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**TELECOMMUNICATION SECTOR NEGOTIATIONS AT THE WTO:  
CASE STUDIES OF INDIA, SRI LANKA AND MALAYSIA**

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## **TELECOMMUNICATION SECTOR NEGOTIATIONS AT THE WTO: CASE STUDIES OF INDIA, SRI LANKA AND MALAYSIA**

### **I. Introduction.**

1. The General Agreement on Trade in Services (the “GATS”) was one of the most important achievements of the Uruguay Round of negotiations that led to the creation of the World Trade Organization (the “WTO”). In 2001, international trade in services constituted approximately \$1.450 trillion which represents almost 20% of total global trade in goods and services combined. Telecommunication services are important not just because annual telecommunications revenues run into hundreds of billions of dollars a year and a significant proportion of global GDP but also because they enable the supply of other types of services as well as the production of goods. As such, telecommunications services are vital to economic development of developing countries.
2. Accordingly, the entry into force of the WTO Agreement on Basic Telecommunications (the “Agreement on Basic Telecommunications”), which provided for liberalization of trade in basic telecommunication services by 69 countries, represented a signal achievement of the WTO Membership (the “Membership”). This paper seeks to provide a basic foundation for developing countries to approach the telecommunications sector negotiations by studying the experience of some developing countries in the Asian region, namely, India, Malaysia and Sri Lanka in the negotiations that led to the WTO Agreement on Basic Telecommunications. Countries such as India appear to have been extremely cautious and defensive in the commitments that they made at the WTO and, in fact, bound their commitments at lower levels than actually found in their domestic regulatory framework. In these countries, commitments appear to have resulted from an autonomous reform process driven by compulsions internal to their domestic economies. The two other countries in this study, Malaysia and Sri Lanka, only bound the *status quo* in their countries. But the subsequent developments in these countries have diverged sharply based on their autonomous development strategies. While Malaysia has liberalized its telecommunications sector at a rapid rate in pursuit of its Vision 2020, Sri Lanka has moved extremely slowly. Yet other countries such as Japan, Korea and Singapore appear to have benefited by making ambitious commitments at the WTO, which they used to accelerate their own domestic reform process. On balance, it is worth noting that countries that have made higher levels of commitments and have opened up to foreign capital and technology in the telecommunications sector have benefited from extremely rapid and measurable growth in this sector.
3. Section II of this paper explains the framework of the GATS and major rules and principles in the context of telecommunication sector. Section III of this paper delves into how telecommunication sector commitments have been integrated into the framework of the GATS. In particular, this section deals with the history of telecommunications service negotiation during and after the Uruguay round, the GATS Annex on Telecommunications, the Reference Paper on Telecommunications, the concept of a Schedule of Commitments and the Fourth Protocol. Section IV deals with the experiences of India, Sri Lanka and Malaysia in negotiating their respective schedules of Specific Commitments against the

background of the structure and regulatory frame work of the telecom sectors in these countries. Section V discusses some of the major issues and challenges faced by these countries in the telecom sector negotiations. Finally, Section VI concludes the paper.

## **II. The GATS Framework in the Context of the Telecommunications Sector.**

4. Under the “single undertaking” or “package” approach of the Uruguay Round of negotiations, each country had the option of either accepting the entire package of agreements that ultimately became part of the Agreement Establishing the World Trade Agreement (the “WTO Agreement”) or of refusing to accept the package, in which case they remained completely outside the WTO.<sup>1</sup> In the case of the Multilateral Agreements on Trade in Goods (the “Agreements on Goods”), which are contained in Annex 1A to the WTO Agreement, Members’ commitments were based on fixed provisions in proposed agreements that were agreed upon after negotiations. Although the GATS was also part of the single undertaking, it is a radically different type of agreement, because it is based on a “positive list” approach in which countries undertook specific commitments such as market access and the national treatment obligation only in the sectors that they listed in their schedules. Further, it offered a “menu” of options because countries could specify the level of commitments that they wished to undertake in a sector by exempting themselves from certain general obligations such as the “most-favoured nation” (“MFN”) principle under which they could not discriminate between or among their trading partners. Thus, the GATS is fundamentally a weak agreement as compared to the Agreements on Goods.
5. The “menu of options” approach to the GATS was part of the compromises that the negotiators were forced to make at the Uruguay Round in order to ensure the conclusion of an agreement to liberalise trade in services. This did not necessarily mean that all service sectors were not part of the bargaining process during the Uruguay Round. Agreements were reached in some sectors as part of the package of agreements. However, the telecommunications sector largely remained outside the scope of negotiations during the Uruguay Round because of difficulties in reaching agreement.
6. The GATS is a comprehensive legal framework that covers 161 service activities across 12 sectors. The service sectors are based on a classification during the Uruguay Round of services sectors and sub-sectors, which are cross-referenced to the United Nations Central Product Classification.<sup>2</sup> The basic thrust of the GATS is to expand trade in services through “progressive liberalization” in the first instance and “higher levels of liberalization” through successive rounds of multilateral negotiations.<sup>3</sup> In fact, Article XIX of the GATS mandates that progressive liberalization is to be achieved through successive rounds of negotiations beginning five years after the entry into force of the WTO and periodically thereafter. However, importantly, Article XIX:2 gives recognition to the principle of special and differential treatment for developing country Members by providing that “... individual developing countries shall have appropriate

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<sup>1</sup> Negotiations at the WTO are based on the principle that “nothing is agreed until everything is agreed”.

<sup>2</sup> MTN.GNS/W/120 dated 10 July 1991.

<sup>3</sup> GATS, Preamble.

flexibility for individual developing countries for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching conditions aimed at achieving the objectives referred to in Article IV”. Separately, Article XXIII of the GATS provides that disputes shall be subject to dispute settlement under the provisions of the WTO Understanding on the Rules and Procedures Governing the Settlement of Disputes (the “DSU”).<sup>4</sup> Article XXIV provides for the establishment of the Council for Trade in Services (the “GATS Council”), open to representatives of all Members to oversee “the operation of [the GATS] and further its objectives”.

7. There are three main elements to the GATS. First, there are certain “general” obligations that cut across all sectors, which include (i) the most-favoured nation treatment obligation; (ii) transparency; (iii) reduction and elimination of non-tariff barriers in domestic regulations; (iv) prevention of anti-competitive practices; and (v) obligations to developing countries. Second, there are certain commitments that are specific to each sector which bind WTO members only if, and to the extent that, they make positive commitments with respect to a specific sector in their schedule. These include (i) market access, and (ii) the national treatment obligations. Both the general obligations and the specific commitments are subject to certain general exceptions (Article XIV), security exceptions (Article XIV *bis*) and certain other exceptions under the GATS. Third, there are certain annexes and attachments to the GATS that deal with specific sectors, eg., the Annexes on Air Transport Services, on Basic Telecommunications, on Financial Services, etc. This peculiar structure of the GATS apparently arose out of the need to reconcile the conflicting pressures to liberalize services, enable Members to liberalize their service sectors at their own pace, and to permit the elucidation of principles that would guide liberalization in particular sectors.<sup>5</sup>
8. The GATS covers every type of service except “services supplied in the exercise of governmental authority”<sup>6</sup> and to every measure “affecting trade in services”.<sup>7</sup> The term “measure” includes measures at every level of government, i.e., central, regional or local government or authority and measures taken by non-governmental bodies that exercises authority delegated by a government.<sup>8</sup> The GATS defines how services may be supplied for purposes of trade in services by specifying four modes of supply, which are as follows:<sup>9</sup>

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<sup>4</sup> The GATS is a “covered agreement” for purposes of dispute settlement under Article 1 and Appendix I of the DSU.

<sup>5</sup> Rupa Chanda, *Globalization of Services: India’s Opportunities and Constraints* 44-45 (Oxford, 2002).

<sup>6</sup> GATS, Article I:3(b).

<sup>7</sup> GATS, Article I:1. Whether a measure is one “affecting trade in services” has been interpreted by the WTO Appellate Body as requiring a dual test: first, whether there is trade in services under any of the four modes specified in Article I:2; and, second, whether the measure at issue “affects” trade in services. The first limb of the test is satisfied in a case where a WTO Member has made a specific commitment in its Schedule of Commitments or where the most-favoured nation principle (“MFN principle”) would be violated. The second limb requires an examination of whether the measure actually affects the supply of a service or a service supplier in its capacity as a service supplier. *See* Appellate Body Report, *Canada – Automotive Services*, paras. 155, 164-65.

<sup>8</sup> GATS, Article I:3(a).

<sup>9</sup> GATS, Article I:2.

Mode 1: Cross Border Supply.

This deals with every form of what are called “cross border supply of services” in which the service is provided across national boundaries. Examples include where an architect or lawyer provides services by fax, email or physically sending papers or floppy diskettes. This is probably the most important mode today in the telecommunications sector from the standpoint of sheer value because international country-to-country telephone calls fall into this category. The most important issue here is probably one of “accounting rates” at which a telecommunications service provider in one country is allowed to “land” its telecommunications traffic in another country under a system pioneered at the International Telecommunications Union (the “ITU”).

Mode 2: Consumption Abroad.

This deals with “consumption abroad” of services in which the customer goes to another jurisdiction to consume services. Tourism is a classic example of this type of service. In the case of the telecommunications sector, some countries have treated calling card services as being covered under this mode.

Mode 3: Commercial Presence.

In contrast to Mode 2 involving travel by the consumer to the country where the service supplier is located, in Mode 3, the supplier travels to the country of the consumer and sets up business by maintaining a “commercial presence” there in order to supply services to the consumer. Such a commercial presence involves foreign direct investment, whether by way of a subsidiary, a branch or a representative office in the country or jurisdiction of the consumer, in order to supply services to that consumer. Examples include banks or insurance companies setting up branches or subsidiaries in other countries to provide banking or insurance services. This is one of the most important modes from the standpoint of telecommunication services. Speedy liberalization of this mode is of crucial significance because it would permit established, cash-rich telecommunications service providers in the developed countries to bring competition into other developed country markets or to fund the rapid expansion of telecommunications infrastructure in poorer developing countries.

Mode 4: Movement of Natural Persons.

This mode deals with the supply of services by a supplier of one country in another country through the presence of natural persons in the other country's territory. This mode would cover situations in which an independent service supplier such as a lawyer, doctor or architect travels to another country to provide services. However, it would also be relevant where an employee of a juridical person such as a telecommunications provider travels to another country to provide services of any description.

One of the most important implications of the above definition of the modes by which services may be supplied under the GATS is that the commercial presence mode, in effect, has introduced an investment agreement into the WTO through the backdoor at least in the area of services.

9. The general obligations, specific commitments, additional commitments and exceptions to these obligations and commitments are each discussed below.

#### **A. General Obligations.**

##### (i) Most Favoured Nation Treatment (MFN).

10. Under Article II of the GATS, a WTO Member is required to "accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country". This provision basically lays down the MFN principle in the context of the GATS under which every WTO member must extend any preferential treatment in the area of services that it seeks to give one or more Members to every other WTO member. Ordinarily, therefore, if a WTO member were to permit nationals of a foreign country to own equity in its local cellular service providers, it would have to extend this right to every other WTO member regardless of how open the other WTO members are to foreign equity holding in their own cellular service providers. Thus, even if there is no specific commitment in a service, where a Member engages in autonomous liberalization in that sector and extends a benefit to some of its trading partners, it must extend the same treatment to all its trading partners.
11. Unlike in the case of the General Agreement on Tariffs and Trade, 1994 (the "GATT"), however, under Article II of the GATS, it is possible for a country to make exceptions to its MFN obligations with respect to specific countries by listing exemptions in their Schedule to the GATS Annex on Article II Exemptions. During the Uruguay Round, WTO members were permitted to enter exceptions to their MFN obligations in their Schedule to the GATS Annex on Article II Exemptions prior to the date of entry into force of the WTO Agreement. All such exemptions were subject to (a) a maximum limit of 10 years, (b) review at the end of the 5 years by the Council for Trade and Services and (c) future negotiations. After the Uruguay Round, however, any fresh exemptions sought by a WTO Member must be approved under the waiver procedures contained in Article IX:3

of the WTO Agreement.<sup>10</sup> A good example of exemptions sought by Members in the context of the Agreement on Basic Telecommunications was for bilateral agreements that they had entered into with their neighbours.

12. Apart from the general exceptions in Article XIV discussed below, there are other exceptions to the MFN obligation. For example, entry into Custom Union of Free Trade Agreement authorised under the GATT and GATS would also result in an automatic exemption from the MFN obligations.

(ii) Transparency.

13. Transparency is another core principle of the GATS, which is embedded in article III of the GATS. It operates at three different levels. First, every WTO member is required to publish any measure of general application that is relevant to, or may affect, the operation of GATS. Second, every WTO member is required to inform the Council on Trade in Services (the “GATS Council”) periodically about any measures taken by it that significantly affects trade in a service covered by one of its specific commitments. Third, WTO members are obligated to provide specific information in response to any request by other WTO members on any measures of general application.

(iii) Reduction and Elimination of Non Tariff Barriers in Domestic Regulations.

14. Article 6 of the GATS requires that domestic regulations relating to services must be “administered in a reasonable, objective and impartial manner”. Members are also required to have judicial, arbitral or administrative tribunals or procedures for review of administrative decisions affecting trade and services, preferably independently of the agency that makes the administrative decision. In addition, the GATS council is required to monitor and develop necessary disciplines for removing unnecessary barriers relating to qualification requirements and procedures, technical standards and licensing requirements. Licensing barriers are also considered technical barriers to trade. Article VII provides a detailed machinery for negotiating “mutual recognition agreements” among Members with respect to educational experience and qualifications needed, requirements to be met or license or certification considered essential for providing particular types of services. WTO members are also required to cooperate with relevant intergovernmental and nongovernmental organizations for establishing “any international standards and criteria for recognition”.

(iv) Prevention of Anti Competitive Practices.

15. The GATS also address certain types of anti competitive practices. While Article VIII does not prohibit national monopolies in services, it does prohibit “abuse” of a monopoly position by a supplier in a manner that would be inconsistent with its commitments. Moreover, Article IX also seeks to address the issue of other business practices that may restrain competition and thereby restrict trade in services. However, even in such cases, Article IX stops at requiring “full and

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<sup>10</sup> GATS, Annex on Article II Exemptions, paragraph 2.

sympathetic consideration” by a WTO Member of a request for consultations by another WTO Member and cooperation by supplying publicly available, relevant non-confidential information and by supplying other relevant information that may be confidential, subject to concluding a satisfactory agreement to safeguard confidentiality.

(v) Obligations to Developing Countries.

16. Under article 4, WTO members are under an obligation to negotiate specific commitments to benefit developing countries and to establish “contact points” to enable developing countries to obtain relevant information.

*B. Specific Commitments.*

17. There are two important specific commitments under the GATS: (a) market access; and (b) the national treatment obligation. As noted above, unlike in the case of the general obligations, Members are bound by these specific commitments only if they make a positive commitment in their Schedules of Specific Commitments in a particular service sector. The form of a Schedule and the issues that it must address are set out in Articles XX:1 and XX:2 of the GATS. The Schedules of Members are annexed to, and form an integral part of, the GATS.<sup>11</sup> The issues of market access and national treatment are discussed below in more detail.

(i) Market Access.

18. The market access principle in Article XVI of the GATS requires Members (a) on a positive note, to permit other Members to provide services through all four modes of supply in accordance with (but also subject to) the commitments that they make in their schedules to the GATS; and (b) negatively, to refrain from impairing access to their markets by maintaining various types of limitations or quantitative restrictions unless otherwise specified in their Schedules. The market access principle is therefore an important complement to the MFN principle (i.e., do not treat suppliers from some Members better than those from other Members) and the national treatment principle (i.e., treat foreign suppliers from other Members the same as domestic suppliers) in ensuring progressive liberalization of services.
19. The prohibition in Article XVI:2 on maintaining certain types of restrictions on market access includes six types of limitations on (i) number of service suppliers, (ii) total value of service transactions or assets, (iii) total number of service operations or quantity of service output, (iv) total number of natural persons that may be employed in a service sector or on number of employees of a service supplier, (v) on types of legal entities or joint ventures through which a service may be supplied (or requirements with respect to them), and (vi) participation of foreign capital either in the form of caps on foreign shareholding or total value of individual or aggregate FDI in a particular service.

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<sup>11</sup> GATS, Article XX:3.

20. In the telecommunications sector, the market access principle has the following implications. First, Members must indicate the limitations on mode of supply. By and large, the two most important modes of supply of telecommunication services are cross-border supply (Mode 1) and commercial presence through FDI (Mode 3). Therefore, the focus on limiting or qualifying commitments in the telecommunications sector remains largely on these two modes. Second, if Members wish to resort to the types of limitations specified in Article XVI:2 (eg., value of service operations or quantity of output or foreign shareholding caps), they must enter qualifications in their Schedules to this effect.

(ii) National Treatment.

21. In accordance with the “positive list” approach of the GATS to specific commitments, Article XVII of the GATS requires Members to indicate in their Schedules the service sectors and modes of supply for which they extend national treatment. It is only in these service sectors that the obligation to extend national treatment will apply. The national treatment obligation requires Members to extend to service suppliers from other Members treatment at least as favourable as that available to domestic suppliers in respect of any measure affecting the supply of services. Therefore, a legal analysis of whether a measure by a Member involves a violation of the national treatment obligation in the context of Article XVII would examine the following issues:

- (a) Whether the concerned Member made a commitment in the service sector at issue;
- (b) Whether a foreign supplier provides a service in that sector;
- (c) Whether the foreign supplier is a like supplier to a domestic supplier, which can be established by showing that the service supplied by the foreign supplier is a like service to that supplied by the domestic supplier;
- (d) Whether and how the foreign supplier is affected by the measure concerned; and
- (e) Whether the treatment of the foreign supplier is adverse as compared to a domestic supplier.

22. Article XVII:2 carries over into the GATS an important principle of GATT jurisprudence concerning national treatment: the measure at issue may accord either formally identical treatment or formally different treatment to the foreign supplier as compared to the domestic supplier, so long as the end result does not prejudice the foreign supplier. However, there is one important difference between the two agreements with respect to national treatment. Under Article III of the GATT, the analysis focuses solely on whether the *origin of the goods is foreign or local*, not whether the origin of the producer is foreign or domestic. Thus, if a Member discriminates against goods produced by a foreign company within its territory as compared to goods produced by its domestic companies, Article III of the GATT will not provide a remedy. However, Article XVII of the GATS prohibits discrimination against services and service suppliers that

originate in another Member. Thus, it would be impermissible for a Member to discriminate against a service provided by a foreign telecommunication supplier that sets up a branch or subsidiary within its territory under Mode 3 access.

23. From the standpoint of the telecommunications sector, it is important that a Member enter in its Schedule any reservations with respect to national treatment in every area in the telecommunications sector in which it makes a commitment.

#### **C. Additional Commitments.**

24. Article XVIII of the GATS permits Members to negotiate additional commitments with respect to measures affecting trade in services. Such additional commitments generally relate to qualifications, standards and licensing but could include other issues. Again, such commitments must be included in the last column in a Member's Schedule relating to additional commitments.

#### **D. Exceptions.**

25. As in the case of the GATT Articles XX (General Exceptions) and XXI (Security Exceptions), the GATS also includes a set of "general exceptions" in Article XIV and of "security exceptions" in Article XIV *bis*. These provisions constitute a complete exemption from all obligations under the GATS. As discussed below, it follows that Members have the right to deviate from their obligations under the GATS if, after they make specific commitments, genuine concerns arise in the future about certain aspects of national sovereignty or national security. An important implication is that potential future concerns of this nature need not stand in the way of making commitments under the GATS.
26. In the case of Article XX, the measure at issue must not only be capable of being characterized as one taken in pursuance of one of the grounds set out below but it is also required to meet the conditions contained in the *chapeau* (i.e., the preambular language at the beginning) to Article XX. The grounds under Article XIV of the GATS on which a Member may take a measure without regard to its obligations under the GATS include:
  - (a) Public morals or public health;
  - (b) Protection of human, animal or plant life or health;
  - (c) Securing compliance with laws or regulations consistent with the provisions of GATS, including for the purpose of
    - (i) Prevention of deceptive or fraudulent practices or dealing with effects of default on services contracts;
    - (ii) Protection of the privacy of individuals; or
    - (iii) Safety.

The provision for protection of the privacy of individuals especially is unusual and one that is not contained in the GATT. In addition, Article XIV(d) grants an exemption from the national treatment obligation under Article XVII for measures that treat services or service suppliers originating in other Members differently only in order to ensure proper collection of taxes. Article XIV(e) grants an exemption from the MFN obligation in Article II for measures arising out of double taxation agreements.

27. The two conditions contained in the *chapeau* to Article XX are that the measure should not be applied in a manner that would constitute (i) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (ii) a disguised restriction on trade in services. In the context of Article XX of the GATT, the WTO Appellate Body has consistently held that the proper approach to determining the consistency of a measure with one of the general exceptions would be to characterize the measure as being taken in pursuance of one of the specified grounds and only thereafter examine whether the application of the measure is consistent with the principles in the *chapeau* to the provision.<sup>12</sup>
28. Article XIV *bis* provides for certain national security exceptions including protection against being required to provide information that it considers “contrary to its essential security interests”. It also provides a blanket exemption from all obligations for any action necessary for protecting its essential security interests (a) relating to the supply of services to its military establishment, (b) relating to materials used in nuclear programmes, or (c) taken during wars or any other emergency in international relations.
29. Other important exceptions to the obligations under the GATS include emergency safeguard measures which, under Article X, remain to be negotiated at the WTO and restrictions to safeguard the balance of payments under Article XII, which substantively is a mixture of Articles XII (applicable to all Members) and XVIII:B (applicable only to developing country Members) of the GATT. Under Article XXVII, a Member may also deny benefits of the GATS to the supply of services or service suppliers from non-Members.

### **III. WTO Telecommunications Services Negotiations.**

#### **A. Uruguay Round Negotiations.**

30. During the Uruguay Round, developing countries strongly resisted negotiations on services, which they believed had been thrust on to the negotiating agenda by the United States and other developed countries in order to further their own interests. The developing countries believed also that they did not have much to gain from an agreement on services and that any agreement would hinder the development of their nascent service sectors. In their perception, the developed countries were building unnecessary linkages between services negotiations and liberalization of imports into their markets in textiles and agriculture.<sup>13</sup>
31. In the end, however, the developing countries were powerless to prevent negotiations on services from being initiated. A Group for Negotiations on Services was established to conduct negotiations. It soon became clear, however, that it would not be possible to reach agreement in four service sectors including the telecommunications sector by the conclusion of the Uruguay Round. Apart from the general distrust on the part of the developing countries of the motives of the developed countries, the automatic application of MFN in the proposed

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<sup>12</sup> See eg., Appellate Body Report, *US-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R.

<sup>13</sup> Rupa Chanda, *op. cit.*, 43.

agreement on services meant that countries that did make commitments in the telecom sector would face a “free-rider” problem in which even countries that did not make commitments in a sector would enjoy those commitments on an MFN basis.<sup>14</sup>

32. There was also the problem that in many countries, there was a monopoly in telecommunication services usually controlled by the government. To ensure meaningful implementation of commitments, it was necessary to apply minimum standards on numerous parameters that had not yet been analyzed or defined in order to ensure that foreign suppliers would be able to compete with the incumbent provider.<sup>15</sup> Only a few Members such as the United States were willing to make commitments in basic telecommunications services as part of the Uruguay Round. Basic telecommunications was defined to include all telecommunication services, both public and private that involve end-to-end transmission of customer supplier information while value-added telecommunication services was understood to mean telecommunications for which suppliers “add value” to the customer’s information by enhancing its form or content or by providing for its storage and retrieval. Those willing to offer commitments frequently limited them to just a single subsector such as telecommunications or to a single technology such as cellular telephone services. It was clear, therefore, that it would not be possible to conclude negotiations by the general deadline of December 1993.<sup>16</sup>

#### **B. Uruguay Round Decision on Negotiations on Basic Telecommunications.**

33. As a result of these difficulties, at the end of the Uruguay Round, Ministers took the “Decision on Negotiations on Basic Telecommunications” under which they decided:
- (a) To establish a Negotiating Group on Basic Telecommunications (the “NGBT”), which would begin negotiations no later than April 30, 1994 and complete them and submit a comprehensive final report on basic telecommunications (including an implementation date for the results) to the GATS Council by April 30, 1996;
  - (b) To keep negotiations open to all Members though they would start with 19 including the individual members of the European Communities;
  - (d) That any commitments resulting from the negotiations would be inscribed in the Schedules of Members annexed to the GATS;
  - (e) That there would be a standstill with respect to new measures by participants designed to improve their negotiating position or leverage commencing immediately until the implementation date; and
  - (f) That compliance with the standstill would be monitored by the NGBT.

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<sup>14</sup> Laura B. Sherman, “Wildly Enthusiastic about the First Multilateral Agreement on Trade in Telecommunications Services”, 51 FEDERAL COMMUNICATIONS LAW JOURNAL 61 (Dec. 1998).

<sup>15</sup> Matsushita, Schoenbaum & Mavroidis, *The World Trade Organization, Law, Practice & Policy*, 254 (Oxford, 2003).

<sup>16</sup> The foregoing account is based on Sherman, *op. cit.*, at 65.

It is worth noting that the April 30, 1996 deadline was not met by the NGBT. However, by April 1996, it agreed on a Reference Paper containing certain regulatory principles to safeguard competition.

### **C. GATS Annex on Telecommunications.**

34. By the end of the Uruguay Round, agreement was also reached on certain principles relating to access to public telecommunications transport networks and services other than cable or broadcast distribution of radio or television programming (“PTTNs”) in the Annex on Telecommunications to the GATS (the “Annex”). The underlying premise of the Annex is that PTTNs are not merely “a distinct sector of economic activity” in their own right but are also “the underlying transport means for other economic activities”.<sup>17</sup> Thus, the Annex is also intended to ensure access to PTTNs for providers of other types of services such as banking services, software services, etc.
35. The two main obligations under the Annex are as follows. Under paragraph 4, Members are required to maintain transparency by ensuring that all relevant information<sup>18</sup> on conditions affecting access to and use of PTTNs is made publicly available. Under paragraph 5, each Member is required to ensure that the service suppliers of other Members are given access to and use of PTTNs “on reasonable and non-discriminatory terms and conditions”. The content of this obligation is elaborated upon in some detail.<sup>19</sup> However, Members are permitted to impose restrictions to the extent necessary to (a) safeguard security and confidentiality of messages, (b) safeguard public services responsibilities of PTTNs including maintaining availability to the public, (c) protect the technical integrity of networks, and (d) prevent service suppliers from other Members from supplying services.<sup>20</sup> Paragraph 5(g) of the Annex also permits developing country Members to place reasonable conditions on access to and use of PTTNs in order to strengthen their domestic telecommunications capacity and service capacity.

### **D. The Reference Paper on Telecommunications.**

36. As discussed above, one of the main problems faced by negotiators during the Uruguay Round was how to make commitments by governments to open up telecommunications market meaningful when, in most countries, monopolistic, national telecommunications providers (generally government-owned) dominated

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<sup>17</sup> GATS, Annex on Telecommunications, para. 1 entitled “Objectives”.

<sup>18</sup> Paragraph 4 specifies that relevant information in this context includes (a) tariffs and other terms and conditions of service; (b) specifications of technical interfaces with such networks and services; (c) information on bodies responsible for the preparation and adoption of standards affecting access and use; (d) conditions applying to attachment of terminals or other equipment; and (e) notifications, registration or licensing requirements.

<sup>19</sup> Under paragraph 5(b), Members are required to guaranteed access for (a) connection of terminal or other equipment, (b) interconnection of private circuits and the circuits of other suppliers with PTTNs; (c) to use operating protocols of the services supplier’s choice except as necessary for ensuring availability of PTTNs to the public generally. Under paragraph 5(c), Members must also ensure access to PTTNs for movement of information within and across borders (including for intra-corporate communications) and for access to databases.

<sup>20</sup> GATS, Annex on Telecommunications, para. 5(e). Further illustration of the types of restrictions that may be imposed are contained in paragraph 5(f).

telecommunications services. In this context, by a Member simply entering a commitment in its Schedule to permit foreign suppliers to provide services in its market, no purpose would be served. It is against this background that the negotiators reached agreement on the pro-competitive regulatory principles contained in the Reference Paper.

37. The main objective of the Reference Paper is to ensure that Members adopt policies that permit competition. The Reference Paper defines a “major supplier” as a supplier that can materially affect the terms of participation in a market because of its control over essential facilities or by abusing its market position. Essential facilities are PTTN facilities that are “exclusively or predominantly provided” by one or a few suppliers for which there is no commercially or technically viable substitute. The major heads under which the regulatory principles in the Reference Paper are elaborated are as follows.

(i) Competitive Safeguards.

38. Members are required to prevent anti-competitive practices by major suppliers. Such anti-competitive practices include (a) anti-competitive cross-subsidization; (b) using information obtained from competitors to stifle competition; and (c) not making available to other service suppliers technically or commercially relevant information that they need to provide services. To illustrate the relevance of these principles, where a national service provider controls local, domestic and international long distance services, a foreign local service licensee would not be able to compete if the national provider promises that customers will get long distance services cheaper if they use its local services and not that of competitors.

(ii) Interconnection.

39. Interconnection is defined in the Reference Paper as linking a supplier to a PTTN in a manner that permits its customers to communicate with the customers of other networks and to obtain access to services provided by other suppliers. However, the obligations as to interconnection will apply only to a Member that has made a specific commitment with respect to the particular service offered by the supplier. A major supplier is required to permit interconnection to a PTTN by another supplier, among other things, (a) at any technically feasible point on non-discriminatory terms, conditions, rates and quality, and (b) in a timely fashion on transparent and reasonable terms, conditions and rates. Certain transparency requirements are also applicable to interconnection negotiations and Members are required to make available a dispute settlement forum for interconnection issues.

(iii) Universal Service.

40. Members are permitted to define the type of universal service obligations that they desire so long as they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary to serve the objectives of universal service set by the Member.<sup>21</sup> Thus, a Member is

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<sup>21</sup> Universal service obligations generally refer to obligations imposed on public utilities or common carriers to provide services in areas or to consumer segments in farflung regions or low-income areas that are not commercially attractive.

not supposed to set universal service obligations in a way that makes new entrants reluctant to enter or remain in its market because the universal service obligation renders the market economically unviable.

(iv) Transparency of Licensing Criteria.

41. Members are required to make licensing criteria, the period of time to decide license applications and the terms and conditions of individual licenses publicly available. An applicant is entitled to know the reasons for denial of a license.

(v) Independent Regulators.

42. Members are required to ensure that the regulator for basic telecommunication services is completely independent of any supplier of basic telecommunication services. The significance of this requirement becomes immediately obvious in countries where the government owns the national provider of telecommunication services, usually an erstwhile monopoly. In such cases, if the government is also the regulator of telecommunications services, a foreign supplier cannot expect the government to remain impartial and unbiased as the foreign supplier starts to make inroads into the customer base of the national provider.

(vi) Allocation of Scarce Resources.

43. The procedures for allocating scarce resources such as frequency bandwidth, numbers and rights of way are required to be carried out in an “objective, timely, transparent and non-discriminatory manner”. Further, the current state of allocation of frequency bands is required to be made publicly available. However, detailed identification of frequencies allocated to specific government uses is not necessary. Again, the objective of these requirements is clear –to ensure that new suppliers do not suffer discrimination by denial of scarce resources necessary to operate their services.
44. It was agreed that commitments in relation to the regulatory principles in the Reference Paper were to be included as “additional commitments” in a Member’s Schedule. Initially, about 30 Members agreed to provisionally adopt the Reference Paper pending completion of negotiations in 1997. By 1997, when the Fourth Protocol was signed, 55 Members had adopted the Reference Paper; 10 Members agreed to adopt all or part of its principles in future.

**E. The Fourth Protocol.**

45. As the April 30, 1996 deadline set in the Decision of the Ministers was impossible to meet, the NGBT agreed to continue negotiations and to extend the deadline for commitments until February 15, 1997 by the Fourth Protocol dated April 30, 1996. The Fourth Protocol was to remain open for acceptance until November 30, 1997 and it retained January 1, 1998 as the deadline for implementation of Members Schedules of Commitments.

## **F. Conclusion of the 1998 Agreement on Basic Telecommunications.**

46. By December 1996, when the Singapore Ministerial Conference was held, many controversial “outstanding issues” included how to accurately schedule (i) supply of satellite services, (ii) management of radio spectrum, (iii) potential anti-competitive distortion of international trade in services, (iv) status of intergovernmental satellite organizations in relation to GATS provisions, and (v) extent to which basic telecommunications commitments included transport of video and or broadcast signals.
47. The issue of spectrum management was resolved by taking a neutral approach including with respect to technology. The satellite services issue was resolved by deciding that no commitments would apply unless specifically included in a Member’s Schedule. Although accounting rate reform was heavily discussed, it remained outside the negotiations.
48. During the period after April 1996, there were 53 participating Members and 24 observer Members. By the deadline of February 15, 1997, which was met this time, 69 Members accounting for more than 80-90% of global telecommunications revenues had made offers to liberalize and introduce competition in their telecommunications markets. One of the most important reasons for the success of the negotiations was the realization in many countries that the revolution in communications technology during the 1990’s, including the growth of cellular technology, the laying of fibre-optic undersea cables, satellite communications and, most importantly, the growth of the Internet, had made existing regulatory frameworks obsolete. Introducing competition and privatising telecommunications services had become an important priority in many countries, whose markets had hitherto been dominated by national telecommunications monopolies. Agreement was also hastened by the conclusion of the agreement on information technology at the Singapore Ministerial Conference. The following table summarizes an analysis of the commitments undertaken by Members upon the entry into force of the Fourth Protocol:

<b><u>Liberalization Commitment</u></b>	<b><u>No. of Schedules</u></b>	<b><u>Countries</u></b>
Voice Telephony	-	61
Voice Service to Closed User groups	-	2
International Voice Services	42	56
National Long Distance	37	41
Local Services	41	55
Data Transmission Services	49	63
Leased Lines	41	55
Cellular / Mobile Telephony	46	60
Other Mobile Services (PCS, mobile data, paging)	45	59
Mobile Satellite Services or Transport Capacity	37	51
Fixed-Satellite Services	36	50
Permit foreign ownership or control of all telecommunications services and facilities	42	-

Source: *Op.Cit.* Bronckers & Larouche, *Telecommunications Services and the World Trade Organization*, (1997) *Journal of World Trade*, pp. 21-2 in Trebilcock & Howse, Regulation of International Trade (Routledge: London, 1999) at 302.

49. By January 2000, 93 Members had included telecommunications services in their list of commitments. Of these, 83 Members had made commitments in basic telecommunications services, while 73 Members had made commitments in value added services. In addition, 72 Members had committed to the regulatory principles contained in the Reference Paper, 66 of whom had accepted them almost fully or with small changes.

#### **IV. Case Studies**

##### **A. India**

###### **(i) Background and Regulatory Framework**

50. With a population of over a billion people, India is the world largest democracy. In the 1950's, under the leadership of Prime Minister Nehru, India adopted the socialist path based on national planning and a mixed economy with a large public sector and an extensively regulated private sector. Beginning in 1985, however, the Government gradually began to liberalize the economy without officially jettisoning the socialist ideology. In 1991, however, under imminent threat of defaulting on its external debt and with foreign exchange reserves at less than a billion dollars, India officially embarked on a programme of liberalization based on freeing its economy from socialist-era controls. It abolished industrial licensing, began opening up its foreign trade by phasing out its import licensing regime and welcomed foreign investment by phasing out its case-by-case foreign investment approvals process. At the same time, India also began to privatize its large public sector enterprises and to welcome private investment into most areas of infrastructure.
51. The telecommunications sector was one of the important sectors targeted for reform by welcoming private investment. However, India, like many other countries, has adopted a gradual approach to telecom sector reforms through selective privatization and managed competition in different segments of the telecommunications market. To date, the Indian Telegraph Act of 1885 and the Wireless Telegraph Act of 1932 have provided the legal basis for regulating the telecommunications sector in India. These statutes permit the government to regulate by simply adopting new policies to govern the telecommunications sector. Until 1985, posts and telecommunications were combined in one Posts and Telegraphs department run by the Ministry of Communications. The public outcry over poor and lax service by the government led to the establishment of a Parliamentary Committee in 1981 to review the existing situation. The Committee recommended numerous structural and service improvements, which eventually culminated in the bifurcation of the Ministry of Posts and Telegraphs in 1985.
52. A separate Department of Telecommunications ("DoT") was established under the Ministry of Communications and two public sector undertakings Mahanagar Telephone Nigam Ltd. ("MTNL") & Videsh Sanchar Nigam Limited ("VSNL") were created in 1986 to expand, develop, and manage crucial segments of the Indian telecommunications system. The DoT provided local network and domestic long distance services everywhere except in Mumbai and New Delhi where MTNL operated the local network. VSNL was set up to run international services. Telecommunications in the rest of the country continued to be run as a government department because of staff resistance to change.
53. Subsequently, a Telecom Commission was established in 1989 to perform the executive and policymaking functions of the government in telecommunications. It has a wide range of executive, administrative and financial power to formulate

and regulate policy and prepare the budget for the DoT. The DoT is the executive and policy-implementing body that looks after the licensing and overall policymaking in India.

54. Under the New Economic Policy of 1991, however, India started its liberalization process in telecommunications by allowing private competition in value-added services in 1992 followed by opening up of cellular and basic services for local area to private competition. This “autonomous liberalization” was the outcome of internal market forces and the recognition by developing nations that telecommunications could drive economic growth and, therefore, had to be accorded the highest priority. This was also due to the realization within the government that the rapid advances in communications technology had rendered obsolete the notion of a “natural monopoly” and that it was necessary to introduce competition and lower tariffs in order to enhance the rate of penetration of telecommunications services into the economy in order to promote rapid economic development.
55. In 1994, the Government announced the National Telecom Policy (“NTP 1994”) which defined certain important objectives, including the availability of telephones on demand, the provision of world-class services at reasonable prices, ensuring India’s emergence as major manufacturing/export base of telecom equipment, protecting the defence and security interests of India and ensuring universal availability of basic telecom services to all villages. Moreover, it also announced a series of specific targets like coverage of all villages, telephone availability on demand, providing a PCO for every 500 persons in urban areas and all value-added services available internationally to be introduced in India by 1997. NTP 1994 also recognized that the required resources for achieving these targets would not be available from government sources and concluded that private investment and involvement of the private sector was required to bridge the resource gap.
56. As noted above, the government had already invited private sector participation in a phased manner from the early 1990s, initially for value-added services and thereafter for fixed telephone services. NTP 1994 also stated that in order to implement the policy, suitable arrangements had to be made to protect and promote consumer interests as well as to ensure fair competition. A license-bidding process was initiated to end DoT’s monopoly on basic telephone and cellular services. As a result, India was divided into 21 Telecom circles. One fixed operator, other than the DOT/MTNL, was allowed in each circle for a period of 10 years, after which the situation was to be reviewed. The private operator was permitted to provide long distance service within the licensed service area only. In each service area, two service operators were licensed to provide cellular mobile telephone services for a period of 10 years, after which the situation was to be reviewed. By early 1996, licenses had been granted to 34 private companies to operate in 18 of the 20 circles opened for bidding. Foreign firms were allowed to hold up to 49 per cent of shares in the private consortiums.<sup>22</sup>

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<sup>22</sup> See Patrick Low & Aaditya Mattoo, *Reform in Basic Telecommunications and the WTO Negotiations: The Asian Experience*, World Bank Working Paper, November, 1997.

57. In accordance with the promise in NTP 1994, the Telecom Regulatory Authority of India (“TRAI”) was established in 1997 under the Telecom Regulatory Authority of India Act, 1997 (the “TRAI Act”). This had become a necessity because there were numerous complaints from private operators about the hindrances posed by the incumbent, government-owned companies, VSNL and MTNL in collaboration with DoT, as both licensor and telephone operator in the rest of the country outside the big metropolitan cities. TRAI was supposed to be an independent statutory regulator that reported to Parliament through the Minister of Communications. Initially, in accordance with Section 4 of the TRAI Act, it was headed by a High Court judge. However, an attempt by TRAI to assert its independence soon led the Government to contest its right to “interfere” in policy matters in an action initiated by the cellular operators before the courts. Subsequently, the Government removed the entire membership of TRAI including its head and later, as discussed below, even amended the TRAI Act.

(ii) India’s Commitments under the WTO Agreement on Basic Telecommunications.

58. India was among the first few countries that signed the GATS in 1994. Like many other developing countries, it was suspicious of the service sector negotiations and saw it as a ruse by the developed countries to refrain from making commitments on areas of interest to the developing countries such as textiles and agriculture. In fact, even at the end of the Uruguay Round, when Ministers decided to extend negotiations on trade in basic telecommunications, India was not one of the countries (including the individual members of the European Union) that agreed to be part of the NGBT.

59. India soon joined the negotiations, however, because it wanted liberalization by the developed countries in Mode 4 involving presence of natural persons across service sectors for its professionals. India’s interest was also heightened by the importance of the telecommunications sector to its then nascent software services sector and its decision to join the Information Technology Agreement at the Singapore Ministerial Conference in 1996. As India was also autonomously proceeding with liberalization of its own telecommunications sector, India obviously had everything to gain by joining the negotiations and getting some credit for commitments, the benefit of which would anyway extend to other Members under its GATS MFN obligations. Accordingly, India did become a signatory to the Fourth Protocol and made its commitments effective in February 1998 like most of the other original signatories of the Agreement on Basic Telecommunications.

60. Most independent assessments of India’s commitments in telecommunications services agree that India’s approach was primarily defensive and that it did not even commit to the *status quo* that obtained in reality in India.<sup>23</sup> Moreover, specific commitments cover only some of the sub-sectors and are therefore not comprehensive.<sup>24</sup> India’s Schedule excludes long-distance and international voice services and includes only modest market access commitments. Further, India has

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<sup>23</sup> *Id.* at 161.

<sup>24</sup> Rupa Chanda, Globalization of Services: India’s Opportunities and Constraints (Oxford, 2002) at 157 (hereinafter “Chanda”).

accepted only limited sections of the Reference Paper on pro-competitive principles, choosing instead to make minimal commitments that binds it to observe only regulatory principles of its own creation.

(a) *India's Specific Commitments.*

61. India's Schedule of Specific Commitments lists commitments across various sectors and sub-sectors in services.<sup>25</sup> Supplement 3 to the Schedule of Specific Commitments supplements the entries relating to the telecommunication services section contained in its Schedule.<sup>26</sup> India has not taken any commitments in Modes 1 and 2, i.e., cross border supply and consumption abroad categories, which remain "unbound". In Mode 3, India has taken some commitments in various sub-sectors regarding limitations on Market Access as follows.

*Voice telephone services*

62. India classified this service as being limited to local/long distance for public use over a PTTN. Service was permitted subject to the operator getting a license from the relevant authority who would determine the need, if any, for issuance of new licenses and the terms and conditions of the license were to be laid down by the authority or the Government or based on the prevailing laws of India.

*Wire-based services*

63. Quantitative restrictions were imposed, i.e., only one operator other than DoT/MTNL was permitted in each service area for a period of 10 years from the grant of license and the private operator had to be a company registered in India in which total foreign equity could not exceed 25%. The service operator was permitted to provide long distance service only within the licensed service area. Moreover, resale of voice telephone services was not permitted, but licensees could grant franchises on commission basis for providing public call offices service.

*Circuit-switched data services, private-leased circuits and facsimile services*

64. With respect to circuit-switched data transmission services, licensed voice telephone service operators were permitted to transmit data on the PSTN network (i.e., public switched voice telephone network which was operated by DoT/MTNL or licensed operator) in their licensed service areas. Similarly, licensed voice telephone service operators were permitted for transmission of facsimile on the PSTN network and franchisees of service operators could provide commercial facsimile services. As far as private leased circuit services are concerned, licensed voice telephone service operators were permitted to provide leased circuits to their customers, for their own use within their licensed area and resale of such leased circuits was not permitted.

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<sup>25</sup> GATS/SC/42 dated April 15, 1994.

<sup>26</sup> GATS/SC/42/Suppl.3 dated April 11, 1997.

*Data and Message transmission services*

65. Service was permitted subject to incorporation and foreign equity ceiling of 51%.

*Cellular mobile services*

66. Service was permitted only after the operator received a license from the Designated Authority who would determine the need for issuance of new licenses and lay down the terms and conditions of the license. Only digital (GSM) technology was permitted. Moreover, only two cellular service operators were permitted in each service area with the right of DoT/MTNL to enter into each service area being reserved. Also, foreign equity in private operators could not exceed 25% and they had to form companies registered in India for this purpose. Further, the detailed terms and conditions for providing the service would have to conform to license conditions.

*Long-distance & international services*

67. India stated that the subject of opening up of national long-distance service beyond the service area to competition would be reviewed in 1999. Also, the subject of opening up of international long distance services to competition would be reviewed in 2004.
68. It is to be noted that India has not made any commitments in Mode 4 except as indicated in the horizontal commitments, which cover the entry and temporary stay of business visitors, information and communications technology workers and professionals.

*(b) India's Additional Commitments.*

69. There is an Explanatory Paper on Additional Commitments by India ("Explanatory Paper") annexed to Supplement 3 of India's Schedule of Commitments, which basically details India's position vis-à-vis the regulatory measures enunciated in the Reference Paper.<sup>27</sup> A brief description of India's comments is as follows:

*Definitions*

70. India in its Explanatory Paper agrees to the definitions in the Reference paper and accepts them in full.

*Competitive Safeguards*

71. India explained in the Explanatory Paper that "Appropriate measures shall be maintained for the purpose of preventing service suppliers from engaging in or continuing in anti-competitive practices of the following type:
- (a) using information obtained from competitors with anti-competitive results; and

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<sup>27</sup> GATS/SC/42/Suppl.3 at page 6 dated April 11, 1997.

- (b) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

India did not accept the prohibition against cross-subsidization, which effectively meant that telecommunications providers, especially government-owned ones, could continue to engage in cross-subsidization.

*Interconnection; settlement of interconnection disputes*

72. India stated in its Explanatory Paper that “interconnection with a major supplier will be ensured at any specified feasible point in the network as indicated in the license. Such interconnection will be provided:
- (i) of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers of or for its subsidiaries or other affiliates;
  - (ii) upon request, at points in addition to the network termination points offered to the majority of users as per license conditions, subject to mutually agreed charges.”

Therefore, India did not commit to the requirement that interconnection must be provided in a non-discriminatory, transparent manner as to terms, conditions and rates, in a timely fashion and at reasonable rates. In the case of interconnection at other than network termination points, India did not agree that interconnection would be provided at charges reflecting the cost of construction of necessary, additional facilities.

73. On the requirement of public availability of the procedures for interconnection negotiations, India states that “the procedures applicable for interconnection to a major supplier will be made publicly available”. Moreover, on the requirement of transparency of interconnection agreements, India stated that “It will be ensured that a major supplier will make publicly available either its interconnection agreements, or a reference interconnection offer,” which amounts to accepting this principle in full. As far as settlement of Interconnection disputes is concerned, India stated in its Explanatory Paper that “A service supplier requesting interconnection with a major supplier will have recourse, either (i) at any time or (ii) after a reasonable period of time which has been publicly known.”

*Universal service*

74. India stated in its Explanatory Paper that it retained the right to define the kind of universal service obligation that it wished to maintain and that such obligations would not be regarded as anti-competitive *per se*, because they would be administered in a transparent and non-discriminatory manner. This basically amounts to accepting the commitments as to universal service.

*Public availability of licensing criteria*

75. India stated in its Explanatory Paper that licensing criteria and the terms and conditions of individual licenses would be made publicly available, which amounts to accepting this regulatory principle in full.

*Regulatory Authority*

76. India states in its Explanatory Paper that “the decisions of and the procedures used by the regulatory authority shall be impartial with respect to market participants.” In other words, India refused to accept that the regulatory body must be separate from and not accountable to any supplier of telecommunications services, presumably because DOT continued to be the licensor, to enjoy some regulatory functions and to have the power to give TRAI directions under TRAI Act.

*Allocation and use of scarce resources*

77. India states in its Explanatory Paper that “Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, would be carried out in an objective and timely manner.” Obviously, however, India did not wish to commit that it would not make public the current state of allocated frequency bands especially as this could involve revealing defence services allocations or to promise that allocation would be transparent or non-discriminatory to leave room for making special allocations to DOT’s telecommunications services.

(c) *MFN Exemptions listed by India.*

78. Supplement 1 to India’s Schedule of Specific Commitments lists India’s Article II (MFN) exemptions relating to telecommunication services, in particular in relation to international services.<sup>28</sup> India has sought MFN exemption for measures including the application of different accounting rates for different operators/countries covered by international telecommunication services agreements between VSNL and various foreign operators and the countries to which the MFN exemptions applies are the countries covered by these agreements. The explanation for this exemption is that VSNL, the government-owned international long distance operator, had entered into various bilateral agreements with foreign operators dealing with various aspects of cooperation. Accordingly, India sought this exemption for an indefinite duration.
79. India has also sought MFN exemptions for measures including the application of different accounting rates covered by Telecommunication Agreements entered into by the Government of India with different neighbouring countries such as Pakistan, Bangladesh, Nepal and Bhutan. India’s explanation for this exemption is that it has entered into various bilateral agreements with governments of neighbouring countries. Again, the exemption sought is for an indefinite duration. The indefinite duration for which India seeks both exemptions is potentially inconsistent with paragraph 6 of the Annex on MFN Exemptions, which limits such exemptions to 10 years with review at the end of 5 years.

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<sup>28</sup> GATS/EL/42/Suppl.1 dated April 11, 1997.

(iii) Subsequent Developments.

80. India had approached the negotiations at the WTO on various services sectors, especially telecommunications very cautiously and in a defensive manner. The assumption that India took such a position as it was uncomfortable about opening up its markets to foreign competition in key service sectors is not accurate because it is clear that, at the time that India became party to the Agreement on Basic Telecommunications, it had already autonomously opened up its markets to a far greater extent than its commitments.
81. NTP 1994 had specified various goals and targets to be achieved within a certain period of time. The government had also concluded that private investment and involvement of the private sector was required to bridge the resource gap. As mentioned earlier, the government had invited private sector participation in a phased manner from the early nineties, initially for value-added services and thereafter for fixed telephone services. The results of the privatization were not entirely satisfactory. The private sector entry was slower than that envisaged in NTP 1994. The main reasons according to the cellular and basic operators, was the fact that the actual revenues realized by these projects fell far short of projections and the operators, and that they were unable to arrange financing for their projects.<sup>29</sup> As a result, some of the targets, as envisaged in the objectives of the NTP 1994 remained unfulfilled.
82. Based on the existing situation and in view of the need for further liberalization in the telecom sector, the Prime Minister of India set up an Advisory Council on Trade and Industry to advise him on economic issues including on telecommunications issues. A task force on infrastructure proposed a “New Telecom Policy” to reform telecommunications policy in India. The new telecom policy was intended to take account of the convergence of telephony, data transmission and media and broadcasting by auctioning radio spectrum to telecommunications and broadcasting service providers.
83. Ultimately, the proposed policy was adopted as the New Telecommunications Policy (“NTP 1999”), which is currently the most important policy document shaping the development of the telecommunications sector. The objectives of NTP 1999 are, *inter alia*, availability of affordable and effective communications for its citizens; drawing an appropriate balance between the provision of universal service to all including in uncovered areas and the provision of high-level services capable of meeting the needs of the country’s economy; encouraging the development of telecommunication facilities in remote, hilly and tribal areas; achieving efficiency and transparency in spectrum management; transformation (in a time bound manner) of the telecommunications sector to a more competitive environment providing equal opportunities and level playing field for all players; and the creation of a modern and efficient telecommunications infrastructure taking into account the convergence of IT, media, telecom and consumer electronics and thereby propel India into becoming an IT superpower. The specific targets that NTP 1999 sought to achieve were

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<sup>29</sup> See NTP 1999, paragraph 1.2.

- Teledensity of 7 by 2005 and 15 by 2010
- Increase in rural teledensity to 4 by 2010
- Telecom coverage of all villages by 2002
- Internet access to all district headquarters by 2000
- High speed data and multimedia capability to all towns with a population greater than 2 lakh by the year 2002
- Making telecom in rural areas more affordable by a suitable tariff structure and making rural communication mandatory for all fixed service providers

84. At the same time, as foretold in the dispute between the Government and the TRAI over the attempt of the latter to establish its independence, the TRAI Act was amended in the year 2000.<sup>30</sup> Rather than strengthening the independence of the TRAI after the courts had interpreted the TRAI Act as limiting the powers of the regulator, the Government amended the TRAI act to establish the Telecom Disputes Settlement and Appellate Tribunal (“TDSAT”), which was vested with the TRAI’s powers to adjudicate disputes between licensors, licensees, service providers and consumers.<sup>31</sup> However, competition issues are not subject to adjudication by the TDSAT but rather by the Monopolies and Restrictive Trade Commission.<sup>32</sup> TDSAT’s decisions are appealable only to the Supreme Court of India.<sup>33</sup> After the amendment in 2000, TRAI’s functions have been better defined and in certain instances, for example, with respect to powers relating to interconnection conditions, have increased.<sup>34</sup> Moreover, the amendment in 2000

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<sup>30</sup> Act 2 of 2000 which came into force on January 24, 2000.

<sup>31</sup> Section 14 of TRAI Act 2000 which states as follows:

“Establishment of Appellate Tribunal – The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to –

(a) adjudicate any dispute –

- (i) between a licensor and a licensee;
- (ii) between two or more service providers;
- (iii) between a service provider and a group of consumers:

<sup>32</sup> *Id.* Section 14(a)(A) provides that “... nothing in this clause shall apply in respect of matters relating to – (A) the monopolistic trade practice, restrictive trade practice and unfair trade practices which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission...”. The Monopolies and Restrictive Trade Practices Act, 1969 is in the process of being repealed. The Competition Act, 2002 has been passed by both the houses of Parliament but is awaiting notification by the Government of India. Under the Act, the powers of the Competition Commission would extend to all issues relating to competition.

<sup>33</sup> Section 18 of TRAI Act 2000, which states as follows:

“ Appeal to Supreme Court – (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of that Code.

(2) No appeal shall lie against any decision or order made by the Appellate tribunal with the consent of the parties.

(3) Every appeal under this section shall be preferred within a period of ninety days from the date of the decision or order appealed against:

Provided that the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.”

gave TRAI new, recommendatory powers with respect to the need and timing for introduction of new service providers as well as to advise on the terms and conditions of licenses to service providers.<sup>35</sup> Where the government concludes that TRAI's recommendations cannot be accepted, or needs modifications, it is required to refer the recommendations back to TRAI before taking a final decision.

85. In making its recommendations, TRAI has followed a public consultation process, which has enabled various stakeholders to put forth their views. This has made the process of determining entry conditions transparent and has generally led to better outcomes than before. For example, TRAI invited Tata Consultancy Services, a leading software consultancy firm in India, to prepare a consultation paper that would provide the framework for public discussion on the introduction of competition in domestic long-distance communication, and to make appropriate recommendations to the government.<sup>36</sup> By virtue of making it mandatory for the government to seek prior recommendations of the TRAI before introduction of new services and making the TDSAT's orders directly appealable to the Supreme Court, the TRAI Act to a large extent ensures the neutrality of the Indian telecommunications regulatory regime.<sup>37</sup>
86. In many respects, India's commitments at the WTO in 1998 were significantly lower than its actual policy regime. For example, India maintained a 25 % cap on foreign investment in various telecommunications services. However, at the relevant time, up to 49% foreign direct investment was permitted.<sup>38</sup> In fact, on October 10, 2003, a ministerial group recommended that the 49 percent cap on Foreign Direct Investment (FDI) be raised to permit foreign portfolio investment up to an additional 25% taking the total of foreign direct plus portfolio investment to 74 percent subject to management control remaining with the Indian operator.<sup>39</sup> A table showing inflow of FDI into India in the telecommunications sector is as follows:

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<sup>34</sup> TRAI Act, Section 11. See Rajat Kathuria, Harsha Vardhana Singh and Anita Soni, *Telecommunications Policy Reform in India* (hereinafter "Kathuria & Singh") in Aaditya Mattoo & Robert Stern eds., *India and the WTO* (Oxford, 2003) at 105 (hereinafter "Mattoo & Stern".)

<sup>35</sup> International Telecommunications Union, *Competition Policy in Telecommunications: The Case of India*, November 2002 at p.9.

<sup>36</sup> See [http://www.tcs.com/0\\_case\\_studies/Industry\\_practices/telecom\\_TRAI\\_casestudy.htm](http://www.tcs.com/0_case_studies/Industry_practices/telecom_TRAI_casestudy.htm).

<sup>37</sup> See Deepak Pareek, *Telecom Sector in India: Vision 2020* at 21. available at <http://www.consultingbase.com/classified/clitem.cfm?adsid=321>.

<sup>38</sup> See Kathuria & Singh at 103. The authors states that "[W]ith the approval of the Foreign Investment Promotion Board, the maximum foreign equity permitted in the telecom services sector is as follows:

49 percent	Basic, cellular mobile, paging, V-SAT, mobile radio trunking, Internet; investment companies set up for investments in telecom services companies (investment by these companies in a telecom services company is treated as part of domestic equity and is not set off against the foreign equity cap)
51 percent	Email, voice mail, online information and data retrieval, online information and/or data processing; enhanced/value-added facsimile services, including store and forward, store and retrieve."

<sup>39</sup> See <http://www.indiatelecomnews.com/newdetails.asp?newsid=307>.

**Sector Wise actual Inflow of FDI in Telecom Sector  
(Aug'91 to May'2003)**

(Rs in Million)

Chart 19

S.No.	SERVICE/ITEM	FDI	%
1	Basic Telephony Service	3937	4.10%
2	Cellular Mobile Telephony Service	23328	24.32%
3	Radio Paging Service	910	0.95%
4	E-Mail Service	688	0.72%
5	VSAT Service	281	0.29%
6	Cable TV Network+Internet	1704	1.78%
7	Satellite Telephony Service	481	0.50%
8	Radio Trunking Service	71	0.07%
9	Manufacturing & Consultancy	15784	16.46%
10	Holding Companies	48277	50.34%
11	Other Value Added Services	107	0.11%
12	Automatic Route	340	0.35%
	<b>TOTAL</b>	<b>95907</b>	<b>100%</b>

Source: <http://www.trai.gov.in/report%20QE%20jun-03%20Final.htm>

87. India had stated in its commitments at the WTO that the subject of opening up of national long-distance service beyond a service area to competition would be reviewed in 1999. India had also stated that the subject of opening up of international service to competition would be reviewed in 2004. But India has actually opened up national long-distance service (2000) and international long distance services (2002), not merely reviewed these areas. NTP 1999 envisaged opening up of the national long distance (NLD) service beyond service area to private operators for competition with effect from January 1, 2000, which was carried out. Similarly, it has also opened up international service to competition by privatizing VSNL as well as removing restrictions on the number of operators since April 1, 2002.<sup>40</sup> Moreover, as a result of this opening up, foreign equity would also be permissible in national and international long distance up to 49%.
88. The existing basic and cellular service providers were offered a migration package under NTP 1999, allowing them to migrate from an annual fixed license fee to a revenue share arrangement. Further, in order to introduce more competition, one of the conditions of the offered migration package is that the licensee must forego its right to operating in a regime of limited competition after August 1, 1999 and

<sup>40</sup> VSNL, 16<sup>th</sup> Annual report, 2001-2002 at 5. "Government of India divested 25 per cent strategic stake of Videsh Sanchar Nigam Limited (VSNL), a public sector monopoly incumbent in ILD telephony to Tata group in the private sector out of 52.97 per cent equity held by the government. This was followed by opening up of ILD business to private players from April 1, 2002, terminating VSNL monopoly two years ahead of schedule."

must be prepared to operate in a “multipoly” regime, that is to say the licensor may issue additional licenses for the same service without any limit in the service area. As of today, 33 licenses have been issued to seven basic telephone service providers inclusive of the two government-owned enterprises, i.e., BSNL and MTNL. In the area of cellular licenses, either BSNL or MTNL can provide Cellular Services as the third operator. Based on the recommendation of the TRAI, the government has decided to allow one more private operator as the fourth cellular mobile service provider in each service area. The number of cellular operators was restricted to four (including BSNL or MTNL) due to limited spectrum availability.<sup>41</sup>

89. Most importantly, the government and the TRAI are seriously considering scrapping the cumbersome licensing system, restricted by geography (license circles), by technology (eg., fixed vs. wireless, GSM vs. CDMA), by market segment (local vs. long distance and data vs. voice). As recently as in August 2003, TRAI has proposed to bring all segments of the telecom market under a single “unified” license, covering fixed, mobile, data, voice, domestic and international long distance and thereby creating uniform rules for all players.<sup>42</sup> The proposed new license is likely to create a single, pan-Indian market by scrapping rules that restrict operators to 20-odd regional circles and thereby unify the currently fragmented market.<sup>43</sup>
90. India’s regulatory standards that are currently in place are higher than its commitments made while signing the Agreement on Basic Telecommunications and now its regulatory standards either satisfy or are very close to the standards set out in the Reference Paper.

#### *Competitive Safeguards*

91. Competitive safeguards are established to prevent anti-competitive behaviour, and specific mention is made of cross-subsidization practices, and the misuse of information. In practice, both market structure as well as TRAI oversight provide effective safeguards against cross-subsidization.
92. The TRAI Act mandates that every service provider shall maintain such books of account or other documents as may be prescribed.<sup>44</sup> The Central Government may, by notification, make rules prescribing the category of books of account or other documents, which are to be maintained. In a move to help better monitor and measure the financial performance of individual telecom companies, TRAI in December 2002 finalized guidelines for a new accounting system, making it mandatory for operators to separate their records for each service being offered. This “System on Accounting Separation” is expected to help disaggregate costs at the level of network elements and would also help in identification of cross-subsidization practices in the industry, wherever these exist. By providing for maintenance of detailed cost records right up to the level of network elements, the system will help generate accurate information on costs, which is necessary for

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<sup>41</sup> See <http://www.trai.gov.in/final%20consultation16th%20july.html>

<sup>42</sup> See <http://www.indiabandwidth.com/dir1/bandwidth64.html>.

<sup>43</sup> *Id.*

<sup>44</sup> See TRAI Act, Section 12(3).

tariff and interconnect regulations.<sup>45</sup>

### *Interconnection*

93. Some analysts believe that the regulatory discipline commitments by India are less onerous than the disciplines actually applied in practice.<sup>46</sup> This is certainly true as far as interconnection regulations are concerned. While India has not agreed to apply a non-discriminatory interconnection regime, in practice, non-discrimination is one of the principles of the interconnection regime that has been specified by TRAI.<sup>47</sup> Moreover, India has not committed in the WTO to cost-based interconnection charges but TRAI has adopted this principle in 1999.<sup>48</sup> Similarly, TRAI has specified that interconnection should be provided at any technically feasible point in the network.<sup>49</sup> Pending further review, the TRAI has also issued the Telecommunication Interconnection Usage Charges Regulation in 2003. This became necessary because of the opening up of the national and international long distance markets for competition, which drastically reduced the margin available to fund the “access deficit” incurred by basic service operators as a result of rentals being significantly lower than actual costs. Accordingly, TRAI has now specified cost-based “interconnection usage charges” which include an “access deficit charge”.

### *Universal service*

94. NTP 1999 states that the government is committed to providing access to basic telecom services for all at affordable and reasonable prices.<sup>50</sup> The government also sought to achieve universal service obligations like providing voice and low speed data services to the remaining 290,000 uncovered villages by 2002, achieving internet access for all district headquarters by the year 2000, and achieving telephone on demand in urban and rural areas by 2002.<sup>51</sup> Moreover, TRAI is empowered to ensure effective compliance of universal service obligations.<sup>52</sup>

### *Public availability of licensing criteria*

95. As discussed above in the context of the proposal for a “unified license”, India is also working towards further reforms in its telecom sector in the licensing area in order to make procedures more transparent and less cumbersome.

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<sup>45</sup> See <http://www.thehindubusinessline.com/bline/2002/12/28/stories/2002122801710700.htm>.

<sup>46</sup> See Kathuria & Singh, *supra* at 104.

<sup>47</sup> *Id.*

<sup>48</sup> See Chanda, *supra* at 175.

<sup>49</sup> *Id.*

<sup>50</sup> See NTP 1999, paragraph 6.0.

<sup>51</sup> *Id.* Paragraph 6.0 also states “The resources for meeting the USO would be raised through a ‘universal access levy’ which would be a percentage of the revenue earned by all the operators under various licenses. The percentage of the revenue share towards universal access levy would be decided by the Government in consultation with TRAI.”

<sup>52</sup> See TRAI Act, Section 14 (1)(b)(ix).

### *Regulatory Authority*

96. NTP 1999 expressly states that the government is committed to a strong and independent regulator with comprehensive powers and clear authority to effectively perform its functions.<sup>53</sup> In an effort to separate the service provider from the policy-maker and licensor, the Department of Telecom Services (DTS) was created in 1999. DTS is responsible for providing telecommunications services, whereas the DoT retains its mandate as policy-maker and licensor. The functions of licensor and policy-maker continues to be discharged by the Government in its sovereign capacity and in areas where TRAI has merely a recommendatory role, the government is not obligated to seek TRAI's recommendations.<sup>54</sup> Moreover, TRAI's chairperson and its other members are appointed by the Central Government and can be removed by the Central Government in certain circumstances.<sup>55</sup>

### *Allocation and use of scarce resources*

97. India had stated in its explanatory paper that “[a]ny procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective and timely manner” . NTP 1999 proposed to review spectrum utilization from time to time keeping in view the emerging scenario of spectrum availability, optimal use of spectrum, requirements of market, competition and other interest of public.<sup>56</sup> Also, NTP 1999 stated that there was a need for a transparent process of allocation of frequency spectrum for use by a service and making it available to various users under specific conditions.<sup>57</sup> The policy also stated that only appropriate spectrum usage fees should be charged and promised the setting up of an empowered Inter-Ministerial Group to periodically review spectrum availability and allocation policy.<sup>58</sup> Moreover, TRAI can make recommendations to the government for the efficient management of available spectrum.<sup>59</sup> As noted above, a ministerial group has now recommended that the military's requirement of a modern communications system that requires less spectrum should be financed by the government to increase spectrum availability for commercial, telecommunications services. Similarly, NTP 1999 states that “government recognises that expeditious approvals for right-of-way clearances to all service providers are critical for timely implementation of telecom networks. [All levels of government] shall take necessary steps to facilitate the same.”<sup>60</sup>

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<sup>53</sup> See NTP 1999, paragraph 7.0.

<sup>54</sup> *Id.*

<sup>55</sup> See TRAI Act, Section 4 & 7.

<sup>56</sup> See NTP 1999, paragraph 3.1.1.

<sup>57</sup> *Id.* at paragraph 5.0.

<sup>58</sup> *Id.*

<sup>59</sup> See TRAI Act, Section 14 (1)(a)(viii).

<sup>60</sup> See NTP 1999, paragraph 8.8.

## Network Status as on 31st August, 2003

No.	Description	(in million)
1.	Switching Capacity (MTNL + BSNL)	56.96
2.	Direct Exchange Lines (DELs) or Fixed Lines including WLL (MTNL + BSNL)	40.42
3.	Direct Exchange Lines (DELs) or Fixed Lines including WLL (Private operators)	5.18
<b>4.</b>	<b>Direct Exchange Lines (DELs) or Fixed Lines including WLL (Total)</b>	<b>45.6</b>
5.	Cellular Mobile Phones (MTNL + BSNL)	3.99
6.	Cellular Mobile Phones (Private operators)	13.4
<b>7.</b>	<b>Cellular Mobile Phones (Total)</b>	<b>17.39</b>
8.	Rural Direct Exchange Lines (DELs) or Fixed Lines including WLL (as on 31.7.2003)	11.497
9.	PCOs (at the end of quarter June, 2003)	1.48
10.	Internet subscribers (at the end of quarter June, 2003)	3.67
11.	Village Public Telephones (MTNL + BSNL)	0.505
12.	Village Public Telephones (Private operators)	0.012
<b>13.</b>	<b>Village Public Telephones (Total)</b>	<b>0.517</b>

### B. Sri Lanka.

#### (i) Background and Regulatory Framework.<sup>61</sup>

98. Until 1980, Sri Lanka's domestic and international telecommunication services were under the Posts and Telecommunications Department in the Ministry of Posts and Telecommunications. The rapid changes in telecommunications worldwide both in terms of industry structure as well as technology had an impact on Sri Lanka's telecommunication sector as well. In the 1970s, the quality and availability of telecommunications in Sri Lanka was average compared to other Asian countries but relatively poor compared to most other parts of the world.
99. Consistent with the perception that improvement in telecommunications services was important to increasing teledensity levels in Sri Lanka and hastening economic development generally, the Government of Sri Lanka decided to liberalize the telecom sector in the early 1980s. Initially, the Department of Telecommunications and Postal Services was separated into separate services in 1980 and international direct dialing was introduced the same year in some parts of the country. This was extended in the next few years to other parts of the

<sup>61</sup> The background and regulatory framework of Sri Lanka's telecommunications sector is based on the following: (i) Rohan Samarajiva, "The Role of Competition in Institutional Reform of Telecommunications: Lessons from Sri Lanka", prepublication of an article that will appear in Telecommunications Policy Vol. 24 Nos.8/9; and (ii) "WTO Agreement on Basic Telecommunication Services – Sri Lanka's Experience on Interconnection and Pricing – Case Study" by Ms. Sumathi Dharmawardena, Telecommunications Regulatory Commission of Sri Lanka, July 10-12, 2003

country. Subsequently, in 1991, the major Public Telephone Operator Sri Lanka Telecom was converted into a government-owned corporation. In the same year, the Sri Lanka Telecommunications Act No. 25 of 1991 (the “Telecommunications Act”) was enacted, which constituted the Office of the Director General of Telecommunications as the regulatory authority, mainly to foster the growth of the telecommunications sector.

100. In practice, however, the Office of the Director General was hamstrung by lack of resources and found it difficult to recruit qualified personnel. As a result, several provisions of the Telecommunications Act could not be enforced properly. The Office of the Director General did make progress, however, in the area of issue of licenses and formulating proposals to amend the Telecommunications Act. As a result of these proposals, the Government of Sri Lanka amended the Telecommunications Act by the Sri Lanka Telecommunications (Amendment) Act No. 27 of 1996 “to provide for the establishment of the Telecommunications Regulatory Commission of Sri Lanka” (TRCSL) as the regulatory agency to fulfill the objectives of the Act.
101. At about the same time, in 1996, the Sri Lanka Telecommunication Corporation was converted into a fully government-owned company named Sri Lanka Telecom Limited (“Sri Lanka Telecom”) as part of the process of market reforms taking place in Sri Lanka and in the international telecommunications sector. In the same year, the Government of Sri Lanka also invited international offers for the management of Sri Lanka Telecom. The Government divested 35% of its shares in Sri Lanka Telecom to NTT of Japan and handed over the management to them in 1997.
102. Sri Lanka has also followed the pattern common to many other developing countries of first liberalizing its domestic market before introducing competition in international telecommunication services. Competition in the area of fixed telephony was introduced for the first time in 1996 with the licensing of two wireless local loop (“WLL”) operators Lanka Bell (Pvt.) Limited and Tella Lanka Private Limited (Suntel). These two private companies were issued a license to operate fixed basic telephony, data transmission, payphone, voicemail and facsimile in Sri Lanka for 20 years commencing from February 1996. Four cellular mobile telecommunication service licenses were also granted to Celltel Lanka Limited, QTC Australia, MTN Networks Limited and Lanka Cellular Services Limited. However, in the domestic fixed wire voice telephone services, Sri Lanka did not issue any new licenses till August 2002 and Sri Lanka Telecom has a monopoly in this area.
103. In international telecommunication services as well, Sri Lanka created a monopoly in 1997 in favour of Sri Lanka Telecom for a period of 5 years by modifying the license granted to Sri Lanka Telecom by TRCSL to the effect that no other licenses would be issued for providing international telephone services in Sri Lanka up to August 4, 2002.

(ii) Sri Lanka's Commitments under the Agreement on Basic Telecommunications.

104. Like many other developing countries, Sri Lanka also did not participate fully in the negotiations on telecommunications services during the Uruguay Round. Even at the end of the Round in Marrakesh, it was not a party to the Ministerial Decision on Negotiations on Basic Telecommunications. However, it subsequently did join the negotiations and was a signatory to the Fourth Protocol to GATS, which concluded in February 1997. Its commitments from the date of entry into force of commitments under the Agreement on Basic Telecommunications are as follows.

(a) Schedule of Specific Commitments.

105. In international basic voice telecommunication services, Sri Lanka guaranteed a monopoly to Sri Lanka Telecom until December 31, 1999. The Government of Sri Lanka proposed to issue an additional license by that date based on achieving progress in the area of tariff balancing. With respect to Mode 3 involving commercial presence, the Government permitted foreign equity participation of up to 35 percent to a strategic partner in Sri Lanka Telecom based on its restrictions in the horizontal section of Sri Lanka's schedule of concessions. Even the presence of natural persons is unbound, except as indicated in the horizontal section. There are no limitations on national treatment. At least with Sri Lanka Telecom, Sri Lanka had already fulfilled its commitment before it made it.

106. In the domestic local, and long-distance basic telephone services, the only limitation is on commercial presence. Licenses would be issued to four operators and foreign equity participation would be determined in accordance with the horizontal commitments. The government committed to review the limitation on the number of operators in 2000.

107. Another area in the domestic local and long-distance basic telephone services is the Wireless Local Loop (WLL) to provide basic telephony, data transmission, payphone, voice mail and facsimile. The only limitation in these services is on commercial presence where the Government sought to guarantee a duopoly for a period of five years. In addition, Sri Lanka Telecom would be permitted to provide WLL services in 800 MHz Band. Foreign equity participation in these enterprises would be determined under the horizontal commitments. In the public pay phone services, the number of providers was limited to five, which would be reviewed on economic needs criteria.

108. For radio paging services, there are two limitations on market access. Commercial presence is limited to five operators, which may be changed depending upon economic needs. Foreign equity participation is based on the horizontal section. Mode 4 based on presence of natural persons is bound, except as indicated in the horizontal section.

109. Even in data communication services, the two limitations on market access are on commercial presence and presence of natural persons. Sri Lanka would issue licenses to six operators. No new licenses would be issued for facilities-based

operators until 1998. Foreign equity participation is again in accordance with the horizontal commitments. Mode 4 for presence of natural persons is again unbound except as indicated in the horizontal section.

110. For GMPSC services supplied through own gateways, market access is unbound as far as cross-border supply is concerned. Regarding commercial presence, the Government of Sri Lanka was considering the issue of licenses. Foreign equity participation again is determined under the horizontal commitments. The presence of natural persons mode of supply is unbound, except as indicated in the horizontal section, both for market access and national treatment.

*(b) Additional Commitments.*

111. Sri Lanka has fully adopted the reference paper on regulatory principles. As compared to its commitments, the regulatory measures existing in Sri Lanka in 1998 were as follows.

*Competitive Safeguards*

112. Sri Lanka Telecom had a monopoly in international telecommunications services till August 2002. Although they may have permitted cross-subsidization of local basic telephone services to compete against WLL-based competitors, it would have been unlikely because of the 35% foreign shareholding of NTT in Sri Lanka Telecom. All tariff (except for WLL operators) for telecommunication services were to be approved by the TRCSL in consultation with the Minister<sup>62</sup>.

*Interconnection*<sup>63</sup>

113. Under the Telecommunications Act, TRCSL was authorized to determine interconnection charges among the networks of the different service providers and Sri Lanka Telecom where they failed to agree among themselves. However, it was not a mandatory condition under the Act<sup>64</sup>. Sri Lanka Telecom was under an obligation to provide interconnection to other operators, a condition that was imposed on it under clause 12 of the license granted to it<sup>65</sup>. TRCSL was also the authority to determine disputes that arose between the parties on interconnection.
114. TRCSL faced two important issues pertaining to interconnection in 1997. One was the interconnection charge between Mobile Communication Operators and fixed Access Operators, and the other between Sri Lanka Telecom and the two WLL operators and three Mobile Operators.<sup>66</sup>

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<sup>62</sup> Section 5(k) of the Telecommunications Act.

<sup>63</sup> The issue of interconnection is based on “WTO Agreement on Basic Telecommunication Services – Sri Lanka’s Experience on Interconnection and Pricing – Case Study”, Mr. Sumathi Dharmawardena, TRCSL. This article is available at [www.aptsec.org/satrc/fifth-satrc/presentations](http://www.aptsec.org/satrc/fifth-satrc/presentations)

<sup>64</sup> Section 5(1) of the Telecommunications Act.

<sup>65</sup> License Agreement to Sri Lanka Telecom dated August 8, 1991.

<sup>66</sup> For details see “WTO Agreement on Basic Telecommunication Services – Sri Lanka’s Experience on Interconnection and Pricing – Case Study” by Ms. Sumathi Dharmawardena, Telecommunications Regulatory Commission of Sri Lanka, July 10-12, 2003.

### *Regulatory Authority*

115. As mentioned above, by way of an amendment to the Telecommunications Act in 1996, all duties performed by the office of the Director General of Telecommunications were transferred to TRCSL<sup>67</sup>. The single-member form of regulatory institution was converted to a five-member Commission. The members of TRCSL include the Secretary to the Minister of Mass Communications as the Chairman, a Director General, and three other members appointed by the Minister of Mass Communications. Remuneration of the members is out of the funds of TRCSL.
116. The objectives of TRCSL among others are to<sup>68</sup>:
- (a) Ensure the provision of a reliable and efficient telecommunications service;
  - (b) Protect and promote the interests of consumers;
  - (c) Maintain and promote effective competition;
  - (d) Promote the rapid and sustained development of telecommunication facilities;
  - (e) Ensure that operators carry out their obligations for providing reliable and efficient services; and
  - (f) To encourage the major users of telecommunication services whose places of business are outside Sri Lanka to establish places of business within Sri Lanka
117. For purposes of achieving the objectives, the powers of TRCSL include<sup>69</sup>:
- (a) To advise the Minister of Mass Communications regarding the grant of licenses, and on policies of tariffs, pricing and subsidies, and also to fix the tariffs in accordance with the policy;
  - (b) Regulatory measures to ensure compliance with ITU standards and with the international and other obligations incurred by the Government of Sri Lanka regarding telecommunications;
  - (c) To approve interconnections charges and prescribe the accounting system to be followed by the telecommunications operators; and
  - (d) To ensure the conservation and proper utilization of the radio frequency spectrum by operators and other organizations and to manage<sup>70</sup> the same.
118. The TRCSL also has the power to investigate and take remedial measures where a subscriber to a telecommunication service or a member of the public makes a complaint to it in relation to the telecommunication service provided by an operator.<sup>71</sup> The TRCSL, or its committee, decides on the complaint after hearing all interested parties. The procedure for the hearing is provided in sections 11 and 12 of the Telecommunications Act. The order, award or direction is final. An appeal to the Court of Appeal is limited to a question of law.<sup>72</sup> Any contravention

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<sup>67</sup> By Section 65A of the amended Act.

<sup>68</sup> Section 4 of the Telecommunications Act, 1991, as amended by the Telecommunications (Amendment) Act no. 27 of 1996

<sup>69</sup> Section 5 of the Telecommunications Act.

<sup>70</sup> Section 10(2) of the Telecommunications Act.

<sup>71</sup> Section 9 of the Telecommunications Act.

<sup>72</sup> Sub-sections (1) and (2) of Section 14 of the Telecommunications Act.

of the order of the Commission or an award of the committee entails penal consequences.<sup>73</sup>

119. The Reference Paper does not define an “independent regulator”. However, it goes on to explain that the regulatory body should be separate from, and not accountable to, any supplier of basic telecommunications services. The decisions and the procedure used by the regulators must be impartial with respect to all market participants. To this extent, TRCSL is independent and it is not affiliated or accountable to any basic telecommunications provider. It may be worth noting that the Secretary in the Ministry of Posts and Communications is the Chairman of TRCSL. Although, this may be consistent with the plain language the Reference Paper, it is probably inconsistent with the spirit of the requirement, especially when the Government of Sri Lanka is the majority shareholder in Sri Lanka Telecom.

*Public Availability of Licensing Criteria*

120. Licenses are granted by the Minister of Mass Communications on the recommendation of TRCSL.<sup>74</sup> The Minister also has the power to reject the recommendation of TRCSL for reasons to be recorded in writing and grants a license in his own discretion. The Telecommunications Act does not provide any criteria for the grant of a license. However, the TRCSL website contains certain broad guidelines on the application procedure and the application form.<sup>75</sup>

*Allocation and use of scarce resources*

121. One of the duties of TRCSL was to ensure the conservation and proper utilization of the radio spectrum by operators and other organizations and individuals who need to use radio frequencies<sup>76</sup>. The state of the frequency bands was also publicly available.<sup>77</sup> Under Section 22 of the Telecommunications Act, any person could apply to TRCSL for a license. A decision of TRCSL refusing a license was appealable. TRCSL’s website contain the relevant information on the application procedure.<sup>78</sup> TRCSL was also responsible for regulating the right of way.

*(c) Exceptions to Most Favored Nation Treatment.*

122. Certain GATS obligations apply to all Member countries (for example the MFN principle), while others depend on sector-specific commitments by individual Members. One of the general exemptions in the telecommunications sector from MFN taken by a number of countries, including Sri Lanka, is with respect to accounting rate arrangements. In the international services sector, the exception has been described as “measures including the application of different accounting

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<sup>73</sup> Section 16 of the Telecommunications Act.

<sup>74</sup> Section 17 of the Telecommunications Act.

<sup>75</sup> See [www.trc.gov.lk/licenses.htm](http://www.trc.gov.lk/licenses.htm)

<sup>76</sup> Section 5(v) of the Telecommunications Act.

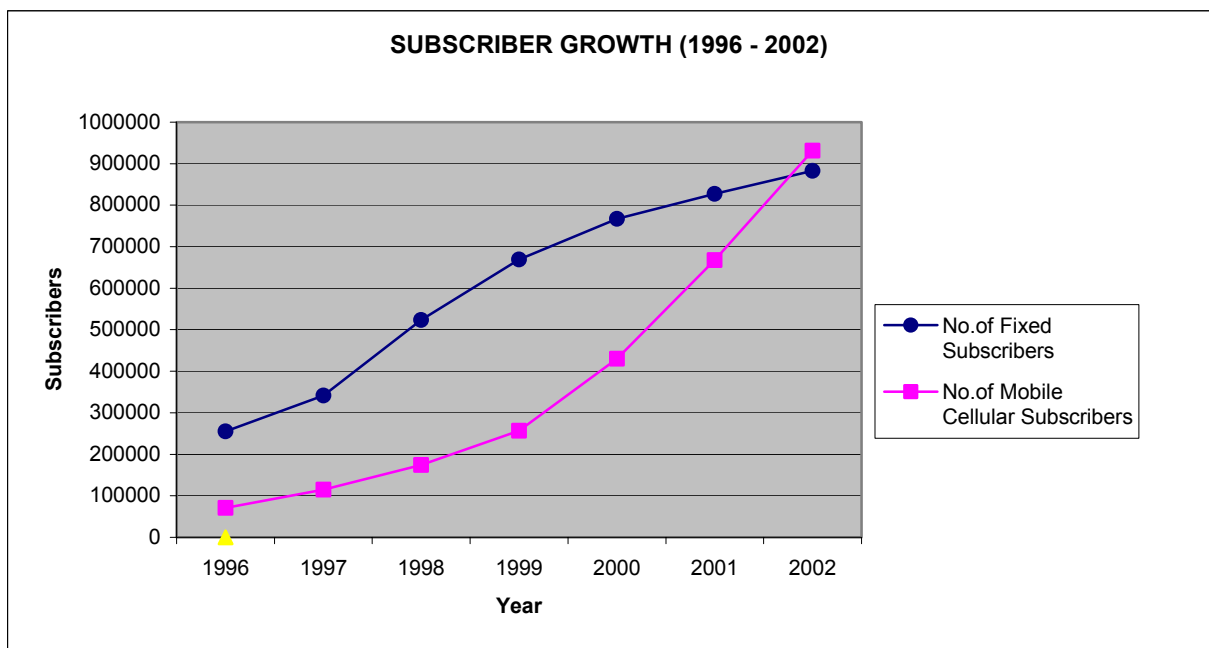
<sup>77</sup> See [www.trc.gov.lk/spectrum.htm](http://www.trc.gov.lk/spectrum.htm)

<sup>78</sup> See [www.trc.gov.lk](http://www.trc.gov.lk) “Achieving Good Governance – Provision of Service Information to the General Public”.

rates for different operators/countries covered by International Telecommunication Services Agreements between Sri Lanka Telecom Limited and various foreign operators”. The exception is applicable to all countries covered by the International Telecommunication Services Agreements between Sri Lanka Telecom and foreign operators. Sri Lanka has claimed this exemption for an indefinite period. A similar exception has also been specified for agreements entered into with the neighboring countries in the South Asian Association for Regional Cooperation.

(iii) Subsequent Developments after 1998

123. As it clear from the graph below, the telecommunications sector in Sri Lanka has had a consistent growth since the 1990s. In 2002, it reached a figure of around 880,000 fixed telephone subscribers and 930,000 mobile cellular telephones subscribers.<sup>79</sup>



	1996	1997	1998	1999	2000	2001	2002
<b>No. of Fixed Telephone Subscribers</b>	255,049	341,622	523,529	669,113	767,411	827,195	883,108
<b>No. of Mobile Cellular Telephone Subscribers</b>	71,029	114,888	174,202	256,655	430,202	667,662	931,580*
<b>Total Fixed &amp; Mobile Telephone Subscribers</b>	<b>326,078</b>	<b>456,510</b>	<b>697,731</b>	<b>925,768</b>	<b>1,197,613</b>	<b>1,494,857</b>	<b>1,814,638</b>

124. In September 2002, Sri Lanka came out with a Proposed Communications

<sup>79</sup> See [www.aptsec.org/satrc/fifth-satrc/presentations](http://www.aptsec.org/satrc/fifth-satrc/presentations)

Policy. This policy if implemented will have a far-reaching effect on telecommunication services in Sri Lanka. The highlights of the Proposed Policy are to (i) transform the telecommunications market structure and regulation towards a more liberalized, technology-neutral model, (ii) establish an explicit Universal Access policy, (iii) confer greater independence and authority on TRCSL and introduce transparency into its procedures, and (iv) confer on TRCSL the power to regulate tariffs and minimize barriers and to develop and enact a new Convergence Act, which will include Information and Communications Technology, media and telecommunications among others. At the Asian Region Conference of the World Summit on the Information Society (WSIS) in Tokyo, Japan on January 13-15, 2003, the Minister of Mass Communication informed an international audience that his government has approved the proposed National Communications Policy and that legislative changes were being drawn up for its implementation. However, an informal check with TRCSL confirmed that the proposed Policy is still under review by the government and that it may undergo further changes.

125. In 2003, TRCSL framed the Interconnection Rules under Section 68 of the Telecommunications Act to fill in the lacunae in the Act on interconnections between the Operators, which came into effect from March 2003.
126. Sri Lanka Telecom had a monopoly in international telecommunications services till August 2002. After February 2003, TRCSL has issued 27 new licenses to, among others, the two WLL operators, three mobile operators and also to new entrants in this area.<sup>80</sup> The new licenses have resulted in a reduction in tariffs for international calls.
127. In the domestic fixed wire voice telephone services, Sri Lanka did not issue any new licenses till August 2002. In the services offered by WLL operators, the duopoly of Suntel and Lanka Bell was maintained till 2000. The Government sought to extend this duopoly for a further period of 5 years if certain specified targets in their license conditions were met. The fixed basic voice telephone service providers (Sri Lanka Telecom and the two WLL operators) were not allowed to provide mobile telephone services. As of August 2003 there are amongst others three Fixed Access Operators, four Mobile Operators and 32 Internet Service providers (ISP's) in Sri Lanka.
128. In data communication services no new licenses were issued to facilities-based operators till 2002. However, the provision for data communication services using infrastructure leased from licensed operators was permitted. Operating GMPCS systems did not require licenses issued by the Minister unless the gateway earth station was located in Sri Lanka. However, licenses were necessary for use of frequencies within the range allocated by the ITU.
129. The potential of Sri Lanka Telecom for cross-subsidization has been further

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<sup>80</sup> "WTO Agreement on Basic Telecommunication Services – Sri Lanka's Experience on Interconnection and Pricing – Case Study" by Ms. Sumathi Dharmawardena, Telecommunications Regulatory Commission of Sri Lanka, July 10-12, 2003.

reduced. Its monopoly in international telecommunication services ended in August 2002 and it is facing stiff competition in this area after February 2003. In the area of interconnection, the Interconnection Rules require TRCSL to scrutinize the dominant operator's agreements and ensure that the agreements conform to the rules.<sup>81</sup>

130. In the Proposed Telecommunication Policy, one of the objectives of the regulator is to impose specific requirements governing fair competition practices. Operators that are deemed to have significant market power or that have control over bottleneck facilities or scarce resources should be subject to appropriate structural and behavioral regulation and other appropriate safeguards to ensure that competition in the market is not adversely affected by their entry into a new area.
131. On confidentiality of information exchanged by the operators, the Interconnection Rules specifically prohibit using information exchanged between parties negotiating an interconnection agreement.<sup>82</sup> The parties are required to sign a non-disclosure agreement prior to entering into negotiations. Where parties fail to reach an agreement on confidentiality, the dispute is referred to the TRCSL.
132. Again in the area of interconnection, the access providers must agree to provide an interconnection service to any access seeker at any technically feasible point in the provider's network.<sup>83</sup> The interconnection charges also are provided in the Rules. Any dispute in this regard is again referable to the TRCSL.
133. In 2003, Sri Lanka also introduced Interconnection Rules. These rules were framed by TRCSL under Section 68 of the Telecommunications Act and came into effect from March 7, 2003. The rules removed certain defects in the Telecommunications Act on the issue of interconnection, mainly in relation to the following:
  - (a) Section 5(I) was inadequate to fulfill Sri Lanka's commitments under the Agreement on Basic Telecommunications;
  - (b) Interconnection was not mandatory under the Telecommunications Act;
  - (c) There was no provision under which TRCSL could fix the interconnection charges on a cost-oriented basis where parties failed to agree;
  - (d) There was no provision for the resolution of disputes arising out of interconnection; and
  - (e) It was not mandatory for the operators to disclose the contents of the interconnection agreement, including the interconnection charges to TRCSL. This posed a serious barrier to creating a level playing field from all operators.
134. The salient features of the Interconnection Rules of 2003 are as follows.
  - (ii) The Rule applies to every connectible licensed operator who is authorised to connect to any interconnected telecommunication system.<sup>84</sup>
  - (iii) Interconnection service is mandatory among connectable operators and is

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<sup>81</sup> Rule 15 of the Interconnection Rules.

<sup>82</sup> Rule 5(7) of the Interconnection Rules.

<sup>83</sup> Rule 8 of the Interconnection Rules.

<sup>84</sup> Rule 2 of the Interconnection Rules.

required to be provided on efficient, non-discriminatory and cost-oriented basis.<sup>85</sup>

- (iv) Every Access Seeker must enter into an Interconnection Agreement with the Access Provider<sup>86</sup> on such terms as set out in the Rules. The terms and conditions on which interconnection is provided, both price and non-price terms, must represent world's best practice.<sup>87</sup>
  - (v) Where an Access Provider fails to provide information, which are necessary to negotiate an agreement, to the Access Seeker within five working days, the Access Seeker may inform TRCSL. TRCSL would then make its determination.<sup>88</sup>
  - (vi) All parties to a negotiation must sign a non-disclosure agreement prior to commencement of the negotiations.
  - (vii) No Interconnection Agreement comes into effect until TRCSL issues a certificate that it conforms to the Rules.<sup>89</sup> Rule 15 sets out the role of TRCSL with respect to agreements entered into with dominant operators.
  - (viii) Activities, including concealment or misrepresentation as to the origin or nature of traffic, are prohibited under Rule 9.
  - (ix) TRCSL would determine interconnection charges where parties fail to reach an agreement.<sup>90</sup>
  - (x) All disputes are referred to TRCSL, which must make a determination within 30 days of the receipt of the complaint.<sup>91</sup>
135. As is the case with other regulators, even in Sri Lanka, effective and stringent implementation of the Rules by TRCSL is the key to fostering competition in the telecommunication sector by providing a level playing field to all operators, including the new entrants.
136. With respect to Universal Service obligations, the commitment to provide telecommunications facilities in rural areas is recognized in both the Proposed National Communications Policy, and in Sri Lanka's commitments under the Agreement on Basic Telecommunications.
137. The TRCSL is currently in the process of providing telephone services to 595 rural sub-post offices throughout the country that require such facilities urgently. TRCSL also devised a subsidy scheme in 1999 to provide incentives to payphone operators to provide payphones in rural areas. TRCSL has also been instrumental in providing access to telecommunications to people with disabilities.<sup>92</sup>
138. Under the proposed National Communications Policy of September 2002, a Telecommunications Development Fund is to be established to help support the rapid development of universal access in areas and for populations that are inadequately served by present operator networks. The contributions to the fund

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<sup>85</sup> Rule 4 of the Interconnection Rules.

<sup>86</sup> Rule 5(2)(a) of the Interconnection Rules.

<sup>87</sup> Rule 5(4)(e) of the Interconnection Rules.

<sup>88</sup> Rule 5(7) of the Interconnection Rules.

<sup>89</sup> Rule 5(11) of the Interconnection Rules.

<sup>90</sup> Rule 10 of the Interconnection Rules.

<sup>91</sup> Rules 5(16), 7(2) and 8(2)(iv) of the Interconnection Rules.

<sup>92</sup> See [www.aptsec.org/satrc/fifth-satrc/presentations](http://www.aptsec.org/satrc/fifth-satrc/presentations)

would come from all licensed telecom operators. It has also been proposed that at the initial stage multi-purpose community telecentres would be set up in rural areas. Further it is also proposed that universal service obligations would be introduced as a condition for the grant of license.

139. Regarding the availability of licensing criteria, the position essentially remains the same. On the issue of independence of the regulatory authority, the proposed National Communication Policy of September 2002 recognizing the importance of an independent, professional and transparent regulatory commission for a long-term domestic and foreign investment in this vital infrastructure sector decided to strengthen the independence of the proposed Telecommunications Regulatory Commission, the transparency of its procedures and the competency of its staff. This Commission was to be renamed as the Communications Regulatory Commission (CRC). This, according to the Policy, was for the following reason:

Sri Lanka will honor its commitments to conform to the regulatory principles of the World Trade Organization's telecommunications services agreement, by ensuring that the CRC becomes completely independent of any operator or service provider in the Communication Sector. The CRC will furthermore be accorded greater autonomy from the Government. This will ensure that its decisions are unbiased and not subject to political or industry influence.

140. On the issue of allocation and use of scarce resources, one of the objectives of the Proposed National Communications Policy is to modify the legislation to ensure that the Communications Regulatory Commission has jurisdiction and authority to require that the operators have reasonable and timely access to necessary public right of way, subject to appropriate local safeguards and operator liability for costs and damages.<sup>93</sup>

## **C. Malaysia**

### **(i) Background and Regulatory Framework.**

141. Prior to 1987, the telecommunications industry was highly regulated with services provided by the telecommunications department of the government, Jabatan Telekom Malaysia ("JTM"). Initially, the Telecommunications Act of 1950 (the "Telecommunications Act") was amended to make JTM the regulatory authority in this sector. However, the licensing function continued to be the province of the Ministry of Energy, Telecommunications and Posts (the "METP"), as provided in the Telecommunications Act. Thereafter, the Telecommunications Service (Successor Company) Act, 1985 was passed to permit Syarikat Telekom Malaysia (STM) to take over the service provision function from JTM. In 1987, JTM was corporatized and restructured. Operational services were transferred to STM and JTM became purely a regulatory agency.

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<sup>93</sup> Paragraph 3.3.2 of the Proposed National Communications Policy, September 2002.

142. In 1990, the government sold 25% of STM's equity to the public. After this, STM was called Telekom Malaysia Berhad ("TMB"). The government still owns about 70% of the TMB's equity. The government also owns a single unit "golden share" that entitles it to veto on major decisions that have national interest implications.<sup>94</sup> In 1989, customer equipment and value-added services were liberalized and in 1990, there was a further increase in the number of players in the market.
143. In 1994, METP (since 1998, the Ministry of Energy, Telecommunications and Multimedia), issued The National Telecommunications Policy (the "NTP"). The NTP contained a set of policy recommendations aimed at developing the sector between the year 1994 and 2020. The NTP is part of the government's aim of reaching developed country status by 2020 commonly known as "Vision 2020". In the NTP, competition was for the first time acknowledged as an important dimension of regulatory policy.<sup>95</sup> In fact, the telecom sector is the only sector in Malaysia in which competition is recognized as a regulatory principle.
144. Central to this strategic national development plan is the Multimedia Super Corridor (the "MSC"). The government plans that the entire population of Malaysia should be electronically networked by 2020 so that they can obtain and transmit information seamlessly nationwide and worldwide. The MSC was to be the incubator and the prototype for this vision. The government has promoted MSC as a high technology research and development, design and production zone to attract international investment, especially in the area of information technologies. It is a 15-kilometer wide, 50-kilometer long corridor running from the Kuala Lumpur City Center to the Kuala Lumpur International Airport. A rapid transit line and state of the art fiber optic networks will connect the entire strip. Infotech companies that operate in Malaysia to connect the strip are listed as MSC companies. These companies are entitled to exemption from income tax for up to the first ten years and exemption from duties when importing multimedia equipment. However, foreign investment into the zone still remains relatively low.
145. Between 1993 and 1995, five additional licenses to operate in the fixed line market were approved and competition was introduced in the interconnection market. However, the prohibitive cost of building a fixed line network from scratch discouraged the other license holders from competing with TMB in this market, so much so that the TMB's market share in 2000 was estimated to be as high as 96.7%.<sup>96</sup> New entrants into the market tended to focus on mobile telephony. Mobile telephony was seen as having relatively low capital-intensity compared with fixed public network telecommunications services (PSTN) and therefore ideally suited to new players entering the market. It was also not subject to universal service obligations and was seen as very profitable.
146. By 1997, largely because of excessive spending on large, costly, showcase,

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<sup>94</sup> Lee, Cassey, Telecommunications Reforms in Malaysia, 2001 available at <http://www.cassey.com/fea2001-6.pdf>.

<sup>95</sup> National Telecommunications Policy, p. 9

<sup>96</sup> *Op.cit.* TIME dotCom, 2001, 26

infrastructure projects and because of an unexpected downturn in demand, the entire economy including the Malaysian telecom industry was in turmoil. Soon the entire region had caught the Asian economic 'flu. In 1998, about the time when Malaysia's commitments under the Agreement on Basic Telecommunications became effective, but actually in order to combat the economic downturn, the Government increased foreign direct investment from 30% to 49% including in the telecommunications sector and introduced sweeping capital control measures that imposed restrictions on foreign trading of Malaysian shares.

(ii) Malaysia's Commitments Under the Agreement on Basic Telecommunications.

147. Malaysia also was not among the 15 countries that joined the NGBT at the end of the Uruguay Round. Under the Agreement on Basic Telecommunications, Malaysia made commitments on most basic telecom services and partially adopted the Reference Paper on regulatory principles. The additional commitments made by Malaysia pertain to the provision of a pro-competitive regulatory framework with respect to interconnection and competition.

(a) Schedule of Specific Commitments.

148. In international basic telecommunications services, Malaysia has made commitments in almost all basic telecommunications services other than broadcasting services. Its commitments cover facilities-based and local, inter-exchange and international services, supplied over the PSTN using any network technology in the following market segments: Voice service, Packet-switched data transmission services, Circuit-switched data transmission services, Facsimile service, Private leased circuit service, Domestic/International satellite services, Satellite earth stations, International switching and other international gateway facilities, Mobile services, Paging services, Trunked radio services and Video transport services. At present, at least two U.S. firms have investments in the basic and enhanced service sectors.
149. Malaysia has placed no limitations on market access under Mode 1 and 2, i.e., cross border supply and consumption abroad. Examples of these modes of delivery of services in a telecommunications context would be for instance, international calls under Mode 1 and the buying of calling cards by tourists under Mode 2.
150. Malaysia has, however, limited market access under Mode 3, i.e., commercial presence. Foreign operators can have a commercial presence in Malaysia only through the acquisition of shares of existing licensed public telecommunications operators and subject to a maximum foreign shareholding of 30% in these service providers. As for limitations under Mode 4, i.e., the presence of natural persons, Malaysia made no commitments except as indicated in its horizontal commitments.<sup>97</sup>

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<sup>97</sup> Malaysia Schedule of Specific Commitments, Supplement 2

151. Malaysia has placed no limitations on national treatment under Modes 1, 2 and 3. Under Mode 4, Malaysia made no commitments except as indicated in its horizontal commitments section.

*(b) Additional Commitments.*

152. Malaysia has only partially adopted the Reference Paper on regulatory principles. Malaysia committed to a pro-competition regulatory principle in respect of interconnection arrangements and competition. The Reference Paper set out certain measures that would ensure the efficacy of its specific commitments, which are discussed below.

*Competitive Safeguards*

153. Malaysia committed to a regulatory body that would maintain fair competition among network operators and safeguard the interests of the consumers. At this time, Malaysia had not yet formally adopted a competition policy with respect to telecommunications sector. The regulatory body was JTM, the regulatory agency for the telecommunications sector.

*Universal Service*

154. Malaysia committed to ensure that network operators contribute to certain universal service obligations, particularly the extension of services into rural and other underserved areas as stipulated in the licenses. Prior to 1999, TMB was the only network operator required to fulfill universal services obligations. Other network operators were required only to contribute to the provision of universal service in proportion to their revenues and weighted by services. This is because, in a totally open and competitive market, no private operator would voluntarily meet such an obligation. Accordingly, the levy of some kind of charge on the revenues or profits of private operators becomes a necessity.

*Interconnection arrangements*

155. Malaysia committed to ensure that the following principles pertaining to interconnection arrangements are observed:
- (a) Interconnection and access between network based operators would be on an equitable and non-discriminatory basis;
  - (b) Charges for interconnection facilities and services provided by network operators would be fair and equitable;
  - (c) The technical qualities of interconnect facilities and services provided by network operators would be of the same quality as those provided by them within their own networks;
  - (d) A domestic network operator in any of the market segments would not abuse its market power to limit access to essential facilities only for interconnection;
  - (e) The network operator that provides the access connection to the customer

would be allowed to tell him (the customer) that no cross subsidies should be allowed between carriers whereby one carrier has to bear an inequitable share of the universal service burden where such a share is not proportionate to its market.

156. Prior to the Agreement on Basic Telecommunications, JTM had issued a General Framework for Interconnection and Access (the “GFIA”) in 1996. The GFIA set out the operational guidelines and principles that will govern interconnection and access between telecommunications networks in Malaysia. It covered both fixed and mobile operators, and local, long-distance and international traffic. All service providers were to be judged according to their contributions to rolling out basic voice services to as wide a community as possible, to making advanced services available where there is an effective demand for them, and providing these services in the most efficient manner possible, which means keeping prices as low as possible.
157. Like all incumbent major suppliers, TMB at first strongly opposed the provision of interconnection facilities to its network. In the first agreement in 1990, Celcom (a mobile phone operator) had to pay TMB the full PSTN rate. In the second agreement in 1995, the commercial arrangement was confined to revenue sharing. The shift to cost-based interconnection charges was brought about when JTM (the predecessor of the Malaysian Communications and Multimedia Commission (“CMC”)) called the industry players together to jointly fund inquiries into costs of equal access and interconnection. At the same time, the cost of TMB’s universal service obligation was estimated and a formula introduced to pay for it.

#### *Regulatory Body*

158. Malaysia committed to exercising its functions with respect to the conduct of telecommunications operators and the running of telecommunications services in Malaysia as provided for under Section 3B of the Telecommunications Act. The regulatory body at this time was JTM, which, as noted above, was a government department.

#### *Public availability of licensing criteria*

159. Malaysia committed to advising all network operators on the licensed status of other network operators including terms and conditions pertaining to the operator’s license which govern the right of the licensee to interconnect with other operators.
160. One problem that arose as a result of the initial shift towards a more competitive and liberal market structure is that it blurred the lines of authority, especially because the policy making and regulatory processes were not sufficiently clearly defined in law and lacked transparency in practice. There was no clearly laid out policy on how many licenses should be issued, or the scope and conditions attached to licenses. The terms and conditions of licenses were not made available for public scrutiny. There was also confusion on who would issue the licenses.

*Allocation and use of scarce resources:*

161. Malaysia made no commitments with respect to this section of the Reference Paper.

*(c) Exceptions to Most Favoured Nation Treatment.*

162. In common with many other developing country Members, one of the general exemptions in the telecommunication sector to MFN taken by Malaysia is with respect to accounting rate arrangements. Malaysia has also taken an exemption in all sectors with respect to measures limiting foreign equity in companies in Malaysia being carried out in a preferential and differentiated manner. The measure would be applied in a differentiated manner to those investments that match Malaysia's specific development requirements with the abilities and facilities provided by foreign enterprises and their home countries. The objective is to maximize the economic benefits of foreign participation to the Malaysian economy.

*(iii) Subsequent Developments.*

163. Almost simultaneously, in April 1999, the Malaysian government enacted two key statutes to regulate the telecommunications sector: the Communications and Multimedia Act 1998 (the "CMA") and the Malaysian Communications and Multimedia Commission Act 1998 (the "CMCA"). While the CMA sets out the regulatory institutions involved and the structure for the industry, the CMCA provides for the setting up of the regulatory agency and its functional and operational aspects. The two main institutions in the regulatory framework are the Communications and Multimedia Commission (the "CMC") and the Minister of Energy, Communications and Multimedia (the "Minister"). The major reason for the restructuring exercise was to bring the regulatory structure in line with technological developments worldwide, in particular, the convergence in communications and multimedia industries.<sup>98</sup>
164. The CMC is the regulatory authority. The role of the CMC is to make recommendations on policy to the Minister and then to implement the policy. It is the role of the Minister to create policy and provide policy directions.
165. The CMC comprises of five members. Although only a single member of the CMC is a government representative, all five members are appointed by the Minister. Under this regulatory framework, the Minister still retains enormous influence. Even with respect to issuing of licenses, while the CMC administers the application and renewal process and makes the recommendations, the final decision is left to the Minister.
166. The CMA does provide for the independence of the CMC from suppliers of

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<sup>98</sup> The Ministry defines convergence as "the progressive integration of the value chains of traditional communications and content industries within a single value chain based on the use of distributed digital technology." See <http://www.ktkm.gov.my>

telecommunications services and from political influence. Financially, the CMC is largely independent, deriving most of its revenues from licensing. However, it has a close nexus with the government and is supported where necessary by government.

167. The changes in the regulatory framework have brought about a greater role for public participation. The CMC can now conduct public enquiries on regulatory matters. So in drafting regulatory policies, the CMC can and does solicit opinions from operators. Discussion papers are then published on CMC's website and the public are invited to submit their views within a given period. Industry forums are also established and act as a consultative body to CMC in important issues. The CMA also allows for the setup of an Appeal Tribunal to review CMC's decisions. However, it is still unclear whether a more extensive notion of transparency is desirable and possible since the Minister still ultimately makes key regulatory policy decisions.
168. The CMA recognizes the importance of market competition in the achievement of efficiency and incorporates in the Act prohibitions on anti-competitive practices. The CMA has provisions for market-based rate setting (i.e. cost-oriented and no cross-subsidies) but retains the Minister's right of intervention. Thus, tariff re-balancing requires Ministerial approval.
169. Equal access by way of call-by-call was implemented in January 1999. This enables subscribers to choose their long distance and international carrier by dialing a 3-digit selection code. However, market operators are not allowed to offer rate discounts that exceed TMB's published rates by more than 20%. This was to allow for a smooth transition to cost-based pricing and to avoid a price war.
170. Although the benchmark interconnection prices are predetermined, any privately negotiated agreements can undercut them and remain commercially confidential, but must be registered with the CMC, which can compare agreements to ensure no anti-competitive practices are in place.
171. The CMA provides for a Universal Service Fund ("USF") to improve network facilities and services in underserved areas and for underserved groups within the community into which contributions are made by private network operators. The regime is now in transition to a full USF-based system.
172. The CMA completely overhauled the licensing regime. The fundamental principles of the CMA are transparency, technology neutrality, self-regulation, social responsibility and consumer protection. Most value-added service providers will merely need to register themselves, and a class licensing system will deregulate many other service areas. Previously, licenses were issued for service-specific technologies and services such as telecommunications license, cellular license, broadcasting license, etc. This restricted competition into narrow markets and did not allow licensees to move freely into related and adjacent activities.
173. After the reorganization of the market under the CMA, however, licenses are

service-neutral and technology-neutral. Under the CMA, licenses are issued for four major categories of activities, namely content services, application services, network services and network facilities. This new licensing structure takes cognizance of the potential vertical separation, allowing competition at different levels along the upstream-downstream continuum of the industry. Licensees can now compete in any of four markets within the sector, i.e. facilities, connectivity, applications and content applications. The activity-based licensing is also expected to facilitate the introduction of convergent services. So, now a company having a license to provide facilities based services will not require separate or additional licensing if it wishes to provide new services employing new technologies, e.g., 3G services.

174. Although Malaysia did not make any commitment with respect to the allocation of scarce resources, the CMA also deals with technical regulation. Key areas under technical regulation are spectrum assignment, numbering and electronic addressing, and technical standards. The CMC can issue spectrum assignments to operators but only after the Minister has determined the frequency bands for it. All assignments will have to be consistent with the spectrum allocation plan. The CMA confers rights on a person to use one or more specified frequency bands for any purpose consistent with the assignment conditions and also provides wide discretion in terms of spectrum usage. The assignee has the right to transfer and/or deal with any or all the rights under the assignment.
175. During the financial crisis period, foreign ownership limit was temporarily relaxed, first to 49% in February 1998 and even up to 61% in April 1998 (on a case-by-case basis, provided the funds used to purchase these stakes came from abroad) subject to bringing the limit back down to 30% once the crisis was over. By 2001, however, the foreign ownership of three of the major operators had come back down: Maxis (only 33% owned by British Telecom), Celcom (only 21% by Deutsche Telekom AG) and DiGi (only 30% by Telenor International AS) all with shareholdings far below their 1998 highs.<sup>99</sup> There is now a 30% limit on foreign participation in all future domestic telecommunications companies. This is consistent with Malaysia's commitment in Mode 3 under the Agreement on Basic Telecommunications.
176. Still, market structure and the role of foreign investment in the sector will be important issues in the future. With the third generation cellular technology (3G) on the horizon, the industry will require additional infusion of funds. With most operators being heavily indebted and the industry facing diminished foreign participation, technological diffusion in the sector may be delayed.

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<sup>99</sup> Business Times, May 9, 2001

**Table 1: Malaysia - Telecommunications Indicators, 1970-2000**

Sector	1970	1980	1985	1990	1995	2000
Population Size ('000)	8,118	13,879	15,883	18,102	20,689	23,250
Fixed Line Subscribers	107,000	395,640	948,598	1,585,744	3,332,447	4,628,000
Cellular Phone Subscribers	0	0	4,630	84,557	872,790	5,122,00
Internet Subscribers	-	-	n.a.	n.a.	64,000*	1,659,000
Fixed Line Penetration Ratio (per 100 population)	1.3	2.9	6.0	8.7	16.6	21.0
Rural Penetration Ratio (per 100 population)	n.a.	n.a.	n.a.	2.0	5.5	11.7
Urban Penetration Ratio (per 100 population)	n.a.	n.a.	n.a.	n.a.	24.8	28.6

Sources:

*Sixth Malaysia Plan, Mid-term Review of the Sixth Malaysia Plan, Seventh Malaysia Plan, Mid-term Review of the Seventh Malaysia Plan, Eighth Malaysia Plan,*

*Malaysian Communications and Multimedia Commission (<http://www.cmc.gov.my>)*

\* Refers to 1996 Figures.

#### **D. Comparative Evaluation of Negotiating Strategies.**

177. The three WTO Members whose negotiation strategies have been analysed are very different in their characteristics. India is a geographically large, heavily populated, relatively low income country that offers enormous potential to its trading partners. Malaysia, at the other extreme, is a relatively small, middle income country, which even at the time of the negotiations could be considered an attractive market despite the unfavourable economic conditions in 1997-98. Sri Lanka, on the other hand, by most standards is a small low-income developing country that scores high on human development indicators but not very high on *per capita* GDP. All three Members appear to have started their domestic reform programmes during the 1980s though Malaysia was, by any measure, the fastest to liberalize its telecommunications market. Viewed in terms of the ambitiousness of autonomous reform programmes, India is clearly not in the same category as Malaysia but is clearly far more ambitious than Sri Lanka.
178. At least one influential analysis of the approach of Asian WTO Members to making commitments at the WTO has sought to divide Members' negotiating approaches into four categories:<sup>100</sup>

<sup>100</sup> See Low & Mattoo supra at 21-22.

- (a) Those that bound less than their current policy regimes;
- (b) Those that bound their current policy regimes;
- (c) Those that liberalized during the negotiations and bound the new situation; and
- (d) Those that promised future liberalization that may or may not have been planned during the negotiations.

According to this study, some Members such as India and Indonesia apparently fell into the first category and their approach to the negotiations can safely be characterized as “defensive”. India bound its foreign investment shareholding cap at 25% even though it had already allowed 49% well before the negotiations. Others such as Malaysia and Sri Lanka apparently fall into the category of those who bound their current regulatory regimes. These countries apparently wanted to signal positively their intention to guarantee the conditions offered to foreign suppliers. Some countries such as Singapore, Japan and Korea apparently used the negotiations to accelerate and bind their reform commitments. Others such as India and Sri Lanka also made weak commitments to review existing restrictions within a specified time frame. For example, both India and Sri Lanka committed to reviewing the status of their international long distance monopolies within a fixed time frame.

- 179. On the basis of an analysis of the post-Agreement on Basic Telecommunications situation in each of these Members, however, it becomes clear that India and Sri Lanka actually treated their weak commitments as being important to carry into effect, regardless of their binding nature. However, some important differences remain among the three Members. An evaluation of the post-commitment situation in Sri Lanka shows that it did not undertake serious autonomous liberalization efforts after the commitments were made. On the other hand, both India and Malaysia have made enormous strides in their autonomous liberalization programmes.
- 180. Malaysia, in particular, is now at a stage where it even permits entry of foreign suppliers by simple resale without facilities-based operations subject of course to the foreign equity cap of 30%, presumably in order to pursue its Vision 2020 objective of becoming a knowledge-based economy. By mandating and enforcing interconnection, Malaysian regulators have lowered entry barriers to rural markets so that firms no longer face the all or nothing decision of network deployment. This will allow service-based operators into the market who will purchase capacity from existing network owners and then resell it to consumers. In doing so, companies essentially pool their resources for a single network where building multiple networks is uneconomical. More competition and capital is therefore available, triggering infrastructure development with private capital.
- 181. India’s more mundane objective of improving its teledensity ratio, increasing access to telecommunications infrastructure of manufacturing and service industries dependent on telecommunications and generally fostering economic development has also led to rapid liberalization in terms of the number of operators in each circle, privatisation of the government-owned international long distance provider and strikingly enough, the proposal for a single, unified, pan-Indian licences that would completely do away with the geographically segregated

licensing pattern that it originally followed.

182. Only Sri Lanka's record in this regard is a little disappointing. There have not been serious reforms in its market except in the sphere of international long distance, where new licences have been issued and the monopoly of the majority-owned government provider has been terminated in early 2003.
183. As a result, India and Malaysia enter the GATS 2000 negotiations with some fresh bargaining chips. On the other hand, with the singular exception of its international long distance market in which it has issued large numbers of new licenses, Sri Lanka, even after it puts in place its proposed new telecommunications policy of 2002 would still barely have fully fulfilled its existing commitments. One potential explanation is that the lack of attractiveness of Sri Lanka's telecommunications market for foreign suppliers and the need to provide stable competitive conditions for existing foreign suppliers. Sri Lanka may also be influenced by the fact that existing entrants are required to fulfil certain infrastructural commitments which could be compromised by permitting new entrants.

#### **IV. GATS 2000 Negotiations on Telecommunications Services.**

184. As part of the objective of "progressive liberalization of trade in services" referred to in the Preamble and in Article IV of the GATS, Article XIX:1 of the GATS provides that negotiations in services must begin five years after the entry into force of the WTO Agreement, i.e., on January 1, 2000. As part of this "inbuilt agenda" of the WTO, the Membership did commence negotiations for further liberalization of trade in services in 2000, commonly referred to as the GATS 2000 negotiations. These negotiations are proceeding alongside the negotiations agreed upon at the Doha Ministerial Conference as part of the Development Round. Telecommunications is one of the areas included in the GTS 2000 negotiations.

##### **A. Negotiation Mechanisms in GATS 2000.**

185. The basis of the negotiations was determined during a special session of the GATS Council. On March 28, 2001, a special session of the GATS Council adopted certain "Guidelines and Procedures for the Negotiations on Trade in Services" (the "Guidelines and Procedures").<sup>101</sup> The basis of the negotiations is stated to be the "progressive liberalization of trade in services" in the context of "promoting the economic growth of all trading partners and the development of developing countries" while "recognizing the right of Members to regulate". The aim of the negotiations is to reduce or eliminate the adverse effects of measures on trade in services as a means of providing effective market access.<sup>102</sup> From the standpoint of developing countries, the negotiations aim at increasing their participation in trade in services, while at the same time giving "appropriate flexibility" for individual developing country Members, "special priority" to least developed-country Members and "due respect for national policy objectives",

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<sup>101</sup> WTO S/L/93 dated March 29, 2001.

<sup>102</sup> *Id.*, para. 1.

“level of development” and “size of economies”.<sup>103</sup> While such lofty sentiments are always present on the WTO agenda in the negotiations mandate on any issue, in practice, the interests of Members, including developing and least-developed country Members, are always the subject matter of hard bargaining during the actual negotiations.

186. The scope and content of the negotiations will be structured, however, by certain basic principles set out in the Guidelines and Procedures that must be respected. The existing “structure and principles of the GATS” including the right to specify sectors in which commitments will be taken and the four modes of supply will be respected.<sup>104</sup> Further, none of the service sectors will be excluded *a priori*. Although “special attention” is to be given to sectors and modes of supply of interest to developing countries, it is safe to conclude that the “presence of natural persons” mode of supply, which is the single most important demand of the developing country Members will be given short shrift unless extraordinary compulsions prevail with the developed countries. The principle that MFN exemptions cannot exceed 10 years will also be maintained.<sup>105</sup>
187. From the standpoint of actual “modalities and procedures” for negotiations, the Guidelines and Procedures specify that negotiations will be conducted in Special Sessions of the GATS Council which will report to the General Council.<sup>106</sup> They are to be open to all Members as well as acceding countries and separate Customs territories. The method of negotiations is to be the “request-offer” approach but liberalization is to be advanced through “bilateral, plurilateral or multilateral negotiations”.<sup>107</sup> Credit will also be given for autonomous liberalization undertaken by Members since the previous negotiations.<sup>108</sup>
188. Requests and offers are a familiar method of conducting negotiations at the WTO. In paragraph 15 of the Doha Declaration, the Ministers agreed that initial requests for specific commitments must be made by June 30, 2002 and that offers would be made available by March 31, 2003. It is clear, however, from the current progress in the services negotiations that there have been considerable slippages in the process of requests and offers.
189. In response to requests from Members, the WTO Secretariat has prepared an excellent paper that succinctly describes the “Technical Aspects of Requests and Offers”.<sup>109</sup> When discussing the nature of requests and offers, however, it is important to keep in mind the nature of the columns in the Schedule of Commitments. The first column specifies the sectors and subsectors in which specific commitments are undertaken. Against each sector or sub-sector specified in the first column, the second column specifies the “Limitations on Market Access”; the third column specifies the “Limitations on National Treatment”; and the fourth column specifies the “Additional Commitments” which in the case of

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<sup>103</sup> *Id.*, paras. 2 and 3.

<sup>104</sup> *Id.*, para. 4.

<sup>105</sup> *Id.*, para. 6, reflecting the requirement in paragraph 6 of the Annex on MFN Exemptions.

<sup>106</sup> *Id.*, para. 8.

<sup>107</sup> *Id.*, para. 11.

<sup>108</sup> *Id.*, para. 12.

<sup>109</sup> See [http://www.wto.org/english/tratop\\_e/serv\\_e/requests\\_offers\\_approach\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/requests_offers_approach_e.doc)

the telecommunications sector generally refers to the commitments relating to the regulatory principles in the Reference Paper.

190. Requests are usually made bilaterally to another Member. However, where a requesting Member wishes to make the same request to a group of Members on the basis of a concern shared by other Members, eg., a request to remove restrictions on the presence of natural persons, the request can turn into a plurilateral or even multilateral exercise involving discussions by the entire Membership in the GATS Council. The content of a request by a Member can include: (a) the addition of sectors not included in the Schedule of the group or Member; (b) request the removal or reduction of existing limitations or restrictions in the Schedule; (c) requests for additional commitments, eg., those relating to the Reference Paper; and (d) removal of existing MFN exemptions. The format is usually in the form of a simple letter stating clearly the nature of the request. Where the requesting Member wants another Member to remove all limitations in a specific sub-sector, it can simply ask the other Member to remove the limitation by inscribing “None” against the relevant sub-sector in the “Limitations on Market Access” and “National Treatment” columns.
189. Requests will need to be more specific, however, where the requesting Member seeks a lowering of the existing level of restrictiveness without necessarily requiring complete removal. For example, if the requesting Member wants to lower the level of restrictiveness on market access in a particular mode, eg., to raise a low cap of 25% on foreign shareholdings on cellular services, it must state clearly in its request that it would like the cap to be raised to say 49%, 51% or 74%. Requests will need to be specified in more detail mainly in the context of the regulatory principles in the Reference Paper.
190. The content of an offer corresponds largely to the content in the case of a request. Although Members are required to respond to every request, they need not address every element in their offers. The format, however, is different insofar as most Members make their offers in the form of a draft Schedule of Commitments, which will require careful technical preparation by government and technical and legal experts. On balance, the WTO Secretariat recommends that draft Schedules be prepared that contain both the old and the new commitments, using techniques such as bold or italics to indicate new language and strike out for language to be deleted. Members are also advised to introduce “technical” refinements such as the specification of modes where they did not do so earlier. An “Explanatory Note” prepared in the Committee on Specific Commitments titled “WTO Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services” also contains an excellent explanation of how to schedule commitments in services negotiations.<sup>110</sup>
191. The offer process is also very different from the process of making requests. For one thing, unlike requests, which are made bilaterally, offers are circulated multilaterally to enhance transparency and improve the functionality of the process because an offer is a response by a Member to all the requests that it has received. The initial offers will be followed by a long series of requests and offers

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<sup>110</sup> S/L/92 dated 28 March 2001.

until the conclusion of negotiations, which will necessitate a series of revisions to the offers. In fact, offers are usually the beginning of real negotiations, with a number of bilateral meetings among delegations, where each side explains the significance of its requests and offers to the other. Further, as noted above, during bilateral discussions, issues will often arise that require discussion in plurilateral (i.e., of many but not all Members) and multilateral meetings, of all Members usually in the Special Sessions of the GATS Council.

192. At bilateral meetings to discuss requests and offers, it is common to have participation from the Ministries or regulatory bodies in the capital that have expertise in a particular area as well as the representative at the WTO Mission of the Members concerned who have been regularly attending meetings of the GATS Council to maintain continuity. In the context of telecommunications sector negotiations, especially, it is important to remember that specific commitments are likely to be dominated by the results of bilateral meetings while the broad terms and basis of negotiations as well as horizontal issues are likely to be dominated by multilateral meetings. It is important for developing country Members to remember that they will never have the level of expertise and resources to completely understand the implications of issues that are brought up at bilateral meetings by developed country Members. Accordingly, delegations of developing country Members should take positions on issues brought up for the first time at bilateral meetings only after complete analysis and reflection by technical and legal experts in their capitals and after receiving advice from their WTO Missions.
193. The importance of understanding and carefully drafting the language in documents, whether exchanged bilaterally or decided on in multilateral meetings, also cannot be overemphasized. In the case of multilaterally agreed documents, it is important to focus not merely on understanding how a commitment may hurt the developing country Members and obtaining provisions for “special and differential treatment” for developing country Members but also to understand whether and how the developed country Members have crafted and built in special exceptions for themselves. In such cases, diluting the adverse impact on developing countries may well involve removing or restricting the exceptions for the developed country Members. Moreover, even the larger developing country Members have only limited influence in multilateral gatherings and their strength if any lies in numbers. Making common cause with larger developing country Members on issues that are clearly identified as being of common interest is an important way of getting over such problems.
194. One important concern in drafting of Schedules of Commitments is the inter-relationship between the telecommunications services and other services such as audiovisual services and computer-related services. If commitments are drafted too broadly in the latter services, they may well be interpreted subsequently as requiring access to be granted in telecommunications services that was not intended. Arguments about the “real” intention could potentially be settled ultimately through the dispute settlement process, which generally favours trade liberalization rather than closing off trade.

## **B. Direction of Negotiations in the Telecommunications Sector.**

195. Since the commencement of negotiations in the services sector, Members have made a number of proposals in telecommunications services. In general, most of the Members that have made proposals including Australia, Colombia, Cuba, the Republic of Korea, Japan, etc., have agreed on the importance of the Reference Paper and welcomed further progressive liberalization of telecommunications services. Most of the proposals have emphasized the importance of all Members accepting commitments relating to the Reference Paper.
196. Australia and United States, in particular have made some controversial proposals that have been discussed in special sessions of the GATS Council. Australia has proposed that certain regulatory principles in the Reference Paper require further clarification including further clarifications on how to safeguard the independence of the regulator. This proposal has been strongly resisted by most Members who believe that reopening the Reference Paper will only create more confusion and hinder negotiations on further liberalization. Australia has also proposed that the moratorium proposed in the Agreement on Basic Telecommunications on initiating disputes on accounting rate issues should be brought to an end and that this issue should also be opened up to negotiations. However, most developing country Members have strongly resisted this proposal.
197. The United States has proposed that Internet services should be free from regulation as a value-added service and that certain complementary services should also be liberalized in conjunction with Internet services. The only restriction should be on participation and interference by major suppliers who have built up entrenched positions. Members have pointed out that Internet Services has both a basic and a value-added dimension.
198. The United States has also proposed that incumbent, government-owned telecommunications providers should be privatised as a pro-competitive measure. Again, there has been tremendous resistance within the GATS Council to these measures. Many Members have pointed out that the U.S. proposal on Internet Services is really in the nature of a proposal on e-commerce services. Members have also voiced strong opposition to dragging the issue of privatisation into the telecommunications service negotiations. Many Members have pointed out that maintaining at least one government supplier in telecommunications services may actually be necessary as well as pro-competitive in order to ensure that giant foreign telecommunications providers do not end up dominating the market.

## **C. Developing Countries and Telecommunications Service Negotiations.**

199. In discussing negotiations in telecommunications services negotiations, it is important to remember that, unlike the Agreement on Basic Telecommunications in 1996-97, negotiations on telecommunications will be part of larger, wide ranging negotiations not merely on the inbuilt agenda but also on the agenda for the Doha Round. In view of the single-undertaking format that is generally followed in new Rounds, issues will be viewed as part of an overall package involving cross-sectoral concessions on controversial and systemic issues ranging from agricultural subsidies, the Singapore issues, anti-dumping, subsidies and the

dispute settlement system.

200. India's position in the GATS 2000 negotiations will basically focus on obtaining Mode 4 access for movement of its professionals, highly educated as well as skilled and semi-skilled labour to the developed countries. From India's standpoint, almost all other issues in the GATS 2000 negotiations will pale into insignificance. In order to promote the liberalization of Mode 4, India has submitted a proposal at the Special Session of the Council for Trade in services on "Liberalization of Movement of Professionals".<sup>111</sup> Important features of the proposal include the development of norms for economic needs tests in this mode, the elimination of social security contributions for temporary movement of persons, transparent administration of visa procedures, the concept of GATS visas for persons covered by horizontal or sectoral commitments, and the promotion of mutual recognition agreements for professional qualifications.<sup>112</sup>
201. Specifically in telecommunications services, however, India is likely to see linkages between requests made in audio-visual services and computer-related services. From India's standpoint, while it is in a good position to respond with offers to requests in the telecommunications services and will have a considerable interest in requests in computer-related services, it will not be able to make significant offers in audio-visual services where it currently maintains quantitative and content restrictions on motion picture and video tape distribution services. A summary of requests made to India from its trading partners are as follows:<sup>113</sup>
- (a) Eliminate existing limitations and take full commitments in Basic Telecom and value added services and telex and telegraph services;
  - (b) Make full commitment on EDI and code and protocol conversion;
  - (c) Eliminate restrictions on the number of operators and on geographical coverage for wire-based public voice services, private leased circuit services, cellular telephones etc.;
  - (d) Eliminate the prohibition on resale for wire-based public voice services and private leased circuit services;
  - (e) Eliminate the limit of 25% on total foreign equity for wire-based public voice and cellular mobile telephone services;
  - (f) Remove the restriction on equity of 51% for electronic mail, voice mail, on-line information and data base retrieval, enhanced/value-added facsimile services;
  - (g) Commit fully to the Reference Paper; and
  - (h) Remove MFN exemptions relating to accounting rates.
202. In the basic telecommunications services negotiations, assuming that India follows its defensive strategy from the previous negotiations, India could make the following commitments at Doha:

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<sup>111</sup> See Communication from India: Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services (GATS), S/CSS/W/12 dated November 24, 2000.

<sup>112</sup> See [http://commerce.nic.in/faqs\\_gats.pdf](http://commerce.nic.in/faqs_gats.pdf)

<sup>113</sup> See Consultation Document on the WTO negotiations under the General Agreement on Trade in Services (GATS) available at [http://commerce.nic.in/wto\\_counsel\\_paper.htm](http://commerce.nic.in/wto_counsel_paper.htm).

- (a) Raise FDI in basic and cellular telecommunications to 49%, possibly more;
- (b) Provide interconnection at cost-based rates that are transparent, reasonable, non-discriminatory, and sufficiently unbundled;
- (c) Provide interconnection at any technically feasible point;
- (d) More transparency in decision-making processes for licences, allocation and use of scarce resources;
- (e) Open up national and international long distance under Mode 3 subject to a foreign shareholding cap of 49%;
- (f) Increase the number of operators in basic and cellular services; and
- (g) Open up internet telephony given the recent decision to eliminate government's monopoly in this sector.

India could make any or all of these commitments in view of the reforms that it has carried out already (discussed above).

203. Sri Lanka also will have a significant interest in Mode 4 access across the board from the developed country Members but is unlikely to have much to offer or request in telecommunications services in other respects. Malaysia is an important trading nation, especially in goods but also in services. However, Malaysia is unlikely to be making requests or offers in services in Modes 3 or 4. In telecommunications, Malaysia is in a good position to satisfy requests made with respect to different types of basic and value-added telecommunications services but will not have much flexibility in Mode 3 given its restrictive foreign direct investment policy or in Mode 4 for movement of natural persons given its interest in shutting foreign professionals, skilled and semi-skilled workers out of its markets.
204. The position of smaller developing country Members is likely to be complicated by what appears to be a resurgence of unity among developing countries for the first time since the Uruguay Round in groupings such as the G-21 grouping led by Brazil, Malaysia, India and China as well as the least-developed country grouping. Developing countries, especially the smaller ones, will therefore be buffeted by competing, crosscutting demands from their immediate trading partners as well as various groupings including the Quad countries, the Cairns Group and ideological appeals from other developing country Members. The recent Ministerial Conference at Cancun has exposed bitter divisions among the developed and developing Members on the Doha Round. It will be difficult in these circumstances to focus on clear objectives in services such as telecommunications services.
205. Accordingly, in the case of smaller developing countries, it is necessary to maintain a sustained focus at all times on issues of immediate importance rather than being distracted by issues that are of systemic importance or cut across the negotiations in an entire sector. A good way of conceptualising the approach to be taken is probably to approach negotiations at an ascending level of generality, from a specific commitment in a particular service to horizontal rules or commitments in that particular sub-sector and other allied services that could have an impact on the service and then broadening outwards to other areas of negotiation.

206. Because telecommunications is part of essential infrastructure and crucial to expanding the production of goods and services in a developing economy, it may not be advisable for smaller developing countries to demand too many commitments in other areas as a *quid pro quo* for opening up basic telecommunications services. Particularly in the telecommunications sector, it is important to remember that most developing countries do not have either the capital or the technology to rapidly expand teledensity in their countries. This can only come from opening up to foreign capital by making commitments under Mode 3. At the same time, however, this should be balanced against the consideration that there will be very little flexibility left in future negotiations if all modes are completely opened up. The presence of a governmental counterweight may well assist in maintaining basic levels of competition in this sector and, therefore, immediate privatisation of an existing government provider may not be a wise choice.
207. Many issues that are brought up during bilateral meetings will also echo concerns that are discussed in plurilateral and multilateral meetings. The important developed countries, especially the U.S., E.C., Japan and Canada, would have coordinated their positions carefully on most important issues. Developing country Members should likewise coordinate their positions where the issue is of concern to them. For small developing country Members, construction alliances and groups of smaller developing country Members and least-developed country Members with a congruence of interests would be the best solution. In such cases, it is best to nominate a leader who will take positions on issues after discussions amongst the entire group. This was one of the important success stories at the Cancun Ministerial Conference. Alternatively, smaller developing country Members should identify larger developing country Members that have a position similar to their own and coordinate their positions with such Members.
208. Building developing country groupings and nominating a leader is important because, frequently in the case of larger issues, many smaller developing country Members will not be invited to the smaller, informal meetings of delegations that take a decision on such issues and produce the document that is subsequently placed before larger meetings such as the GATS Council for negotiations. In particular, small developing country Members are always excluded from the infamous "Green Room" discussions where many of the important issues are thrashed out. This aspect of the negotiations should be factored in when approaching the Doha Round of negotiations.

## V. Conclusion.

209. This paper has presented a broad overview of negotiations in the area of telecommunications services both from a historical and a conceptual standpoint. What emerges from the analysis is that most developing country Members have tended to approach telecommunications negotiations defensively. They have generally made commitments based on their own autonomous development strategies for the telecommunications sector. This is perhaps a wise choice because basic telecommunications is characterized worldwide by economies of scale and large oligopolistic firms. Thus, developing country Members may well find that their flexibility is compromised if they make liberalization commitments that they find are inconsistent subsequently with their national interests. In the Doha Round, however, they are likely to find that their flexibility in making commitments could be considerably diminished if they limit their commitments in advance because this is not a single sector negotiation like the Agreement on Basic Telecommunications in which they have something to offer but nothing to request. The Doha Round is a multi-sectoral negotiation that will extend across many crucial areas from agricultural subsidies to anti-dumping. If developing country Members build coalitions with other developing country Members on important issues in order to gain the necessary leverage, the Doha Development Round could still live up to its name.