



The GATS and new rules for regulators

Lee Tuthill

The liberalization committed in February by 69 governments in the World Trade Organization (WTO) negotiations on basic telecommunications offers yet another catalyst to the sector's rapid global transformation. Telecom regulators need now to fully appreciate their scheduled market access, national treatment and regulatory commitments as well as the rights and obligations in the Services Agreement. MFN treatment, for example, is a vital but often ill perceived obligation. The fundamentals of the multilateral system are progressive liberalization, non-discrimination, transparent, reasonable and objective regulation, safeguards on competition, and a fair degree of flexibility. Mastery of the rules is indispensable, not only because of the benefits they impart but also because they are legally binding and enforceable. © 1997 Elsevier Science Ltd. All rights reserved.

Lee Tuthill is a senior staff member of the World Trade Organization, Rue de Lausanne 154, CH-1211 Geneva 21, Switzerland. Tel: +41 22 739 5204; fax: +41 22 739 5771; email: lee.tuthill@wto.org.

The views expressed in this paper are the author's own and are not intended in any way to represent the views of the WTO, any of its officials, or any of its Member governments. The author wishes to thank Pierre Guislain, Coordinator, Programme on Private Participation in Mediterranean Infrastructure, World Bank—European Commission, for his thoughtful advice on the drafting of this paper.

¹Local, domestic long distance, or international service.

continued on page 784

In an era of wholesale rethinking of ways to ensure that telecommunications reach the public, service the economy and provide functional national systems, the role of regulators is changing. In recent years, developed and developing countries alike have begun to accept the notion that effective reform means the mobilization of competition. As a result, regulators will no longer be officials who also work for a national operator. They will no longer be charged only with ensuring that a monopoly operator satisfies the government's social objectives and avoids mistreating consumers.

Much of the new role of telecom regulators flows from transformations that are endemic to the sector. Yet with the conclusion of the extended negotiations in the World Trade Organization (WTO) on basic telecom services in February and the resulting liberalization committed by 69 governments, another important influence on telecommunications policy has come into play. The results illustrate the dramatic scope of regime changes. Fifty-nine of the governments committed to competition among infrastructure-based operators (defined here as permitting two or more) of public voice telephony in one or more market segment.¹ The results on simple resale are equally impressive: 42 governments, or more than 70%, committed to allow resellers to offer public voice telephony.² Clearly, conventional wisdom about 'natural monopoly' features of telecom infrastructure and the need to reserve public voice as the bread and butter of public monopoly service is rapidly crumbling under the weight of modern technologies and unrequited consumer demand.

Moreover, a great many of those who committed in the WTO negotiations will urgently need to revise their regulatory frameworks and reorient their regulators to become facilitators of competition. A number of governments, many European Union Member States, for example committed to reforms of public telephony by January 1998 that were not yet implemented when the commitments were negotiated. Another 25 governments, or 42%, agreed to introduce competition in public telephony on specified future dates, in so called phased-in commitments.³ Such commitments to reforms now only on the drawing board were often, but not exclusively, made by developing countries seeking the stability of the General Agreement in Trades and Services (GATS) commitments to ensure that their plans proceed on track.

The new role of regulators is first and foremost to manage a country's transition from monopoly to market. As the experience of early liberalizing regimes demonstrates, this responsibility is not a short-term occupation. Few of the markets that liberalized even well over a decade ago can yet claim that the vestiges of monopoly control are gone. Moreover, the need to manage transition gives way to a long-term responsibility to perpetuate competition. Second, government regulators must take into account the needs of consumers and find ways to compensate for possible market failure.⁴ Third, regulation can reduce uncertainties about the resolve of government, brought on by unpredictable administrative practices or the lack of transparent rules (eg for licensing and tenders) that can thwart the success of telecom reforms.

As the role of regulators changes, their objectives shift as well. For example, rather than promoting universal service and consumer demand through obligations assigned to a single operator, reforming governments strive to extend service and efficiency by facilitating competition and market entry.⁵ And they can protect consumer interests through sanctions against fraud and deceptive practices. A new regulatory objective for many governments is to create a framework that will attract and protect investors. Domestic and foreign investors alike will be wary of participation in the sector under unstable investment conditions. Finally, a familiar objective that remains equally important but perhaps more challenging is the need to ensure inter-operability and network integrity. Achieving these objectives in a competitive environment depends heavily on interconnection requirements rarely necessary in a monopoly era.

Some activities of regulators, often including rule-making, award and repeal of licenses, management of finite resources (eg spectrum, rights of way and numbering) and enforcement of technical standards remain broadly similar to those conducted prior to the introduction of competition. One important difference is usually that these functions are separated from the operator, and sometimes even separate from the policy-making arm of government. However, some regulatory activities will require a new or greater emphasis than in the past. These include interconnection, tariffs and the resolution of disputes among operators or on behalf of customers.⁶ Such activities of regulators will be important tools in securing sector reforms and compliance with the new rules.

GATS: what a regulator needs to know

Regulatory authorities dealing with telecom reform now need to be fully aware of the obligations their government has assumed in the GATS. Compliance with these obligations often does not involve major departures from the many telecom regulatory reforms already adopted or under way. After all, many governments' telecom officials worked actively along with trade officials not only in the extended negotiations on basic telecom commitments, but also in the Uruguay Round of Multilateral Trade Negotiations on drafting the GATS. As a result, the GATS rules and obligations are broadly consistent with regulatory practices widely considered 'best practice' for ensuring that national telecom reforms succeed.⁷

However, any breach of GATS obligations and commitments cannot be taken lightly. They are legally binding on governments and can be enforced through a dispute settlement mechanism administered by the

continued from page 783

²For more details on the results of the WTO negotiations on basic telecommunications and copies of the schedules of commitments made, see the WTO website at <http://www.wto.org>.

³The formal entry into force of the basic telecom schedules will be on 1 January 1998. But where commitments on certain services are to be phased in, actual implementation will be on the date specified in the schedule.

⁴Berg and Foreman caution against "regulatory micro-management" but emphasize that the regulatory tasks of serving as an umpire of competition rules and protecting consumers are unavoidable. Berg, S V and Foreman, R D 'Incentive regulation and telco performance: a primer' *Telecommunications Policy*, 1996, 20(9), 651.

⁵As an example of how competition can be harnessed to extend service to rural areas, see Wellenius, B, *Extending telecommunications service to rural areas—The Chilean experience: Awarding subsidies through competitive bidding*. FPD Note series, The World Bank, Washington, DC (1997).

⁶See also "Types of regulatory decision" in Cave, M and Crowther, P 'Determining the level of regulation in EU telecommunications: A preliminary assessment' *Telecommunications Policy*, 1996, 20(10), 728–729.

⁷See, for example, Wellenius, B *Success factors of telecommunications reform* FPD Note series, The World Bank, Washington, DC (1997) in press.

WTO. So it is essential that the regulatory authorities of any government that has taken on telecom services commitments in the WTO have clear answers to the following questions:

- (1) What are the scheduled commitments of my government on market access and national treatment for telecommunications services?
- (2) What GATS framework obligations apply to the regulation of the committed services?
- (3) What additional commitments has my government scheduled on regulatory principles to govern telecommunications?

This article will focus primarily on several articles of the GATS most relevant to the sector, the Annex on Telecommunications and the Reference Paper on regulatory principles drafted during the basic telecom negotiations as a guideline for additional commitments in schedules. The Reference Paper addresses competition safeguards, interconnection guarantees, transparent licensing, independence of regulators, fair allocation of finite resources, and universal service policies.

The fundamentals

The GATS can be reduced to a set of fundamental principles that sustain the multilateral trading system. These principles, which will also serve to organize the information presented here, are as follows:

- (1) Progressive liberalization through binding commitments in schedules;
- (2) Non-discrimination and transparency;
- (3) Regulations that are reasonable, objective, impartial, and not more burdensome than necessary;
- (4) Competition safeguards aimed at the realization of obligations and commitments;
- (5) Flexibility in recognition of national sovereignty and economic development needs.

The basic structure of the Agreement has three parts: the so-called framework of articles presents the general obligations and disciplines; the annexes elaborate further on certain sectors or obligations; and the schedules contain commitments submitted by each WTO Member. The framework contains some obligations that apply across the board to all services whether or not listed in schedules and some that apply only to scheduled services. Both types of obligations are referred to as general obligations because they are spelled out in the Agreement and apply generally to all Members rather than in the schedules whose commitments are unique to each government. The framework also contains permitted departures and exceptions from the rules which contain related disciplines that apply if they are to be invoked. Among the GATS annexes is one on telecommunications, which applies to any WTO government, even if it has scheduled no commitments on telecommunications. On one hand, the general obligations and the Annex on Telecommunications are not negotiable. Moreover, entries in schedules (which are negotiated) cannot compromise the general obligations.⁸ On the other hand, only governments who have listed telecom services in their schedules are bound by the commitments specified in the schedule.

⁸However, the Annex permits departures from its core obligations by a developing country, but, for transparency, only if the departure is noted in its schedule.

GATS schedules: what's in a commitment?

Knowing the nature and extent of its government's scheduled commitments on telecommunications are a starting point for a regulator. One task of a regulator will be to help ensure the commitments inscribed by the government in a schedule are fulfilled. While there is nothing preventing a government from adopting measures that are more generous than the limitations indicated in a schedule, a government may not apply more onerous restrictions without facing challenge in WTO dispute settlement or (as a last resort) undergoing arduous procedures to renegotiate commitments and compensate its trading partners.

Each WTO government negotiates and submits a schedule that contains its commitments on market access and national treatment for the sectors and services it has specified. (Governments may, for example, decide not to list some services or sectors.) Schedules may also contain additional commitments based on a GATS provision allowing for negotiation on reform of measures not captured by the market access and national treatment obligations.

Market access is an obligation to grant services and service suppliers of other Members the treatment specified in the schedule.⁹ A schedule can grant full or partial market access. Defined in explicit terms, full access means that a government has agreed not to apply any limitations of the following types: (a) on the number of suppliers; (b) on the total value of transactions or assets; (c) on the total number of operations or the total quantity of service output; (d) on the total number of employees permitted in a sector or by a supplier; (e) which restrict or require specific types of legal entity or joint venture;¹⁰ and (f) on foreign equity participation. Partial access means that one or more of these measures, but only those specified in the schedule, may be applied. Measures not included in (a)–(f) fall outside the scope of the market access definition.

The GATS definitions of national treatment and additional commitments are open ended. National treatment requires a government to treat foreign firms the same as national firms in relation to all laws, measures and practices, except as ways clearly inscribed in its schedule.¹¹ For example, if authorization were required of foreign suppliers but not national ones, this difference in treatment would need to be specified. This obligation applies to both *de jure* and *de facto* treatment. As a result, a law that is similarly applied to both domestic and foreign service suppliers but more adversely affects the ability of foreign suppliers to compete might contravene the national treatment obligation. In telecommunications, national treatment limitations are relatively rare. On additional commitments, the GATS stresses that they may be used to negotiate away possible trade-restrictive effects of regulatory measures such as qualification requirements, standards or licensing.¹² The Reference Paper on regulatory principles was a ground breaking achievement for the Services Agreement. It was the first time that negotiators took advantage of the additional commitments. The approach used, the drafting of a common text, but giving governments the flexibility to draw selectively from it, could serve as a model for other sectors. Fifty-seven of the 69 participants in the negotiations on basic telecommunications adopted the Reference Paper in full or with fairly minor modifications as additional commitments. However, six more participants scheduled selected elements of it or drafted their own wording. Another six decided not to offer any additional commitments on regulation.

⁹GATS Article XVI.

¹⁰Or, for (a)–(d), any economic needs tests having the same effect as explicit limitations of these types.

¹¹GATS Article XVII.

¹²GATS Article XVIII.

Table 1. Illustrative GATS basic telecommunications commitments.^a

Sector or sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
<i>Telecommunications</i>			
Facilities-based public telecommunication services:	(1) Until December 2000, only through the network of duopoly operators. None as of January 2001	(1) None	See the attached Reference Paper.
Voice telephone services	(2) None	(2) None	
Private leased circuit services ^b	(3) Until December 2000, reserved to two public operators and foreign equity limited to 49%. None as of January 2001	(3) Until December 2000, a majority of the members of the board of directors must be nationals. None as of January 2001.	
	(4) None	(4) None	

^aModes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

^bDefined as the ability of suppliers to sell or lease network transmission capacity. See, Note by the Chairman: Notes for scheduling basic telecom services commitments' WTO Doc. No. S/GBT/W/2/Rev.1, 16 Jan. 1997.

Table 1 presents some hypothetical schedule entries of a regime which commits to a duopoly initially and then to introduce full competition in 2001. To reflect this, it first restricts to two suppliers the right to have commercial presence (mode of supply 3) to provide public voice telephony and leased circuit services (ie transmission capacity) provided over network infrastructure (as indicated in the first column). The government has privatized the operators and limits foreign investment in them to 49%. This government could not, without violating its commitments, subsequently decide to revert to having one operator or to reduce foreign equity limits below 49%. To reflect the introduction of competition, the next entries show 'none', meaning no limitations will be applied, "as of January 2001". In view of these commitments, the government authorities must ensure that adequate preparations are made to implement the reforms by that date. For cross-border supply (mode 1), the example indicates that until facilities competition is introduced, other telecom providers must terminate or supply their services over the networks of the duopoly operators. The national treatment column entry limiting foreign control of the board of directors complements the foreign equity limitation and is also scheduled to be phased-out. Finally, the schedule shows that the Reference Paper on regulatory principles has been attached as additional commitments.

It should be pointed out that Table 1 is intended only to illustrate how to interpret the entries in a schedule. In fact, many governments do not enter foreign investment restrictions in their telecom commitments, and often those who do refrain for limiting foreign representation on corporate boards. Under such circumstances, minority foreign partners can nevertheless be assured that their views and expertise can influence corporate direction.

Beyond schedules: regulatory obligations and disciplines

Many kinds of government measures not addressed in schedules can affect trade and market access. For these, the framework articles contain important disciplines. In this sense, the GATS makes a distinction between measures that are *a priori* defined as market access restrictions and those that are not. Falling into the latter are many kinds of measures often employed to meet other policy and regulatory objectives. For example, licensing is nowhere mentioned in the GATS list of market access limitations. Clearly, licensing may be among the administrative

procedures used to implement or enforce the kinds of limitations entered in schedules. But the GATS recognizes that governments are entitled to have licensing processes or other administrative procedures, technical requirements and qualification criteria for the accomplishment of other national policy objectives. It does not presume these to be market access barriers, but strives to ensure that they would not be used as such. Many of the disciplines apply when services are listed in a schedule, but some apply to all services, listed or not.

Non-discrimination and transparency

Non-discrimination and transparency are two cornerstones of the multilateral trading system. Moreover, the concepts are reiterated in many other GATS provisions aimed at other objectives as well. The provisions of the Reference Paper on regulatory principles also draw extensively on these principles. Non-discrimination in the form of most-favoured-nation treatment (MFN) and transparency are two of the most important of the provisions that apply across the board to all services. Therefore, understanding and abiding by these obligations would, at a minimum, be imperative for telecom regulators whether or not their governments scheduled telecom commitments. When, for example, governments undertake privatization of a monopoly operator, the tendering and bidding qualifications and other criteria and the procedures could not favour investors of any particular country and must be made public. Similarly, licensing of new operators or service suppliers, even where no scheduled commitments were involved, would still need to comply with MFN and transparency obligations.

The MFN obligation prohibits Member governments from discriminating among other Members or from treating other Members less favourably than any other country, member or not.¹³ This obligation applies to all measures except to ones which a government may have inscribed in a List of MFN Exemptions. Governments filed these Lists by the end of the Uruguay Round or can do so for basic telecoms by December 1997 or upon accession to the WTO. Four MFN exemptions were filed on measures related to telecommunications at the end of the Uruguay Round¹⁴ and nine more have been submitted in the negotiations on basic telecoms.¹⁵ None of these represent the kind of broad sectoral carve out that the extended telecom negotiations sought to prevent; they are fairly narrow in scope.

Non-discrimination in the form of national treatment is a commitment undertaken in schedules, but it is worth reiterating here since it also arises in the Annex on Telecommunications and the Reference Paper. In the Telecoms Annex, non-discrimination in terms of both MFN and national treatment is required regarding access to and use of public telecom networks and services needed *by* the suppliers of scheduled services. In contrast, schedules address national treatment extended *to* the supply or suppliers in relation to the listed services themselves. In the Reference Paper, non-discrimination applies, for example, to interconnection requirements on dominant operators, again, rather than to conditions on market access.

GATS framework provisions on transparency require Members to publish promptly all relevant measures of general application¹⁶ which affect the operation of the Agreement and includes any relevant bilateral or international agreements.¹⁷ If publication is not practicable, the

¹³GATS Article II.

¹⁴By Colombia, Honduras, Pakistan and Turkey.

¹⁵By Antigua and Barbuda, Argentina, Bangladesh, Brazil, India, Pakistan, Sri Lanka, Turkey, and the United States.

¹⁶The term "measures of general application" excludes measures that concern, eg a ruling or decision involving an individual supplier.

¹⁷GATS Article III.

information must be made publicly available in some other manner. The Annex on Telecommunications elaborates further on transparency obligations for the sector.¹⁸ It requires Members to ensure that relevant information on conditions affecting access to and use of public telecom transport networks and services is publicly available. It also lists examples of such measures. These include:

- (1) tariffs and other terms and conditions of service;
- (2) specifications of technical interfaces with such networks and services;
- (3) information on bodies responsible for standards affecting access and use;
- (4) conditions applying to attachment of terminal or other equipment;
- (5) and notifications, registration or licensing requirements, if any.

In one respect, the Annex transparency obligations not only elaborate but also build upon the framework obligation. The framework applies to measures of the government itself while the Annex obliges governments to ensure that information is made publicly available that in some regimes may rest in the hands of telecom operators. Many governments have requirements on operators, or at least dominant ones, to make such information public. Other governments require operators to provide such information to the government who can, in turn, make it public. However, some governments argue that in a competitive telecom regime, information related, for example, to tariffs may be commercially sensitive and should remain confidential. This approach may be consistent with a GATS exception to transparency obligations when such information might “prejudice legitimate commercial interests” of particular companies.¹⁹

Fairness and objectivity

The concepts of reasonableness and objectivity are embodied in GATS Article VI. Entitled “Domestic Regulation”, it contains the core disciplines on regulatory matters not normally addressed in schedules. In its initial paragraph, Article VI requires that, for services listed in commitments, governments must administer all measures of general application in a reasonable, objective and impartial manner. As with many GATS obligations, the provision sets the standard and leaves governments free to determine how comply. WTO telecom negotiators concurred that objectivity and impartiality were essential. But in awareness of a sectoral tradition of operator doubling as regulator and the conflict of interest this would pose in a liberalized market, they took the obligations a step further. Governments who have scheduled the Reference Paper must ensure that a regulator of the sector will be separate from, and not accountable to, any supplier of basic telecommunications services and specifies that the decisions of and the procedures used must be “impartial *with respect to all market participants*” (italics added).

Another provision on domestic regulation also conveys the importance of fairness. It requires governments to offer suppliers of all services, whether or not listed in commitments, an avenue for recourse of administrative decisions.²⁰ It calls for judicial, arbitral or administrative tribunals or procedures which provide service suppliers with prompt review of, and if justified, appropriate remedies.²¹ It specifies, further, that if these procedures are not independent of the agency entrusted with

¹⁸Annex, Section 4.

¹⁹GATS Article III bis.

²⁰GATS Article VI, para 2.

²¹Such tribunals or procedures are not required where this would be inconsistent with a Member's constitutional structure or the nature of its legal system.

the decision concerned, the Member shall nevertheless ensure an objective and impartial review. Again, the Reference Paper takes this concept a step further. While the framework deals with recourse for government decisions, the Reference Paper commits governments to provide a mechanism of recourse to settle interconnection disputes among operators.

The article on domestic regulation also outlines disciplines to govern many qualitative or technical requirements often embodied in regulation.²² For services where commitments are taken, a government must ensure that the procedures, criteria and requirements related to licensing, certifications or technical standards are based on objective and transparent criteria and that they are not more burdensome than necessary to achieve the desired objectives. Telecom authorities may bear in mind that the provision recognizes the international standards-setting performed in some sectors by other international organizations (eg the ITU or the ISO) and states that such standards are to be considered in evaluating compliance with these obligations. The objectives of such regulation are often aimed at ensuring the quality of services or their suppliers. But quality is not the only kind of objective relevant. In telecommunications, regulatory requirements related to such objectives as inter-operability of networks or universal service can fall within Article VI rights and disciplines. In order to eliminate any doubt in this respect, the Reference Paper adds valuable clarification. It recognizes that each Member has the right to define the kind of universal service obligation it wishes to maintain, but goes on to invoke the kinds of disciplines found in Article VI. It stipulates that such obligations (whether implemented through license provisions, universal service fund mechanisms or other means) must be transparent, non-discriminatory, not more burdensome than necessary, and affect competitors in a neutral manner.²³

More on licensing

The framework article on domestic regulation also explicitly addresses certain issues related to licensing for services where commitments are undertaken. One paragraph is dedicated to ensuring that if any form of authorization is required, the relevant authorities shall, within a reasonable period of time after an application is completed, inform the applicant of the decision and, at the request of the applicant, provide information concerning the status of the application without undue delay.²⁴ Also, the article's provision on regulatory requirements maintains that licensing procedures must not *in themselves* be used to restrict the supply of services.²⁵

Although some Uruguay Round negotiators would have liked Article VI disciplines on licensing to go somewhat further, the above points were as much as consensus could garner at the time. Looking closely at concerns in the telecom sector, WTO telecom negotiators were once again able to ratchet the common denominator somewhat higher. Governments committed to the Reference Paper must ensure that, if a licence is required, they will make publicly available all licensing criteria, the period of time normally required to reach a decision on an application, and the terms and conditions of individual licences. They must also provide an applicant with the reasons for denial of a licence, upon request.²⁶

Another article of the GATS relates to mutual recognition.²⁷ Originally drafted with licensing or certification of professional service providers in mind, the article allows governments to recognize, among other things,

²²GATS Article VI, paras 4 and 5.

²³Reference Paper, para 3.

²⁴GATS Article VI, para 3.

²⁵GATS Article VI, para 4.

²⁶Reference Paper, para 4.

²⁷GATS Article VII.

the licenses granted in another country (through harmonization, bilateral or plurilateral agreements or arrangements, or on an autonomous basis) for licensing of suppliers in their own regime. It can also relate to the mutual recognition of standards and qualification criteria applied to service providers. Due to concerns that recognition could be abused as a back-door infringement of the MFN obligation, the article spells out relevant disciplines. Moreover, the potential MFN implications make it necessary for the disciplines to apply to any services, whether or not listed in schedules. First, a government must not accord recognition in a manner which is discriminatory or a disguised restriction on trade. Second, it must give other Members the opportunity to negotiate accession to such an agreement or arrangement, to negotiate comparable ones, or to demonstrate that their licenses, or certifications or requirements should also be recognized. Third, it must inform the Services Council of its recognition measures or agreements and, as far in advance as possible, of negotiations on new ones.

Finally, recognition should, as appropriate, be based on multilaterally agreed criteria or on cooperation with intergovernmental and non-governmental organizations on common standards and criteria for recognition.²⁸ In telecommunications, the Memorandum of Understanding on global mobile personal communications by satellite negotiated under ITU auspices provides, in part, an example of the kind of cooperation advocated in this provision.

Spectrum management

Although the GATS framework never explicitly mentions spectrum management, some Members felt that its disciplines were germane. Discussions among telecom and trade officials during the WTO negotiations on basic telecommunications provided greater clarification and more specific obligations in the Reference Paper. The paper's provision on "allocation and use of scarce resources" draws upon framework principles in requiring that procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, must be carried out in an objective and transparent manner.²⁹ It also requires that the procedures be non-discriminatory. In addition, it introduced an obligation that the procedures be carried out of timely manner, an element not secured in the framework obligations. The Reference Paper also elaborates on transparency obligations. It requires adherents to make publicly available the current state of allocated frequency bands. However, it explicitly refrains from requiring detailed identification of frequencies allocated for specific government uses; a compromise reached to address concerns about confidentiality for military and security use of spectrum.

Finally, WTO telecom negotiators provided a bridge between trade and telecom concepts on regulatory responsibilities for managing spectrum. This was accomplished by discussions on the relationship between spectrum management, the scheduling of commitments, and framework disciplines on regulation. A note issued by the Chairman of the basic telecommunications group concluded that spectrum/frequency management (like licensing) was not, *per se*, a limitation on market access.³⁰ The note underscored the notion that under the GATS, each Member has the right to exercise spectrum/frequency management, recognizing that it could, like other technical standards or regulatory requirements, affect

²⁸GATS Article VII, para 5.

²⁹Reference Paper, para 6.

³⁰WTO Doc. No. S/GBT/W/3, 3 February 1997.

market entry, in particular the number of service suppliers that would be technically feasible. The note stressed that spectrum management, like other regulatory requirements and procedures, must be performed in accordance with Article VI and other relevant GATS provisions (such as the general and security exceptions, described below).

Competition safeguards

A number of the provisions that have been grouped under this heading are not always considered competition rules, *per se*. Indeed, to the extent that the GATS deals with competition-related issues, it does so not for their own sake, but rather in the interest of safeguarding the integrity of obligations and commitments.

Two framework obligations are relevant. One is a provision on monopolies and exclusive service providers.³¹ It requires governments to ensure that any monopoly or exclusive supplier does not act in a manner inconsistent with MFN obligations or scheduled commitments in the supply of services reserved to them. And, where monopoly or exclusive suppliers are allowed to compete, even through an affiliate, in services outside their areas of exclusivity, governments must ensure that they do not leverage their position so as to negate a government's commitments on the competitive services. The other obligation relevant to competition is one on restrictive business practices.³² It requires governments to engage in consultations, upon request, with a view to eliminating practices of any service suppliers that may restrain competition in trade in services. Although the two provisions are generic, applying to any or all sectors, their potential relevance to newly introduced competition in telecommunications is apparent. Their generality, however, gave rise to further elaboration in both the Annex on Telecommunications and the Reference Paper.

Access guarantees

During the Uruguay Round, negotiators drafted an Annex on Telecommunications realizing that telecom operators were in a unique position of having the potential to undermine commitments taken in schedules—not only on telecoms but any service sector in which telecommunicating was essential to doing business. Offering greater specificity than the framework, the Annex on Telecommunications has as its core objective to guarantee suppliers access to and use of basic public services.³³ It requires governments to ensure that other Member's suppliers are afforded reasonable and nondiscriminatory³⁴ access to and use of public telecommunications transport networks and services (PTTNS).³⁵ The obligations benefit suppliers of any service listed in a government's schedule.³⁶ And because they cover to access rather than supply (which is addressed in schedules), government must ensure the fulfilment of these obligations with respect to any entity providing PTTNS even if no basic telecom commitments are scheduled and whether or not they are supplied by a monopoly or through competition.³⁷

During negotiations on the Annex, attention was focused on finding a balance between what were characterized as users' rights and so-called regulators' rights. Table 2 outlines the provisions that resulted to achieve this balance. On the one hand, very explicit examples of users' rights are enumerated. On the other hand, these rights are tempered by the rights of

³¹GATS Article VIII.

³²GATS Article XIX.

³³For more details on obligations of the Annex on Telecommunications, see Tuthill, L 'Users Rights: The multilateral rules on access to telecommunications' *Telecommunications Policy*, 1996, 20(2), 89–99.

³⁴"Non-discriminatory" refers to MFN and national treatment as defined in the GATS, as well as to sector-specific usage involving "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances" (footnote to Annex para 5a).

³⁵In Annex definitions: "Public telecommunications transport service" means any telecommunications transport service required, explicitly or in effect, to be offered to the public generally and typically involving the real-time transmission of customer-supplied information without any end-to-end change in its form or content. "Public telecommunications transport network" means the public telecommunications infrastructure permitting telecommunications between and among network termination points.

³⁶Annex, para 5a.

³⁷At the time, governments who maintained monopolies were wary of obligations that they alone would incur, given concern that dominant operators in a competitive regime might also engage in unfair practices restricting access and use.

Table 2. Access to and use of PTTNS.

'Users' rights'	'Regulators' rights'
Each Member shall ensure service suppliers access to and use of any PTTNS offered within or across the border, including private leased circuits, and ensure that suppliers may:	Each Member shall ensure that no condition is imposed on access to and use of PTTNS other than as necessary:
purchase or lease and attach terminal or other equipment with the network, necessary to supply a service ^a	to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally ^c to protect the technical integrity of PTTNS ^c
interconnect private leased or owned circuits with PTTNS or with circuits leased or owned by another service supplier ^a	to ensure that service suppliers do not supply services unless permitted pursuant to commitments in the schedule ^c
use operating protocols of the service supplier's choice to supply a service, other than as necessary to ensure the availability of TTNS to the public generally ^a	to ensure security and confidentiality of messages ^d
use PTTNS to move information within and across borders, including intra-corporate communications, and to access information in data bases or other machine-readable form in the territory of any Member ^b	

^aAnnex, para. 5(b); ^bAnnex, para. 5(c); ^cAnnex, para. 5(e); ^dAnnex, para. 5(d).

regulators to impose conditions on access, but only so long as these are aimed at, and no more onerous than necessary for, the attainment of the agreed policy objectives.

Given considerable uncertainty at the time about how the new Services Agreement and Annex would function, some negotiators sought assurances about the kinds of measures regulators would be entitled to use to achieve the recognized objectives. This resulted in a provision clarifying that, so long as they met objectives set out in the "regulators' rights" and satisfied its "necessity test", conditions on access to and use of PTTNS might include:³⁸

- (1) restrictions on resale or shared use, if, for example, resale were not liberalized;
- (2) requirements to use specified technical interfaces, including protocols or for type approval of terminal equipment or technical requirements for the attachment of equipment in order, for example, to avoid technical harm to networks;
- (3) requirements, where necessary, for inter-operability, where necessary to achieve objectives such as global compatibility, particularly when supported by standards work of international bodies such as the ITU;
- (4) restrictions on inter-connection of private leased or owned circuits with networks or services or with circuits leased or owned by another service supplier to prevent, for example, unauthorized or unlawful by-pass of public networks where such options were not liberalized;
- (5) and notification, registration and licensing procedures.

³⁸Annex, para 5(f).

³⁹Holmes et al warn that without agreement on competition safeguards in the WTO negotiations, the industry would have faced the uncertain prospect of unilateral safeguards and further trade conflicts in Holmes, P, Kempton, J and McGowan, F 'International competition policy and telecommunications: Lessons from the EU and prospects for the WTO' *Telecommunications Policy*, 1996, 20(10), 766–767.

⁴⁰In Reference Paper definitions: A "major supplier" is one 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. "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 to provide a service.

Abuse of dominance

In the basic telecom negotiations, participants were concerned that not only the framework provisions but also the Telecoms Annex might not be adequately equipped to deal with potential anti-competitive practices of monopoly and dominant operators.³⁹ This might be particularly apparent once the GATS commitments covered suppliers engaging in head-on competition with incumbents. In the Reference Paper, negotiators drafted competition obligations to apply to "major suppliers", or telecom operators having control over essential facilities or market dominance.⁴⁰ The initial provision of the section on competitive safeguards is broadly

cast. It requires adherents to prevent suppliers who, acting alone or together, are a major supplier from engaging in anti-competitive practices.⁴¹ The subsequent provision offers a few specific examples of such practices, including:⁴²

- (1) anti-competitive cross-subsidization, such as using revenues from remaining exclusive services to undercut prices of competitors for liberalized services;
- (2) using information obtained from competitors, for example, through interconnection negotiations, with anti-competitive results;
- (3) not making promptly available technical information about essential facilities and other commercially relevant information necessary for other suppliers to provide their services.

Interconnection guarantees

Telecom negotiators recognized that effective interconnection requirements were crucial to the successful introduction of competition and to maximizing its benefits. They feared, however, the access guarantees of the Telecoms Annex were too vague to guard sufficiently against anti-competitive interconnection practices. For example, the Telecoms Annex contained no clear disciplines, beyond “reasonableness”, over the pricing or promptness of access or on bundling practices. The Reference Paper offered a great deal of added specificity in this regard. Its adherents must ensure that major suppliers will provide interconnection:⁴³

- (1) under non-discriminatory, transparent and reasonable terms, conditions (including technical standards and specifications) and rates;
- (2) of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
- (3) at cost-oriented rates;
- (4) in a timely fashion;
- (5) sufficiently unbundled so that a supplier need not pay for network components or facilities it does not require;
- (6) at any technically feasible point in the network;
- (7) and upon request, at points in addition to the network termination points offered to most users, albeit allowing for charges that reflect the construction cost of necessary additional facilities.

Other Reference Paper provisions on interconnection provide for greater transparency and require dispute resolution mechanisms. Adherents must ensure that procedures for the negotiation of interconnection to a “major” supplier and either its interconnection agreements or a reference interconnection offer will be made publicly available.⁴⁴ On dispute settlement, a service supplier requesting interconnection with a major supplier must have recourse to an independent domestic body (perhaps, but not necessarily the regulatory authority) to resolve disputes within a reasonable period of time about the terms, conditions and rates involved.⁴⁵ In a compromise reflecting differing approaches in use, the dispute resolution mechanism may be made available either at any time in the course of interconnection negotiations among operators or once a reasonable period of time (also made public) has elapsed since the initiation of negotiations.⁴⁶

⁴¹Reference Paper, para 1.1.

⁴²Reference Paper, para 1.2.

⁴³Reference Paper, para 2.2.

⁴⁴Reference Paper, paras 2.3 and 2.4.

⁴⁵Reference Paper, para 2.5.

⁴⁶The importance of the possibility for regulator intervention to settle interconnection disputes is stressed in Lasserre, B ‘La régulation, la concurrence et la dominance’ *Communications & Strategies*, 1966, 24, 131–132.

GATS flexibility: national sovereignty and economic development

Exceptions to the rules

The GATS provides for both general and security exceptions. The general exceptions confirm that the Agreement does not preclude measures necessary to protect public morals or to maintain public order; to protect human, animal or plant life or health; or to secure compliance with laws or regulations which are not otherwise inconsistent with the Agreement (eg the prevention of fraudulent practices, protection of privacy of personal data and confidentiality of individual records and accounts).⁴⁷ Many such objectives may arise in any service sector. In the telecom sector, in particular, much effort has been expended in recent years on ways to protect privacy and confidentiality of personal data in the computer age. Disciplines imposed on the general exceptions are that they must not be applied in a way which would arbitrarily or unjustifiably discriminate among Member countries or be used as a disguised restriction on trade. The exceptions related to national security maintain that the Agreement does not require a Member to furnish information contrary to its essential security interests or prevent it from taking any action necessary to protect its security interests.⁴⁸ This provision could be considered relevant to matters concerning communications networks or spectrum devoted to military or national security applications.

Moreover, recognizing the potential benefits to trade or economic arrangements aimed at comprehensive liberalization, GATS provisions on economic integration exempt Members belonging to such arrangements from the MFN obligations, if the arrangement satisfies a set of disciplines aimed at preventing protectionist side effects.⁴⁹ Often such arrangements are among regional groups. The parties to such an arrangement must notify the WTO, where a working party may examine its consistency with these provisions.⁵⁰ The article also affords developing countries a degree of flexibility in meeting the disciplines. Some Asian and Latin American groupings envision telecoms liberalization as part of their regional plan. The North American Free Trade Agreement (NAFTA) also addresses telecommunications and the European Union internal liberalization of telecommunications is another example.

Two GATS provisions would permit temporary escape from obligations and commitments. One deals with balance-of-payments difficulties and the other concerns possible emergency safeguard measures. The article on restrictions to safeguard balance of payments allows a government to adopt restrictions on trade in services subject to scheduled commitments, if serious balance-of-payments difficulties arise in a country's overall external accounts.⁵¹ It also recognizes particular pressures on the balance of payments of developing countries and the possible need for their restrictions to ensure adequate financial reserves for development programs. However, a number of disciplines apply.⁵² The article on emergency safeguards is was left unfinished by the Uruguay Round and forms part of a work program of the Services Council.⁵³ Similar WTO provisions relating to goods trade permit temporary suspension of commitments when domestic industry is suffering from serious injury due to a sudden increase in imports resulting from tariff concessions. Whether and how, the goods-related provisions could be adapted to services is among the challenges facing the work program.

⁴⁷GATS Article XIV.

⁴⁸GATS Article XIV bis.

⁴⁹GATS Article V.

⁵⁰Such arrangements must have substantial sectoral coverage and provide for the elimination of substantially all national treatment discrimination among the parties at entry into force or on a reasonable time-frame. Also, they must not raise the overall level of barriers to trade with other WTO Members.

⁵¹GATS Article XII.

⁵²The restrictions must be nondiscriminatory, consistent with IMF rules, avoid unnecessary damage to the commercial, economic and financial interests of other Members, not exceed what is necessary to deal with the circumstances, be temporary and notified and subject to a WTO consultative process.

⁵³GATS Article X.

Progressive liberalization and the renegotiation of commitments

One of the fundamental ways that the GATS shows deference to national sovereignty is through the rules of the game on how to achieve liberalization.⁵⁴ First and foremost, liberalization is to be achieved progressively over time, as and when each government is prepared to assume greater levels of commitments and to reduce the number of restrictions maintained in its schedule. The mechanism used is successive 'rounds' of negotiation, the next of which is to begin in the year 2000. Moreover, the rules on negotiating commitments declare that a developing country will be afforded greater flexibility to progressively extend market access more slowly and selectively, if desired. This and other provisions giving regard to economic development were crucial to gaining developing countries' acceptance of the new agreement. In telecommunications, many developing countries have viewed taking on commitments as consistent with, rather than contrary to, the pursuit of their national development objectives.⁵⁵

Finally, the GATS spells out procedures a government can use to modify or withdraw its scheduled commitments.⁵⁶ The relevant article imposes rigorous disciplines, however, and can only be invoked after a commitment has been in force for at least three years. After notifying the Services Council, in advance, of an intended change to its schedule, a government must negotiate, upon request, with any affected WTO Members on compensatory adjustments.⁵⁷ Simply put, to withdraw or reduce a commitment, other commitments must be added to a schedule to compensate the trading partners for their loss of benefits. Perhaps it can be reassuring to governments who have committed in the GATS to ambitious programs of phased-in telecom reform that they could resort to these procedures if they were to encounter serious legislative or other hurdles. However, the first line of defense, and one of the advantages of assuming the commitments, is normally to try and alleviate domestic concerns in a way that will permit a government to maintain commitments. But if all else fails, these procedures can and must be used.

Conclusions: legal and institutional issues

There is no single solution to regulatory structure, instead a fairly wide variety of approaches have evolved. Often, all regulatory activities are not vested in a single entity. Many governments assign most functions to a telecoms regulatory authority but some use a regulator that deals with public utilities generally and a some others depend more on competition authorities. Some governments use authorities within a relevant ministry as regulator and others separate the regulatory functions from the policy-making institutions. Even were a regulator is separate from the ministry concerned or competition authorities are involved, different regulatory activities are sometimes distributed among them. Also, a government's judicial system may have a role in the enforcement of telecommunications rules and regulations.⁵⁸

Whatever organizational structure is employed to institute reform, a government must ensure that adequate institutional capacity and legal authority is vested in the body or bodies responsible. The relevant authorities must be able to prepare and implement reforms on track. They must have the competence to award (or withdraw) licenses and organize tenders fairly, openly and efficiently. They must be capable of

⁵⁴GATS Article XIX.

⁵⁵See Tuthill, L 'Developing countries hook up' *South* April 1997, 23–24.

⁵⁶GATS Article XXI.

⁵⁷The sanctions for non-compliance are that if agreed compensatory adjustments to the schedule are not implemented, an affected Member may retaliate by withholding some of its own commitments from the government concerned.

⁵⁸Cave and Crowther review considerations and options on allocation of regulatory functions with the introduction of EU telecoms competition in Cave, M and Crowther, P 'Determining the level of regulation in EU telecommunications: A preliminary assessment' *Telecommunications Policy*, 1996, 20(10), 731–735.

establishing competition-neutral and objective universal service obligations, licensing requirements and criteria and other regulation. They must be armed with the information necessary to take a wide range of regulatory decisions.⁵⁹ And finally, it almost goes without saying that they should be given whatever measure of independence and empowerment is necessary to allow them to administer and enforce the laws and regulations effectively and with impartiality.

Often, a government would first need to create favourable conditions, both in the telecom regulatory framework and under general investment rules, for new providers facing the challenge of entering a market dominated by a former monopoly. Later the government must foster an environment in which unfair and anti-competitive business practices are minimized. Governments may find they need to be more aggressive in managing transition, particularly in urging incumbant operators to move to cost-based tariffs and interconnection rates, and fairly light handed in regulating competition once it has taken hold. But the optimal mix of regulatory policies and instruments is hard to come by and even governments with longer experience with liberalizing telecom markets continue to experiment to discover what may most effectively capture the public interest.⁶⁰ Maintaining the flexibility for regulators to adapt to the evolution of the market, can therefore also be an advantage.⁶¹

But timing is also important. The latest OECD Communications Outlook observed that "Perhaps the most important regulatory challenge in the short term will be to ensure that the decision to open facilities and voice services to full competition leads rapidly to a sustainable competitive market.... This will require that regulatory frameworks are put in place as rapidly as possible, and preferably *before* markets open to competition." (Italics added.)⁶² If lessons can be drawn from the OECD experience, it may be wise for even the WTO governments who have commitment to phased-in liberalization in the future to begin work on putting in place the appropriate regulatory framework.

The WTO telecommunications negotiations represent a historic turning point, not only because of agreement by so many to apply multilateral trade rules to the sector, but also for the dynamics of the sector itself. The consensus achieved to garner the WTO results confirms the end of the era of monopoly national telecom regimes and marks the passage to an era of near universal appreciation of the benefits of market-based, competitive global communications.

While remarkable, the WTO results are only one milestone among more to come. The multilateral liberalization process is itself dynamic—an undeniable asset given the pace of regulatory, technological and commercial change in the sector. The negotiations provided for the acceptance of basic telecom commitments or MFN exemptions until December 1997 from governments who were unable to meet the February deadline, and some governments hope to take advantage of this to join the results. Moreover, although the ability to file an MFN exemption expires in December, nothing in the multilateral rules prevents a government from unilaterally submitting new or improved commitments at any time. This option permits governments, whenever new telecom reforms are instituted, to brace them with the stability and viability that the WTO helps ensure. Then, in the year 2000, a new round of negotiations to improve and expand the GATS commitments on all services, including telecommunications, will begin. In the meanwhile, many governments negotiating to accede to the WTO find the basic telecommunications

⁵⁹See *The Role of Information in Telecommunications Regulations* OECD General Distribution Document and OECD/GD(96)106, Paris (1996).

⁶⁰See, for example, Dnes, A *Post-Privatization Performance—Regulating Telecommunications in the UK: Testing for regulatory capture* FDP Note series, The World Bank, Washington, DC (1995).

⁶¹An asset emphasized in *op cit* Ref 46, 130.

⁶²OECD *Communications Outlook 1997* Vol. 1c OECD, Paris (1997), p. 31.

results are a useful model for accession commitments they want to make on services.

In a sector in which reforms initially can be fragile, the enforceability of the WTO commitments is more an advantage than a threat to policy makers who want to see reforms succeed. WTO institutional machinery such as the dispute settlement body helps keep implementation on track and debate in the Services Council (or its sub-organs) can maintain visibility for important issues and concerns of all Members. The importance of an effective framework of national and multinational rules, of improving the efficiency and capacity of government regulators, and of providing a catalyst for investment in telecom infrastructure extends far beyond the sector itself. These will be essential to reaping benefits of emerging global information highways and securing sustainable economic development.⁶³

⁶³See, for example, What must governments do? In Talero, E and Gaudette P (eds) *Harnessing Information for Development: A Proposal for a World Bank Group Strategy*. The World Bank (1996) and Fenoulhet, T R "The Regulatory Dynamics of the Information Society" in Dumort, A and Dryden J (eds) *The Economics of the Information Society* European Communities in arrangement with OECD, Luxembourg, 1997, esp. pp 23–26.