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Investment Policies and Telecommunications Regimes

Zdenek Drabek

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Zdenek Drabek

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Contents

I Introduction 9

II The WTO Telecommunications Agreement: Its Role and Impact 11

A. Importance of investment policies for FDI in the telecommunications industry 13

B. GATS: main achievements 14

C. The impact of GATS and telecommunications agreements 18

D. Open-ended and outstanding issues 32

III Comparison of GATS/Telecom Agreement and Other International Agreements 39

A. Telecommunications agreements 39

1. NAFTA: main features of the chapter on telecommunications 40

2. A brief evaluation of the WTO Telecommunications Agreement 40

B. Foreign investment agreements 43

1. NAFTA 43

2. Concluding remarks on the comparisons 47

IV Prospects for Future Negotiations in the WTO 48

A. Effectiveness of multilateral negotiations 48

B. Issues for negotiations under GATS 49

1. General issues: built-in agenda 49

1. (a) Safeguards 49

1. (b) Government procurement 50

1. (c) Subsidies 51

2. Emerging issues for telecommunications 51

C. Negotiating approaches 54

V Conclusions 55

References 79

List of Tables

Box 1:	Main Features of the Reference Paper	17
Box 2:	Main Investment Provisions in the NAFTA and GATS Agreement	58
Box 3:	Main Provisions for the Telecommunications Sector in NAFTA and GATS	68
Table 1:	GATS/TELECOM Agreements: Level of Commitment by sector and mode of supply	24
Table 2:	GATS/TELECOM Agreements: Market access, types of limitations by sector and mode of supply listed	28
Table 3:	GATS/TELECOM Agreements: National treatment, types of measures by sector and made of supply	30

Abstract

This paper looks at the role of the key international agreements in the process of liberalization of the telecommunications industry. We analyse in particular the role of the WTO agreement in furthering liberalization around the world, and the extent to which it provides protection for foreign investors. The analysis includes assessments of not only market access but also the treatment of property rights, rights of way, financial conditions and regulations as well as issues related to market structure and competition. Outstanding issues representing impediments of these agreements are also identified. The approach is to a large extent based on a comparison with other relevant international agreements, especially with NAFTA. The WTO agreement comes out of the analysis quite well. It is an important instrument of protecting and safeguarding market access for foreign investors even though, undoubtedly, several areas of the agreement will be subject to pressures for further negotiations.

Zusammenfassung

Dieses Papier befasst sich mit der Rolle der bedeutendsten internationalen Abkommen im Liberalisierungsprozess der Telekommunikation. Speziell fragen wir nach dem Beitrag des WTO-Abkommens zur weltweiten Liberalisierung und nach dem Schutz, den es ausländischen Investoren gewährt. Die Analyse umfasst die Beurteilung der Regelungen über Marktzugang, Eigentumsrechte, Wegerechte, finanzielle Bedingungen und Regulierungen sowie Fragen der Marktstruktur und des Wettbewerbs. Ferner werden die noch offenen Probleme behandelt. Der Ansatz beruht in einem erheblichen Maße auf einem Vergleich mit anderen relevanten internationalen Abkommen, insbesondere NAFTA. Das WTO-Abkommen schneidet bei dieser Untersuchung recht gut ab. Es ist ein bedeutendes Instrument zur Sicherung des Marktzugangs für ausländische Anbieter, auch wenn zu erwarten ist, dass für Teile des Abkommens Druck zur Aufnahme weiterer Verhandlungen entstehen wird.

JEL Classification: F02, F13, L96

Keywords: International Economic Order, WTO, NAFTA, Trade Negotiations, International Investment, Telecommunications Services

I. Introduction[*]

The revolution in the telecommunications industry in recent years raises a number of interesting economic questions with significant policy implications. One of these questions is the extent to which foreign investment in the telecommunications industry is accompanied by policies that are conducive to cross-border investments. These policies can be both domestic and international. The discussion in this contribution is limited to the latter by concentrating on the role of the WTO and other international agreements.

The critical question both for industry and for international negotiators is what the role of international agreements should be in providing the optimal policy and regulatory framework. Should foreign direct investment (FDI) be exclusively subject to home and host countries' domestic policies or should there be an 'umbrella' in the form of an international/multilateral agreement? What has been the experience so far with existing international agreements? What have been the main objectives of international telecommunications-related agreements and how successful have these international agreements been in meeting their objectives? In particular, what has been the impact of these agreements?

The events in Seattle as well as the 'noisy follow-ups' in Washington, Prague and other cities are reminders that a bright future for multilateral agreements is not a foregone conclusion. It is, therefore, appropriate for us to ask the question regarding the prospects for future agreements on telecommunications. This issue is, of course, also closely related to the failed negotiations of rules on foreign direct investments, such as the Multilateral Agreement on Investment (MAI). This demonstrated that the problems are not only be political, but technical and substantive as well.

By way of a reminder, in the area of telecommunications, the important WTO agreements are GATS and the Agreement on Basic Telecommunications of 1997 (TA). In addition, FDI in telecommunications have been subject to other important international agreements. These include regional agreements such as NAFTA and several regional agreements of the European Union. Other international initiatives

* The views expressed in this paper are personal and should not necessarily be attributed to the WTO or its members. The author is grateful to the following colleagues and friends for useful and helpful discussions: Professors H-E Scharrer, P Guerrieri and A Kopp, Dr J Richards, Dr P Holmes and A Young. The author has benefited from the insight and comprehensive knowledge of S Robinson of the OAS. His special thanks also belong to Lee Tuthill, who has been following the telecom developments in the WTO very closely. Last but not least, he is grateful to Aaditya Mattoo, who knows that the best research on the WTO telecom agenda is done in the IBRD, and to Fiona Palmer, who has provided major assistance in sifting through the legal texts.

include a large and expanding set of bilateral investment agreements to which we shall also briefly refer in this contribution. In the telecommunications sector *per se*, three main international initiatives have been particularly important. Apart from the WTO agreements already noted, another initiative was the adoption of the Revised International Telecommunication Regulations supplementing the International Telecommunication Convention of the International Telecommunication Union (ITU). Finally, the other development was the emergence of bilateral International Value-Added Network Service Arrangements (IVANS) in the OECD area.

The main aim of this study is to asses the importance of the WTO telecommunications agreement. We shall be asking the following questions: (i) How much liberalization does the agreement allow? Or, to put it differently, how restrictive are the agreements? (ii) What are the main remaining restrictions left in the agreement? (iii) How important were multilateral negotiations in opening up telecommunications markets to foreign investors? (iv) How much investment protection do these WTO agreements provide? (v) How do these agreements compare with some other important international agreements? (vi) What are the main merits and shortcomings of these agreements?

These questions and concerns already form part of the growing literature on GATS in general and on telecommunications in particular. The latter have been covered in studies put forward by *Bronckers* and *Larouche*, *Low* and *Mattoo*, and *Hufbauer* and *Wada*.[1] To some extent, the present study builds on these contributions, and we shall refer to these contributions in more detail in the text below. For the purpose at hand, however, these contributions are limited. None of these contributions discusses the question of international investment regimes/policies. Instead, the authors address the broader issues of telecommunications services. In addition, the papers were written at the end of the GATS negotiations and they are now somewhat out of date. Furthermore, our approach in assessing the WTO agreements will also be somewhat different from the methodologies used so far. The approach can be summarized as follows:

The aim will be to asses the quality of the agreement by reviewing the scope and depth of rules and disciplines that govern Mode 3 (commercial presence) in the WTO GATS/Telecom Agreement. In other words, we will evaluate the main principles, standards, criteria and institutions that define the agreement. In order to do so, we will evaluate the TA from two different angles. Our first approach will be to look at the

1 *M Bronckers* and *P Larouche*, ‘Telecommunication Services and the World Trade Organization,’ *Journal of World Trade* 31 (1997); *P Low* and *A Mattoo*, *Reform in Basic Telecommunications and the WTO Negotiations: The Asian Experience*, mimeo (Geneva: WTO, 1997); *G C Hufbauer* and *E Wada* (eds), *Unfinished Business: Telecommunications After the Uruguay Round* (Washington DC: Institute for International Economics, 1997).

actual commitments of countries in GATS/Telecom and assess their economic significance. We will be asking the following specific questions: To what extent have members actually adopted the GATS principles and eliminated restrictions on access to their markets by foreign investors? How wide or limited is the scope of the TA? What is the effect of the agreements on economic incentives? How much competition do the agreements actually allow? Do they facilitate the contestability of markets? How balanced are the agreements? Are all countries likely to benefit equally from the agreements? The second approach in evaluating the TA will involve comparing its scope and structure with other relevant multilateral agreements. Is the TA in some sense a 'better' agreement than the other agreements?

The paper is organized as follows. Section I elaborates on the importance of investment policies for FDI in the telecommunications industry. Here we introduce our discussion of international agreements by outlining the main elements of investment agreements. The main achievements of GATS and the impact of GATS/Telecom Agreement are also described and discussed, followed by an identification and a discussion of the outstanding and open-ended issues of the Telecom Agreement. Section II evaluates the GATS/Telecom Agreement in relation to other investment-type agreements. In particular, we review the relevant passages of NAFTA and several EU regional agreements. Finally, the prospects for future telecoms negotiations in the framework of new GATS are discussed in Section III. The paper ends with conclusions.

II. The WTO Telecommunications Agreement: Its Role and Impact

The telecommunications sector includes both the delivery of telecommunications services and the production and distribution of telecommunications equipment. Correspondingly, the telecommunications sector is subject to international agreements concerning both services and goods. *Pari passu,* foreign direct investments in the telecommunications sector are essentially subject to three types of international agreements: multilateral agreements, regional agreements and bilateral agreements. Multilateral agreements include two WTO agreements: GATS and the Agreement on Telecommunications. In addition, FDI in the telecommunications sector are affected by other important international agreements: the agreement under the auspices of the International Telecommunication Union (ITU) concerning the settlement of international traffic and payments and government regulations on technical standards, which are subject to the WTO Agreement on Technical Barriers to Trade, by practices on government purchases, which are subject to the Government Procurement Code, and by countries' commitments on TRIPS. Furthermore, FDI decisions will also be affected by host countries' trade policies towards merchandise imports and hence to these countries' commitments in GATT. This study covers only the first elements of all these agreements — GATS and the actual Telecommunications Agreement, known as the Fourth Protocol on Basic Telecommunications.

Regional agreements are more numerous, but the most important ones are NAFTA and some regional agreements of the European Union. The EU has signed a large number of regional agreements, ranging from agreements on free trade areas to cooperation agreements or to the so-called Association Agreements or the Europe Agreements (as they are also known). Free trade agreements like custom unions tend to be highly limited (i.e. often to trade only) and they do not cover investment issues. In contrast, the Association Agreements include both investment and telecommunications as two important chapters. For these reasons, this study will not include any discussion of agreements such as MERCOSUR, which is a free trade agreement. Yet we will be discussing the Association Agreements in more detail.

Many countries have also signed bilateral investment agreements in which telecommunications do not typically feature prominently but are simply treated as any other sector. By the end of 1996, there were about 1160 bilateral investment agreements around the world. Most of these agreements were signed during the 1990s and were between the OECD countries and non-OECD countries.[2] The proliferation of these agreements reflects the interests of foreign investment home countries to protect their investor interests in developing and transition countries. Most of these agreements contain a core of common provisions. Despite this similarity and areas of convergence, there are also significant differences among these agreements. For example, most of the agreements encourage mutual foreign investment. In contrast, the US bilateral treaties require the application of MFN and national treatment. Given the number of bilateral investment treaties and their non-discriminatory treatment of telecommunications, however, we will not dwell on these treaties in further detail.[3]

2 See WTO, *Annual Report 1996* (Geneva: World Trade Organization, 1996), 62.
3 WTO, *Annual Report 1996*. For more details, a brief survey of literature and bibliography.

A. Importance of investment policies for FDI in the telecommunications industry: general comments

Government policies can generally play an extremely important role in stimulating foreign direct investment (FDI). Poor policies will typically discourage FDI while good policies will stimulate it. This general rule also holds true in the case of government policies and their impact on FDI in the telecommunications sector. There is a variety of aspects of FDI activities subject to government interventions and other barriers to FDI. They include the rights of market access, property rights and ownership and control, financial conditions, conditions of rights of way, regulations, employment conditions and the like.

Market access. In order to allow foreigners to invest in its markets, the host country must allow foreign ownership of assets in its territory. This is clearly the *sine qua non* of FDI activities. Yet the telecommunications sector is one in which the rights of foreigners have for a long time been severely impaired. Governments have traditionally perceived telecom services as a public good and the providers of telecommunications services as natural monopolies. As a result, they have made telecommunications subject to the objectives of public policies and to severe restrictions on foreign ownership. The result of these policies has been a prevalence of state monopolies in the majority of countries around the world.

Market access of foreign investors can be also constrained by specific government policies to influence different activities within the telecommunications sector. Some governments may restrict the activities of foreign investors to what is known as basic telecommunications while others open up the sector much wider. Market access of telecommunications companies has also been affected by government pricing policies which have been designed to regulate the rates of return as well as the delivery of telecommunications services to different regions through cross-subsidization. The scope of activities, the division of responsibilities and other aspects of the telecommunications business are sometimes affected by conditions of universal service that investors are required to sign.

Property rights. Governments may also restrict property rights with significant implications for foreign investors. Ownership rights may be restricted to minority shares or to special arrangements under which foreign investors may only purchase the country's assets in (typically minority) partnerships with domestic residents. Such restrictions have been particularly common in the telecommunications industry. Governments will also play an important role in ensuring that property rights and contracts are enforced. If the judicial system of a particular country is weak, its effectiveness can only be increased through deliberate policy measures. Similarly, the safeguard of property rights is critically linked to the transparency of government policies. The costs of business and of investing will be also affected by government policies targeted at parallel activities. For example, telecommunications companies may require unhindered access to land which in turn may require clear title to land ownership.

Rights of way. Even when an investor is given clear ownership rights, it may still be restricted in doing its proper business. For example, a telecommunications company needs to be able to lay down cables but the right to do so may be subject to restrictions imposed by local authorities. Awarding licences for mobile telephony will also be worthless without a parallel allocation by government authorities of spectrum licences. In brief, market access is useless without what is known in the industry jargon as the ‘rights of way’. Similar constraints may arise from host government measures to impose unreasonable technical standards.

Financial conditions. The financial conditions of investment projects are dependent on government taxation policies as well as on policies concerning customs duties, subsidies and price regulations. Many governments also provide special financial incentives to foreign investors in order to increase the country’s attractiveness. Yet, arguably, the most critical issue concerns the terms and conditions for interconnection. Foreign investors will only be able to operate in the country if the ‘price’ for interconnection is reasonable and makes the investment viable.

Regulations. Another major issue for the telecommunications industry is regulations. Governments affect the performance of foreign investors through policies on market access and national treatment. In the context of foreign investment, the government measures take the form of permitting the right of establishment, or in the language of the WTO agreement, the right of commercial presence. However, both market access and national treatment can be adversely affected by various domestic regulations concerning technical standards, financial conditions (as noted above) and other kinds of regulations.

B. GATS: main achievements

The General Agreement on Trade in Services (GATS), which constitutes a part of the Uruguay Round Agreements signed in Marrakesh on the occasion of the Ministerial

Conference on 15 April 1994, is the most important multilateral agreement on services to date. The agreement covers all services and four modes of supply. The modes are (1) cross-border supply, (2) consumption abroad, (3) commercial presence and (4) movement of natural persons. FDI takes place through commercial presence, hence the reason why the following discussion is limited to Mode 3. Telecommunications services and investment are partly covered by the main body of GATS and partly by the Agreement's Annex on Telecommunications.

The Annex on Telecommunications delineates the scope of the agreement. The agreement only applies to measures affecting the access and use of public telecommunications transport networks and services. Explicitly excluded from the agreement are 'measures affecting cable or broadcast distribution of radio or television programming' (Annex, Paragraph 2).

The agreement offers conditions for a significant improvement in market access. It provides for the adoption of two critical principles of non-discrimination: most-favoured nation treatment (MFN — Article II) and national treatment (Article XVII). It stresses the importance of transparency in order to ensure the implementation of the agreement (Article III). It opens up possibilities for developing countries to adopt specific commitments in order to increase their participation in the world trade in services.

Trade and investment in the service sector may be subject to trade barriers that are qualitatively different from those applied to trade in goods. Service providers do not typically face tariffs or quotas on the delivery of their services but they are more likely to be affected by domestic regulations. For example, the entry of foreign banks or other financial institutions into the domestic markets of host countries is typically subject to prudential regulations to ensure the stability of these sectors. Similarly, professional, educational and other services can normally be provided only if the service providers meet given professional, educational and other relevant standards. These constraints are recognized through the provisions of Article VI of the agreement, which seeks to make the regulatory process and its administration 'reasonable, objective and impartial'.[4] It also seeks to facilitate the process further by offering the members the possibility of recognizing the education and experience of service providers from other members (Article VII).

Many services have traditionally been provided through monopolies or exclusive service providers. This means that competition has been completely or almost eliminated, adversely affecting both domestic and foreign new entrants.

4 GATS, Article VI, Paragraph 1.

Telecommunications has been a classical example of this policy in the majority of member countries. The GATS has made a major breakthrough to increase competition and hence market access for foreign investors even though it still offers countries ‘escape clauses’. Members are expected to ensure that monopolies do not ‘act in a manner [...] inconsistent with the Member’s obligations under Article II’.[5] The agreement introduced (1) the so-called ‘facilities competition’, which allows access to the existing infrastructure of the incumbent service supplier. Moreover, (2) the agreement enables firms to enter new competing markets such as cellular and cable networks. (3) Members also recognized that competition may be restrained by certain business practices, and through the provisions of Article IX, Paragraphs 1 and 2, it calls on countries to cooperate ‘with the view to eliminating these practices’. The ‘escape clause’ somewhat mitigates the importance of the provisions of Article VIII. Under Article XXI, members ‘may modify or withdraw any commitment from its schedule’ subject to certain conditions specifying the necessary compensation adjustment and dispute resolution (arbitration).

The contribution of GATS is also important in terms of transparency and clarity of commitments. This should go a long way towards reducing ambiguities about country’s and commercial risks, towards levelling the playing fields for investors and towards guaranteeing the security over foreign investments. The agreement addresses these issues in particular by specifying the situations in which the general and specific conditions of market access do not apply. The exceptions include emergency safeguard measures (Article X), weak balance-of-payments conditions (Article XII), government procurement (Article XIII), general exceptions related to public morals, protection of animal, human and plant life and health, as well as other conditions specified in Articles XIV and XIV *bis*.

Reference Paper. For many observers, perhaps the most significant achievement of the Telecommunications Agreement was the creation and acceptance of the so-called Reference Paper. The latter provides a set of regulatory principles which greatly enhances the effective enforcement of market-access commitments made by countries in GATS/Telecom. It also provides for a set of common understandings about competition and about the way countries were to move away from markets that were not contestable to competitive ones. The Reference Paper covers six main principles: (1) competitive safeguards, (2) interconnection, (3) universal service, (4) public availability of licensing

5 See GATS Article VIII, Paragraph 1. By way reminder, Article II refers to the national treatment principle.

criteria, (5) allocation and (6) use of scarce resources. In total, 60 of 69 countries that made bindings offers on market access signed up to the Reference Paper.

The Fourth Protocol On Basic Telecommunications. The GATS Fourth Protocol on Basic Telecommunications came into force on 5 February 1998. It was the result of a mandate from the Uruguay Round Agreement which called, *inter alia,* for a continuation of negotiations on basic telecommunications. The original signatories of the Protocol were 69 countries including all EU member states. By May 2000, the total number of members with specific Schedules of Commitments on telecommunications services was 93. Even though the Protocol refers to basic telecommunications, many countries have also made commitments on the so-called value-added services. Basic telecommunications are included in the commitments of 83 countries and 72 countries committed to value-added services.

Box 1: Main Features of the Reference Paper

The MAI Negotiating Text as of 24 April 1998 was structured as follows:

I. General Provisions
   Preamble
II. Scope and Applications
   Definitions
   Investor
   Investment
   Geographical Scope of Application
   Application to Overseas Territories
III. Treatment of Investors and Investments
   National Treatment of Most-Favoured-Nation Treatment
   Transparency
   Temporary Entry, Stay and Work of Investors and Key Personnel
   Nationality Requirements for Executives, Managers and Members of the Boards of Directors
   Employment Requirements
   Performance Requirements
   Privatization
   Monopolies, State Enterprises, Concessions
   Investment Incentives
   Recognition Arrangements
   Authorization Procedures
   Membership of Self-Regulatory Bodies
   Intellectual Property
   Public Debt
   Corporate Practices
   Technology R&D
   Not Lowering Standards
   Additional Clause on Labour and Environment
IV. Investment Protection
   General Treatment
   Expropriation and Compensation
   Protection from Strife
   Transfers
   Information Transfer and Data Processing

	Subrogation
	Protecting Existing Investments
V.	Dispute Settlement
	State-State Procedures
	Investor-State Procedures
VI.	Exceptions and Safeguards
	General Exceptions
	Transactions in Pursuit of Monetary and Exchange Rate Policies
	Temporary Safeguards
VII.	Financial Services
	Prudential Measures
	Recognition Arrangements
	Authorization Procedures
	Transparency
	Information Transfer and Data Processing
	Membership of Self-Regulatory Bodies and Associations
	Payments and Clearing Systems, Lender of Last Resort
	Dispute Settlement
	Definition of Financial Services
VIII.	Taxation
IX.	Country-Specific Exceptions
	Lodging of Country-Specific Exceptions
	Relationship to Other International Agreements
	Obligations under the Articles of Agreement of the International Monetary Fund
	The OECD Guidelines for Multinational Enterprises
XI.	Implementation and Operation
	The Preparatory Group
	The Parties Group
XII.	Final Provisions
	Signature
	Acceptance and Entry into Force
	Accession
	Non-Applicability
	Review
	Amendment
	Revisions to the OECD Guidelines for Multinational Enterprises
	Withdrawal
	Depositary
	Status of Annexes
	Authentic Texts
	Denial of Benefits

Source: Original OECD sources reprinted in UNCTAD, *Lessons from MAI* (Geneva, 1999).

C. The impact of GATS and telecommunications agreements

Problems of measurement. Assessments of the impact of international agreements such as GATS are subject to several serious difficulties. The difficulties reflect problems of measurement as well as the fundamental problems of data. Unlike commitments made by countries on market access in goods, commitments in services are quite difficult to evaluate and to interpret. There are several reasons for this.

The main reason is the absence of an easily quantifiable measure of the restrictiveness of measures affecting trade in services. Thus, while the restrictiveness of trade in goods can be measured on the basis of the level of tariffs, there is no comparable indicator of restrictiveness for trade in services. This clearly complicates the evaluation of countries' commitments and this complication will also be reflected in the following discussion.

Researchers have to rely on highly imprecise methods to evaluate the results of the Telecom Agreement quantitatively. The formal analyses have exclusively relied on the use of frequencies of occurrence of a particular commitment as an indicator of the relevant trade policy measure. For example, analyses of market access would identify the number of countries which allow free market or partial market access. Similarly, analyses of limitations on market access may identify the number of countries imposing particular types of limitation. It is this use of frequencies that is also available to us. In addition, several academics have tried to develop alternative approaches to measuring the restrictiveness of policies in services. These methods are based on the *general equilibrium models* which simulate the effects of policies on prices (estimating price-cost margins) and on quantities (estimating the difference between actual and predicted volume of imports). These are fairly traditional methods that have been used in the past to estimate, *inter alia*, the welfare effects of government interventions, exogenous shocks, changes in investment or savings behaviour.[6]

The frequency indicator technique has a number of problems. One problem with the frequency indicators is that they only provide a picture of a particular activity. The unbiased aggregation of these indicators is only possible with the appropriate weighting. Another problem is the absence of qualitative properties of these indicators, making them non-comparable between activities and countries. Assume, for example, that the fixed line telephony sector is constrained by various restrictions in 25 countries while mobile telephony is restricted in ten countries. Do these figures really mean that that voice telephony tends to be more restricted than mobile telephony? The answer is unclear since the 'restrictiveness' of restrictions in each sector may vary.

While more sophisticated and, therefore, less arbitrary, there are also serious problems with the alternative methods based on the general equilibrium model. These problems are of a theoretical nature (e.g. the treatment of market imperfections, policy or market failures or of the 'aggregation problem'), technical (e.g. structure and features of the model, the level of disaggregation), problems of data (e.g. consistency and compatibility

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6 All the existing methods are reviewed in OECD, *Quantification of the Costs to National Welfare of Barriers to Trade in Services*, Scoping Paper (Paris: OECD Working Party of the Trade Committee, 4-5 December 2000).

of data sources, comparability of data, poor data on trade in services, even worse data on restrictions in trade in services, difficulties in separating rents from costs in prices) and of the interpretation of results (e.g. separation of trade and other policy effects). The values predicted by the model (e.g. for price-cost margins or quantities) are only as good as the model and the model builder.[7] The practical usefulness of these models is, therefore, very limited. Could, for example, negotiators use the estimates obtained from the model in the actual negotiations? If so, which model should be used?

There are also difficulties with sectoral analyses. The GATS sectoral classification breaks down to 15 sectors. However, the *sectoral classification* is imperfect and in many instances inadequate. The classification does not reflect any generally agreed methodology except that it served as a convenient tool in the actual negotiations. It cannot be easily compared with product/service classifications since there is no direct correspondence between the GATS and other classifications. Moreover, any sectoral classification becomes obsolete due to technological changes in industry and this is particularly the case in the telecommunications sector, where technological progress has been extremely rapid.

Another problem for the empirical analysis is the quality of data. Commitments made by countries in international negotiations may not necessarily reflect domestic policy measures. For example, tariffs bound in the Uruguay Round agreements may actually be higher than the corresponding actual tariffs. Similarly, commitments made in the service area (such as in financial services) may in fact be more ‘restrictive’ than the actual policy. This difference between WTO commitments and the ‘status quo’ also complicates empirical assessments. Indeed, it could be argued that, for example, the inflow of foreign capital into the financial sector of a given country is not due to the commitments made by that country in the WTO but due to the country’s actual policy on the ground.

Finally, time also matters. It is arguably still too early to provide a solid economic evaluation of the impact of GATS and Telecommunications Agreements. There has not yet been enough time for the agreement to make any significant impact, even assuming that countries’ individual schedules of commitments provide for effective market openings. However, it is precisely the extent to which markets have been opened to foreign investors in telecommunications that we need to analyse first. Only once the

7 These are essentially also the conclusions of a recent studies prepared for the Working Party on Services of the Trade Committee of OECD. See OECD, *Quantification of the Costs to National Welfare of Barriers to Trade in Services: A Literature Review* (Paris: OECD Working Party of the Trade Committee, 18 September 2000), 12.

extent of market opening is known will we be in a position to evaluate the actual economic benefits of these two agreements.

Methodology. In assessing the impact of international agreements, ideally we should be examining different aspects. In the case of telecommunications, this would amount to assessing the effects on international service flows, on foreign direct investment in telecommunications, on market penetration, on costs of service providers, on prices, etc. However, for reasons discussed above, an analysis of this kind would be extremely difficult and highly problematic. In the academic literature, an alternative methodology has been to look at the impact of policy liberalization on countries' welfare. The studies were recently reviewed in two OECD papers prepared for the Working Committee on Services of the Trade Committee. The reports conclude:

> The literature overview shows that liberalization of services trade generates welfare gains under all modelling assumptions. [...] As for the regional distribution of welfare effects, the studies indicate that, generally economies with initial high protection levels tend to gain most (in terms of percentage gains to GDP). As the values of estimates for services trade barriers are higher for developing countries than for developed countries, it suggests that the former are potentially the major winners from services liberalization.[8]

For all these reasons, we will adopt a rather different methodology. Our approach of analysing the impact of the Telecommunications Agreement will focus on four separate issues. First, we will analyse the impact of the agreement on the size of the world telecommunications market. We will do this by examining in detail the country coverage of commitments made in different modes of service delivery and individual sub-sectors. Second, there is a relationship between countries' commitments and their effects on different kinds of incentives for service providers and foreign investors. We will be consider the following incentives: (i) incentives to encourage or discourage different telecommunications sectors, (ii) incentives to encourage specific technologies and (iii) incentives to affect the size of the domestic firms. Third, and arguably the most

8 OECD, *Quantification of the Costs to National Welfare of Barriers to Trade in Services: A Literature Review*, 12. Note that the text itself refers to 'the latter' and thus actually refers to developed countries. However, this appears to be a typo since the word would contradict the idea in the first part of the sentence.

important aspect of international agreements, is their effect on competition. We will examine this question in the context of contestability of markets. Fourth, international agreements may also affect telecommunications services through provisions that are not specific to the industry but critical for service providers. One of these provisions concerns the availability of foreign exchange. Another element of basically the same quality is the scope of bindings. These aspects will now be discussed in turn.

Size of telecommunications markets: an impressive start to market globalization. The most obvious and immediate effect of international economic agreements is their impact on the size of global markets. This is also true of GATS and the Telecommunications Agreement. Historically, the world telecommunications market has been fragmented and segmented into national and highly protected markets. GATS has made one major difference in this respect: it has globalized national commitments on market access as well as on the resolution of conflicts.

The size of the global market can be approximated by the country coverage of GATS. The total number of countries signing the Fourth Telecommunications Protocol was 89 at the end of November 1998.[9] The number is steadily rising as new countries join the WTO. These countries represent the bulk of activities of the telecommunications sector. It is estimated that as of February 1998, the countries that made commitments to open their basic telecommunications market to competition represented about 82 per cent of world telecommunications revenues and another six per cent of countries have committed themselves to introduce competition by 2005. The total number of countries with commitments in basic telecommunications was 83 and the corresponding number in value-added telecommunications services was 70. The Reference Paper, specifying a set of regulation principles, was accepted in full or in part by 62 countries by that date.

The schedules were particularly impressive in the case of commercial presence/foreign direct investment. For example, the total of 99 countries made an offer permitting market access for foreign investment in the sector of voice telephony. This number includes eleven countries which provided completely free access to their markets.[10] The total number of countries providing national treatment to foreign investors in that sector was even higher at 17. In contrast, only two countries did not make any provision for

9 As of January 2000, the number of countries through 'late' commitments by WTO members and by commitments made by newly acceding countries. The former included Barbados, Cyprus, Kenya, Suriname and Uganda. The latter includes Estonia, Georgia, Jordan, Latvia and the Kyrgyz Republic. In addition, three countries have revised their original commitments: Guatemala, Pakistan and Switzerland.

10 It should be remembered that the data in Table 1 do not take into account horizontal limitations. These may somewhat reduce the value of the so-called free access commitments.

the entry of foreign investors. The numbers are even more impressive in the case of electronic mail and other forms of data transmission.

According to an internal WTO study, the most far-reaching commitments have been made by industrialized countries. They were far more likely to make market access unrestricted than other countries. They made no ‘unbound’ entries, adding significantly to the value of their commitments. A major contribution to the quality of the agreement has also been made by emerging economies, primarily countries in transition and a selected number of countries in Asia and Latin America. These countries have made serious commitments — full or partial — to open up their markets to foreign investors. This reflected, *nota bene*, the desire of these countries to obtain access through modes of delivery that provide the service itself, but it would also bring with it the necessary financing, new-technology technical expertise and know-how.

Sectoral incentives. As in the case of overall commitments, the countries’ WTO sectoral commitments can be seen either as revolutionary or disappointing, depending on the point of departure. If we look at the telecommunications sectors some 15 or even 10 years ago, the commitments constitute a major progress. If , on the other hand, we look at the commitments in terms of an ideal standard, we are, of course, still far from a satisfactory outcome.

A complete market opening for foreign investors — without any MFN or national treatment limitations — is offered by a relatively small number of countries. As can be seen in Table 1, the total number of these countries is shown in the section identified as ‘commercial presence’ and in the column ‘full’, showing that market opening without any specific limitations was offered across the whole spectrum of telecommunications sectors. The commitments have been made both on MFN and national treatment basis. To put it differently, these countries have imposed no limitations on foreign investors. Thus, most countries have put some restrictions on the presence of foreign investors as indicated by the large numbers in the column ‘partial’ commercial presence. Which restrictions have been imposed by countries will be discussed further below.

Table 1: GATS/TELECOM Agreements: Level of commitments by sector and mode of supply*

2.C Telecommunication Services	No. Listed	Cross border			Consumption abroad			Commercial presence		
		I In per cent of listed sub-sectors								
MARKET ACCESS		**Full**	**Partial**	**None**	**Full**	**Partial**	**None**	**Full**	**Partial**	**None**
a. Voice Telephone Service	65	12	78	9	31	58	11	11	88	2
b. Packet-Switched Data Transmission Services	59	19	75	7	42	51	7	10	90	0
c. Circuit-Switched Data Transmission Services	60	18	73	8	42	50	8	10	88	2
d. Telex Services	59	20	75	5	47	45	7	11	89	0
e. Telegraph Services	43	19	72	9	49	42	9	9	91	0
f. Facsimile Services	55	18	75	7	44	49	7	11	87	2
g. Private Leased Circuit Services	55	16	80	4	42	55	4	11	89	0
h. Electronic Mail	52	35	60	6	46	42	12	17	79	4
i. Voice Mail	48	35	58	6	44	48	8	17	81	2
j. On-line Information and Data Base Retrieval	54	31	61	7	44	43	13	17	78	6
k. Electronic Data Interchange (EDI)	45	36	58	7	51	42	7	20	76	4
l. Enhanced/Value-Added Facsimile Services	43	37	56	7	49	40	12	21	74	5
m. Code and Protocol Conversion	42	31	60	10	48	48	5	19	79	2
n. On-line Information and/or data processing	40	33	55	13	50	35	15	18	80	3
o. Other, Terrestrial-based Mobile	61	8	79	13	30	61	10	13	87	0
o. Other, Satellite-based Mobile	23	9	87	4	28	68	4	8	92	0
o. Other, other	42	5	86	10	10	81	10	2	93	5
NATIONAL TREATMENT		**Full**	**Partial**	**None**	**Full**	**Partial**	**None**	**Full**	**Partial**	**None**
a. Voice Telephone Service	65	23	65	12	26	63	11	17	77	6
b. Packet-Switched Data Transmission Services	59	37	53	10	39	54	7	34	63	3
c. Circuit-Switched Data Transmission Services	60	37	52	12	40	50	10	30	65	5
d. Telex Services	59	40	55	5	44	47	9	31	65	4
e. Telegraph Services	43	40	51	9	42	47	12	33	65	2
f. Facsimile Services	55	40	55	5	44	49	7	31	64	5
g. Private Leased Circuit Services	55	36	56	7	40	55	5	27	65	7
h. Electronic Mail	52	50	44	6	44	40	15	48	46	6
i. Voice Mail	48	46	48	6	46	42	13	42	54	4

j. On-line Information and Data Base Retrieval	54	52	41	7	48	35	17	48	44	7
k. Electronic Data Interchange (EDI)	45	56	38	7	53	36	11	49	42	9
l. Enhanced/Value-Added Facsimile Services	43	56	37	7	51	33	16	51	42	7
m. Code and Protocol Conversion	42	50	40	10	50	40	10	48	45	7
n. On-line Information and/or data processing	40	55	33	13	53	28	20	55	38	8
o. Other, Terrestrial-based Mobile	61	21	66	13	25	64	11	20	74	7
o. Other, Satellite-based Mobile	23	19	74	8	21	74	6	15	79	6
o. Other, other	42	7	83	10	10	80	10	7	88	5

Legend: FULL = No limitations listed, Partial = Limitations listed, None = No commitments taken on this mode

* Data in this table does not take into account horizontal measures listed in the schedules. As such, Mode 4, movement of natural persons, is not included in this table since commitments on this mode are essentially determined by the horizontal measures.
Source: WTO.

As noted, the market openings for foreign investors have covered virtually all sectors. The markets for value-added telecommunications services have been opened up by a greater number of countries than the market for basic telecommunications. This is the case for both MFN and national treatment principles. Perhaps somewhat surprisingly, fewer countries have imposed limitations on the national treatment principle than they have done in the case of MFN treatment. For example, the voice telephony market was fully liberalized on the MFN principles in eleven countries but the corresponding number is 17 countries with regard to the liberalization on the national treatment principle. One possible explanation could be the effect on countries' commitments from regional arrangements but a more detailed analysis would be required to confirm this finding. The finding is surprising since countries normally try to protect their nationals before protecting foreign competitors investing or doing business in their countries.[11]

Trade and investment incentives and the choice of technique. We saw above that countries do still impose a variety of restrictions on market access and on national treatment that vary among different modes. For example, *Hoekman* observed that countries have often provided for different treatment across the four modes of the

11 Another explanation could be that countries have made the appropriate restrictions in horizontal schedules.

GATS.[12] A recent WTO study on market access has also confirmed that the schedules differ quite significantly among different modes of service delivery. This is also confirmed by the comprehensive data presented in Table 1.

Hoekman believes that this different treatment of different modes of delivery generates cross-modal technological biases and distortions. However, the case is not entirely clear. What is particularly unclear is the question of how one can pre-judge the different technological treatment on *a priori* grounds. The most important condition is to ensure that the four different modes should be subject to neutral incentives. That, obviously, cannot be ascertained from the number of limitations on individual modes of delivery. The dangers of market distortions from different modal incentives has been also recognized in the telecommunications negotiations, and negotiators agreed to stick to technological neutrality among modes of delivery.

Contestability of markets. Unfortunately, the commitments on market access are not sufficient to ascertain the real degree of competition in the telecommunications markets. Countries use a variety of instruments to restrict market access to foreign investors. The most frequently notified restrictions in GATS in the countries' Schedules of Limitations include three instruments. These are limitations on the number of suppliers in the industry, restrictions on the type of legal entity and limits on the participation of foreign capital.[13] The limitations imposed on the number of suppliers stem from the belief that telecom companies operate as natural monopolies, or that the entry into the market must be restricted on prudential grounds. Restrictions on legal entity may include requirements for foreign investors to set up, for example, special types of joint ventures in which foreign subjects are obliged to participate in equity partnership with the host country's subjects. Finally, restrictions on foreign ownership typically impose minority limits on the foreign ownership of telecommunications companies.

In addition, the value of countries' commitments has been also constrained by the possibilities to depart from the MFN principle. This has raised a number of concerns.[14] There are two ways countries can depart from the MFN provisions. The first includes

12 *B Hoekman*, 'Assessing the General Agreement in Services,' *The Uruguay Round and Developing Countries*, eds *W Martin* and *L A Winters* (Cambridge: Cambridge University Press, 1996).

13 In principle, the GATS contains six types of restrictions — a 'black list' — which countries were not allowed to impose, provided they were not specifically scheduled in their list of commitments. In other words, the effectiveness of the 'black list' only refers to new measures. The six types in the list are: (1) the number of service suppliers allowed, (2) the total values of transactions and assets, (3) the total output of services, (4) the total number of natural persons employed, (5) the type of legal entity (e.g. branch rather than subsidiary) and (6) foreign equity participation on investment.

14 See, for example, *A Mattoo*, 'MFN and GATS,' *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, eds *T Cottier* and *P Mavroidis* (Ann Arbor: University of Michigan Press, 2000).

explicit departures from the MFN, such as exemptions for regional integration (Article V) and general exemptions (Article XIV). The second includes measures such as domestic regulations, quantitative restrictions, restrictions arising from the reciprocity conditions tolerated by GATS and, finally, competition provisions. Not all of these departures are equally valid for each service sector. The competition provision was particularly important in the telecommunications negotiations since some countries were concerned about whether the MFN obligation was giving them enough scope to take action against foreign anti-competitive practices.[15]

The pattern of restrictions can be seen in Table 2. The table shows for each telecommunications sector the distribution of the total number of countries imposing particular restrictions on market access in the telecommunications industry. For example, in voice telephony, the number of countries imposing limitations on the number of suppliers in their markets was 38. Similarly, 22 countries imposed restrictions on the legal entity and 23 countries imposed restrictions on foreign participation. This pattern is basically repeated in every sector.[16] In basic telecommunications, the highest frequency of limitations affected the form of legal incorporation and foreign capital participation. Limitations on the number of suppliers were relatively less frequent but still frequent enough. In value-added services, the pattern was similar, even though the limitations were less frequent.[17] What should be emphasized at this stage is the point that all these limitations refer to those aspects of business management that can frequently be critical for companies in their decision to invest abroad. Restrictions on foreign ownership can be particularly damaging, even though many recent deals in telecom have involved investments with minority shares.

15 *Mattoo*, 'MFN and GATS.'

16 Note that the sums along horizontal lines may exceed the total number of countries participating in the agreement. The reason is that many countries have imposed more than one limitation on foreign investors in their markets.

17 See *R Adlung* et al., *The Pattern of Restrictions in GATS Schedules*, mimeo (Geneva: WTO, 1999).

Table 2: GATS/TELECOM Agreements: Market access, types of limitations by sector and mode of supply listed*

2.C Telecommunication services	Mode	Market access limitations					
		a	**c**	**d**	**e**	**f**	**G**
a. Voice Telephone Services	CB	5			4	1	11
	CA	1			4	1	8
	CP	38	1		22	23	38
b. Packet-Switched Data Transmission Services	CB	5			4	1	8
	CA	2			4	1	6
	CP	24	1		22	17	32
c. Circuit-Switched Data Transmission Services	CB	3			4	2	8
	CA	2			4	1	6
	CP	23	1		19	18	31
d. Telex Services	CB	2			3	2	7
	CA	1			3	1	5
	CP	22	1		20	17	27
e. Telegraph Services	CB	2			3	1	6
	CA	1			3	1	5
	CP	18	1		18	13	24
f. Facsimile Services	CB	2			2	2	7
	CA	1			2	1	4
	CP	16	1		17	15	28
g. Private Leased Circuit Services	CB	2			4	2	8
	CA	1			4	1	6
	CP	20	1		18	16	31
h. Electronic Mail	CB	3					7
	CA	1					1
	CP	14	1		8	7	19
i. Voice Mail	CB	3					4
	CA	1					1
	CP	13	1		7	8	16
j. On-line Information and Data Base Retrieval	CB	3					5
	CA	1					2
	CP	12	1		8	9	18
k. Electronic Data Interchange (EDI)	CB	2					4
	CA	1					1
	CP	9	1		4	5	14
l. Enhanced/Value-Added Facsimile Services	CB	2					4
	CA						1
	CP	10	1		5	6	16
m. Code and Protocol Conversion	CB	2					3
	CA	1					1
	CP	9	1		3	5	13
n. On-line Information and/or data processing	CB	3					5
	CA	1					1
	CP	10	1		6	4	13
o. Other - Terrestrial-based Mobile	CB	4			4	2	11
	CA	1			4	1	8
	CP	30	1		20	21	33
- Satellite-based Mobile	CB	2			4	2	9
	CA	1			4	1	6
	CP	24	1		20	18	31

Legend: CB = Cross-border supply, CA = Consumption abroad, CP = Commercial presence, a = number of suppliers, c = number of operations, d = number of natural persons, e = types of legal entity, f = participation of foreign capital, g = other measures

* Data in this table does not take into account horizontal measures listed in the schedules. As such, Mode 4, movement of natural persons, is not included in this table since commitments on this mode are essentially determined by the horizontal measures.
Source: WTO.

The reluctance of countries to allow full ownership control in their telecommunications markets by foreign entities is revealed by other limitations imposed by governments on national treatment. This was done in GATS through 'limitations on nationality requirements' and through a variety of other measures that normally fall under the heading of 'domestic regulations'. This includes limitations on residence requirements, tax measures, licensing requirements and requirements on standards and qualifications, registrations, authorization and limitation on ownership of land and other property. A summary of countries' schedules is presented in Table 3. It should be noted that they have been recorded in countries' schedules as horizontal measures. Horizontal measures are not reported in Table 3.[18]

18 It should be also noted that not all of these measures/regulations are necessarily discriminatory against foreigners. For example, authorization requirements may be non-discriminatory in theory but their implementation can lead to a different treatment.

Table 3: GATS/TELECOM Agreements: National treatment, types of measures by sector and mode of supply*

2.C Telecommunication Services	Mode	National treatment limitations						
		a	d	e	F	g	h	l
a. Voice Telephone Services	CB	1	6	4			4	4
	CA		6	4			4	4
	CP	1	12	5	3	1	5	5
b. Packet-Switched Data Transmission Services	CB	1	6	4			4	4
	CA		6	4			4	4
	CP	1	10	5	2	1	5	5
c. Circuit-Switched Data Transmission Services	CB	1	7	4			4	4
	CA		6	4			4	4
	CP	1	11	5	2	1	5	5
d. Telex Services	CB	1	7	4			4	4
	CA		6	4			4	4
	CP	1	13	4	1	1	5	5
e. Telegraph Services	CB	1	6	4			4	4
	CA		6	4			4	4
	CP	1	11	4	1	1	5	5
f. Facsimile Services	CB	1	7	4			4	4
	CA		6	4			4	4
	CP	1	12	4	1	1	4	5
g. Private Leased Circuit Services	CB	1	7	4			4	4
	CA		6	4			4	4
	CP	1	10	4	1	1	4	5
h. Electronic Mail	CB		1		1			
	CA		1		1			
	CP		4		1			1
i. Voice Mail	CB		1		1			
	CA		1		1			
	CP		5		1			1
j. On-line Information and Data Base Retrieval	CB		1		1			
	CA		1		1			
	CP		5		1			
k. Electronic Data Interchange (EDI)	CB		1		1			
	CA		1		1			
	CP		4		1			
l. Enhanced/Value-Added Facsimile Services	CB		1		1			
	CA		1		1			
	CP		4		1			1
m. Code and Protocol Conversion	CB				1			
	CA				1			
	CP		3		1			
n. On-line Information and/or data processing	CB				1			
	CA				1			
	CP		2		1			
o. Other - Terrestrial-based Mobile	CB	1	7	4			4	4
	CA		6	4			4	4
	CP	1	12	5	3	1	6	4
- Satellite-based Mobile	CB	1	7	4			4	4
	CA		6	4			4	4
	CP	1	9	4	1	1	5	4

Legend: CB = Cross-border supply, CA = Consumption abroad, CP = Commercial presence, a = tax measures, d = nationality requirements, e = residency requirement, f = licensing, standards, qualifications, g = registration requirement, , h = authorization requirements, l = ownership of property/land

* Data in this table does not take into account horizontal measures listed in the schedules. As such, Mode 4, movement of natural persons, is not included in this table since commitments on this mode are essentially determined by the horizontal measures.
Source: WTO.

The table confirms that the countries' GATS schedules on foreign investment in the industry are often constrained by nationality, residency and authorization requirements. The nationality restriction is particularly prevalent in country schedules in Mode 3, significantly more so than in the other modes. These restrictions are more frequently imposed in developing countries than in rich countries. As a WTO study concluded:

> [E]merging markets are about five times more likely than industrialised countries to have maintained limitations on the number of suppliers and almost four times more likely to require that a particular type of legal entity be established to provide service. They were also more than three times more likely to have listed limitations under the heading 'other requirements'.[19]

According to a recent OECD study, 96 per cent of the OECD market is now open to competition.[20]

GATS and stability of trade policy. Theoretically, one the greatest contributions of the WTO agreements to economic performance of countries is their effect on the stability of trade policy. This is provided in the agreements through the so-called bindings of countries' commitments. Commitments that are 'bound' cannot be waived except in specific and generally agreed circumstances. It is the bindings that make countries' trade and investment policies transparent, predictable and generally more stable.

Unfortunately, we do not have specific data on the level of bindings in the telecommunications sector. As a general rule, however, countries agreed that their commitments were bound unless they indicated to the contrary. It is the latter that is,

19 See WTO, *Telecommunication Services* (Geneva: World Trade Organization, 1998), 8.

20 OECD, *A Review of Market Openness and Trade in Telecommunications* (Paris: OECD, DSTI, Working Party on Telecommunication and Information Services Policies, 1999), 5.

unfortunately, not available in detail. What we know from anecdotal evidence, however, is that Latin American countries tended to bind, or at least phase-in their bindings. Asian countries, on the other hand, made their offer subject to fewer bindings even though their actual regime were more liberal.[21] African countries made few bindings, developed countries tended to bind all their commitments.

The figures are impressive, but not so much because of their significance in relation to offers in the other modes of supply delivery (compare Table 1). As we saw above, countries continue to maintain many restrictions on both market access and national treatment. However, the significance of the commitments is in the change of attitude of countries towards reaching a multilateral agreement. Their schedules of commitments also represented a reversal of the highly restrictive and closed policies practised in the telecommunications sector in the past. The achievement is all the more impressive in the light of a general reluctance at the time to pursue negotiations on a multilateral agreement on investment.

D. Open-ended and outstanding issues

The agreement is neither foolproof nor sufficiently comprehensive. This was well recognized by the negotiating parties, and the nature and the scope of 'unfinished business' is thus reflected in the actual text of the agreement. Perhaps the most open-ended issues are those relating to subsidies and emergency safeguards, the extent of liberalization and the degree of the commitments made by less developed countries (LDCs). In addition, the agreement also suffers from limitations on bindings, unresolved issues of competition, regulation, rights of way and pricing.

Subsidies. On subsidies, GATS is relatively 'timid' and inconclusive. It is recognized in Article XV that subsidies may be distortional but the agreement leaves the substance to future consultations and negotiations in terms of establishing actual multilateral disciplines, their relationship to countervailing measures and to development programmes of LDCs. Injury caused by subsidies should only be addressed through mutual consultations. Members have also been aware that there continues to be an ample room for more liberalization of services sectors and commit themselves to further

21 For example, India and Indonesia made less than *status quo* commitments with respect to foreign equity participation. However, this was not a general pattern. For this and other examples, see *P Low* and *A Mattoo, Is There a Better Way?: Alternative Approaches to Liberalization under GATS,* mimeo (Geneva: WTO, 1998).

negotiations in the future (Article XIX). Members have also agreed that LDCs may place ‘reasonable conditions’ on the access and use of public telecommunications networks and services to strengthen domestic telecommunications infrastructures (Annex, Paragraph 5g).

It is difficult to assess how widely subsidies are actually used by countries in the telecommunications industry. A recent review showed that the total number of countries with a subsidy policy in force was only four: Singapore, Peru, India and Trinidad and Tobago.[22] However, it should be remembered that the study is based on a rather limited definition of subsidies derived from the WTO Agreement on Subsidies and Countervailing Duties. The definition excludes, for example, services subject to cross-subsidization under the universal service arrangements, particularly relevant in the telecommunications industry. Moreover, the number of countries that have been subject to reviews under the TPRM is limited, constraining the size of the sample.

Market access. For a number of reasons, it is also difficult to assess the extent of market-access commitments fully. One reason concerns the problem of measurement discussed above. Another problem is that effective market access may be restricted not only by limitations on markets but also by various horizontal and regulatory restrictions. The latter, in particular, are extremely difficult to assess. The third reason is that countries may not have been willing to schedule the same level (value) of market access as the one actually applied in practice. Clearly, the liberalization of the telecommunications markets started well before the WTO negotiations.[23]

How many of the market-access commitments have been made as a result of the actual WTO negotiations? According to observers who were close to the negotiations at the time, only a few countries were ‘induced’ to liberalize as a result of negotiating pressures in WTO.[24] Most countries have apparently made commitments that did not go

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22 See WTO, *Subsidies for Service Sectors*, S/WPGR/W/25/Add 2 (Geneva: WTO, 12 December 2000). The study was carried out under the TPRM mandate and for the Working Party on GATS Rules.

23 For a review of policies in a sample of WTO member countries including three countries in transition (Hungary, Poland and the Czech Republic) and four developing countries (Mexico, Argentina, Peru and Chile) see *P Cowhey* and *M Klimenko, The WTO Agreement and Telecommunication Policy* Reforms, mimeo (Washington DC: The World Bank, 1999). A useful overview of policies in the APEC region can be found in *E Wada* and *T Asano*, ‘Telecommunication Services in the Asia Pacific Countries,’ *Unfinished Business: Telecommunications After the Uruguay Round*, eds. *G C Hufbauer* and *E Wada* (Washington DC: Institute for International Economics, 1997).

24 It appears that Japan, Singapore, the Republic of Korea, Portugal and Spain made additional concessions during the negotiations even though the countries would not acknowledge that this was done as a result of outside pressures. The Asian countries experience is discussed in Low and *Mattoo, Reform in Basic Telecommunications and the WTO Negotiations*.

beyond their existing policies. Other countries have made commitments below the status quo, as noted above. Some countries were allowed to make commitments based on future liberalization (several African and Caribbean countries). All these problems notwithstanding, it appears that only a handful of countries have been prepared to offer completely free access to their telecommunications industries, as already noted.

Many countries have also taken autonomous liberalization measures after the conclusion of the Telecommunications Agreement.[25] These measures are not necessarily incorporated into the original countries' schedules. For example, several central European countries — candidates for the accession to the European Union — are currently in the process of rapid harmonization of their laws with the *acquis communautaire*. The reform process is fluid and continues, and most of the new measures are probably not in the relevant countries' schedules to GATS. In sum, the actual impact of the WTO on countries' market-access commitments was at best moderate. The value of the agreement lay mainly elsewhere, as we will see below. Hence, there is clearly considerable room to open domestic markets up further through multilateral commitments.

Limitations on bindings. The GATS/Telecommunications Schedules of countries' commitments may sometimes be misleading as an indicator of the actual policy and regulatory situation in a given industry. Just as actual tariffs may deviate from bound tariffs in countries' schedules of commitments in trade in goods, the schedules of countries' commitments in telecommunications services may differ from actual measures. The main explanation is the fact that countries have bargaining strategies and may not be willing to 'give away' in their offers the full value of their commitments until suitably 'compensated' by their negotiating partners.

Under GATS, all scheduled commitments are deemed 'bound' unless indicated otherwise. This is quite important to emphasize. It implies that countries were prepared to make 'bound' rather than 'open-ended' commitments. Nevertheless, several observers have recently complained that many countries have not scheduled the full extent of domestic liberalization measures in their WTO commitments.[26] In particular, these countries were typically unwilling to 'bind' the domestic measures. If true, the value of their commitments would be diminished.

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25 For an historical account of countries' schedules and negotiations, see Low and *Mattoo*, *Reform in Basic Telecommunications and the WTO Negotiations*.

26 See, for example, *Hoekman*, 'Assessing the General Agreement in Services' and *B Hoekman*, *Towards a More Balanced and Comprehensive Service Agreement*, mimeo (Washington DC: The World Bank, 1999).

In judging the 'value' of bindings, it is important to distinguish between two issues: the value of the bindings *per se*, that is the value of a commitment that cannot be lowered, and the value of binding in relation to existing policies (status quo) or even in relation to future policies. The first value of binding lies in transparency and predictability. Given the number of countries' offers and their coverage of sectors, there is no doubt that the Telecoms Agreement provides for considerable improvement to the establishment of international/multilateral disciplines on telecommunications. However, has the agreement resulted in binding a status quo or even a more progressive liberalization in relation to the status quo? In other words, does the agreement reflect the ongoing process of liberalization around the world? The answers to these questions are more difficult since we do not have detailed evidence on a country-by-country basis. However, as we have already seen, the quality of bindings varies from country to country and probably from region to region. On the one hand, several Asian countries tended to bind below the status quo.[27] On the other, Latin American countries tended to bind existing policies or sometimes future liberalization, as noted above. In brief, the negotiations probably helped in some situations but probably only to a limited extent.

Competition. Despite the major progress in introducing competition to the telecommunications industry, it is quite clear that competition and its rules continue to be a major issue of the telecommunications industry. State ownership provides a good example here. On the one hand, there is no doubt that the role of government in the industry has been significantly reduced. Reduced government involvement in running the telecommunications sector can be seen from data on government divestiture. Government involvement has been dramatically reduced over the last decade or so. On the other hand, the role of government remains important in many countries. For example, in Europe 37 per cent of PTOs have not yet been privatized. The percentages are even higher in Asia-Pacific (47 per cent), Africa (65 per cent) and in Arab states (71 per cent). Only in the Americas is the corresponding percentage lower (26 per cent).[28] The WTO agreements have provided no guidance on the role of the state as an owner of productive assets.

We have also seen that governments often restrict market access for new entrants while permitting and/or preferring the infusion of foreign equity into existing companies.

27 India and Indonesia, for example, bound at less than the *status quo* with respect to foreign equity participation. Other Asian tigers such as Malaysia, Thailand and the Philippines have also made commitments below their *status quo*. See *Bronckers* and *Larouche*, 22; *Low* and *Mattoo, Reform in Basic Telecommunications and the WTO Negotiations*, 22.

28 See *B Petrazzini, Global Trends in Market Reform,* mimeo (Geneva: ITU Strategy and Policy Unit, 2000).

Thus, competition continues to be restrained in the countries' schedules in GATS through restrictions on the choice of investment portfolio. However, how serious are these restrictions and how important is the role of foreign investment? This question was considered in an earlier study by *Low* and *Mattoo*, who used the case-study of Asian countries.[29] They found no evidence of a simple correspondence between market openness and the degree to which FDI occurred. The reasons may be the continued or even increased presence of domestic firms or the attempts of governments to control the speed of divestiture. In sum, there is clearly ample room for the further opening of markets to foreign investors and hence for further multilateral negotiations.

Even though the GATS/Telecommunications Agreement already addresses competition issues, this is done in a very rudimentary manner and is highly incomplete. Several observers have already been quite critical of the lack of precision in defining various competition concepts and issues or about the gaps in the agreement. For example, *Crandall* complains about the agreement, which refers in Article VIII to 'monopoly providers' while the issue may no longer be a question of monopolies but that of 'dominant' suppliers.[30] The point is, for example, that incumbents may no longer be in the exclusive position of monopolies but, since they control the interconnections, they may be in the position to abuse their position by creating bottlenecks and other kinds of pressures on their clients.[31] The improvement of market access through facilities competition measures and, in particular, through interconnections was quite revolutionary. Nevertheless, it is only now that the systems are being tested. As the most recent difficulties of negotiating the access to the Mexican telecommunications market documents, we are up against issues that will only emerge through practical operation.

Competition in the telecommunications industry can be also restrained by impediments to rights of way. Foreign investors can run into serious difficulties when investing abroad for reasons that may be beyond the control of central governments and their policies. For example, companies may run into strong resistance from municipal authorities even though central governments may be providing attractive conditions. In other words, regulatory issues between central and regional governments can become a major stumbling block to competition between incumbents and new entrants into the

29 *Low* and *Mattoo*, *Reform in Basic Telecommunications and the WTO Negotiations*.

30 *R W Crandall*, 'Telecom Mergers and Joint Ventures in an Era of Liberalization,' *Unfinished Business: Telecommunications After the Uruguay Round*, eds. *G C Hufbauer* and *E Wada* (Washington DC: Institute for International Economics, 1997).

31 For more details, see for example, *J J Wheatley*, *World Telecommunications Economics* (London: The Institution of Electrical Engineers, 1999), 142-43.

market. Once again, GATS does not provide much of a guidance; it does not address the question of guaranteeing the most efficient rights of way.

The agreement continues to allow for licensing. Foreign companies have to apply for a licence in order to operate in a given country. The question that is now increasingly asked is whether the practice needs to be continued in the future.

The GATS/Telecoms Agreement also does not provide for remedies from injuries caused by monopolies. Article IX only refers to ‘consultations’ between partners. There has also been concern about cross-sectoral mergers involving the telecommunications industry and with multimedia firms. The concern is based on the latter gaining full control over the development of technology in telecommunications — one reason why several of these deals have received strong opposition from competition authorities.

Despite the major achievement in successfully negotiating the Reference Paper, the international regulatory framework continues to be subject to many question marks. First, the Reference Paper only deals with major regulatory issues while others are left to national authorities. Second, given the general nature of the Reference Paper, national authorities have a great deal of autonomy in interpreting the rules. The general question often posed is whether these regulatory principles are or will be performing well and, if not, what changes will have to be contemplated. This is an empirical problem. Third, the Reference Paper only provides minimal guidance on the status of the regulators. It states that the regulators should not be linked or accountable in any way to any supplier of telecommunications services. It avoids addressing what is currently perhaps the most burning issue: namely, the question of independence from government authorities. The failure to separate regulators from government authorities is often seen as a potential ground for distortion of competition.

Finally, an interesting national treatment issue has been brought up by *Bronckers* and *Larouche*.[32] They argue that the principle operates differently for services than for goods. As they point out:

> For foreign service suppliers, being subject to the same requirements as domestic companies may mean that they are actually worse off. In the telecommunications sector, imposing some form of universal service or minimum coverage requirement to a foreign entrant can put it in a worse

32 *Bronckers* and *Larouche*.

> position than the local service provider which, although under the same obligation, has the requisite infrastructure already in place and has acquired a certain market share.[33]

Pricing. The rules on pricing can be also seen as vague since they do not provide for a proper and economically rational way of pricing interconnections nor do they deal with the important issue of international settlements. The latter continues to be regulated under the ITU agreement on the settlement of international traffic and payments. This agreement specifies the accounting rates — the per-minute rate used as a basis for international payments on a route. These rates vary from route to route and are typically twice the so-called settlement rate — the rate actually paid for the delivery of an outgoing call.[34] Thus, international prices have been subject to bilateral agreements which regulate international price settlements through a system based on accounting rates.[35] This is a particularly difficult problem for WTO negotiators since the system of accounting rates violates the MFN principle.

Pricing of telecommunications services has been perhaps the most contentious and sensitive area under discussions, for domestic reasons as well. Pricing of telecommunications services has traditionally been subject to various forms of price control in most countries. Governments have regulated domestic prices through the operations of state and private monopolies in order to provide for universal service, distribution of services, generating tax revenues and mobilizing investable funds.

These pricing policies have been under heavy pressure for reform. Domestic price regulation has been found to be a major source of delay in investment approvals, cross-subsidies have been extremely rigid and the pricing of services is not always well coordinated with the pricing of interconnections. The international price settlement system has been under even greater strain. The WTO Telecommunications Agreement did not address these issues in specifics, but it has most likely created an environment in which it has proved difficult, if not impossible, to maintain the existing pricing policies. Reluctance to change the accounting rate system comes from countries that are dependent on telecommunications revenues for their general budgets — typically developing countries.

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33 *Bronckers* and *Larouche*, 16.

34 For more details, see, for example, *Brockers* and *Larouche*, 22.

35 For more details see, for example, *H Ergas*, ‘International Trade in Telecommunications Services,’ *Unfinished Business: Telecommunications After the Uruguay Round*, eds. *G C Hufbauer* and *E Wada* (Washington DC: Institute for International Economics, 1997); *Wheatley*.

III. Comparisons of GATS/Telecom Agreement and Other International Agreements

In this section we will compare the GATS and Telecom Agreements with other important investment and telecommunications-related international agreements. The point of departure is the criterion that the international agreement in question must provide rules and disciplines governing foreign investment in telecommunications. We will be referring to the following international agreements: (1) regional agreements on telecommunications, (2) regional agreements on foreign investment and (3) bilateral agreements on foreign investment.[36] In addition, foreign investment disciplines were also subject to the well-known and failed negotiations of a multilateral agreement on investment (MAI). In this section, we will provide a brief comparison of GATS/Telecom Agreements with each type of international agreement noted above. The discussion is schematically divided into two separate parts, covering international agreements on telecommunications and on foreign investment respectively.

A. Telecommunications agreements

Regional agreements vary in scope and detail. Most regional agreements refer to special arrangements concerning trade and they are, therefore, not relevant as policy instruments for foreign investment in telecommunications. However, there are two regional telecommunications agreements — NAFTA and the European Union's regional agreements — that are relevant and important. There are many different types of EU regional agreements. The EU has a number of free trade agreements, and cooperation agreements, but again these are not relevant for foreign investment in telecommunications. However, the EU has signed a number of the so-called Association Agreements or Europe Agreements, which contain important provisions on both foreign investment and telecommunications. Apart from NAFTA and the EU regional agreements, there are, of course, other regional agreements to which we will briefly refer further below, but their significance is very limited.

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36 The number of bilateral treaties designed to promote foreign investment rose fivefold during the 1990s to 1857, involving 173 countries, according to UNCTAD. At the end of 1980s, the corresponding number was 385. The figures were reported in *Financial Times* (19 December 2000).

1. NAFTA: main features of the chapter on telecommunications.

Telecommunications are treated in NAFTA as a separate industry — Chapter 13. By treating the sector separately, the agreement adds to commitments already made under 'investment' and 'cross-border supply'. The chapter describes three basic policies that governments must seek to implement as part of the agreement: (i) free flow of information, (ii) non-discrimination and (iii) transparency. The main provisions of NAFTA and GATS are compared in Box 2 below. In certain areas, the agreement goes beyond GATS, and these areas are identified below:

Pricing. Interconnection charges must reflect true economic costs. In addition, the agreement provides for rules concerning the leasing of private circuits; prices must be on flat-rate basis.

Transparency. The rules on transparency are enforced by several provisions. For example, the parties agreed to guarantee freedom of movement of information to persons of other NAFTA-parties (Article 1302).

Security and confidentiality. The parties have also agreed to take the necessary measures to ensure the security and confidentiality of messages and the privacy of subscribers to the public networks or services.

Value-added services. NAFTA contains detailed conditions for the provision of value-added services (Article 1302).

Standards. The agreement calls on the parties to adopt measures leading to the acceptance of tests carried out by other NAFTA parties (Article 1304).

Monopolies. Non-competitive business practices are fully recognized in NAFTA, partly in Article 1305 and partly in Chapter 15 (Competition Policies). The agreement goes further than GATS here because it includes specific provisions to remove such distortions, such as the timely disclosure of technical changes to networks and their interfaces.

2. A brief evaluation of the WTO Telecommunications Agreement

We will now provide a brief evaluation of the WTO Agreement and we will do so by comparing its main features with the most important international agreements on telecommunications. The question we are asking is the following: How does the WTO Telecommunications Agreement compare with other international agreements? We will compare the agreement with the relevant provisions in NAFTA and some other regional agreements.

NAFTA. A detailed comparison between the relevant provisions on telecommunications in GATS and NAFTA is provided in Box 3 below. The main differences are printed in bold for an easier comparison and identification of the main specifics. The differences can be summarized as follows:

The scope of the agreements and the basic rights are different in both agreements. While the scope in the WTO agreement is limited to only those sectors in which countries have made their commitments (i.e. scheduled sectors), NAFTA contains no such limitations. This difference is reflected in the extent to which the parties can impose extra conditions of service or additional restrictions. NAFTA is more forthcoming in this respect. For example, NAFTA makes it clear that a party cannot be required to establish telecommunications transport networks and services that are not offered to the public generally. Similarly, the agreement requires a 'Party engaged in the broadcast or cable distribution of radio or TV programming to make available its cable or broadcast facilities as a public telecommunications transport network'.

NAFTA is a broader agreement in that it includes a separate and detailed set of rules for value-added services. These cover specific provisions for licensing procedures and, once again, a specific provision prohibiting a party from forcing any subject to provide specific value-added services. Moreover, 'no Party may require a person providing value-added services to conform to particular standards or technical regulations for interconnection'. In GATS, on the other hand, value-added services are covered by individual members' commitments in their schedules.

The NAFTA provisions on domestic pricing issues concerning interconnections also seem concrete. As already mentioned above, the provisions require charges to be related to 'economic costs' rather than to 'cost-oriented rates', as required in the WTO agreement.

On competition, both agreements cover relatively similar areas. An exception is the requirement in NAFTA 'to adopt or maintain effective measures such as accounting requirements and requirements for structural separation' with a view to preventing anti-competitive conduct. In contrast, GATS is more forceful in stating that 'procedures for interconnections must be publicly available'.

NAFTA also has a detailed section dealing with 'standards-related measures' to ensure interoperability. These measures, as well as conformity assessment tests, must be limited to the technical operations of the system, such as preventing technical or electromagnetic interference, or to ensuring safety or access to public networks or services. The idea of these requirements presumably was driven by the desire of the negotiators to ensure that standards-related measures do not become tools for protecting domestic markets.

Interestingly enough, both agreements also differ on the treatment of universal service. The WTO agreement specifies that defining universal service is the sole right of national governments, provided that the right is administered in a transparent, non-discriminatory, neutral and cost-effective manner. NAFTA, on the other hand, provides no coverage of universal service requirements.

Finally, both agreements are quite clear about licensing requirements. The WTO provisions appear to be somewhat more specific in their call for publicly available licensing criteria, time periods for reaching a decision, terms of individual licences and reasons for denial of licence.

EU regional agreements. The most important of these agreements are the so-called Association Agreements (or the Europe Agreements). These are agreements between the EU and the central and eastern European countries with the view to the eventual integration of the latter in the Union. Like NAFTA, the Association Agreements typically include special coverage of telecommunications. However, the detail of the relevant provisions is less comprehensive than NAFTA, Chapter 13, or even GATS for that matter. The focus is on the exchange of information, the transfer of technology and the promotion of new communications. In other words, there is no provision in the agreements to provide market access.

EU cooperation agreements. These are agreements between the EU and Middle Eastern and North African countries. They also include cooperation agreements with Chile and Mercosur as well as Albania, Bulgaria and Romania. The coverage of telecommunications in these agreements is even less comprehensive than in the association agreements.

Regional trading arrangements. Traditional regional trading arrangements — free trade areas or customs unions — are not particularly important as policy instruments affecting the rules of foreign investment. These arrangements are important only insofar as they merely introduce disciplines for international trade. They are, therefore, only important to foreign investors indirectly through rules on movements of goods, such as rules on tariffs or on technical specifications.

The assessment of the WTO agreement on telecommunications would not be complete without an analysis of its provisions concerning foreign investment, or ‘commercial presence’ in WTO jargon. This is an aspect to which we will turn now.

B. Foreign investment agreements

Investment agreements do not specifically target telecommunications but they may be critical for FDI in the telecommunications industry. The reason here is that they include internationally binding commitments specifying the terms and conditions for foreign investment. Once again, the most important regional investment agreements are NAFTA and the EU association agreements. At the end of this section, we will also evaluate the GATS in terms of the Multilateral Agreement on Investment (MAI) — an agreement that never was.

1. NAFTA

While the main principles of the investment chapter of NAFTA are the same as those in GATS regarding transparency and non-discrimination, NAFTA extends the coverage of GATS in several areas: These include the provisions for minimum standards of treatment, transfers, expropriation and compensation and environmental measures. There are also some notable differences in national treatment and MFN provisions, the scope of restrictions, market access and competition policy provisions.

MFN and national treatment. One interesting exception to MFN treatment is the provision of Article 1108 (7)(b) of NAFTA, which specifies that MFN provision does not apply to subsidies or grants provided by a party or a state enterprise, including government-supported loans, guarantees and insurance. As already noted, members can maintain under GATS measures that are inconsistent with MFN but these must be established as an exception and scheduled.

National treatment is applied under GATS by members only to scheduled sectors. The corresponding NAFTA provisions appear to be broader. They require each party to accord no less favourable treatment than it accords to its own investors — in like circumstances (Article 1102). However, NAFTA is much more clear and 'more liberal' with regard to equity ownership. It states that 'no Party may impose on an investor of another Party a requirement that a minimum level of equity be held by the nationals' (Article 1102).

Minimum standard of treatment. GATS is not a *bona fide* investment agreement. It does not, therefore, provide for the detailed protection of foreign investors to the extent possible in investment agreements. In fact, GATS has no specific coverage of this issue, unlike NAFTA. NAFTA provisions are in this respect much more specific and detailed.

Thus, according to Article 1105, investors must be treated in accordance with international law. The article further specifies the international minimum standards by requiring that investments of the investor be treated in a fair and equitable manner and enjoy full protection and security.

Restrictions. NAFTA makes special provisions through which it may be possible to deny benefits of the agreement under certain conditions. For example, the denial of benefits can be invoked under the agreement if the denying party does not maintain diplomatic relations with a non-party. There is also a provision that denies the benefits to a non-party if the latter does not have substantial business activities on the territory of the party.

Transfers. Like GATS, NAFTA recognizes that the benefits of foreign investments can be 'nullified' in the absence of proper conditions on financial transfers. However, NAFTA goes further in that it also prohibits the forced repatriation of funds, i.e. incomes, profits and earnings arising from the investment (Article 1103/3).

Expropriation and compensation. NAFTA also includes detailed provisions with respect to expropriation and compensation. This allows for an elaboration of the minimum standard of treatment required by international law (Article 1110). Quite importantly, Article 1110 (2)-(6) specifies the criteria for compensation using the concept of 'fair market value', and specifying that the compensation must be done without delay, must be fully realizable and freely transferable.

Market access. The agreements differ greatly in the treatment of market access. NAFTA contains no specific commitments. GATS contains specific commitments in scheduled sectors and specifies six types of measures that may not be maintained or adopted (e.g. number of service suppliers, etc.).

Competition. It is arguably in the area of competition measures that both agreements part most radically. Under NAFTA, each party is to adopt/maintain measures to proscribe anti-competitive business conduct and take appropriate action (Article 1501). Even more importantly, 'no Party may have a recourse to a dispute settlement mechanism under the NAFTA Agreement'. This is clearly a reason why the recent dispute involving the US and Mexican telecommunications firms has been brought into the WTO.

The NAFTA agreement also goes further in the treatment of state enterprises. This an issue that is only under discussion in the WTO. The NAFTA agreement permits parties to maintain state enterprises and specifies general conditions under which they must operate. These conditions include, for example, the requirement that state enterprises must act in a manner consistent with the provisions of foreign investment (Chapter 11) and that state enterprises must act in a non-discriminatory way whenever they sell goods or services to foreign investors.

*European Union – foreign investment protection under the Europe Agreements***.** Once again, the most important of the regional investment related agreements are the association agreements with the countries of central and eastern Europe. These agreements contain fairly detailed rules to protect the interests of foreign investors in the associated countries' markets. Their coverage tends to be similar to that of NAFTA, with perhaps one major exception: the EU association agreements cover not only foreign direct investment but also portfolio investments.[37]

Multilateral Agreement on Investment — common building blocks. The GATS provisions on commercial presence provide a number of rules and disciplines that could easily be identified with a *bona fide* multilateral agreement on foreign investment with the key exception that GATS only covers services. The rules and disciplines that are already in GATS would necessarily be a part of an MAI;[38] these are the common building blocks of both agreements.

These common rules and disciplines are: First, the GATS is built on the acceptance of the non-discrimination principle: both the most-favoured-nation treatment and national treatment (MFN and NT). This will most likely be true with any MAI. Second, the GATS contains specific commitments of countries on market access. MAI could contain similar provisions or, at least, incorporate a formula for ensuring mutually satisfactory market access. Third, both GATS and MAI negotiators have to address the issues related to employment conditions. Fourth, the GATS includes provisions on various institutional arrangements that would also most likely be a part of an MAI. The rules include provisions for consultation (Article XXII), dispute settlement and enforcement (Article XXIII), the role of the GATS Council (Article XXIV) and provisions for technical cooperation (Article XXV). The MAI Negotiating Structure (as of 24 April 1998) is reproduced for information and comparison purposes as Box 1.

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37 The statement is definitely true for the agreements with the central European countries: Hungary, Poland and the Czech and Slovak Republics. It was not possible to verify the treatment of this issue in the other agreements.

38 Since we have no MAI, there is obviously no agreement on what a potentially successful negotiation of an MAI would encompass. However, most observers agree that the MFN and the NT principles would have to be the real building blocks. For more discussion, see *Z Drabek*, 'A Multilateral Agreement on Foreign Investment: Convincing the Sceptics,' *The Policy Challenges of Global Financial Integration*, ed. *J J Teunissn* (The Hague: FONDAD, 1998); *E M Graham*, *Direct Investment and the Future Agenda of the World Trade Organization* (Washington DC: The Institute for International Economics, 1996).

In many areas, the GATS/Telecoms Agreement goes as far the MAI, and both go much further than many bilateral free-standing investment treaties. The prime examples are the provisions on competition. The agreements recognize that the benefits of market-access commitments could be nullified by improper business practices as well as by other anti-competitive practices. Both GATS and MAI negotiators had to address the most burning issue of many areas of services: the treatment of local monopolies. To make the matter more complicated, these monopolies have typically been either in state ownership or had large state equity participation. Hence, the provisions of Article VIII of GATS are designed to ensure that monopolists do not act in a manner that would be inconsistent with the country's schedule of commitments and that it does not abuse its position. GATS Article IX on business practices is a fairly general statement recognizing the dangers of restrictive trade practices, but it does not go into operational aspects apart from the recommendations for consultations. These are important provisions, even though the agreement does not provide much detailed guidance on how to ascertain instances of non-competitive behaviour. The most important aspect of the pro-competitive provisions of the GATS Agreement — with direct relevance to telecommunications — is the existence of Reference Paper.

Investment agreements also typically contain provisions to protect investors against restrictions imposed by monetary authorities on foreign exchange transactions. The fact that countries agreed in GATS to make a commitment on commercial presence in a given service sector demonstrates that they are allowing the inflow of foreign capital. In addition, investors need to have a 'guarantee' that they will be allowed to make current payments abroad as well as transfer profits and dividends. To give them this guarantee, GATS specifies in Article XI (1) that 'a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments'.

Missing elements. However, certain elements are missing from the GATS/Telecoms Agreement, elements that would most likely be an important part of an MAI. Most bilateral and many regional investment agreements have special provisions concerning investment protection. This could include provisions against nationalization or other forms of expropriation. None of this forms part of GATS. In contrast, MAI went further; the negotiators foresaw the need to include provisions for compensation, transfers and subrogation.

Another important element of an MAI would have been the inclusion of provisions concerning financial incentives. GATS makes no attempt to specify disciplines on the use of financial incentives except for recognizing the potentially distortional impact of subsidies (Article XV). As noted above, members are required to negotiate the necessary multilateral disciplines. Thus, the current text of GATS hardly even addresses what is undoubtedly one of the biggest outstanding issues in foreign investment markets.

The third and arguably the most conspicuous missing element in GATS is the absence of a provision frequently found in investment agreements guaranteeing foreign investors their right to repatriate their capital. This is a question of capital outflow. Investors must not only be permitted to invest in a foreign country but must also be able to withdraw capital whenever they choose to liquidate their investment. The rules applicable to capital outflows are governed by the relevant rules of the IMF, which is mandated to oversee the relaxation of capital controls — a fact fully recognized in GATS. It is worth noting that the provisions of Article XI (1) noted above only refer to current transactions.

2. Concluding remarks on the comparisons

Comparison between international agreements are never straightforward and they are also subject to analysts' biases and preferences. Nevertheless, the following conclusions may be suggested on the basis of the preceding discussion: (1) Arguably the key difference between the WTO telecommunications agreement and NAFTA is the presence of a dispute settlement mechanism in the WTO. This makes the WTO agreement more effectively enforceable. (2) NAFTA provides wider protection of foreign investors' interests. These protection provisions range from standards of treatment to detailed specifications of conditions for compensation as a result of expropriation. In contrast, the WTO agreement is not a *bona fide* investment protection agreement. This means that foreign investors are only protected in some areas but not others. Examples of the former are the provisions to guarantee the investor access to foreign exchange. An example of the latter is the absence of detailed provisions on the standard of treatment. (3) With regard to telecommunications *per se*, NAFTA appears to be a more comprehensive agreement than the WTO agreement. It is less ambiguous as far as rules for pricing interconnections are concerned. It provides a detailed and separate section on provisions of value-added services and it is more specific about rules on transparency, the conduct of monopolist service providers and on technical standards.

IV. Prospects for Future Negotiations in the WTO

In certain respects, the prospects for future negotiations are clear and good. As part of the built-in agenda resulting from the Uruguay Round Agreements, the WTO members agreed to continue negotiations on services and agriculture by certain dates. These negotiations have already started and they include negotiations of telecommunications services. What will come out of these negotiations is another matter, and their success will depend entirely on the negotiating strategies of countries and the main challenges in these negotiations. These challenges can be summarized as follows: (i) concerns about the effectiveness of multilateral negotiations to liberalize domestic telecommunications markets significantly; (ii) main issues for negotiations and (iii) negotiating approaches/methods; including, *nota bene,* questions concerning countries' interests and the way they are balanced in negotiations and the treatment of autonomous liberalization.

A. Effectiveness of multilateral negotiations

The existing views on the effectiveness of multilateral agreements in general and on the WTO Telecommunications Agreement in particular vary a great deal among experts. Some observers argue that the agreement has been 'the next best thing since sliced bread'. For example, *Cowhey* and *Klimenko* argue that the agreement represents a major boost to domestic competition and more flexible pricing practices of cross-border supply of telecommunications services.[39] They even take the view that the agreement was essentially instrumental in getting rid of 'accounting rates', that it led to an increase in competition and opened up room for 'arbitrage'. The significance of GATS goes beyond individual countries' commitments. They also argue that the benefits will spill over to the rest of the world. This could partly be because international investment regimes will change. Perceptions of investors will change depending on how well regulated the countries are and on how fast the growth of global carriers is. Similar positions are taken by other observers who emphasize the fact that the agreement commits the industry to trade disciplines, is multilateral and binding, induces changes in domestic regulatory systems and provides for a system of dispute settlement.[40]

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39 *Cowhey* and *Klimenko* 15 onwards.

40 See *Drake* in *W J Drake* and *E M Noam,* 'Assessing the WTO Agreement on Basic Telecommunications,' *Unfinished Business: Telecommunications After the Uruguay Round,* eds. *G*

These views are not shared by everyone. For many observers, the WTO's role and its contribution to market access have been greatly exaggerated. For example, unilateral liberalization has been more important than the WTO negotiations, as noted above. Critics also suggest that the speed of implementation will be slow due to complexities of the agreement and that the treatment of anti-competitive practices is extremely difficult to detect or prove. Negotiations tend to be slow and lead to the 'lowest common denominator'. Moreover, the negotiations will be far slower than the pace of technological progress and the changes in domestic regulations in at least the OECD countries. For all these reasons, critics suggest that the multilateral route is less efficient and that bilateral approaches would be a better alternative.[41]

B. Issues for negotiations under GATS

The issues for negotiating better access to the telecommunications markets are many and varied. The following discussion provides a brief account of the topics most frequently raised. These issues can be divided into two groups. The first group contains issues that need to be addressed following the mandate from the Uruguay Round negotiations under GATS. These basically include three topics: safeguards, subsidies and government procurement. The second group includes other specific telecommunications-related issues that are most likely going to be raised as a result of recent discussions.

1. General issues: built-in agenda

1. (a) Safeguards

Many countries are concerned about the need to strengthen the safeguard mechanism. As in the case of safeguards in GATT related to trade in goods, the question is whether countries should be allowed to protect their markets if there is a 'threat of serious injury

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C Hufbauer and *E Wada* (Washington DC: Institute for International Economics, 1997); and OECD, *International Telecommunications: A Review of Issues and Developments* (Paris: DSTI Committee for Information, Computer and Communications Policy, 1995).

41 See, for example, *Noam* in *Drake* and *Noam*; OECD, *International Telecommunications: A Review of Issues and Developments*, 20-21.

as a result of a surge in imports of particular services'. This pressure is resisted by a few countries who consider safeguards as an instrument of disguised protectionism.

The ongoing discussions of safeguards are only in their infancy but several problems can already be identified. The problem perhaps most important in this respect is the treatment of safeguards in Mode 3 – commercial presence. Most of the discussions in the relevant negotiating groups have focused on cross-border services and consumption abroad, while the issue has not yet received much attention in the case of commercial presence. Yet service delivery through commercial presence is clearly a potential alternative to cross-border supply or, possibly, consumption abroad. In the financial sector, for example, the question of new entry is dealt with under prudential regulations and possibly, under 'economic means' tests, to which we will refer further below. In telecommunications, however, the issue is much less clear.

Another major issue related to safeguards is the insistence of some countries on economic means tests. These tests permit countries to restrict access to their markets on the basis of economic viability. If emergency safeguards were introduced, this would reduce the need for additional economic means tests — something that many countries are also not willing give up.

The current discussions in the Working Party on GATS Rules are primarily focused on two issues. The first issue concerns safeguard measures of a horizontal nature — an equivalent of GATT Article XIX and the Agreement on Safeguards. The idea is to define conditions that would allow countries to invoke the measure with regard to any commitment. The second issue concerns the treatment of sector-specific safeguards measures.

1. (b) Government procurement

Government procurement of goods and services is subject to the WTO Agreement on Government Procurement (GPA). This is a multilateral agreement signed by 26 mostly developed countries. It is not subject to the MFN obligation except in the case of the Understanding on Commitments in Financial Services. In 1996, WTO members established a Working Group on Transparency in Government Procurement but the work has been progressing very slowly. The existing agreement exclusively addresses the issues of transparency and procedures without introducing substantive obligations on national treatment and MFN. It is very uncertain at this stage whether members will be willing to move to negotiations on this substantive issue.

1. (c) Subsidies

Even though the subsidy issue has already been covered to some extent in the existing GATS, the outstanding issues are complex and will be difficult to negotiate. There are several reasons for these difficulties. First, subsidies are treated by many countries as a legitimate instrument of development programmes — an issue that has been recognized in Article XV (1) of GATS and strongly pushed by developing countries. While the idea may be acceptable in principle, many WTO members will not be willing to grant developing countries an open-ended commitment without proper identification of situations that would be acceptable as *bona fide* development programmes. Thus, the negotiators have problems with the speed with which countries will have to abandon their subsidy programme and the criteria of selecting acceptable subsidy disciplines.

Second, the negotiations of subsidies will also be subject to new pressures. Some countries are very concerned and vocal about their ability to protect their rights to subsidize social and cultural activities. They insist that this right must not limited by any international agreement. These concerns have arisen quite recently, as countries began to request more market access in various social service areas such as health. The fact that the countries are typically developed countries further complicates the negotiating atmosphere.

Third, the negotiators also face serious technical problems. For example, while it is relatively simple to refer to 'like products such as steel'— likeness being the critical point of reference concerning the product in question — the definition of 'likeness of services' seems to produce greater complexities. Also, and as already noted earlier, it is sometimes argued that incumbents are *a priori* in a more favourable position to deal with multiple objectives of governments such as efficiency and universal service in the telecommunications sector. If so, this would require corresponding measures to offset the competitive advantages of the incumbent.

2. Emerging issues for telecommunications

The negotiations of telecommunications are not conducted on a separate track — in contrast to the previous round when the negotiations were on a stand-alone basis. The current negotiations are part of the GATS negotiations. What emerges from the initial meetings is that there will be a set of topics that will dominate the discussions. The topics range from the question of pricing, ranging, *inter alia*, from the question of the accounting rate system to questions of privacy and taxation in electronic commerce. Yet there clearly are other issues that will need to be addressed in the negotiations, some of which are discussed below.

Foreign ownership. This may not be a major issue for some countries but it remains one for developing countries, the countries in transition and even for some developed countries. It is likely to be pressed by the countries with the most liberal telecommunications regimes, such as the US and those of the EU. It is likely to be resisted by developing countries. Moreover, the question of foreign ownership has also added another twist to the commitments of some developed countries as a result of pressures in some countries to reject the sale of domestic telecommunications assets to foreign investors that are not *bona fide* private companies. This issue arose recently when Deutsche Telekom made an attempt to acquire a US telephone company but has so far been prevented from doing so on the grounds that Deutsche Telekom is a state-owned company. Similar problems arose when the Czech telecom company SPT was privatized.

Regulatory practices. These are under a severe test. This is a general problem for all WTO activities, and the problem is particularly evident in GATS in general and in telecommunications in particular. Once again, there are several important issues that will have to be addressed by negotiators. The most basic one concerns the countries' freedom to regulate. Some countries fear that a new round of negotiations would take away from national governments the right to regulate. It will take some time and some convincing to show that the liberalization of GATS/Telecoms should not be equated with deregulation. Second, once it is accepted that countries will retain their right to regulate, the next question regards the kind of regulations they will be allowed to pursue. Are we going to see regulatory convergence? If so, how much and in which areas? What will the criteria be? All of these are open questions. Third, regulations often differ in the case of investment in different telecommunications sectors and activities. However, due to strong trends in the convergence of technology and services, the delineation of sectors is becoming more and more blurred.[42] Moreover, due to the rapid development of the telecommunications industry, many observers suggest that regulatory reviews are now necessary and should be relatively frequent. The United States, for example, has such reviews done on a biennial basis. Fourth, the international community must also ensure that whatever rules and criteria are agreed upon must be operational, unambiguous and transparent. There is good reason to believe that the

42 A useful discussion of such regulatory issues as well as a description of recent initiatives in this area is provided in OECD, *A Review of Market Openness and Trade in Telecommunications*, 15.

negotiators will have to identify the rules and criteria very carefully in order to minimize all the complexities.[43]

There are also questions related to the status of regulators. Should they be independent or should they rather be a part of the state supervisory system? The current practice of OECD countries tends to favour the model of independent regulators but there are differences in the implementation, leading to what is known as 'independence variations'.[44]

In general, the key issue regarding regulations is how far they should be harmonized: The question raised about regulations concerning other modes of service delivery (such as the question of technological neutrality as well as the scope for convergence and harmonization of regulations among countries) is equally valid in the case of commercial presence. In other words, the profession as well as many practitioners are deeply divided.[45]

Privacy. The privacy of customers can be affected by inappropriate activities of telecom operators and the question is how far regulations should go to protect privacy while also taking into account the objectives of public policy and interest.

Pricing. It is very likely that more pressure will be put on countries to include some kind of reform of the existing systems of international pricing and, in particular, a reform or the complete elimination of the accounting rate system. For the time being, countries have decided to 'hold fire' and have agreed not to take 'violators' through the dispute settlement mechanism. However, this may not last for long. The evolution in the market has been such that some countries are openly calling for dismantling the accounting rate system.[46] Moreover, the increase in competition through alternative systems such as 'call back' dedicated lines has created an opportunity for arbitrage.

Monopoly, interconnections, exclusive service providers. The operation of service providers in the telecommunications industry is critically linked to the existing practices of protecting domestic monopolies and/or exclusive service providers. Much of the

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43 There is by now a large body of literature addressing various regulatory issues. See, for example, *J Bhagwati* and *R Hudec* (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (Cambridge, MA: MIT Press, 1996); *T Cottier* and *P Mavroidis* (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (Ann Arbor: University of Michigan Press, 2000).

44 *Bhagwati* and *Hudec,* 9.

45 For a comprehensive discussion, see *Bhagwati* and *Hudec*; and *Z Drabek* (ed.), *Globalization under Threat: The Stability of Trade Policy and International Agreements* (Aldershot: Edward Elgar, 2001).

46 For example, both the US and the EU have adopted regulations designed to dispense with settlement rates for a large amount of international traffic.

discussions about the future evolution of regulations concerning these monopolies is linked to various other issues elaborated in greater detail above and further below.

Speed of liberalization. While the merits of liberalization may be much better understood by now, many countries resist rapid change. The fundamental question is, therefore, whether the agenda for telecommunications negotiations should also recognize the need for 'special and differential (S&D) treatment' of a specific group of countries.

In principle, it is difficult to defend special cases and S&D treatment. However, there are at least two reasons why some consideration should be given to special transition periods in the sector of telecommunications. The first reason is that the telecoms industry in many parts of the world — typically countries in transition and many least developed countries — has historically been in disarray. It is more than likely that the rapid liberalization of such highly distorted markets would lead to the costly duplication of investments. A better and more efficient route would be a slower pace with full opening once the major distortions had either been eliminated or minimized. The second reason is the limited size of capital markets in many of these countries. Rapid liberalization could create serious liquidity problems and disruption in what continue to be fragile financial markets.

C. Negotiating approaches

Countries will also have to decide on the rules for negotiating the next agreements. The existence of such rules is vital in order to make the process effective and capable of addressing individual countries' interests. These discussions are still very much ongoing in the GATS Working Party on Rules and Procedures with various proposals made by different delegations.

There are a number of ways to approach the negotiations. One approach that has been pushed by more liberal observers and delegations is based on the so-called 'negative list' ('top-down') approach. However, it is the alternative one based on the *quid pro quo* ('bottom-up' or 'request/offer') approach which seems to be gaining greater ground with delegations. These approaches are fundamentally different — the former was applied in the NAFTA or in the Australia New Zealand Closer Cooperation Agreement.

The latter is more characteristic of WTO negotiations.[47] Some countries have also been looking for a 'formula'-based type of negotiations, but this approach is also resisted. Some thought has been also given to the so-called 'clusters' of services relating to certain core activities. The use of clusters has been supported, for example, by the EU delegation or developing countries such as the Dominican Republic, El Salvador, Honduras, Nicaragua and Panama in the case of a 'cluster' of tourism industries. Since no decision has yet been taken on the approach, it would be premature to speculate in this study.[48] Much discussion has also been devoted to the question of autonomous liberalization, but so far with little success.

Balancing countries' interests. A critical element for future success in negotiating a new telecommunications agreement is the requirement that countries must perceive the benefits of this (and other) agreement(s) as 'balanced'. We have seen, for example, that many developing countries are resisting the complete elimination of the accounting rate system.

Autonomous liberalization. The question of whether countries should be given credit for autonomous liberalization has often been raised by negotiators but so far without much reaction from their partners. More and more countries are pushing the idea that autonomous liberalization should receive special credit in the negotiations. This could be a particularly important issue in the telecommunications negotiations since many countries have been prepared to take autonomous measures on the right of establishment, which is sometimes considered more radical than measures in other modes.

V. Conclusions

How good is the GATS/Telecoms Agreement? Is it restrictive or does it provide a reasonable legal instrument to protect the interests of investors? Does it protect the interests of host countries well? These are the questions that have been addressed in this study. It should be remembered that whatever assessment has been made here is an assessment of an economist, not one of a lawyer. The perspective is economic and

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47 The approach taken in the original Telecoms Agreement relied on the *quid-pro-quo* approach, or 'positive list approach'. The negotiating guidelines are described in the internal document TS/NGBT/W/1, Rev.1, 10 June 1994.

48 These topics are discussed in more detail in *Hoekman, Towards a More Balanced and Comprehensive Service Agreement*; WTO, *Outstanding Market Issues in Manufacturing, Agriculture and Services: A Special Study* (Geneva: WTO, forthcoming in 2001).

perhaps business-oriented and could be altogether different had the subject of this analysis been evaluated by a lawyer.

Returning to the question above, the reading of the WTO Telecommunications Agreement is quite positive. The agreement is an achievement in protecting and safeguarding market access for foreign investors. In some situations, the agreement has allowed better market access than would otherwise have been the case, but these situations are more the exception than the rule. What the agreement does is to provide a set of multilateral investment rules in telecommunications that should be conducive to foreign investment in the sector. This is so for several reasons. First, the agreement incorporates the three fundamental rules that are vital for foreign investment: the non-discrimination principles of MFN and national treatment and the transparency principle. Second, the agreement recognizes and provides for additional measures needed to ensure that the benefits of greater market access are not 'nullified' by poor government policies (e.g. foreign exchange restrictions, price regulations), business practices (e.g. monopolies) or market imperfections (e.g. unavailability of information).

Third, this is the first multilateral agreement on foreign investment in telecommunications. This means a set of disciplines and rules has been agreed upon by the international community without the need to negotiate these disciplines and rules on a bilateral level. This must be a more efficient, that is, a less costly way of agreeing on international standards. The multilateral approach guarantees the uniformity of these standards while bilateral agreements risk the dangers of inconsistencies. Fourth, by signing the Reference Paper, the agreement expands the scope for greater cooperation in the area of regulations. This is a major achievement particularly in telecommunications, where regulations play an extremely important role. Fifth, the agreement endorses and legitimizes the existence and promotion of competition in the industry — no minor achievement for a sector that has been historically dominated by monopolies and government ownership.

However, there is another, this time more controversial point that is often presented as a merit of multilateral agreements such as this one: the contribution of the agreement to the stability of economic policies. The argument says that these types of agreements (i.e. WTO) promote stability by 'locking in the reforms'. Some writers have doubted the value of this contribution by claiming that many countries bind well above the status quo or that they do not bind at all. This criticism is very short-sighted. Take the example of China's accession and assume that China binds above the status quo. By signing the WTO agreements, China agrees, for example, that it will maintain competition in the telecommunications industry at the level at which it bound its commitment in the WTO.

In comparison to the industry structure prevailing up to that point — with the state telecommunications monopoly as the sole provider — the WTO ‘outcome’ is no minor achievement.

Could the agreement be better? The answer is undoubtedly yes and, once again, for several reasons. First, the actual domestic policies — the status quo — tend be more liberal and competition much tougher than what is provided in the countries’ schedules of commitments in the agreement. The agreement provided enough room for countries to make additional limitations on their actual policies. Second, the agreement is not a *bona fide*, full-fledged investment agreement. Even though it includes commercial presence as a separate mode of delivery, this is a telecommunications agreement in a much broader sense. As a result, its coverage is somewhat narrower than some other agreements with stronger investment components, such as NAFTA, the association agreements of the EU or even many bilateral agreements (e.g.on standard of treatment). Third, the agreement does not satisfactorily address at least two important issues: subsidies and safeguards. These are gaps that must be addressed in future negotiations. Fourth, the agreement also does not address the increasingly more relevant problem of international pricing for telecommunications services; this continues to be the subject of a separate agreement under the International Telecommunication Union. There are reasons to believe that some change is imminent — partly because of competition and partly because of pressures from certain countries — but there will also be strong resistance coming from developing countries that depend heavily on revenues from this system.

Box 2: Main Investment Provisions in the NAFTA and GATS Agreements

	NAFTA: Chapter 11: Investment[49]	**GATS**
Scope	**Investment is defined in much greater detail**.[50] Applies to:[51] a) investors of another party[52] b) investments of investors of another party in the territory of the party.[53] Article 1106 lists a number of requirements which parties may not impose in connection with establishment of an investment of an investor of a party. Annex III provides that parties are allowed to perform exclusively economic activities set out in it. In Mexico's Schedule to Annex III, the following sectors are included: 4. Satellite Communications 5. Telegraph Services 6. Radiotelegraph Services	Applies to trade in services which includes the supply of a service by a service supplier of one member through **commercial presence**[54] in the territory of another member.
MFN	General Rule Each party shall accord to investors and investments of investors of another party treatment no less favourable than it accords, *in like circumstances*, to investors and to investments of investors of any other party or of a non-party with respect to the establishment, acquisition, expansion,management, conduct, operation and sale or other disposition of investments.[55]	General Rule[56] Each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than it accords to like services and service suppliers of any other country.

49 In the event of an inconsistency between this chapter and another chapter – the other chapter shall prevail as to the extent of the inconsistency. (Article 1112)

50 Article 1139

51 Article 1101

52 means 'a party or state enterprise thereof, or a national or an enterprise of such a party, that seeks to make, is making or has made an investment' (Article 1139 Definitions)

53 means 'an investment owned or controlled directly or indirectly by an investor of such party'. (Article 1139 Definitions)

54 means 'any type of business or professional establishment, including through I) the constitution, acquisition or maintenance of a juridical person, or ii) the creation or maintenance of a branch or a representative office within the territory of a member for the purpose of supplying a service'. (Article XXVIII Definitions)

55 Article 1103

56 GATS Part II: General Obligations and Disciplines

	Qualification Notwithstanding this article a party may require an investor of another party, or its investment in its territory, to provide routine information solely for information or statistical purposes. The party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment.[57] • **The provision does not apply to subsidies or grants provided by a party or a state enterprise, incl. government supported loans, guarantees and insurance.**[58]	Qualification **Can maintain a measure inconsistent with MFN if it has established an exception to this inconsistency. Exception provides justification for giving more favourable treatment to the country in the exception.** [Such a measure must meet the conditions of Annex on Article II exemptions. No new exemptions possible (only waiver procedure under Part I). Exemptions have max. of 10-yr time-limit.] Article XIV provides that members can maintain/adopt measures inconsistent with Article II as a result of an Agreement on the avoidance of double taxation.
National Treatment	Each party[59] to accord to investors and investments of another party treatment no less favourable than it accords, *in like circumstances*, to its own investors and investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[60] no party may: **1) impose on an investor of another party a requirement that a minimum level of equity in an enterprise in the territory of the party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations.** **2) require an investor of another party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the party.** **The provision does not apply to subsidies or grants provided by a party or a state enterprise, incl. government supported loans,**	• a**pplies <u>only</u> to scheduled sectors (sectors where member has made specific commitment).**[63] Each member, *in the sectors covered by its schedule, and subject to any conditions and qualifications set out in the schedule,* shall give treatment to foreign services and service suppliers no less favourable than it gives to its own services and suppliers.[64] • **Specific commitments assumed under this Article shall not require any member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services/service suppliers.** • As with market access any limitations are to be specified in the schedule. • No coverage, apart from Article XV provides that any member that considers itself

57 Article 111(2)
58 Article 1108 (7)(b)
59 and each state or province (Article 1102(3))
60 Article 1102

	guarantees and insurance.[61] **Special Formalities and Information Requirements provides that:**[62] **1) nothing in the National Treatment article shall be construed to prevent a party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another party such as the requirement the investors be residents of the party or that investments be legally constituted under the laws/regulations of the party, provided they don't materially impair the protections afforded by a party to investors of another party and investments of investors of another party pursuant to Chapter 11.** **2) a party may require an investor of another party, or its investment in its territory, to provide routine information solely for information or statistical purposes. The party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment.**	adversely affected by the subsidy of another member, may request consultations. • No coverage • Article XIV provides a general exception that a member may maintain a measure inconsistent with Article XVII provided the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other members. This must not be applied in an arbitrary manner which could constitute unjustified discrimination.

61 Article 1108 (7)(b)
62 Article 1111
63 Part III GATS, Specific Commitments
64 According to Article XVII this can be either 'formally identical treatment or formally different treatment to that it accords to its own like services/service suppliers. It shall be considered less favourable if it modifies the conditions of competition in favour of the services or service suppliers of the member compared to the like of any other member.'

Standard of Treatment	Each party shall accord to investors and to investments of another party the better of the treatment required by Article 1102 (National Treatment) and Article 1103 (MFN). Minimum Standard of Treatment[65] Investment of another party to be treated in accordance with international law. Fair and equitable treatment. Full protection and security. investors and investments of investors of another party accorded non-discriminatory treatment in relation to measures adopted relating to losses suffered by investments in it territory due to armed conflict or civil strife[66].	**No coverage**
Restrictions	Denial of Benefits • A party may deny the benefits of chapter 11 to an investor of another party that is an enterprise of such party and to investments of such investor if investors of a non-party own or control the enterprise and the denying party: a) does not maintain diplomatic relations with the non-party; or b) adopts or maintains measures with respect to the non-party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of chapter 11 were accorded to the enterprise or to its investments. a party may deny the benefits of chapter 11 to an investor of another party that is an enterprise of such a party and to investments of such investors if investors of a non-party own or control the enterprise and the enterprise has no substantial business activities in the territory of the party under whose law it is constituted or organized.	Denial of Benefits[67] • A party may deny the benefits of the Agreement if the service is supplied from or in the territory of a non-member/ member to which the denying member does not apply the WTO Agreement. May deny benefits to a service supplier that is a juridical person if it is established that its not a service supplier of another member or that it is a service supplier of a member to which the denying member does not apply the WTO Agreement. **No coverage**

65 Article 1105
66 Does not apply to existing measures relating to subsidies or grants which would be inconsistent with Article 1102, but for Article 1108(7)(b)
67 Article XXVII

	<u>Environmental Measures</u> a party may adopt, maintain, enforce a measure consistent with chapter 11 which it considers appropriate to ensure investment activity is sensitive to environmental concerns.	**No coverage.** However, under Article XIV(b) a party may maintain/adopt measures necessary to protect human, animal or plant life or health, as long as measures are not applied arbitrarily and do not constitute unjustified discrimination.
Market Access	No specific market access commitments	• **Applies <u>only</u> to scheduled sectors (sectors where member has made specific commitment).**[68] • **Each member to give no less favourable treatment to the services and service suppliers of other members than is provided for in its schedule.** • **If a member undertakes a market access commitment in relation to the commercial presence mode of supply, it is committed to allow related transfers of capital into its territory.** • **Where market-access commitments in a sector are undertaken, Art. XVI provides six forms of measure which may not be maintained or adopted. They are limitations on:** • **Number of service suppliers;** • **total value of services transactions or assets;** • **total number of service operations or total quantity of service output;** • **number of persons that may be employed in a particular sector or by a particular supplier; and** • **measures that restrict or require the supply of the service through specific types of legal entity or joint venture, and** • **percentage limitations on the participation of foreign capital, or limitations on the total value of foreign investment.**

68 Part III GATS, Specific Commitments

Competition Policy/ Monopolies and Exclusive Service Suppliers provisions	<u>Competition Policy</u>[69] • **Article 1501 states that each party is to adopt/maintain measures to proscribe anti-competitive business conduct & take appropriate action with respect thereto.** In addition, parties are to co-operate on issues of competition law enforcement policy. **However, no party may have recourse to dispute settlement under the NAFTA Agreement for any matter arising under this competition-related Article.** <u>Monopolies</u> • **Nothing in this Agreement shall prevent a party designating a monopoly.** • where a monopoly is designated, a party shall endeavour to introduce at the time of the designation, such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits. • *Article 1502 (3) provides each party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly*[70] *that it maintains*[71] *or designates:* *a) acts in a manner that is not inconsistent with the party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or*	 <u>Monopolies</u> 1. Monopoly supplier[73] not allowed to act inconsistently with members MFN obligations, or its specific commitments, in the supply of the monopoly service in the relevant market.[74] 2. Where a member's monopoly supplier competes either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that member's specific commitments, the member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments. [If a member believes monopoly supplier of a service of any other member is acting in a manner inconsistent with paras 1 or 2, the member can ask the Council for Trade in Services to request specific information of the other member.] If , after the WTO Agreement has

69 Chapter 15: Competition Policy, Monopolies & State Enterprises
70 defined as 'a monopoly that is owned, or controlled through ownership interests, by the federal government of a party or by another such monopoly'.
71 means 'designate prior to the date of entry into force of the NAFTA Agreement and existing on January 1, 1994'.
72 defined as 'an enterprise owned, or controlled through ownership interests, by a party'
73 This also applies to 'Exclusive Service Suppliers', where a member, formally or in effect, a) authorises or establishes a small number of service suppliers and b) substantially prevents competition among those suppliers in its territory.
74 GATS Article VIII

	other governmental authority that the party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licences, approve commercial transactions or impose quotas, fees or other charges, *b) except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d),* **acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale;** **(c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of another party in its purchase or sale of the monopoly good or service in the relevant market; and** **(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anti-competitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.** • Para. 3 does not apply to procurement by governmental agencies of goods or services for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the provision of services for commercial sale.	entered into force, a country makes specific commitments to allow supply of a service and then grants monopoly rights which negate this – mechanism in place for negotiations, or failing that arbitration to reach a compensatory adjustment. Competition Policy[75] Members recognize that certain business practices, apart from those above[76] may restrain competition – each shall enter into consultations with a view to eliminating such practices at the request of any other member.

75 Article IX Business Practices
76 Article VIII

	<u>State Enterprises</u> • **Nothing in this Agreement shall be construed to prevent a party from maintaining or establishing a state enterprise.**[72] • **Each party shall ensure through regulatory control, administrative supervision or the application of other measures, that any state enterprises that it maintains or establishes acts in a manner that is not inconsistent with the party's obligations under Chapters Eleven (Investment)…wherever such enterprises exercises any regulatory, administrative or other governmental authority that the party has delegated to it, such as the power to expropriate, grant licences, approve commercial transactions or impose quotas, fees or other charges.** • **each party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the party's territory of investors of another party.**	
Transfers and Payments	• Each party shall permit all transfers relating to an investment of an investor of another party in the territory of the party to be made freely and without delay.[77] • A party may prevent transfers through the equitable, non-discriminatory and good faith application of its laws in certain areas.[78]	• Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.[79] • If a member undertakes a market access commitment in relation to the commercial presence mode of supply, it is committed to allow related transfers of capital into its territory.

77 Article 1109 lists transfers which are included.
78 Article 1109(4)
79 Article XI

Expropriation & Compensation	**No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory, except:** **a) for a public purpose** **b) on a non-discriminatory basis** **c) in accordance with due process of law the minimum standard of treatment;**[80] **and** **d) on payment of compensation** **<u>Level of Compensation</u>** • **shall be equivalent to the market value immediately before the expropriation took place. Valuation criteria listed.**[81] • **shall be paid with out delay and be fully realizable.** • **if payment made in a G7 currency, shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.**[82] • **on payment, compensation shall be freely transferable as foreseen in Article 1109.**	No coverage. Article XIV provides that nothing shall prevent any member form taking any action it considers necessary to protect its essential security interests: i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; iii) taken in time of war or other emergency in international relations.
Dispute Settlement	• **Without prejudice to the rights and obligations under the main Dispute Settlement procedures**[83] **Chapter 11**[84] **establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the parties in accordance with the principle of international reciprocity and due process before an impartial tribunal:** **1) Investor of a party**[85] **may submit to arbitration a claim that another party has breached an**	**Only member States can initiate the dispute settlement procedures.**

80 See first para Standard of Treatment (Article 1105 NAFTA)
81 Article 1110(2)
82 Article 110(5) includes provisions for payment in a non-G7 currency.
83 Chapter 20
84 Section B
85 Definition: a party or state enterprise thereof, or a national or an enterprise of such party, that seeks to make, is making or has made an investment.

	obligation under Section A or Article 1503(2) (State Enterprises), or under Article 1502(3)(a) where the monopoly has acted in a manner inconsistent with the party's obligations under Section A on its own behalf (Article 1116), <u>OR</u> **2) An investor of a party on behalf of an enterprise of another party that is a juridical person that the *investor controls or owns directly or indirectly* may submit to arbitration a claim that the other person has breached an obligation under Section A or Article 1502(2) (State Enterprises), or under Article 1502(3)(a) where the monopoly has acted in a manner inconsistent with the party's obligations under Section A (Article 1117).** • A NAFTA investor who alleges that a host government has breached its investment obligations under Chapter 11 may, at its option, have recourse to one of the following arbitral mechanisms: - the World Bank's International Center for the Settlement of Investment Disputes (ICSID); - ICSID's Additional Facility Rules; - the rules of the United Nations Commission for International Trade law (UNCITRAL rules). • Alternatively, the investor may choose the remedies available in the host country's domestic courts. • An important feature of the Chapter 11 arbitral provisions is the enforceability in domestic courts of final awards by arbitration tribunals. **Causation: the investor has to have incurred loss or damage by reason of the breach** **<u>Remedies</u>** **Monetary damages and interest, restitution of property and costs awarded.**	

	• **The Dispute Settlement Procedure[86] is applicable to disputes which arise concerning the interpretation or application of the NAFTA. With regard to Ch.11, Investment, it is only available where a party considers that an actual or proposed measures of another party is, or would be inconsistent with the NAFTA Agreement.[87]**	**If a member considers any benefit it could reasonably expect to accrue under a specific commitment is being nullified/impaired due to application of a measure which does not conflict with the Agreement→ recourse to DSU.**

Box 3: Main Provisions for the Telecommunications Sector in NAFTA and GATS

	NAFTA: Telecommunications,ch.13[88]	**WTO: Annex and Reference Paper**
Scope	Chapter applies to: • measures adopted/maintained by a party relating to access to and use of public	Annex[89] on Telecommunications Independent of the specific commitments that individual WTO members have made to open up their markets for telecommunications services. It elaborates upon the GATS provisions relating to access to and use of public telecommunications and establishes the right of the service supplier to make use of public telecommunications networks and services. • Applies to all measures of a member that affect access to and use of public telecoms

86 Chapter 20

87 Annex 2204 makes it clear that a belief in nullification/impairment as a result of the application of a measure which does not conflict with the Agreement is not a ground for action.

88 In the event of any inconsistency between this chapter and another chapter, this chapter shall prevail as to the extent of the inconsistency. (Article 1307).

89 For the purpose of the negotiations on basic telecoms following the Uruguay Round sub-sectors a-g of the GATS Services Sectoral Classification List (MTN.GNS/W/120) and a variety of other services including mobile telecommunications, providing real time transmission of customer supplied services were generally considered basic telecommunications services. Sub-sectors h-n and any ‘other’ services not supplied on a real-time basis or which transform the form or content of the customers information were considered value-added telecommunications services.

90 Means: ‘public telecommunications infrastructure that permits telecommunications between defined network termination points’.

91 Means: ‘any telecommunications transport service required by a party, explicitly or in effect, to be offered to the public generally, incl. telegraph, telephone, telex and data transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer’s information’.

	telecommunications transport • networks[90] or services[91] by persons of another party, *including access and use by such persons operating private networks.* • **measures adopted/maintained by a party relating to the provision of enhanced or value-added services[92] by persons of another party in the territory, or across the borders, of a party.**	transport networks[93] and services[94]
	• does not apply to measures of a party relating to broadcast or cable distribution of radio or TV programming, except to ensure that persons operating broadcast stations and cable systems have continued access to and use of public telecommunications transport networks and services	• doesn't apply to measures affecting cable or broadcast distribution of radio and TV
	• nothing in Chapter shall be construed to: a) require a party to authorize a person of another party to establish, construct, acquire, lease, operate or provide telecommunications transport networks or transport services; *b) require a party, or require a party to compel any person, to establish, construct, acquire, lease, operate or provide telecommunications transport networks or transport services not offered to the public generally;* *c) prevent a party from prohibiting*	• nothing in annex shall be construed to require a member to authorize a service supplier of any other member to establish, construct, acquire, lease, operate or supply telecoms transport networks or services *other than as provided in its schedule*. <u>Reference Paper (RP)</u> set of principles and definitions on the regulatory framework for *basic*[95] telecommunications services.

92 Means: ‘ those telecommunications services employing computer processing applications that, 1) act on the format, content, code, protocol or similar aspects of a customer’s transmitted information, 2) provide a customer with additional, different or restructured information; or 3) involve customer interaction with stored information’.
93 Means: ‘the public telecommunications infrastructure, which permits telecommunications between and among defined network points’.
94 Means ‘any telecommunications service required by a member to be offered to the public generally. May include: telegraph, telephone, telex and data transmission typically involving the real time transmission of customer supplied information between two or more points without end to end change in the form or content of the customer’s information’.
95 No definition contained in RP, but see footnote 5

	persons operating private networks from using their networks to provide public telecommunications transport networks or services to third persons; or *d) require a party to compel any person engaged in the broadcast or cable distribution of radio or TV programming to make available its cable or broadcast facilities as a public telecommunications transport network.*	regulation essential facilities of major suppliers[96]
Access to and Use of Public Telecommunications Networks and Services	Main Obligation Each party to ensure that persons of another party have access to and use of any public telecommunications transport network or service, *incl. Private leased circuits*, offered in its territory or across its borders for the conduct of their business, on reasonable and non-discriminatory terms.[97] Basic Rights – each person to ensure that such persons are permitted to: 1) to purchase/lease/attach terminal or other equipment which interfaces with the public telecommunications transport network 2) to interconnect private leased and owned circuits with public telecoms transport networks in the territory , or across borders, of that party, *incl. for use in providing dial-up access to and from their customers or users*, or with circuits owned or leased by another person *on terms and conditions mutually agreed by those persons*; 3) use operating protocols of their choice; *4) perform switching, signalling and processing functions.*	Main Obligation Each member is required to ensure that all service suppliers seeking to take advantage of any commitments included in the GATS schedule are allowed access to and use of public basic telecommunications on ‘reasonable and non-discriminatory terms’. Basic Rights of access and use for service suppliers: Can use public telecoms networks and services: 1) to purchase/lease/attach terminal or other equipment which interfaces with the network *and which is necessary to supply a suppliers services*; 2) to interconnect private leased and owned circuits with public telecoms transport networks and services or with circuits owned or leased by another supplier; and 3) to use operating protocols of the service supplier’s choice in the supply of any service, *other than as necessary to ensure the availability of telecoms transport networks and services to the public generally*. 4) to move information within and

96 Defined in the RP as ‘ 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 as a result of: a) Control over essential facilities; or b) use of its position in the market.

97 This is defined for Article 1302 purposes as ‘on terms and conditions no less favourable than those accorded to any other customer or user of like public telecommunications transport networks or services’.

98 Defined as ‘telecommunications through which an enterprise communicates: a) internally or with its subsidiaries, branches or affiliates as defined by each party, or b) on a non-commercial basis with other persons that are fundamental to the economic activity of the enterprise and that have a continuing contractual relationship with it’.

	Each party shall ensure that persons of another party may use public telecommunications transport networks or services for the movement of information in its territory or across borders, including intracorporate communications,[98] and for access to information contained in databases or otherwise stored in machine-readable form in the territory of any party. Each party *shall ensure that no condition is imposed on access to and use of public telecommunications transport networks or services, other than is necessary to:* a) safeguard the public service responsibilities of providers of public telecommunications transport networks or services, in particular their ability to make their networks or services available to the public generally; or b) protect the technical integrity of public telecommunications transport networks or services.	across borders including intra-corporate communications[99] and for access to information contained in databases/other machine-readable form in the territory of any member. In relation to 4) above, members *can take such measures as are necessary to ensure* the security and confidentiality of messages, as long as they are not discriminatory or restrictive of trade in services.
	<u>Restrictions</u> Members to ensure no condition is imposed on access to and use other than necessary: → to safeguard the public service responsibilities/making networks available to the public generally → to protect the public integrity of public telecoms transport networks and services. Conditions for access to and use	<u>Restrictions</u> Members to ensure no condition is imposed on access to and use other than necessary: → to safeguard the public service responsibilities/making networks available to the pubic generally → to protect the public integrity of public telecoms transport networks and services *→ to ensure service suppliers of any other member do not supply services unless permitted pursuant to commitments in the members schedules.* Conditions for access to and use

99 Defined as ‘telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and subject to a member’s domestic laws and regulations, affiliates’. For these purposes ‘subsidiaries,’ ‘branches’ and, where applicable, ‘affiliates’ shall be as defined by each member. Intracorporate communications excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

	may include: 1) restrictions on resale or shared use of such services; 2) a requirement to use *specified* technical interfaces, incl. Interface protocols, for interconnection with such networks and services; *3) a licensing, permit, registration or notification procedure which, if adopted or maintained, is transparent and applications filed thereunder are processed expeditiously; and* 4) a restriction on interconnection of private leased or owned circuits with such networks or services or with circuits leased or owned by another person, *where circuits are used in the provision of public telecommunications transport networks or services.*	may include: 1) restrictions on resale or shared use of such services; 2) a requirement to use *special* technical interfaces, including interface protocols, for interconnection with such networks and services; 3*) requirements for the inter-operability of such services and to encourage the achievement of international standards;*[100] 4) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks; 5) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or 6) notification, registration and licensing. • allows developing countries to place some restrictions on access and use if necessary to strengthen their telecoms capacity. Any limitations have to be specified in their schedules.
Conditions of the provision of Enhanced or Value–Added Services	**Each party shall ensure that: a) any licensing, permit, registration or notification procedure that it adopts or maintains relating to the provision of enhanced or value-added services is transparent and non-discriminatory, and that applications filed thereunder are processed expeditiously, and b) information required under such procedures is limited to that necessary to demonstrate that the applicant has the financial solvency to begin providing services or to access conformity of the applicant's terminal or other equipment with the party's applicable standards or technical regulations.**	Only individual member's commitments in their Schedules.

100 Para 7a Annex

	• **No party may require a person providing enhanced or value-added services to:** **a) provide those services to the public generally;** **b) cost-justify its rates;** **c) file a tariff;** **d) interconnect its networks with any particular customer or network;** **e) conform with any particular standard or technical regulation for interconnection other than for interconnection to a public telecommunications transport network.** **Notwithstanding para. c above, a party may require the filing of a tariff by:** **a) such provider to remedy a practice of that provider that the party has found in a particular case to be anti-competitive under its law; or** **b) a monopoly to which Article 1305 relates (see section on Monopolies in Box 2)**	
Transparency	Further to Article 1802 (Publication), each party shall make publicly available its measures relating to access to and use of public telecommunications transport networks or services, incl. measures relating to: a) tariffs and other terms and conditions of service; b) specifications of technical interfaces with the networks or services; c) information on bodies responsible for the preparation and adoption of *standards-related* measures affecting such access and use; d) conditions applying to attachment of terminal or other equipment to the networks; and e) notification, permit, registration or licensing requirements.	Each member to ensure relevant information on conditions affecting access to and use of public telecom networks and services is publicly available, incl:[101] • tariffs; • others terms and conditions of service; • specifications of technical interfaces with such networks and services; • info on bodies responsible for the preparation and adoption of standards affecting such access and use; • conditions applying to attachment of terminal or other equipment; • notifications, registration or licensing requirements.

101 Annex para 2. See also GATS Article III

Pricing	Each party to ensure:[102] • the pricing of public telecoms transport services reflects the **‘economic costs directly related to providing the services’**. • private leased circuits are available on a flat-rate pricing basis. * nothing in this paragraph is to be construed to prevent cross-subsidization between public transportation services.	• The RP states that Interconnection with a major supplier is to be provided at ‘**cost-orientated rates** that are transparent, reasonable, have regard to sufficient economic feasibility and are sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require’.[103] • Interconnection with a major supplier is to be ensured ‘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.[104] * RP para 1.1 and 1.2 rules out engaging in *anti-competitive* cross-subsidization.
Competition Aspects	<u>Monopolies</u>[105] • where a party maintains or designates a monopoly to provide public telecommunications transport networks or services, **and the monopoly, directly or through an affiliate, competes in the provision of enhanced or value-added** *or other telecommunications-related services or telecommunications* related-goods, the party shall ensure that the monopoly does not use its monopoly position to engage in anti-competitive conduct in those markets, either directly or through its dealings with its affiliates, in such a manner as to affect adversely a person of another party.	<u>Monopolies</u> • The RP provides for ‘Competitive Safeguards’ for **basic telecommunications** only.[106] It states that appropriate measures must be maintained to prevent anti-competitive behaviour by suppliers who, alone or together, are a major supplier.[107]

102 Article 1302(3)NAFTA
103 Para. 2.2
104 Para. 2.2(c)
105 Article 1305 NAFTA, Ch.13 Telecommunications
106 See footnote 5 for definition of the scope.

	• Such conduct may include: a) cross-subsidization; b) *predatory conduct*; and c) the discriminatory provision of access to public telecommunications transport networks or services. **to prevent such anti-competitive conduct, each party shall adopt or maintain effective measures, such as:** **a) accounting requirements;** **b) requirements for structural separation;** c) rules to ensure that the monopoly accords its competitors access to and use of its public telecommunications transport networks or services on terms and conditions no less favourable than those it accords to itself or its affiliates; or d) rules to ensure the timely disclosure of technical changes to public telecommunications transport networks and their interfaces.	• Anti-competitive practices shall include: a) cross-subsidization; b) *using information from competitors with anti-competitive results*; and c) not making technical information about essential facilities available timely.[108] Interconnection with a major supplier will be ensured at any technically feasible point in the network: a) under non-discriminatory terms, conditions (incl. technical standards and specifications) and rates and of a quality no less favourable that 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 and conditions (including technical standards and specifications) and cost-orientated 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. • **Procedures for interconnection, are to be publicly available.**
Interconnection	Each person to ensure that persons of another party are permitted to: • interconnect private leased and owned circuits with public telecoms transport networks in the territory, or across borders, of that party, *incl. For use in providing dial-up access to and from their customers or users*, or with circuits owned	Commitment[110] to be provided: 1) under non-discriminatory terms; 2) in a timely fashion on terms and at cost-orientated rates which are transparent, reasonable and sufficiently unbundled; 3) at additional points to the network termination points.[111]

107 Defined as ' 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.

108 Para. 1.2

	or leased by another person *on terms and conditions mutually agreed by those persons*[109]	Transparency procedures for interconnection, interconnection agreements or a reference interconnection offer to be publicly available. Dispute Settlement service supplier requesting interconnection with major supplier must have recourse to independent body to resolve disputes on interconnection terms/conditions/rates.
Standards- related measures	**1) Each party to ensure that standards-related measures relating to the attachment of terminal and other equipment to the public telecommunications transport networks, incl. those measures relating to the use of testing and measuring equipment for conformity assessment procedures, are adopted or maintained only to the extent necessary to:** **a) prevent technical damage to public telecommunications networks;** **b) prevent technical interference with, or degradation of, public telecommunications transport services;** **c) prevent electromagnetic interference, and ensure compatibility, with other uses of the electromagnetic spectrum;** **d) prevent billing equipment malfunction; or** **e) ensure users' safety and access to public telecommunications transport networks or services.** • A party may require approval for the attachment to the public telecommunications transport network of terminal or other equipment that is not authorized, provided that the criteria for the approval are consistent with para. 1	No such detailed coverage. Conditions for access to and use may include: • type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks.

109 Article 1302(2)(b)
110 Applies on basis of specific commitments undertaken. Interconnection is referred to as 'links which allow users of one supplier to communicate with users of another supplier'.
111 Subject to reasonable charges

	• **Each party shall ensure that its network termination points are defined on a reasonable and transparent basis.** • **No party may require separate authorization for equipment that is connected on the customers side of authorized equipment that serves as a protective device fulfilling the criteria in para. 1.** **Each party shall:** **a) ensure that its conformity assessment procedures are transparent and non-discriminatory and that applications filed there under are processed expeditiously,** **b) permit any technically qualified entity to perform the testing required under the party's conformity assessment procedures for terminal or other equipment to be attached to the public telecommunications transport network, subject to the party's right to review the accuracy and completeness of the test results; and** **c) ensure that any measure that it adopts or maintains requiring persons to be authorized to act as agents for suppliers of telecommunications equipment before the party's relevant conformity assessment bodies is non-discriminatory.** **no later than one year after entry into force of this Agreement, each party shall adopt, as part of its conformity assessment procedures, provisions necessary to test the results from laboratories or testing facilities in the territory of another party for**	

112 Annex 913.5.a-2 provides for the establishment of a Telecommunications Standards Subcommittee which within six months of the date of entry into force of NAFTA, should develop a work program and timetable for making compatible, to the greatest extent possible, the standards-related measures of the parties for authorized equipment as specified in Chapter 13. The Annex also states that the Sub-Committee may address other appropriate standards-related matters respecting telecoms equipment or services and 'any such other matters as it considers appropriate'.

	tests performed in accordance with the accepting party's standards-related measures and procedures.[112]	
Universal Service	No coverage	Sole right of members to define Universal Service, provided ist administered in a transparent, non-discriminatory, neutral, unburdensome manner.
Licensing	• *Conditions for access and use of public telecommunications transport networks and services may include a licensing, permit registration or notification procedure, which is adopted or maintained is transparent and applications filed thereunder are processed expeditiously.*[113] • *In relation to the provision of enhanced or value- added services: Each party shall ensure that any licensing, permit, registration or notification procedure that it adopts or maintains is transparent and non-discriminatory and applications are processed expeditiously.*[114]	Where a licence is required, the following must be must be publicly available: • licensing criteria; • **time-period required to reach a decision;** • **terms of individual licences;** • **reasons for denial of licence**
Scarce Resources[115]	No specific coverage	procedures for allocation to be objective, timely, transparent and non-discriminatory.

113 Article 1302(7)(d)
114 Article 1303(1)(a)
115 e.g. frequencies, numbers, rights of way

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