requirement is subject to Art. XVI GATS and must be listed as a limitation on market access in the schedule of specific commitments.

¹⁴⁶ GATS, Art. III.1.

¹⁴⁷ GATS, Art. III.3. Note that, as with notification obligations generally in the WTO, there is no immediate sanction foreseen in the event notification has been omitted. This is to be contrasted, for instance, with the rigorous case law of the European Court of Justice pursuant to which Member States having failed to notify technical regulations to the Commission, pursuant to Directive 94/34 of June 22, 1998 [1998] OJ L 204/37, are barred from enforcing those rules against individuals. See ECJ, 30 April 1996, Case C-194/94, *CIA Security International v. Securitel* [1996] ECR I-2201.

¹⁴⁸ GATS, Art. VI.1.

¹⁴⁹ GATS, Art. VI.2.

his application.¹⁵⁰ These general obligations correspond to or complete the specific commitments found in the RP.¹⁵¹

Moreover, in the absence of anything on this point in the RP, the general obligations of the GATS are the only provisions applicable to the substance of the terms and conditions of telecommunications licenses, although some guidance can already be derived from the provisions of the AT dealing with conditions on access and use, where a core of permissible restrictions and requirements is outlined.¹⁵² In essence, licensing requirements should not restrict trade unnecessarily. Whenever a WTO Member has given commitments on telecommunications services, its licensing requirements are subject to a form of proportionality test (objective and transparent criteria, not more burdensome than necessary to ensure quality of service, not in themselves a restriction on supply). No WTO Member can undermine these commitments through the imposition of unnecessarily cumbersome licensing requirements, at least when such requirements would be new or unexpected.¹⁵³

The WTO Council for Trade in Services is supposed to elaborate disciplines to concretize these principles—whether they are subject to commitments or not.¹⁵⁴ A reading of the GATS that would, for example, expressly tolerate the capricious, subjective and biased regulation of “uncommitted” telecommunications services would seem out of place.¹⁵⁵

Nevertheless, the negotiation of principles of good administration regarding services regulation is proving to be difficult. It is generally recognized that the present disciplines of Art. VI need to be clarified and sensibly strengthened.¹⁵⁶ A key question has become how to determine in the WTO whether services regulations, such as telecommunications licensing requirements, are “necessary” or “proportionate”.¹⁵⁷ In reaching this determination the basic tension between market integration and national regulatory autonomy has to be resolved. This difficulty is not particular to the services sector. In the goods areas as well, assessing the proportionality of non-discriminatory domestic regulation has been one of the most intractable questions for the WTO membership.¹⁵⁸

¹⁵⁰ GATS, Art. VI.3.

¹⁵¹ See RP, par. 2.5 and 5 on recourses for interconnection disputes and the independence of the regulatory authority.

¹⁵² AT, par. 5(c) and (f).

¹⁵³ See GATS, Art. VI.5.

¹⁵⁴ See GATS, Art. VI.4.

¹⁵⁵ See *contra* GATS, Art. VI.1.

¹⁵⁶ See e.g., Geza Feketekuty, *Regulatory Reform and Trade Liberalization in Services*, in GATS 2000: New Directions in Services Trade Liberalization 225, 237–238 (Pierre Sauv e and Robert M. Stern eds. 2000).

¹⁵⁷ See GATS, Art. VI.4, opening paragraph and subclause (b). The EU and its Member States recently presented their views on this issue to the WTO Membership, with reference to their own experiences and case law. See *European Communities—Domestic Regulation: Necessity and Transparency*, S/WPDR/W/14 (May 1, 2001).

¹⁵⁸ See generally, Axel Desmedt, *Proportionality in WTO Law*, 4 J. Int'l Econ. L. 441 (2001).

C. *Government Procurement*

The scope of GATS is limited in an important respect. The general MFN principle, as well as specific commitments relating to market access and national treatment, do not apply to government procurement of services. Negotiations on this subject started in 1995, though no timetable was set for their completion.¹⁵⁹ It is currently envisaged by the Members that the negotiations on government procurement will be completed at the same time as the overall negotiations on services liberalization which restarted in 2000.¹⁶⁰

For foreign suppliers of telecommunications services this gap can have considerable impact. Governments are probably the largest single customer for telecom services in any country. The political expediency to purchase locally is supplemented by an economic interest, as long as governments retain an important stake or share in the local TO.

IV. *Remedies and Dispute Settlement*

The substantive GATS provisions applicable to telecommunications have been examined above. It must now be assessed whether these provisions can be effectively enforced. The following section is concerned with applicable remedies and dispute settlement. Two cases are distinguished for the purposes of remedies, namely injury to telecommunications service providers in their home market as a result of practices from foreign suppliers, and difficulties on a foreign market.

A. *Remedies for Injury to the Domestic Market*

The GATS does not contain a set of self-help remedies, unlike the GATT, where Members can take unilateral action against dumped or subsidized imports from other Members, or even impose safeguard measures against imports that cause serious injury.¹⁶¹ Even though WTO Members recognized that subsidies may distort competition in services as well,¹⁶² the GATS contains no disciplines regarding government subsidies.¹⁶³ If a Member finds that

¹⁵⁹ See GATS, Art. XIII. On the issues to be addressed in these negotiations see Patrick Low, Aaditya Mattoo and Arvind Subramanian, *Government Procurement in Services*, in *Law and Policy in Public Purchasing—The WTO Agreement on Government Procurement 225* (Bernard M. Hoekman and Petros C. Mavroidis, eds. 1997).

¹⁶⁰ According to the “built-in agenda” of GATS, Art. XIX.1, a new round of negotiations on services started in the year 2000: See the Guidelines and Procedures for the Negotiations on Trade in Services, S/L/93 (March 29, 2001). These “built-in” negotiations have been merged into the Doha Round and have made slow progress to date.

¹⁶¹ See GATT, Art. VI and the WTO Anti-dumping and Subsidies Agreements, as well as GATT, Art. XIX and the WTO Safeguard Agreement.

¹⁶² See GATS, Art. XV.1.

¹⁶³ To the extent a Member has not scheduled limitations on national treatment regarding subsidies, it may be forced to give subsidies to local and foreign telecommunications suppliers indiscriminately.

subsidies granted by another country create distortions on its market, the GATS does not envisage countervailing action. A Member with sufficiently serious grievances about foreign subsidies on services is only entitled to “sympathetic consideration” if it requests consultations with the subsidizing country.¹⁶⁴ WTO Members have undertaken to address these issues in further negotiations,¹⁶⁵ and currently aim to complete these prior to the conclusion of the new overall negotiations on services liberalization, started in the year 2000.¹⁶⁶

The GATS envisages no remedy either against injury caused by private anti-competitive behavior of foreign suppliers. The GATS, in other words, does not contain an anti-dumping remedy. This is remarkable, as the GATS itself offers no alternative. The GATS principles on restrictive business practices¹⁶⁷ or the RP do not really help here, as they are principally concerned with helping foreign suppliers to gain market access in the face of a powerful incumbent.

In some sense, it may be laudable that the GATS drafters did not simply copy the anti-dumping regime for trade in goods, given that this remedy is open to fundamental criticism. Beyond protecting against abuses by powerful exporters enjoying protection in their home market, anti-dumping measures have also been used to strike at competitive practices that are perfectly legitimate under national competition law and should create no concern internationally either.¹⁶⁸

Perhaps the GATS drafters were not overly concerned about the lack of remedies against anti-competitive practices, as most of the specific commitments on market access aim to allow foreign service suppliers to establish a commercial presence in the host country.¹⁶⁹ Such a commercial presence may have been thought sufficient for the host country to exercise jurisdiction and curb any anti-competitive practices from the foreign supplier pursuant to domestic competition law. This assumption may not readily hold for telecommunications, and in particular international telecommunications, however. International telecommunications are often traded across borders, without a commercial presence of the supplier in the country where the service is consumed.¹⁷⁰ Furthermore, a local affiliate in the host country may not reflect the full competitive potential of the foreign supplier and therefore escape competition

¹⁶⁴ GATS, Art. XV.1.

¹⁶⁵ See GATS, Art. XV.2.

¹⁶⁶ See *supra* note 160.

¹⁶⁷ See GATS, Art. VIII and IX.

¹⁶⁸ See Marco Bronckers, *Rehabilitating Antidumping and other Trade Remedies through Cost-Benefit Analyses*, 30 *Journal of World Trade* 5–37 (1996). For an economist's perspective see P.J. Lloyd, *Anti-dumping Law and Competition Law*, in Vol. II *The World Trade Organization: Legal, Economic and Political Analysis* 67–82 (Macrory, Appleton & Plummer eds., 2005).

¹⁶⁹ This is the third mode of international service delivery recognized in GATS, Art. I.2.

¹⁷⁰ This is the first mode of international service delivery recognized in GATS, Art. I.2.

law disciplines imposed on major suppliers.¹⁷¹ Accordingly, countries such as the United States have resisted the opening of their markets as long as no effective remedies against unfair competition from abroad were in place.

Such resistance may well have been compounded by the absence of an effective safeguard mechanism. Trade agreements traditionally incorporate an escape clause, a “failsafe” mechanism, in order to provide assurance to countries which open their markets that they could unilaterally suspend trade concessions if these would cause unexpected problems for their domestic industry. An escape clause allows restrictions on imports, even if trade is considered fair; what matters is the injury suffered by the domestic industry.¹⁷² Expressed differently, an escape clause can operate as an alternative or a complement to the remedies against anti-competitive practices or unfair trade (such as anti-dumping or countervailing duties). The GATT contains an escape clause, which after much difficulty was elaborated in a separate WTO agreement in the course of the Uruguay Round.¹⁷³

The GATS, however, does not incorporate a safeguard mechanism yet. The agreement only provides that negotiations on such a mechanism were to be concluded before January 1, 1998,¹⁷⁴ but this deadline has been extended indefinitely.¹⁷⁵ In the meantime, the GATS allows WTO Members to permanently withdraw or modify concessions in accordance with a more cumbersome process.¹⁷⁶ The safeguard concept does not fit easily into the context of services.¹⁷⁷ Suppose, for instance, that a local TO runs into serious difficulties as a result of the surge in competition following the abolition of its monopoly over voice telephony. It would not seem feasible to simply “suspend” the concession, and reinstate the monopoly for some period.¹⁷⁸ A better alternative might be to impose a temporary surcharge on the sales of

¹⁷¹ In EC competition law terms, for instance, the European subsidiary of a foreign supplier might escape the pricing disciplines which a dominant supplier must observe by virtue of Art. 82 EC.

¹⁷² Paradoxically, by allowing a country to suspend its concessions when it finds itself in difficult circumstances, even if the foreign competition is fair, an escape clause is seen as an encouragement to trade liberalization.

¹⁷³ See GATT, Art. XIX and the WTO Safeguards Agreement.

¹⁷⁴ See GATS, Art. X.1.

¹⁷⁵ See *Fifth Decision on Negotiations on Emergency Safeguard Measures*, S/L/159 (March 17, 2004).

¹⁷⁶ See GATS, Art. X.2. Although not explicitly stated, the reference to Art. XXI suggests that a WTO Member wishing to avail itself of this provision may have to pay compensation to other disaffected WTO Members. This constraint is not in line with current thinking on the effective operation of an escape clause. See WTO Safeguards Agreement, Art. 8(3).

¹⁷⁷ See Gilles Gauthier, Erin O'Brien & Susan Spencer, *Déjà Vu, or New Beginning for Safeguards and Subsidies Rules in Services Trade*, in *GATS 2000: New Directions in Services Trade Liberalization* 165, 166–176 (Pierre Sauvé and Robert M. Stern eds. 2001).

¹⁷⁸ This could amount to expropriation of, or at least far-reaching interference with an established business of foreign service providers. Note that similar, conceptual concerns were deemed insurmountable in the context of intellectual property, and have been put forward to explain the absence of an escape clause in the TRIPS agreement. See Bronckers, *supra* note 5, at 1260.

foreign telecom suppliers, to ease momentarily the competitive pressures on the local TO.

Perhaps the GATS negotiating parties felt that they were better protected against unexpected developments than in the goods sector, as GATS offers market access piecemeal through specific commitments. This is different from the original GATT approach, where quantitative restrictions had to be abolished as a matter of principle, tariffs reduced and national treatment immediately given. Whether sudden leaps in competitive advantage will happen in services remains to be seen. In the telecommunications sector at least, this seems a safe bet in view of continuing and rapid technological developments.

However, while for the time being the GATS does not explicitly envisage self-help remedies, it does not prohibit them altogether. The GATS acknowledges that WTO Members have latitude in developing their own public policies. Thus, the GATS would seem to allow a Member to impose licensing conditions in order to protect fair and undistorted competition in its own market.¹⁷⁹ Yet in order to be GATS-consistent, there would have to be evidence of anticompetitive behavior in the host country (or an unjustifiable failure of the foreign supplier to cooperate with a competition-related investigation by the host country) before a telecom license could be withdrawn. Expressed differently, telecom licenses cannot be denied *ex ante*, based on the presumption that a powerful foreign supplier *might* engage in anticompetitive behavior.¹⁸⁰

B. Remedies for Difficulties on Foreign Markets

Various reasons may explain why a given telecommunications service provider (the “entrant”) has difficulties in accessing a foreign market (the “host country”). It may be that the entrant has been correctly treated by the authorities of the host country, for example as far as licensing is concerned, but is facing anti-competitive practices from a major supplier in that host country. By way of example, the entrant may be deterred from offering services in the host country if the prices charged by the local TO are perceived to be artificially low. In that case, a faithful implementation of the principles of the RP should provide the entrant with a remedy before an independent regulatory authority, with the additional possibility of recourse against the decision of that authority, pursuant to the GATS.¹⁸¹

It may be however that the RP and the GATS have not been implemented in the host country, or that the entrant is hampered by the host country itself breaching one of the GATS commitments applicable in the telecommunications sector as described above, be it market access, foreign investment, MFN, transparency, etc. The entrant may then have difficulties obtaining redress,

¹⁷⁹ See GATS, Art. VI.

¹⁸⁰ See Gonzalez Durantez, *supra* note 85, at 64–65.

¹⁸¹ GATS, Art. VI.2.

which reflect the problems private parties have with the enforcement of the WTO agreements in general.

First, there is no direct right of access to the WTO dispute settlement mechanism for private parties. Second, it is open to question whether the WTO agreement can be invoked by a new entrant before a national court in the host country. This depends on whether the host country is “dualist” or “monist”, and in “monist” systems whether courts are willing to grant direct or indirect effect to WTO agreements.¹⁸² The country of origin of the new entrant could of course initiate government-to-government litigation in the WTO, yet such litigation is normally an act of sovereign discretion. However, some WTO Members have introduced in their domestic law mechanisms whereby private parties can petition them to act before the WTO.¹⁸³ Pursuant to these mechanisms a telecom supplier from country A might formally request its government to initiate WTO dispute settlement action against country B which has frustrated this telecom company’s access to country’s B market (*e.g.*, by not curbing the anti-competitive practices of its domestic incumbent).

C. *The WTO Dispute Settlement System*

The WTO Agreement brought about a considerable improvement in dispute settlement procedures over the former GATT. In sum, the WTO has created a unique system, which has compulsory jurisdiction to resolve disputes between Member countries rather quickly and effectively. Yet despite the innovative nature and wide-ranging scope of the Fourth Protocol, combined with the general obligations of the GATS, there have been relatively few disputes between WTO Members concerning telecommunications. Some of them are discussed below.

The only telecommunications dispute that has led to a WTO panel ruling, in April 2004, is the *Telmex* case, involving a complaint by the United States against Mexico. This case is commented on at some length in this Chapter.

Japan found itself in the crossfire of the United States and the EC, among others as regards persistently high interconnection fees with the incumbent NTT.¹⁸⁴ The case has not progressed to the dispute settlement stage.

A row between the United States and the EU/Germany was avoided in 1999.¹⁸⁵ In the course of setting out the details of the interconnection regime,

¹⁸² For a European Community law perspective, see Pieter Jan Kuijper and Marco Bronckers, *WTO Law in the European Court of Justice*, 42 CMLRev 1313–1355 (2005).

¹⁸³ See *e.g.*, in the EC, Regulation 3286/94 of December 22, 1994 [1994] OJ L 349/71, discussed in Marco Bronckers and Natalie McNelis, *The EU Trade Barriers Regulation Comes of Age*, 35 J. World Trade 427–482 (No. 4, 2001).

¹⁸⁴ See U.S. Trade Representative, “*Annual Review of Telecommunications Trade Agreements Highlights High Interconnection Rates in Japan*”, Press release 00–22 (March 30, 2000), available at <http://www.ustr.gov>.

¹⁸⁵ See David Molony, U.S. *poised to take German Interconnect Row to WTO*, *Communications Week International* (March 15, 1999).

the German regulator tried to find a way to distinguish between “true” telecommunications operators and “mere resellers” (who would get a less favorable interconnection rate to the incumbent). At some point, the envisaged solution would have placed international operators (whose network in Germany is often limited to a point of presence for the delivery of traffic to the incumbent) in the same basket as resellers. However, the solution finally retained was satisfactory to U.S. interests.

Finally, the United States has put in place a special monitoring process for telecommunications, whereby every year a number of countries are reviewed for compliance with their GATS commitments.¹⁸⁶ The review generally notes a number of points for each country, but it appears that most of these points are subsequently settled.

SECTION FOUR: IMPLEMENTATION OF WTO COMMITMENTS

This section deals with how the two major trading blocks—the EU and the United States—implemented their WTO commitments in the telecommunications sector. It would be equally interesting to conduct such a study of the other WTO Members that have entered into commitments in the telecommunications sector,¹⁸⁷ but it would make this contribution much too large. In any event, the extensive experience of the EU and the United States with respect to regulation and competition law should be indicative of the difficulties arising in other WTO Members.

I. *The EU, its Member States and their WTO commitments*

Before looking at how the EU and its Member States implemented their WTO commitments, it should be underlined that developments in the EU had a substantial influence on the content of the Fourth Protocol and indeed on the very fact that it was concluded. First of all, the Protocol was to enter into force on January 1, 1998,¹⁸⁸ which is also the date on which the full liberalization of the EU telecommunications sector was set to take place under EC law.¹⁸⁹

¹⁸⁶ Pursuant to the Omnibus Trade and Competitiveness Act of 1988, section 1377, 19 U.S.C. § 3107. The reports can be found at <http://www.ustr.gov>.

¹⁸⁷ See e.g., Ringrose, *supra*, note 53. The situation in the APEC countries is also surveyed in Shin Cho and Myeongho Lee, *Competition and Deregulation: An APEC Perspective* and Erika Wada and Tomohiko Asano, *Telecommunications Services in the Asia Pacific Countries*, both in *Unfinished Business: Telecommunications after the Uruguay Round* 155 and 181 respectively (Gary C. Hufbauer and Erika Wada, eds. 1997). See also Toshiaki Tarigawa, *The Impact of the WTO Telecommunications Agreement on U.S. and Japanese Telecommunications Regulations* 32 J. World Trade 33 (1998).

¹⁸⁸ It eventually entered into force on February 5, 1998.

¹⁸⁹ See Directive 90/388, *supra* note 39, Art. 2(2), as amended by Directive 96/19 of March 13, 1996 [1996] OJ L 74/13.

This is no coincidence. As mentioned earlier, the United States always insisted on a “critical mass” of offers, and only when the offers coming from the EC and its Member States became satisfactory to the United States did it become possible to attain such a critical mass. Political agreement within the EC on the full liberalization of the telecommunications sector was only finalized at the very end of 1994,¹⁹⁰ when work was being pursued under the NGBT. The EC offers in the NGBT then began to reflect that agreement. Since full liberalization in the EU was one of the most significant commitments made, it made sense to align the date of entry into force of the Fourth Protocol with the internal deadline for liberalization in the EU.¹⁹¹

As for market access and national treatment, the EC schedule contains very few permanent limitations of any significance. Leaving aside limitations scheduled by Portugal and Greece,¹⁹² the most significant limitation on the EC schedule is the twenty percent limit on direct non-EC ownership of public telecommunications providers operating radio-based infrastructure in France.¹⁹³ This limit is widely seen as an answer to a similar limitation found in the U.S. schedule.

It has been said that the Reference Paper was based in large part on the regulatory framework that was being discussed at the EC level in 1996–1997.¹⁹⁴ Accordingly, the substance of the Reference Paper was already present in that regulatory framework, and there was no need to modify or complement it to bring it into line with the Reference Paper.¹⁹⁵

¹⁹⁰ See Larouche, *supra* note 21, at 19–23. The date of January 1, 1998 already appeared much earlier, in a Council Resolution of July 22, 1993 [1993] OJ C213/1, as the date for completing the liberalization of all telecommunications services (with the liberalization of voice telephony). Agreement on the date of January 1, 1998 for the opening up of infrastructure, however, was only reached 18 months later, as evidenced by Council Resolution of December 22, 1994 [1994] OJ C 379/4.

¹⁹¹ Within the EC, the deadline for full liberalization had been extended for some Member States (Spain, Greece, Ireland, Portugal and Luxembourg), pursuant to Directive 96/2 of January 16, 1996 [1996] OJ L 20/59, Art. 4 and Directive 96/19, *supra* note 167, Art. 1(2), replacing Directive 90/388, *supra* note 39, Art. 2. See Decision 97/114 of November 27, 1996 (Ireland) [1997] OJ L 41/8, Decision 97/310 of February 12, 1997 (Portugal) [1997] OJ L 133/19, Decision 97/568 of May 14, 1997 (Luxembourg) [1997] OJ L 234/7, Decision 97/603 of June 10, 1997 (Spain) [1997] OJ L 243/48 and Decision 97/607 of June 18, 1997 (Greece) [1997] OJ L 245/6. To the extent applicable, the extensions granted in those decisions were reflected in the EC schedule to the Fourth Protocol. They now have all lapsed.

¹⁹² Portugal scheduled a requirement that cross-border supply of basic services be limited to companies established in Portugal, and that the direct or indirect participation of non-EC entities in firm supplying basic services be limited to 25 percent. Greece limited market access to corporations engaged exclusively in the provision of telecommunications services.

¹⁹³ As currently found in the French Code des postes et télécommunications, Art. 33–1.III. Art. 33–1.III. sets out the twenty percent limit for both direct and indirect ownership, however it is subject to international agreements, so that the limitation on indirect ownership is rendered inoperative towards firms from WTO Members through the commitments made in the Fourth Protocol.

¹⁹⁴ See Naftel and Spivak, *supra* note 85, who also note, however, that U.S. negotiators thought that the U.S. Telecommunications Act of 1996, *supra* note 10, provided the “gold standard” for the WTO.

¹⁹⁵ For an explanation of how the EC regulatory framework in place for 1998 implements

For the EC and its Member States, the key operation required to implement the specific WTO commitments on telecommunications consisted of extending the benefits of internal measures to providers from non-EC WTO Members. In line with the respective constitutional orders of the EC and its Member States, this was done through various legislative enactments ratifying the Fourth Protocol,¹⁹⁶ so that for all intents and purposes firms from other WTO Members were put on the same footing as EC firms. Accordingly, the implementation of the Fourth Protocol by the EC and its Member States did not give rise to any significant problems.

In this context, mention should be made of the tensions that arose between the EC and its main trading partners, first and foremost the United States, concerning Directive 95/46 of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.¹⁹⁷ This Directive requires the Member States to put in place a regulatory framework to ensure the protection of personal data.¹⁹⁸ In order to avoid circumvention through “data havens” outside the EC, Article 25 of the “Data Protection Directive” obliges Member States to ensure that transfers of personal data to a non-EC country only take place if that country offers an “adequate level of protection” for such data, as found by Commission decision.¹⁹⁹ To assure adequate protection, the situation in the country in question is examined, and if needed negotiations can be held to conclude an agreement with the EC on data protection. Conversely, if the Commission finds that a given non-EC country does not offer an adequate level of protection for personal data, Member States are required to block data transfers to that country. As could be expected, non-EC countries protested at what they saw as an attempt to “export” EC data protection norms. The United States, in particular, disagreed with the EC both on substance—the Data Protection Directive being too protective on a number of points, in their view—and on the regulatory vehicle—the United States preferring to leave data protection to self-regulatory mechanisms instead of legislation. Nevertheless, the United

the commitments made in the WTO, *see* EC, Implementation of Telecommunication Legislation in the European Community, S/C/W/110/Add.5 (June 21, 1999), available at <http://www.wto.org>. *See also* Gonzalez Durantez, *supra* note 85, at 51–70.

¹⁹⁶ *See e.g.*, for the EC itself, Decision 97/838 of November 28, 1997 [1997] OJ L 347/45; for France, Act 97-1098 of November 28, 1997, JO, November 29, 1997, 17284; for Germany, the Act of November 20, 1997, BGBl.II.1990.

¹⁹⁷ Directive 95/46 of October 24, 1995 [1995] OJ L 281/31.

¹⁹⁸ In short, the Data Protection Directive regulates the processing of personal data according to the purpose of such processing (Arts. 7–9). It gives persons the right to be informed of the collection and processing of personal data (Arts. 10–11), the right to access and correct such data (Art. 12) and under certain circumstances the right to object to data collection and processing (Arts. 14–15). Furthermore, Member States must provide for remedies to vindicate those rights, including liability (Arts. 22–24).

¹⁹⁹ In addition to the United States, discussed here, the Commission concluded that there was an adequate level of protection in Switzerland (Decision 2000/518 of July 26, 2000 [2000] OJ L 215/1), Hungary (Decision 2000/519 of July 26, 2000 [2000] OJ L 215/4) and Canada (Decision 2002/2 of December 20, 2001 [2002] OJ L 2/13).

States and the EC entered into discussions on the issue. As the deadline for implementation of the Data Protection Directive (October 24, 1998), loomed without any agreement, the United States indicated that they might take the matter to the WTO as a breach of the EC's commitments regarding market access and national treatment, among others in the telecommunications sector. The EC, on the other hand, thought that the Data Protection Directive fell under the ambit of Article XIV(c)(ii) GATS.²⁰⁰ The matter was ultimately resolved, without prejudice, by the creation of a "safe harbor" system in the United States, which the EC found satisfied its requirements.²⁰¹

More significant difficulties were in store for the EC and its Member States as they renewed their internal telecommunications regulations. Many of the Directives of the 1998 liberalization package²⁰² provided that the Commission had to undertake a review of the EC regulatory framework before the end of 1999.²⁰³ This review led to EC legislation concerning what is now called "electronic communications".²⁰⁴ While the regulatory package adopted in 1996–1998 did not specifically refer to the GATS and the Fourth Protocol, the new regulatory framework contains explicit references to the EC's obligations.²⁰⁵ As discussed below, this does not necessarily mean that the EC's regulatory framework is entirely in line with the requirements set forth in the GATS and the Fourth Protocol. Furthermore, the inclusion of telecommunications, together with a significant part of broadcasting and other activities, under the overall concept of "electronic communications" might create difficulties for the EC in the upcoming rounds of negotiations. This issue is discussed below in relation to convergence.

The new EC regulatory framework rests on a number of assumptions²⁰⁶ that are not necessarily consistent with the thrust of the Reference Paper. The new framework is very much oriented towards competition law in at least two

²⁰⁰ See the First Annual Report of the EC Working Party on the Protection of Individuals with regard to the Processing of Personal Data, available at http://europa.eu.int/comm/internal_market/en/dataprot/index.htm at 17 (covering 1996), and the Second Annual Report (covering 1997), available on the same site, at 30.

²⁰¹ See Decision 2000/520 of July 26, 2000 [2000] OJ L 215/7.

²⁰² Directive 90/387, *supra* note 112, Art. 8; Directive 97/33, *supra* note 67, Art. 22(2); Directive 98/10, *supra* note 101, Art. 31; Directive 97/13 of April 10, 1997 [1997] OJ L 117/15, Art. 23.

²⁰³ *Towards a new framework for electronic communications infrastructure and associated services—The 1999 Communications Review*, COM(1999)539 (November 10, 1999).

²⁰⁴ The main elements are Directive 2002/19, *supra* note 67; Directive 2002/20 of March 7, 2002 (Authorization Directive) [2002] OJ L 108/21; Directive 2002/21, *supra* note 112; Directive 2002/22, *supra* note 101; Directive 2002/77 of September 16, 2002 [2002] OJ L 249/21.

²⁰⁵ See Directive 2002/21, *id.*, Rec. 29, Directive 2002/19, *id.*, Rec. 13 and Art. 8(3) and Directive 2002/22, *id.*, Rec. 3.

²⁰⁶ For more information concerning the new framework, see Pierre Larouche, *A Closer Look at Some Assumptions Underlying EC Regulation of Electronic Communications* 3 *Journal of Network Industries* 129 (2002) and CEPS, *European Communications at the Crossroads*, Report of a CEPS Working Party (Martin Cave and Pierre Larouche, rapporteurs, 2001).

major respects. First, it is widely assumed that in the long-run sector-specific regulation will shrink to leave economic regulation mostly to competition law.²⁰⁷ Second, it is generally agreed that while sector-specific regulation remains in force, its substance should be aligned with that of competition law, by relying on competition law concepts and doctrines in the formulation of regulations.²⁰⁸ Such an approach might prove incompatible with the EC's WTO commitments since the regulatory principles contained in the Reference Paper are not and cannot be aligned with an international competition law framework that presently does not exist.

To take a concrete example, there is no guarantee that the new definition of Significant Market Power ("SMP"), *i.e.*, "a position equivalent to dominance, that is to say a position of economic strength affording [a firm] the power to behave to an appreciable extent independently of competitors",²⁰⁹ will cover the same firms as the definition of "major supplier" in the Reference Paper.²¹⁰ It could be that a firm that would be considered as a "major supplier" within the meaning of the Reference Paper would not be found to have SMP under that new EC definition, thereby escaping obligations (especially as regards interconnection) that the parties to the Fourth Protocol have undertaken to impose on their "major suppliers".²¹¹ In view of that possibility, the Access Directive makes room for SMP-type obligations to be imposed on firms without SMP in order to "comply with international commitments".²¹² Similarly, while the RP prescribes cost-orientation for the interconnection tariffs of major suppliers, the new EC framework leaves more discretion to the national regulatory authorities as to the remedies to be applied.²¹³ Beyond that, it remains to be seen whether the new EC regulatory

²⁰⁷ That proposition has been widely aired in the course of the legislative process: *see* the 1999 Communications Review, *supra* note 203, at 49 and the EP Resolution of June 13, 2000 [2001] OJ C 67/53. It has been taken over in a weakened form in the final texts: *see e.g.*, the *Framework Directive*, *supra* note 204, Rec. 27 or the *Access Directive*, *supra* note 204, Rec. 12. For a similar argument at the international level, *see* Petros C. Mavroidis and Damien Neven, *The WTO Agreement on Telecommunications: It's Never Too Late*, in *The Liberalization of State Monopolies in the European Union and Beyond* 307 (Damien Geradin, ed. 2000), with a reply by Pierre Larouche at 319.

²⁰⁸ *See e.g.*, the *Framework Directive*, *supra* note 204, Rec. 25 and the *Access Directive*, *supra* note 204, Rec. 12.

²⁰⁹ *Framework Directive*, Art. 13(2).

²¹⁰ As discussed *supra* notes 54–61 and accompanying text. *See contra* Ibbetson, *supra* note 89, at 46.

²¹¹ That risk may be limited, however, given that the degree of market power which appears to be envisioned under the definition of "major supplier" in the Reference Paper is at least as strong as dominance as it is understood under EC law. Then again, given that the policy direction underlying the RP (market access or market foreclosure?) has not been articulated by the RP's negotiators, this remains a point of speculation.

²¹² *Access Directive*, *supra* note 204, Art. 8(3).

²¹³ *See* Art. 2.2(b) RP. Firstly, Directive 2002/19, *supra* note 67, does not provide for the automatic imposition of pricing obligations on SMP operators as regards interconnection. Secondly, even if the national authority would impose a pricing obligation in such a case, it does not need to be cost-orientation: Directive 2002/19, Art. 13.

framework will remain as easily “exportable” on the international scene as the previous framework, in the absence of a consensus on the development of an international competition law instrument.

II. *The United States and its WTO Commitments*

Much like the EC and its Member States, the United States went through a major internal telecommunications law reform in parallel with the negotiations of the Fourth Protocol.²¹⁴ Nevertheless, the U.S. telecommunications sector was by and large already liberalized, as reflected in the U.S. schedule of specific commitments, which contains no significant limitations other than a twenty percent limit on direct foreign ownership of telecommunications carriers.

The implementation of WTO commitments in telecommunications has proved far more eventful in the United States than in the EC, for a number of reasons.²¹⁵ First of all, it was difficult for U.S. authorities to abandon the wide-ranging reciprocity principle that governed U.S. telecommunications policy before the Fourth Protocol. Second, U.S. policy on accounting rates provoked considerable friction with other WTO Members.

A. *Abandoning reciprocity*

Of all the parties in the NGBT and the GBT, the United States probably had the most developed international telecommunications policy. It had liberalized its domestic market for long-distance and international telecommunications early on, with the breakup of AT&T in 1984. The United States was ostensibly worried that, in an environment where international communications were still essentially conducted on a bilateral, correspondent basis, U.S. operators competing to handle the origination or termination of international calls in the United States would be vulnerable to foreign operators—generally monopolists—handling the other end of those calls.

The main problems relate to (i) *cross-subsidization*, whereby a foreign operator would use supra-competitive profits in its home market to undercut the prices of U.S. carriers in the United States or in other markets, and (ii) *bypass*, whereby a U.S. subsidiary or affiliate of a foreign monopoly or dominant operator would carry international traffic from that foreign country to the United States outside of the correspondent regime and thereby further distort the imbalance in settlement payments. In addition, the discrimination problem, discussed below in the context of accounting rates also arose from asymmetric liberalization.

²¹⁴ It resulted in the enactment of the Telecommunications Act of 1996, *supra* note 10.

²¹⁵ On the U.S. implementation of its WTO telecommunications commitments, *see also* Kelly Cameron, *The WTO Basic Telecommunications Agreement—Effect on the U.S. Market*, in *Trade & Telecoms 77* (Mark Clough ed. 2001).

As concerns *bypass* and *cross-subsidization*, the FCC introduced a new policy at the end of 1995.²¹⁶ Pursuant to the U.S. Communications Act, FCC approval must in practice be obtained for foreign operators to enter the U.S. market.²¹⁷ According to the relevant provisions of the Act, when examining requests the FCC is to have regard to “public convenience and necessity” or the “public interest”. The FCC interpreted its legislative mandate so as to make its approval subject to the so-called “Equivalent Competitive Opportunities” (“ECO”) test, whereby it must be shown that the country of origin of the foreign operator offers to U.S.-based operators equivalent competitive opportunities. Based on this provision, the FCC assessed whether the foreign market has been sufficiently liberalized, although it was willing to discount a perceived lack of liberalization in foreign markets against the pro-competitive effects on the U.S. market from allowing the entry of the foreign supplier.²¹⁸

The U.S. policy was heavily discussed within the NGBT and GBT. It was argued by participants that it could not be maintained within the framework of GATS, since it breached the MFN obligation by differentiating between countries based on their perceived level of liberalization. Indeed the whole thrust of the Fourth Protocol, especially the additional commitments to the principles contained in the RP, was to address U.S. concerns by ensuring that all signatories create “effective competitive opportunities” and take it upon themselves to prevent anti-competitive behavior by their own operators, so that all markets could be opened at once without reservation, in conformity with the MFN principle. Accordingly, it was argued that the prior approval requirements of the Communications Act (and certainly the ECO test) should be abandoned as concerns WTO Members.

Although the U.S. Administration appeared to agree with the above reasoning, it indicated that it would not introduce legislation to implement the Fourth Protocol, but instead leave it to the FCC to amend its rules. That put the FCC between a rock and a hard place: on the one hand, it has a statutory mandate to look after the public interest, which it cannot readily abdicate; on the other hand, it was being asked to implement an international agreement pursuant to which the MFN principle must be respected, and barriers to market access and national treatment must be removed.

²¹⁶ *Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket 95–22, Report and Order, FCC 95–475 (November 28, 1995). The U.S. policy prior to the Fourth Protocol is discussed critically in Naftel and Spivak, *supra* note 85, at 123–46.

²¹⁷ This is the combined effect of 47 U.S.C. §§ 214 (authorization required for any carrier to operate infrastructure) and 310(b)(4) (authorization required for a foreign entity to own more than 25 percent of a U.S. carrier holding a radio license). In addition, under the Submarine Cable Landing License Act, 47 U.S.C §§ 34–39, a license must also be obtained to land and operate a submarine cable in the United States.

²¹⁸ See *Sprint Corporation*, ISP 95–002, Declaratory Ruling and Order, FCC 95–498 (December 15, 1995).

The FCC sought to live up to the U.S. commitments with its 1997 Foreign Participation Order.²¹⁹ In short, the FCC abandoned the ECO test for firms coming from other WTO Members, and replaced it with the following framework:

- Firms from other WTO Members may openly enter the U.S. market (*i.e.*, the FCC will presume that entry is in the public interest).²²⁰ However, the FCC reserved the right to “attach additional conditions” to authorizations if it finds that existing safeguards might not be sufficient to prevent “anti-competitive harm” and even, “in the exceptional case in which an application poses a very high risk to competition, [the right] to deny an application.”²²¹ Furthermore, national security, law enforcement, foreign policy and trade policy concerns will continue to be considered by the FCC in its decisions, although it is expected that they will rarely be brought to bear.²²²
- At the same time, the FCC revised but ultimately kept in place a number of “competitive safeguards” designed to prevent the exercise of “foreign market power” on U.S. markets.²²³ For instance, U.S. carriers are prevented from accepting any “special concessions”²²⁴ from foreign carriers who have been found to be dominant on their end of the market with respect to international telecommunications services with the United States.²²⁵ Furthermore, U.S. carriers that are “affiliated” with (*i.e.*, more than 25 percent owned by) dominant foreign carriers are to be treated as dominant on the route to the country of that foreign carrier.²²⁶ They are thus subject to specific prior disclosure, structural separation and reporting obligations.²²⁷

A similar approach has been put forward by the FCC for satellite communications.²²⁸

These new rules were criticized by many trading partners, including the EU.²²⁹ In short, they are considered to violate the MFN principle, which is

²¹⁹ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Report and Order, FCC 97-398 (November 26, 1997). See for a critical appraisal Naftel and Spiwak, *supra* note 85, at 156-64.

²²⁰ *Id.* at ¶ 50.

²²¹ *Id.* at ¶ 51-4.

²²² *Id.* at ¶ 61-6.

²²³ *Id.* at ¶¶ 144-6.

²²⁴ Defined as special terms concerning operating agreements for basic services, interconnection agreements, disclosure of information or the joint handling of traffic. *Id.* at ¶ 164.

²²⁵ Dominance being presumptively defined as a share of more than fifty percent of the relevant market. *Id.* at ¶¶ 157-161.

²²⁶ *Id.* at ¶¶ 221-3, 225.

²²⁷ *Id.* at ¶¶ 240 ff.

²²⁸ See *Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States (DISCO II)*, IB Docket 96-111, Report and Order, FCC 97-399 (November 26, 1997). See also Cameron, *supra* note 191 at 94-8.

²²⁹ See Stefan M. Meisner, *Global Telecommunications Competition a Reality: United States Complies with WTO Pact* 13 Am. U. Int'l L. Rev. 1345 (1998).

central to the GATS. As far as market access is concerned, the treatment of foreign firms may differ depending on the perceived level of competition in their respective home countries. It could even be said that the “competitive safeguards”, which do not restrict entry as such, are difficult to reconcile with the MFN principle. Even though the “competitive safeguards” apply to firms operating in the United States, they indirectly affect foreign carriers (which see their freedom to deal with U.S.-based carriers impinged) in a manner that varies depending on their respective home countries. Furthermore, despite FCC statements to the contrary,²³⁰ the thrust of the Reference Paper—in line with the MFN principle—is that each Member is meant to police its domestic market, so that the other Members can open their own markets “safely”.

The relative fragility of the U.S. implementation of its WTO telecommunications commitments was made plain when Deutsche Telekom (“DT”), the German incumbent, sought FCC approval for its purchase of U.S. mobile operators VoiceStream and Powertel.²³¹ Before the FCC, a number of parties intervened to ask the FCC to deny DT the necessary authorizations to carry out the transaction, on the ground that (i) state ownership of DT and/or (ii) DT’s dominant position on many German markets created a risk of harm to competition in the United States, within the meaning set out in the *Foreign Participation Order* outlined above. The FCC firmly rejected these claims, finding among other points that state ownership of DT might put it at a competitive disadvantage,²³² and that DT could not rely on its dominant position in Germany to engage in predatory pricing in the U.S., given the competitiveness of U.S. markets.²³³ Despite this encouraging result from the WTO perspective, the procedure was lengthy (seven months), costly (given the number of interested parties), and overlapped in part with the merger control activities of the Department of Justice.

In parallel with the FCC examination, some U.S. lawmakers (led by Senator Hollings), tried to place a bill on the agenda of Congress that would have prevented the FCC from granting the authorizations requested by DT. This was motivated by a concern that competition in the United States would be distorted by the entry of firms in which a foreign government has a significant stake.²³⁴ This bill provoked a fierce reaction from within the U.S. administration

²³⁰ *Foreign Participation Order*, *supra* note 195, at ¶ 237.

²³¹ See FCC, *VoiceStream/Powertel/DT*, IB Docket 00–187, Memorandum Opinion and Order, FCC 01–142 (April 27, 2001).

²³² *Id.* at ¶¶ 62–5.

²³³ *Id.* at ¶¶ 89–92. The opposing parties even went as far as to suggest that the fact that both DT and VoiceStream used the GSM standard (and planned to use the same 3G standard, namely WCDMA) would give them an unfair competitive advantage.

²³⁴ In the words of Senator Hollings, “you cannot compete with government”: See T. Foley, *Congress Accused of Telecoms Protectionism* Communications Week International (August 14, 2000).

and also from the EU, which threatened to bring the matter before the WTO if the bill in question was passed.²³⁵ Ultimately, the bill was abandoned.

B. *Accounting Rates*

There is a long-standing U.S. complaint about the functioning of international communications accounting rates. For a better understanding of the problem, it is necessary to explain briefly the traditional way in which international communications were operated, namely the “correspondent system” set out in ITU Regulations. Under that system, the TO of the originating country cooperates with the TO of the terminating country to complete telephone calls or other services. The TO of the originating country alone collects a fee from the caller (“collection rate”). As between the two TOs, an “accounting rate” is agreed. For each minute of international traffic, the TO of the originating country owes a fraction of the accounting rate (usually half, called the “settlement rate”) to the TO of the terminating country, in order to compensate the latter for the completion of the international call. The correspondent system works in both directions, so that a given pair of TOs will periodically offset the amounts due to one another. As a consequence, the TO from the country that originated the most traffic will make a payment to the TO of the other country. The correspondent system was developed earlier in the 20th century, at a time when almost all countries were served by monopoly TOs, often State-owned.

On its face, the correspondent system could work effectively when some or all countries have liberalized telecommunications services.²³⁶ However, a central weakness of the traditional system is that accounting rates are not required to, and in practice do not bear any relationship to either customer prices (collection rate) or underlying costs. As technological evolution reduced operating costs, the gap increased. This resulted in two undesirable consequences for traffic between countries that have liberalized the provision of international services and countries that have not done so. First, in a liberalized country, competition among local service providers often brings down prices for international telecommunications, usually markedly below the prices in a non-liberalized country for the same call in the other direction. As a consequence, callers from a non-liberalized country will often try to originate their calls in the liberalized country to benefit from the lower collection rate.²³⁷ The balance of traffic between the liberalized and the non-liberalized country is then upset—more traffic originates in the liberalized country, and

²³⁵ See the European Commission’s yearly Report on U.S. barriers to trade and investment, available at <http://europa.eu.int/comm/trade/bilateral/usa/usa.htm> at 60 (2000) and at 50 (2001).

²³⁶ See *I Want My Pound of Flesh...*, Public Network Europe 33 (September 1996) and *At this Rate, You’re Going Nowhere...* Public Network Europe 31 (October 1996).

²³⁷ Services such as call-back or country direct help callers to “reverse” the direction of their calls.

as a consequence the operators in the liberalized country must make large settlement payments to the TO of the non-liberalized country.²³⁸ Second, operators from the liberalized country are prevented from reducing prices as much as they could because settlement rates are above costs. A large part of the settlement payments made to a TO from a non-liberalized country can arguably be viewed as a subsidy.

The United States was dissatisfied with the artificially high level of accounting rates in comparison to underlying costs, which they claimed led to payment outflows of up to five billion U.S. dollars, three-quarters of which were allegedly a subsidy to foreign TOs. The FCC, in particular, has led a campaign against the correspondent system as a whole (including above-cost accounting rates), which it perceives as a barrier to competition. More specifically, the FCC fears discrimination by the foreign operators towards the competing U.S. carriers, be it through preferential treatment of one carrier in the allocation of return traffic from the foreign operator to the United States, or through whipsawing (pitting competing U.S. carriers against one another in order to obtain discriminatory accounting rate concessions).

In order to alleviate those concerns, the FCC introduced an International Settlements Policy (“ISP”) whereby competing U.S. carriers must be treated without discrimination and must receive a proportion of return traffic to the United States equal to their proportion of outgoing traffic (so-called “proportionate return”).²³⁹ The ISP can be counter-productive when applied to traffic between the United States and another liberalized country, since competition in both countries provides a safeguard against discrimination and the ISP prevents the emergence of innovative alternative arrangements for international traffic between the two countries.²⁴⁰ The FCC has accordingly decided to relax the application of the ISP in appropriate cases for traffic to and from countries that satisfy the ECO test.²⁴¹

Developing countries challenged the ISP, arguing that the high accounting rates, and the ensuing capital flows from developed to developing countries, are

²³⁸ In *International Settlement Rates*, IB Docket 96–261, NPRM, FCC 96–484 (December 19, 1996), the FCC mentions as an example the balance of traffic between the United States and Hong Kong, which in the 18 months to October 1996 went from 1:1 to 7:1 in favor of traffic originating from the United States, as the use of call-back services became more widespread.

²³⁹ *Policy Statement on International Accounting Rate Reform*, FCC 96–37 (January 31, 1996), at ¶ 8. See also the long-standing FCC proceeding on the *Regulation of International Accounting Rates*, CC Docket 90–337: *Phase I Report and Order*, FCC 91–157, 6 FCCR 3552 (May 9, 1991), *Phase II First Report and Order*, FCC 91–401, 7 FCCR 559 (December 12, 1991), *Phase II Second Report and Order*, FCC 92–496, 7 FCCR 8040 (November 5, 1992), *Phase II Third Report and Order*, FCC 96–160 (April 9, 1996), *Phase II Fourth Report and Order*, FCC 96–459 (November 26, 1996).

²⁴⁰ While it may have appeared ironic to see the United States in *Telmex* attack the very type of “proportionate return” policy which it earlier pioneered, there was indeed no obvious purpose to be served by Mexico maintaining such a policy, given that both the United States and Mexico had liberalized the international telecommunications traffic between them.

²⁴¹ *Regulation of International Accounting Rates*, Phase II Fourth Report and Order, *id.*

necessary to foster the development of the telecommunications infrastructure in developing countries. Furthermore, in a context where telecommunications are increasingly used for much more than simple voice telephony, an argument can be made that the accounting rate system amounts to a form of universal service financing mechanism at the international level, given that connecting developing countries also create value and benefits in developed countries (through network effects). From this perspective, it would make sense not to require developing countries alone to bear the cost of improving their telecommunications infrastructure and to transfer funds to them for that purpose. Yet the accounting rate system lacks a number of safeguards that are essential for a good universal service financing system, especially as regards reporting.

The United States tried to place the issue of accounting rates on the table of both the NGBT and GBT, without much success.²⁴² It appears that the United States already envisaged tying the award of licenses to foreign providers to the level of accounting rates between the United States and the foreign country in question. This would not have been compatible with the principle of MFN treatment, and it seems that other participants in the NGBT and GBT were uneasy with this U.S. approach. Ultimately, it was agreed in the Fourth Protocol that the issue of accounting rates would not be raised in WTO disputes until the beginning of the new round of services negotiations in 2000.²⁴³ That understanding was interpreted narrowly in *Telmex*.²⁴⁴

The United States had already changed its course by December 1996. In connection with a downward revision of its benchmarks for accounting rates, the FCC proposed in its *International Settlement Rates* proceedings to impose, as a licensing condition on foreign carriers seeking to enter the U.S. market, a requirement that accounting rates move towards the benchmark rate. If this does not occur, the FCC envisaged various enforcement measures, including ordering U.S. carriers to settle at the benchmark rate with the foreign carrier in question.²⁴⁵

That decision was challenged before U.S. courts by around one hundred governments, regulators and telecommunications firms, principally on the ground that the FCC had exceeded its jurisdiction by seeking to regulate the activities of foreign firms indirectly by pressuring U.S. firms to disregard agreed accounting rates. The U.S. Court of Appeals for the D.C. Circuit dismissed the suit.²⁴⁶

²⁴² See Frid, *supra* note 47, at 87–83.

²⁴³ *Report of the Group on Basic Telecommunications*, S/GBT/4 (February 15, 1997) at para. 7.

²⁴⁴ *Telmex* Report, ¶ 7.124–7.138.

²⁴⁵ See *International Settlement Rates*, *supra* note 213, at ¶¶76, 82, 88–89. For a critical appraisal, see Naftel and Spiwak, *supra* note 66, at 147–56.

²⁴⁶ *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). That decision is reviewed and strongly criticized by Naftel and Spivak, *supra* note 85, at 173–96.

Since then, the ITU has undertaken to reform the accounting rate system, and has come up with innovative proposals, including recognition that accounting rates should be cost-oriented, the creation of its own benchmarks (somewhat higher than the FCC's) and an acknowledgement that international telecommunications can be handled through means other than the traditional correspondent system.²⁴⁷ The status of the accounting rate system under the WTO remains uncertain, since on the one hand, the system itself—to the extent it can be presented as a State measure—would seem to be at odds with the MFN principle,²⁴⁸ and on the other hand, the FCC settlement rate policy is also questionable, if not on WTO grounds (MFN principle), then on other grounds related to international law (comity and jurisdiction). In any event, as between developed countries at least, the accounting rate system is being replaced by other arrangements more suitable to a competitive environment, such as self-correspondence (when a firm is present at both ends of the international communication), interconnection (with termination and origination charges) or peering/routing arrangements (with the transfer of traffic over to IP platforms).²⁴⁹ Indeed the *Telmex* Report deals with the international traffic between Mexico and the United States first and foremost as an interconnection issue, not much different from domestic interconnection. The accounting rate system is seen as but one method to arrange international traffic.²⁵⁰ The difficulties caused by the accounting rate system are now likely to take much more of a North-South dimension.

SECTION FIVE: THE WTO TELECOMMUNICATIONS COMMITMENTS IN A BROADER CONTEXT

The WTO commitments on telecommunications, culminating with the Fourth Protocol, are in many ways groundbreaking. So far, this contribution has examined the specific provisions of the Fourth Protocol, and looked at

²⁴⁷ See the latest version of ITU-T Recommendation D.140 on accounting rate principles for the international telephone service (October 2000) and Accounting Rate Reform undertaken by ITU-T Study Group 3 (2000), available at <http://www.itu.int>. The FCC and ITU approaches are compared by Kenneth B. Stanley, *Toward International Settlement Rate Reform: FCC Benchmarks Versus ITU Rates* 24 *Telecommunications Policy* 843 (2000). In the *Telmex* Report, these reforms were acknowledged and used as evidence by the panel: ¶ 7.170–7.175.

²⁴⁸ Within the realm of State measures (leaving aside purely private arrangements), a uniform termination charge applicable to all foreign carriers that deliver traffic for termination in a given country would be optimal as regards MFN.

²⁴⁹ See Pekka Tarjanne (former ITU Secretary-General), *Preparing for the Next Revolution in Telecommunications: Implementing the WTO Agreement* 23 *Telecommunications Policy* 51 at 54–5, 58–60 (1999) and Peter A. Stern and Tim Kelly, *Liberalization and Reform of International Telecommunication Settlement Arrangements*, available at <http://www.itu.int> for a thorough review of reform options for, as well as alternatives to, the accounting rate system.

²⁵⁰ *Telmex* Report, ¶ 7.96–7.117.

them in the light of domestic telecommunications regulation. The following paragraphs look at broader issues.

I. *Institutional setting: The WTO and the ITU*

The launch of telecommunications negotiations in the course of the Uruguay Round amounted to a rebuke of the ITU by developed countries. The question was whether the WTO would take over the leading role in international telecommunications policy from the ITU,²⁵¹ since the WTO's structure and operation appeared inherently better suited to a liberalized, competitive and global telecommunications environment. Indeed, the ITU reflected the old world order of telecommunications, with government representatives speaking for each Member's telecommunications sector, on all issues ranging from operations to regulation. Like the "correspondent system" (with accounting rates), that grew out of its discussions, the ITU seemed somewhat outdated and was rapidly losing significance.

To its credit, the ITU has sought to respond to the challenge by adapting to the new environment.²⁵² For instance, it recognized that private actors (who can become industry Members of the ITU and participate in its activities) played the leading role in operations and that governments should concentrate more on regulatory issues.²⁵³ It tried to produce meaningful reform of the accounting rate system, but the pace of reform may not be quick enough and the whole system might disappear, at least for communications between developed countries. The ITU took measures to speed up its standardization process to respond to market realities,²⁵⁴ and it has become a credible actor for standardization in areas such as ASDL, Voice over IP and 3G. It has also taken up the task of helping to set up and train regulators in developing countries, and to transfer regulatory expertise from developed countries to developing countries.²⁵⁵

At the same time, the above analysis of the Fourth Protocol should make it clear that if the WTO wants to pursue its work in the telecommunications area, it must go deeper into regulatory issues. In particular, as markets become more competitive, with a greater number of actors, matters such as frequency allocation, interoperability, compatibility and standardization will become

²⁵¹ See Drake and Noam, *supra* note 42, at 50–1.

²⁵² See Pekka Tarjanne (at the time ITU Secretary-General), *Trade in Telecommunications Services: The WTO Agreement and the Role of the ITU*, available at <http://www.itu.int> and Tarjanne, *supra* note 50, at 60–2.

²⁵³ See the Final Acts of the ITU Plenipotentiary Conference (Minneapolis, 1998), available at <http://www.itu.int>, especially Resolutions 71 and 79.

²⁵⁴ See e.g., the new Alternative Approval Process (ITU-T Recommendation A.8), approved in Resolution 37 of the World Telecommunications Standards Assembly (Montreal, 2000), available at <http://www.itu.int>.

²⁵⁵ See "Global Symposium for Regulators an Unqualified Success: ITU to Develop Guidelines and Benchmarks for Effective Regulation", ITU Press Release 2001–30 (December 7, 2001).

increasingly significant.²⁵⁶ On these matters, the WTO has little experience, while the ITU has expertise and is keen to maintain its pre-eminent role.

Accordingly, the WTO and the ITU have concluded a co-operation agreement to formalize their relationship and ensure the co-ordination of their respective activities.²⁵⁷ It is likely that the two organizations will become partners in the management of international telecommunications regulation, with the WTO perhaps focusing on general issues of economic regulation, as well as enforcement, and the ITU taking care of more technical issues, including frequency allocation and standardization.

II. *Beyond telecommunications: convergence with media, electronic commerce*

Given the convergence with neighboring sectors and the rise of electronic commerce, the telecommunications sector is becoming a part of a broader whole. This will affect the negotiations of future WTO commitments.

The first contributions from the EC and the United States to the services negotiations that commenced in the year 2000 already showed some differences in approach. The EC would essentially like to improve the commitments made so far by ensuring that every Member removes scheduled restrictions, commits to the entire Reference Paper and eliminates MFN exemptions.²⁵⁸ The United States would like to go further and, beyond the improvement of commitments, would promote privatization and enhance telecommunications commitments by opening up (or opening further) a number of related areas.²⁵⁹

Significant debate is also likely to arise in the WTO framework concerning convergence, *i.e.*, acknowledging that telecommunications are now becoming part of a larger sector together with media and information technology.²⁶⁰ In the Uruguay Round, the EC was very reluctant to enter into any commitment concerning the audiovisual sector. The EC was concerned that liberalizing the telecommunications sector might undermine its cultural reservations in the audiovisual sector. That issue was solved by the EC making an explicit reservation in its schedule of commitments that telecommunications does not extend to broadcasting, namely “the uninterrupted chain of transmission required for the distribution of TV and radio program signals to the general

²⁵⁶ Witness the debates surrounding the choice of standards for third-generation mobile networks (3G): see Larouche, *supra* note 21, at 388–93. See also Paul A. David and W. Edward Steinmueller, *Standards, Trade and Competition in the Emerging Global Information Infrastructure Environment* 20 Telecommunications Policy 817 (1996) and Tuthill, *supra* note 52, at 784.

²⁵⁷ S/C/9/Rev.1 (June 15, 2000) at <http://www.wto.org>.

²⁵⁸ See Communication from the EC and their Member States—GATS 2000: Telecommunications, S/CSS/W/35 (December 22, 2000).

²⁵⁹ See Communication from the United States—Market Access in Telecommunications and Complementary Services, S/CSS/W/30 (December 18, 2000).

²⁶⁰ See D. Geradin and D. Luff, ed., *The WTO and Global Convergence in Telecommunications and Audio-Visual Services* (2004), in particular P. Larouche, *Dealing with convergence at the international level* at 390.

public”.²⁶¹ Furthermore, the EC expressly noted in its schedule that its commitments do not cover “content provision which require[s] telecommunications services for its transport”.²⁶² This reservation was apparently accepted by other signatories to the Fourth Protocol, although it leaves certain services, for instance, the distribution of audio or video files via the Internet, in a grey zone. Now that the EC has decided to introduce a single internal regulatory framework for telecommunications and broadcasting networks and services, it will be increasingly difficult to defend treating telecommunications and broadcasting separately at the international level.

Against that background, the United States has already indicated that it would like to include the audiovisual sector in the current round of negotiations.²⁶³ The controversy over content regulation in the audiovisual sector is therefore likely to flare up again. This time around, it seems difficult to envisage an agreement to disagree. Convergence will force a re-thinking of the rationale underpinning content regulation (is it the content itself or rather its means of distribution?), with the answer likely to depend on the aim of content regulation (*e.g.*, diversity, protection of minors or consumer protection).

In addition to a repeat of the “audiovisual” controversy, foreseeable difficulties in dealing with convergence at the WTO level include:

- *Scheduling*: The current structure of GATS schedules embodies pre-convergence thinking. Already, there is no consensus on the definition of telecommunications services. In addition, telecommunications services are listed separately from audiovisual services, and no room is made for hybrid services that might fall between these two categories (for instance, video-on-demand or music download services). Even if modifications to the structure of the schedules represent major negotiating processes, they might be necessary in order to take convergence fully into account. The offers made by the US and the EC in 2004 go once more in different directions. In their offer, the United States appear not to move away from the distinction between basic and value-added/enhanced services. However, in line with recent developments in US telecommunications regulation, they are replacing the latter category with “information services”.²⁶⁴ Note that as a result of recent FCC decisions, all broadband services have been classified as “information services” and in fact deregulated.²⁶⁵ The end-result of the

²⁶¹ See the third supplement to the EC Schedule of Specific Commitments, GATS/SC/31/Suppl.3 (14 April 1997).

²⁶² *Id.*

²⁶³ See Communication from the United States—*Audiovisual and Related Services*, S/CSS/W/21 (December 18, 2000).

²⁶⁴ As they are defined in the US Telecommunications Act 1996, *supra*, note {..}: see *United States—Initial Offer*, TN/S/O/USA (April 9, 2003).

²⁶⁵ See FCC, *Cable Modems*, GN Docket 00–185, Declaratory Ruling and NPRM, FCC 02–77 (14 March 2002), FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline*

US proposal is broadly to open the “converged” sector, but also to leave it outside of regulatory schemes, effectively reducing the ambit of the RP to “legacy” services already offered before liberalization. In contrast, the EC removes the distinction between basic and value-added services, and proposes commitments on telecommunications services in general (note that the RP commitments are limited to basic services, however). Yet the EC holds on to the telecommunications/broadcasting distinction, offering no commitment on the latter, and seeks to maintain most of its Article 2 Exemptions relating to audiovisual services.²⁶⁶

- *Treatment of regulatory constraints*: The same scheduling difficulties that beset the NBGT and GBT will surface once more. For instance, how is a must-carry rule—whereby network operators are bound to transmit certain content, *e.g.*, a public broadcasting channel—to be considered? Is it a restriction on market access or national treatment that must be listed in a schedule, is it part of a regulatory framework conducive to entry (like the Reference Paper), or is it none of these, and thus left to be dealt with under the rules concerning domestic regulation?²⁶⁷
- *Technological neutrality*: The mantra of “good regulation” in the convergence era can mean many things. It could imply a preference for competition law over sector-specific regulation, because competition law would be framed in technologically neutral terms.²⁶⁸ It could also mean that decisions on standardization or frequency allocation would become relevant from the point of view of trade law, should they imply a preference for one technology over others.

Finally, the WTO has also taken up discussions on electronic commerce.²⁶⁹ So far, there has been a lot of soul-searching over whether electronic commerce should be considered under the GATT or the GATS framework. So far, that issue has not been settled. Discussions are continuing under the direct supervision of the General Council. In the meantime, WTO members are maintaining a moratorium on imposing customs duties on electronic transmissions.²⁷⁰

Facilities, CC Docket 02–33, Order, FCC 05–150 (23 September 2005) and FCC, *Broadband 271 Forbearance Order*, CC Docket Nos. 01–338, 19 FCC Rcd 21496 (27 October 2004).

²⁶⁶ See *EC and its Member States—Conditional Revised Offer*, TN/S/O/EEC/Rev. 1 (June 29, 2005).

²⁶⁷ GATS, Art. VI.

²⁶⁸ However, it must be possible to formulate sector-specific regulation in functional/economic terms without reference to a particular technology.

²⁶⁹ See the *Work Program on Electronic Commerce adopted by the General Council*, WT/L/274 (September 30, 1998).

²⁷⁰ See the Hong Kong Ministerial Declaration, WT/.MIN(05)/DEC (December 22, 2005), para. 16.

SECTION SIX: MILESTONE OR STEPPING STONE? A CONCLUDING ASSESSMENT

From a telecommunications perspective, the Fourth Protocol marked the beginning of a new era, though its immediate impact should not be overestimated. For a number of significant players, like the EU and the United States, the Protocol essentially consolidated at the international level the liberalization movement to which they were already committed nationally. Other, notably developing, countries claimed long transitional periods or significant exceptions for their liberalization commitments. Furthermore, while the RP represents a useful recognition that the liberalization of monopoly sectors has to be accompanied by additional regulatory and competition law commitments, much unfinished business remains.

In sum, the agreement reached in 1997 can be said to constitute a beginning, and a useful one at that. It will nevertheless take a sustained effort to further develop a suitable legal framework that will deliver the full benefits of the ongoing telecommunications revolution. Furthermore, new issues like convergence and electronic commerce will also force the current arrangements to be reconsidered and improved.

The obligations outlined in the Reference Paper will have to be strengthened as well, although the *Telmex* Report of April 2004 demonstrates that these obligations can already bite. Preferably, the RP obligations should also become part of a WTO agreement, rather than remain a patchwork of individual commitments, so as to ensure a modicum of uniformity, and predictability in their interpretation and enforcement. Yet even if the WTO membership were to negotiate a comprehensive competition law agreement, this would not eliminate the need for an agreed Reference Paper. In part this is because general competition law is unlikely any time soon to replace the regulatory principles necessary to open up and further ensure effective competition in heretofore heavily regulated industries like telecommunications.²⁷¹

Accordingly, while a WTO competition law agreement might adopt and reinforce parts of the Reference Paper, a need for sector-specific regulation in the telecommunications industry is likely to remain. In this respect the Reference Paper can serve as a checklist. It demonstrates to the WTO membership the additional commitments that are necessary to effectively liberalize other regulated service industries such as the post, energy and air transport.

²⁷¹ See Larouche, *supra* note 21, at 322–403. For a different perspective see Mavroidis and Neven, *supra* note 207.

ANNEX—EXAMPLE OF A SCHEDULE OF SPECIFIC COMMITMENTS ON TELECOMMUNICATIONS SERVICES (COUNTRY X)

In the original schedule to the GATS

Modes of Supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

| Sector or sub-sector | Limitations on market access | Limitations on national treatment | Additional commitments |
|---|---|--|------------------------|
| Horizontal commitments (<i>i.e.</i> , across all sectors) | (4) Unbound except for intra-corporate transferees of senior managers | (3) Unbound for subsidies. (4) Unbound except for categories listed in the market access column | |
| Sectoral commitments: | | | |
| 2. COMMUNICATIONS SERVICES | | | |
| C. <u>Telecommunications Services</u> | 1) None | 1) None | |
| h) Electronic mail | 2) None | 2) None | |
| i) Voice mail | 3) None | 3) None | |
| j) On-line information and database retrieval | 4) Unbound, except as indicated in the horizontal section | 4) Unbound, except as indicated in the horizontal section | |
| k) Electronic Data Interchange (“EDI”) | | | |
| l) Enhanced/Value-added facsimile services | | | |
| m) Code and protocol conversion | | | |
| n) On-line information and/or data processing | | | |

In the schedule to the Fourth Protocol to the GATS
 Modes of Supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

| Sector or sub-sector | Limitations on market access | Limitations on national treatment | Additional commitments |
|--|--|---|--|
| 2. COMMUNICATIONS SERVICES | 1) None, except for voice telephony services, to be liberalized as of 1.1.2000. | 1) None. | Country X undertakes the obligations contained in the reference paper attached hereto. |
| C. <u>Telecommunications services</u> | 2) None. | 2) None. | |
| a) Voice telephony | 3) None, except for: Voice telephony services, to be liberalized as of 1.1.2000; Foreign direct or indirect investment in facilities-based telecommunications service suppliers is permitted up to 33 percent of voting shares only. | 3) None. | |
| b) Packet-switched data transmission services | | | |
| c) Circuit-switched data transmission services | | | |
| d) Telex services | | | |
| e) Telegraph services | | | |
| f) Facsimile services | | | |
| g) Private leased circuit services | 4) Unbound except as indicated in the horizontal section. | 4) Unbound except as indicated in the horizontal section. | |
| o) Other | | | |

REFERENCE PAPER

Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

Definitions

Users mean service consumers and service suppliers.

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

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

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

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

*1. Competitive safeguards**1.1 Prevention of anti-competitive practices in telecommunications*

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

1.2 Safeguards

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

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

2. *Interconnection*

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

2.2 *Interconnection to be ensured*

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

- (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favorable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
- (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and
- (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

2.3 *Public availability of the procedures for interconnection negotiations*

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

2.4 *Transparency of interconnection arrangements*

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

2.5 *Interconnection: dispute settlement*

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

- (a) at any time or
- (b) after a reasonable period of time which has been made publicly known to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

3. *Universal service*

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

4. *Public availability of licensing criteria*

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

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

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

5. *Independent regulators*

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

6. *Allocation and use of scarce resources*

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

