ESCAP United Nations Economic and Social Commission for Asia and the Pacific

Main Trade & Regulatory Principles in the GATS/WTO

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Services, Telecoms, Globalization

- To benefit from process of globalization, enterprises must have access to efficient services.
- Telecom services, together with financial services, transport etc., also known as “backbone” services – services that determine efficiency and competitiveness of an economy and therefore vital components of economic growth and development.
- Modernization of telecom sector became even more urgent with technological advances of the digital economy.
- Already in early 1980s, as globalization began to accelerate, governments came under increased pressure to liberalize and undertake regulatory reforms in the services sector.

- By 1986 when the Uruguay Round of multilateral trade negotiations was launched, rules on these liberalization and regulatory reforms in the services sector were included in the negotiating agenda, for the first time.
- The results of these negotiations are embodied in GATS (General Agreement on Trade in Services), which represents the first major step towards bringing trade in services under international disciplines.

Structure of Uruguay Round Legal Texts

Marrakesh Agreement establishing WTO

- Annex 1
  - A
    GATT 1994 and associate agreements
    (goods)
    - e.g. ITA (Information Technology Agreement)
  - B
    GATS
    (services)
    - e.g. ABT (Agreement on Basic Telecommunication Services)
  - C
    TRIPS
    (intellectual property rights)
- Annex 2
  DSU (dispute settlement)
- Annex 3
  TPRM (trade policy review mechanism)
- Annex4
  Plurilateral agreements

GATS Coverage

- GATS covers wide range of economic activity, 12 services sectors of which communications is one, and 155 subsectors of which about 15 are related to telecom services
- GATS covers all services that are supplied on commercial and competitive basis, whether supplied by government entity or private entity.
- GATS does not cover government services supplied on a non-commercial or non-competitive basis, or consumed in the exercise of governmental authority, e.g. public services, operations of central bank, procurement by defence department for national security objectives, etc.

GATS – Objectives, Principles and the Basic Rules

- GATS is an intergovernmental agreement that establishes a multilateral framework of principles and rules
- Seeks to increase trade in services through increased transparency and predictability so that economic growth of all trading partners and development of developing countries is promoted.

Transparency – (Article III)	WTO members have to make available all information on domestic regulatory environment, through notifications to WTO and through establishment of national enquiry points
Predictability –	legally binding commitments. Sudden policy reversals unlikely, and if they occur, compensation has to be offered to affected party.

GATS – Objectives, Principles and the Basic Rules (cont'd)

- GATS distinguishes between form modes in which services can be exchanged

Mode of delivery	Example	Significance of trade	Examples of trade barriers
1. cross-border supply	international phone calls	produces bulk of revenue. By far most important form	• bilateral settlement agreements
2. consumption abroad	international roaming	not significant but high potential for development of truly global mobile communication	• lack of roaming agreements • incompatible technical standards • high costs
3. commercial presence	foreign owned company (often TNC) establishing subsidiary joint venture to offer telecom services	second most important mode of supply (China, Brazil rank among top 5 in attracting telecom FDI)	• foreign investment restrictions • licence requirements
4. movement of staff	consultancies	growing need for specialized, advice on sector restructuring privatization/regulatory policies	• restrictions on work permits

GATS – Objectives, Principles and the Basic Rules (cont'd)

GATS consists of four main elements

1) **A set of general concepts, principles, rules that apply to all measures affecting trade in services**
2) **Specific commitments that apply only to services sectors/subsectors listed in a member's schedule of commitments**
3) **Understanding that periodic negotiations will be undertaken to progressively liberalize trade**
4) **A set of attachments/annexes/protocols setting out sector-specific or mode-specific disciplines and ministerial decisions.**

GATS – Objectives, Principles and the Basic Rules (cont'd)

- **As in GATT, core principle of GATS is non-discrimination**
  - **Article II, MFN, general obligation, but GATS allows a one-time list of MFN exemptions for a limited period of time.**
  - **Article XVII, National Treatment (NT), but sector-specific commitment**
- **GATS introduced a second sector-specific commitment: market access (MA) obligation, Article XVI**
- **A fundamental premise of GATS is the right to regulate.**
- **Regulation is a *sine qua non* for liberalization in services, whether undertaken nationally or internationally in order to address public and social policy concerns.**
- **Freedom to regulate is practically unrestrained (except for transparency obligations + application on reasonable and impartial basis.)**
- **Article VI.4 specifically focuses on certain types of regulations dealing with consumer protection and related public concerns. (Part II, General Obligations and Disciplines Article)**

- Article VI.4 mandates disciplines necessary for developing qualification standards and procedures, technical standards, licensing requirements. The objectives are to ensure that standards are
  - based on objective and transparent criteria e.g. competence or ability to supply the service
  - not more burdensome than necessary to supply the service
  - in the case of licensing procedures, not a restriction on the supply of the service
- Monopolistic/oligopolistic supply of services is allowed, but governments should ensure that firms granted exclusive rights do not abuse market power. Article IX requires that members consult with each to remove trade-restrictive practices, but no obligations are imposed with regard to scope and enforcement of competition policy rules.

Format and example of a schedule of GATS commitments

Commitment type and mode of supply	Conditions and limitations on market access	Conditions and qualifications on national treatment	Additional commitments
Horizontal commitments (across all sectors)			
1. Cross-border	None.	None.	
2. Consumption abroad	Unbound.	Unbound.	
3. Commercial presence (foreign direct investment)	Maximum foreign equity stake is 49 percent.	Unbound for subsidies. Approval required for equity stakes over 25 percent.	
4. Temporary entry of natural persons	Unbound except for intracorporate transfers of senior managers.	Unbound except for categories listed in the market access column.	
Specific commitments (sectoral)			
1. Cross-border	Commercial presence required.	Unbound.	
2. Consumption abroad	None.	None.	
3. Commercial presence (foreign direct investment)	25 percent of management to be nationals.	Unbound.	Establishment of an independent regulator.
4. Temporary entry of natural persons	Unbound, except as indicated under Horizontal commitments.	Unbound, except as indicated under Horizontal commitments.	

Note: "None" implies that no exceptions are maintained (a bound commitment).

GATS Architecture – Development Dimension

- GATS – Development-friendly agreement
- Preamble to GATS and Article IV recognize link between economic development and an efficient services capacity. The increasing participation of developing countries in services and in progressive liberalization of trade in services is promoted.
- Article XIX recognizes that pace of liberalization should reflect level of development and national objectives.
- Therefore, members have the right to regulate their services provided they do so in an objective and impartial manner, and provided that the measures are not more trade restrictive than necessary. (members can pursue own developmental objectives provided do not interfere with overall WTO rules.)
- Developing countries given more flexibility to
  - liberalize fewer sectors
  - use restrictions for Balance of Payments reasons
  - liberalization under RTAs.

GATS Architecture – Evolving Process of Liberalization

- **Work in progress-young agreement, therefore rules are incomplete in many aspects**
- **GATS architecture best understood in terms of concerns of participating countries in the UR negotiations**
- **Developing countries: traditionally not services exporters, underdeveloped services sectors, concerned about weak regulations**
- **Developed countries: well developed, heavily regulated services sectors that were seeking access to emerging and fast growing markets of developing countries**
- **Asymmetry in capacity to trade in services**
- **US (hard position) vs EU+developing countries (soft position) <u>OR</u> full application of GATT paradigm vs limited application of GATT paradigm**

GATS – Evolving Process of Liberalization

- Soft approach prevailed because concern was that full application of GATT paradigm would lock-in the then prevailing services inequities between developed and developing countries.
- Therefore developing countries did not seek S+D (special differential) treatment or unilateral preferences following GATT Part IV traditional lines, instead sought to weave the development dimension into the framework itself.
- Bottom-up approach: default position is for all services sectors to be exempt from MA and NT obligations, unless a member specifically includes sector in its schedules of commitments.
- Also known as positive list approach: facilitates participation of developing countries with regulatory policy regimes that are not fully developed yet.

Advantages

- Development-friendly, provides flexibility
- accepts that developing countries have different development objectives from developed countries
- enables countries to regulate services in pursuit of policy objectives and does not seek to influence these objectives

Disadvantages

- very complex
- weak instrument in promoting trade liberalization
- commitments by member countries were in fact modest, mostly reflecting a static position, maybe even a rollback (members bound their then existing position on liberalization).
- Majority of services are not subject to disciplines and doubts have been expressed about whether GATS will ever be an effective instrument for trade liberalization or remain a harvester of autonomous liberalization.

Example of GATS Commitments on Voice Telephone Services

Participant	Fixed public voice telephone: Market segment[a]				Phase-in date[b]	Limits on foreign equity or number of suppliers	Additional commit-ments, Reference Paper (RP)[c]	Additional commit-ments (other)[d]
Commitments in the Fourth Protocol of the GATS								
Antigua and Barbuda	[-]	[-]	(I)	[-]	2012	100%	X	[-]
Argentina	L	LD	I	R	*11/2000*	100%	X	[-]
Australia	L	LD	I	R		11.7% Telstra; 100% other	X	[-]
Bangladesh	L	LD	[-]	[-]		100%; 3 suppliers; Dhaka—L/LD monopoly	[-]	To review and con-sider adding
Belize[e]	[-]	[-]	[-]	[-]		25% single entity share-holding limit for BTL	X	[-]
Bolivia	L	LD	I	R	*12/2001*	100%	[-]	X
Brazil[f,g]**	[-]	[-]	[-]	[-]		n.a.	[-]	Consid-ering introduc-tion of RP
Brunei Darussalam[h]	[-]	[-]	I	[-]		n.a.; I—duopoly	X	[-]
Bulgaria	(L)	(LD)	(I)	[-]	2003–05	100%	X	[-]
Canada	L	LD	I	R	*I–03/2000*	46.7%—cumulative—20% direct, 33.3% indirect	X	[-]
Chile	[-]	LD	I	R		100%	X	[-]
Colombia	L	LD	I	[-]		70%; ENT only for LD and I voice	X	[-]

Participant	Fixed public voice telephone: Market segment[a]				Phase-in date[b]	Limits on foreign equity or number of suppliers	Additional commitments, Reference Paper (RP)[c]	Additional commitments (other)[d]
Commitments in the Fourth Protocol of the GATS								
Côte d'Ivoire	(L)	(LD)	(I)	(R)	2005	100%	X	[-]
Czech Rep.	L	LD	I	R	*2000*	100%	X	[-]
Dominica[e]	[-]	[-]	[-]	[-]		100% for committed services	X	[-]
Dominican Rep.	L	LD	I	R		100%	X	[-]
Ecuador	[-]	[-]	[-]	[-]		n.a.	[-]	[-]
El Salvador	L	LD	I	R		100%	X	[-]
European Union	L	LD	I	R	*P, IR—2000* Gr 2003	P: 25% F: 20% radio licenses (direct only)	X	[-]
Ghana[h]	L	LD	I	[-]		Must have joint venture with nationals (no specific equity limit)	X	[-]
Grenada	(L)	(LD)	(I)	(R)	2006	100%	X	[-]
Guatemala	L	LD	I	R		100%	[-]	X
Hong Kong (China)	L	LD	[-]	IR		100%	X	[-]
Hungary	(L)	(LD)	(I)	(IR)	LD—2003 L—2004	75% for Matrav and Antenna Hunagria; 100% other	X	[-]
Iceland	L	LD	I	R		100%	X	[-]

Participant	Fixed public voice telephone: Market segment[a]				Phase-in date[b]	Limits on foreign equity or number of suppliers	Additional commitments, Reference Paper (RP)[c]	Additional commitments (other)[d]
India[h]	L	LD	[-]	[-]		Duopoly by service area; 25%	X	X
Indonesia[h]	L	[-]	I	[-]		Local PTT + 5 cooperators; I—duopoly; 35%	X	[-]
Israel[g,h]	[-]	[-]	I	[-]		74%	X	[-]
Jamaica	(L)	(LD)	(I)		09/2013	100%	X	[-]
Japan	L	LD	I	R		20% NTT/KDD; 100% other	X	[-]
Korea, Rep.	L	LD	I	R	*For. eq.—2001*	*33% KT; 49% other* (single investor limit—10% wire-based voice)	X	[-]
Malaysia	L	LD	I	[-]		Limited to current suppliers; 30%	[-]	X
Mauritius	(L)	(LD)	(I)	[-]	2004	100%	[-]	Considering introduction of RP
Mexico	L	LD	I	R		49%	X	[-]
Morocco	L	LD	I	[-]	*2002*	IAM: unbound; all others 100% at phase-in	X	[-]
New Zealand	L	LD	I	R		49.9% NZT (single investor limit only), 100% other	X	[-]

Participant	Fixed public voice telephone: Market segment[a]				Phase-in date[b]	Limits on foreign equity or number of suppliers	Additional commit-ments, Reference Paper (RP)[c]	Additional commit-ments (other)[d]
Norway	L	LD	I	R			X	[-]
Pakistan	[-]	[-]	[-]	[-]		Commercial presence: unbound	X	[-]
Papua New Guinea[h] **	[-]	[-]	[-]	[-]			X	[-]
Peru	L	LD	I	R	*07/1999*	100%	X	[-]
Philippines**	L	LD	I	[-]		40%		X
Poland	L	(LD)	(I)	(R)	2003	I (facilities based)—49% at phase-in; I (resale) and LD—49%; L—100%	X	[-]
Romania	(L)	(LD)	(I)	(R)	2003	100%	X	[-]
Senegal[e,h]	[-]	[-]	[-]	[-]		n.a.	X	[-]
Singapore	L	LD	I	[-]	*04/2000*	73.99% (49% direct; 24.99 indirect)	X	[-]
Slovak Rep.	(L)	(LD)	(I)	(R)	2003	100%	X	[-]
South Africa[h]	(L)	(LD)	(I)	(R)	2003	Duopoly at phase-in; 30%	X	[-]
Sri Lanka[e,h]	L	LD	I	[-]	I—01/ 2000, subject to tariff re-balancing	35% for international; 40 % other committed services; L and LD for WLL only—3 suppliers; I—duopoly	X	[-]

Participant	Fixed public voice telephone: Market segment[a]				Phase-in date[b]	Limits on foreign equity or number of suppliers	Additional commitments, Reference Paper (RP)[c]	Additional commitments (other)[d]
Switzerland	L	LD	I	R		100%	X	[-]
Thailand[f]	[-]	[-]	[-]	[-]		n.a.		Considering introduction of RP
Trinidad and Tobago[f]	(L)	(LD)	(I)	(R)	2010	100%	X	[-]
Tunisia	(L)	[-]	[-]	[-]		10% TT (2002), other 49%	[-]	[-]
Turkey (5)	(L)	(LD)	(I)	(R)	2006	49% at phase-in	[-]	X
United States	L	LD	I	R		20% radio licenses (direct only); 100% other	X	
R. B. de Venezuela	L	LD	I	[-]	*12/2000*	100%	[-]	X
Commitments submitted after Fourth Protocol								
Albania	L rural; (L) urban	(LD)	(I)	(R)	2003	100%	X	[-]
Barbados	(L)	(LD)	(I)	(R)	2012	100%	X	[-]
China	(L)	(LD)	(I)	(R)	By service area, 12/2004–12/2007	Joint venture required. 25% as of 12/2004; 35% as of 12/2006; 49% as of 12/2007	X	[-]
Croatia	(L)	(LD)	(I)	(R)	2003	100%	X	[-]
Cyprus[h]	[-]	[-]	[-]	[-]		n.a.	[-]	Decision taken in 1998 re: liberalization

Participant	Fixed public voice telephone						Additional commit- ments, Reference Paper (RP)[c]	Additional commit- ments (other)[d]
	Market segment[a]				Phase-in date[b]	Limits on foreign equity or number of suppliers		
Estonia	L	(LD)	(I)	(R)	2003	100%	X	[-]
Georgia	L	LD	I	R		100%	X	[-]
Jordan	(L)	(LD)	(I)	(R)	2005	100%	X	[-]
Kenya	L	LD	(I)	(R)	2003; (L) Nairobi	30%	X	[-]
Kyrgyz Rep.	L	(LD)	(I)	(R)	2003	100%	X	[-]
Latvia	(L)	(LD)	(I)	(R)	2003	100%	X	[-]
Lithuania	(L)	(LD)	(I)	(R)	2003	100%	X	[-]
Moldova	(L)	(LD)	(I)	(R)	2004	100%	X	[-]
Oman	(L)	(LD)	(I)	(R)	2004	70% as of 2001; 100% as of 2005	X	[-]
Suriname[g,h]	L	LD	I			40% public services; 100% nonpublic fixed and wireless nonvoice services; duopoly for public voice	X	[-]
Taiwan (China)	L	LD	I	R		Chunghwa Telecom 20% aggregate dir. and indir.; facilities-based 20% dir. and 60% aggregrate dir. and indir.; 100% resale	X	[-]

Participant	Fixed public voice telephone: Market segment[a]				Phase-in date[b]	Limits on foreign equity or number of suppliers	Additional commitments, Reference Paper (RP)[c]	Additional commitments (other)[d]
Uganda	L	LD	I			Duopoly	X	[-]
Total governments, including other (86)	73	72	73	57			73	7
(Subject to phase-in)	(21)	(24)	(26)	(22)				

[-] No commitment.
( ) Phased-in commitment.
** Entry into force pending acceptance of Fourth Protocol.
n.a. Not applicable.
a. Listings for voice telephone are broken down by market segment: local (L), domestic long distance (LD), international (I), and R, resale of public voice. The listings also show whether the commitment to competition is, or was, to be phased in on a date subsequent to the entry into force of the schedule as a whole. A market segment is indicated as subject to competition on entry into force of the schedule if it may be provided, at that time, by two or more suppliers. The public voice commitments in this table relate to commercial presence (GATS mode 3). Many GATS schedules commit on other telecommunications services such as mobile voice, data transmission, mobile services, and value-added services, which are not included in this table.
b. Italics denote a phase-in date that has passed.
c. "X" denotes that member incorporated the Reference Paper on regulatory principles with few, if any, modifications.
d. "X" denotes that member included some portions of the Reference Paper or independently drafted regulatory commitments, or as indicated.
e. Fourth Protocol commitments do not include voice telephone services but do include other services.
f. Commits to improve offer once pending national legislation has been adopted.
g. Where no public voice telephone commitments are indicated, voice over closed user groups is nonetheless committed.
h. Commits to review the possibility of allowing market access for additional suppliers.
Source: WTO.