

THE CHANGING ROLE OF GOVERNMENT
IN AN ERA OF TELECOM DEREGULATION

**TRADE AGREEMENTS
ON TELECOMMUNICATIONS:
REGULATORY IMPLICATIONS**

Report of the Fifth
Regulatory Colloquium
held at the ITU Headquarters
6-8 December 1995



INTERNATIONAL TELECOMMUNICATION UNION

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PREFACE
BY THE SECRETARY-GENERAL OF THE ITU

I am extremely pleased to introduce the Report of the Fifth Colloquium on the Changing Role of Government in an Era of Telecom Deregulation, which was held at ITU Headquarters in Geneva from 6-8 December 1995.

The Fifth Colloquium considered a subject which is likely to become increasingly central to the realm of telecommunications: namely the impact which the emerging free trade regime of the World Trade Organization (WTO) will have on national telecommunication regulation and regulators, as well as on the telecom industry generally. The Colloquium took the highly innovative step of inviting as participants key officials and policy makers involved in current WTO negotiations, along with the normal complement of telecom regulators and policymakers. I also had the pleasure of welcoming Mr. Warren Lavorel, Deputy Director General of the WTO, as well as the expert WTO staff officials on telecommunications, Mr. Neil McMillan of the UK, Chairman of the WTO Negotiating Group on Basic Telecommunications (NGBT), the group established by the WTO to make further progress on extending the regime to basic telecommunications; and a number of government officials active in the NGBT.

The meeting's purpose was educational and analytic: to explain to the telecom community how their activities will be effected by the new WTO regime, and at the same time to convey back to the trade community of policy makers and negotiators some of the special complexities and considerations posed by the telecommunications industry that need to be taken into account in extending a multilateral free trade regime to telecommunications.

The unstinting cooperation of our colleagues from the trade community was critical to the success of the meeting, and for this I am most appreciative of the support of the WTO community, beginning with its Director General, Renato Ruggiero.

The meeting was once again made possible by the generous funding of the Friedrich Ebert Foundation of Germany (FES), and for this critical help I am most appreciative to the FES and to the director of its Geneva office, Dr. Erich Vogt.

As I noted in my Introduction to the Report of the First Colloquium, the concept of the Colloquia originated with David Leive when he was Chairman of the ITU's Telecom '91 Regulatory Symposium in Geneva in October 1991. An extensive round of informal consultations with experts from many countries led Mr. Leive, Ambassador Gerald Helman, who provided critical assistance, and me to conclude that the Colloquium would meet a significant need and be of great practical value to many countries. This forecast has been more than borne out by the success of the five Colloquia and the widespread use of its Reports.

In view of his outstanding leadership of the Colloquia, I asked David Leive after the Second Colloquium to continue as permanent Chairman. As we have come to expect, he was done his usual admirable job in organizing and conducting the Fifth meeting.

The results of the Fifth Colloquium are reflected in the following Chairman's Report by Mr. Leive. Together with several of my senior colleagues, I participated throughout the three day session, just as I had at the first four Colloquia.

The Report describes the consensus of the participants on the principal issues discussed, but does not represent individual participants' views.

This publication also includes the executive summary of the Briefing Report prepared by a distinguished independent expert, Michael Tyler, which was presented to the Colloquium in draft form to serve as a basis of the discussions. The full Briefing Report will be translated and distributed to all administrations this winter. Both the executive summary and the Briefing Report reflect Mr. Tyler's own research and views, and are not products of the Colloquium discussions themselves.

Planning is now underway for subsequent meetings. The Sixth Colloquium, scheduled for September 1996, will consider the

impact upon the national telecom regulator of the growing convergence of conduit and content. The Seventh Colloquium is scheduled for April 1997, on a topic to be selected.

The Colloquium represents an important continuing initiative to consider, in an informal, expert and practical way, some of the fundamental issues of telecommunications regulation that arise from today's fast-changing telecommunications environment. The Colloquium is non-governmental in nature, privately financed, and brings together, in their individual capacities, high level telecom officials and experts from a diverse range of countries. The participants meet in Geneva for three days to formulate practical advice designed to be of immediate benefit to policy makers, regulators and business communities in developed and developing countries alike.

Participants in the Fifth Colloquium noted the increasing efforts that are now being made by the ITU itself, and by the World Bank, to more widely disseminate the results of the five Colloquia, recognizing that the underlying purpose of the activity is that the global community of telecom policy makers, regulators, and private sector participants should benefit from the focussed work of these Colloquia.

I firmly believe that the Fifth Colloquium constituted an historic occasion marking the practical cooperation between the WTO and ITU, reflecting the shared goals of both organizations to foster telecom regulatory reform so that countries may fully benefit from modern technologies and competitive forces to develop their national economies. I look forward to working in close partnership with Director General Ruggiero, Deputy Director General Lavorel and their able staff to achieve these shared goals for the benefit of our members.

Pekka TARJANNE
Secretary-General

Geneva, January 1996

PREFACE

BY THE DIRECTOR-GENERAL OF THE WTO

Access to modern telecommunications services is an essential condition for success in the development of national economies and in international trade. Telecommunications is both a vital underlying means of transport for all forms of economic activity and a traded service in its own right; one in which private operators and competition are assuming an ever more prominent role.

These realities have been recognized by the community of nations in the Marrakesh Agreement which, under the auspices of the General Agreement on Trade in Services, made telecommunications subject to the rules of the multilateral trading system. Progressive liberalization of basic and value-added telecommunications networks and services through the introduction of competition will greatly reduce the cost of doing business and could make a real difference to economic growth rates. But much remains to be done to ensure that business and consumers reap the full benefits of the phenomenal improvements in technical efficiency which are now being made.

The first priority is to reach a successful conclusion of the extended WTO negotiations on basic telecommunications in April 1996. A key ingredient in this process, and in all future negotiations to introduce market forces in telecommunications, is to broaden the dialogue between the trade and telecommunications communities so as to foster mutual understanding of the trade disciplines and of the unique characteristics of the sector. For example, the application of the trade principles of most-favoured-nation treatment, national treatment and market access will have important implications for both traditional and newly evolving regulatory practices, technical requirements and public policy objectives.

For this reason, I was pleased to accept the invitation of Secretary-General Tarjanne for the WTO to participate in the Fifth ITU Regulatory Colloquium and welcomed the opportunity for WTO and ITU staff to join with trade and telecommunications experts

from some of our Member nations in this beneficial exchange of information and ideas. The results of this constructive exchange are contained in the Report by the Colloquium's chairman, David Leive, and I earnestly commend it to your attention. The Chairman has offered a number of practical conclusions and recommendations which reflect some of the insights gained by each of our communities about issues and problems faced on both sides.

I wholeheartedly endorse Pekka Tarjanne's call for closer co-operation between the WTO and the ITU, and – still more important – between the trade and telecommunications administrations within each country. We, at the WTO, look forward to promoting close collaboration in a variety of formal and informal ways to achieve our common goals. This valuable Colloquium served as one such vehicle.

Renato RUGGIERO
Director-General

Geneva, January 1996

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CHAIRMAN'S REPORT

TRADE AGREEMENTS ON TELECOMMUNICATIONS: REGULATORY IMPLICATIONS

PART I – INTRODUCTION AND SUMMARY

It has become commonplace to observe that telecommunications has entered a period of explosive, global growth. This telecommunications revolution has been marked by the unleashing of technological change, competitive forces and the privatization of state monopolies, the creation of consortia of service providers which are global in scope, and of wholly new services embodying advanced capabilities often targeted to the specific needs of businesses or individual consumers.

Less noticed, but of great potential significance to the future growth and stability of the industry, has been the beginning of a multilateral governmental response to this telecommunications revolution. In the trade field, it was expressed when the Marrakesh Agreements, signed in 1994, for the first time squarely placed the provision of telecommunications services within the pre-existing framework of global trade negotiations.

Why Did This Happen and What Does It Mean?

Technological and market forces are changing the telecommunications industry from a state industry with special status (and often under state ownership) to one in the mainstream of trade. The globalization of national economies, the trend towards "information economies" and open access, the greater interest of the state in telecommunications as a key factor in national development, the significant decreases in costs in the sector which have facilitated entry, the fact that telecommunications is an essential infrastructure to facilitate trade in goods and services now being covered within the trade framework, such as financial services, and the creation of global telecommunications companies and consortia, all have contributed to bringing about this change. Telecommunications is now seen as the modern trade route.

The efforts to place telecommunications in a trade setting, if they continue to be successfully pursued, will certainly add to the momentum of the telecommunications revolution, with major benefits for all countries. Whether there is an orderly transition from today's partly monopolistic and nationally regulated bilateral trading system in telecommunications to one in which trade barriers are largely discarded and such established free trade principles as Most Favored Nation (MFN) treatment within a multilateral framework are applied will depend in part on establishing a strong dialogue between trade experts and those in the field of telecommunications.

Such a dialogue is especially important in the case of national telecommunications regulators and policy-makers, who will have the task of adapting, in the face of the practical operational realities of managing a national telephone system, to a future new global free-trade regime. The aim of contributing to the process of orderly transition, which is in part one of mutual education, led the Regulatory Colloquium to convene a representative group from the fields of telecommunications and international trade to discuss the impact of the emerging free trade regime on the regulation of telecommunications. (For a list of participants, see Attachment 1.) It is a contribution to a process which certainly will have to continue in order to enable all countries, and particularly developing and newly-industrializing countries, to deal with the economic and technological realities of the 21st century.

* * *

The Marrakesh Agreement culminated the latest multilateral "round" of trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT). It established a new international organization, the World Trade Organization (WTO), replacing the GATT, with new powers and procedures. Part of the Marrakesh Agreement is a General Agreement on Trade in Services (GATS). The GATS is the first global trade agreement which contains treaty provisions applicable to telecommunications; one of GATS' Annexes is a Telecommunication Annex, which clarifies and extends some of the GATS provisions as they apply specifically to telecommunications. In addition, schedules to GATS contain commitments

by which fifty-seven WTO members open their national markets to international competition in varying degrees. For the time being, these commitments apply chiefly to value added services. Lastly, at Marrakesh, countries were unable to reach agreement on major market-opening measures for basic telecommunications, so a new mechanism, the Negotiating Group on Basic Telecommunications (NGBT), was established to deal with this fundamental issue.¹

The NGBT is meeting on a frequent schedule with the objective of reaching an agreement by April 1996 on market-opening measures concerning trade in basic telecommunications services.

There is a growing convergence of goals of the ITU and WTO – to increase the value and utility of telecommunications to society as a whole, and to foster telecommunications regulatory reform so that countries may fully benefit from modern technologies and develop their national economies. However, not all ITU members are members of the WTO, and even for the 100 or so countries which are members of both, there is a surprising lack of information and understanding among the telecommunications community about what the WTO is, what it does, and what impact it is likely to have on their telecommunication industries and their telecommunications regulatory regimes. Perhaps even more importantly in that context, are the potential impacts on each nation state's broader public interest goals – general economic growth and job creation, the opportunity to fully participate in the growing global trading system, and social benefits of opportunities such as distance learning and telemedicine.

A purpose of this report, then, is to describe to that telecommunications community what it should know about the new trade regime, and what can be inferred about its likely impact on their regulatory practices.

¹ For more detailed background explanations of the complex WTO regime, including GATS, MFN, etc., readers are referred to Attachment 2 to this Report, to the Executive Summary of the Briefing Report, at p. 73 of this Report, and to the full text of the Briefing Report, which is separately published by the ITU.

The report is addressed to the trade community as well. Just as the telecommunications community needs to become fully cognizant of the potentially radical changes that may come about as a result of bringing telecommunications within a trade framework, so the community concerned with international trade policy needs, in order to do its job better, to appreciate the particular complexities of the telecommunications industry and regulatory structures.

For these reasons, the Colloquium concluded that it was essential that this Report be distributed as widely as possible.

At the same time, while this report assesses the impact of the WTO regime on telecommunications regulation and regulators, and indeed on nation states' policies, it is too soon to be prescriptive about the precise impact. Many questions are still unresolved, although the general direction is clear.

Why Does It Matter?

The Fifth Regulatory Colloquium was mainly concerned with:

- 1) Understanding the evolving world of negotiations and agreements concerning trade in telecommunications services, including its impact on developing countries and how developing countries might associate themselves with the process to their best advantage;
- 2) Assessing the implications for national telecommunications regulation of the existing GATS Agreement;
- 3) Considering the substantive options available to the NGBT negotiators, particularly their merits and disadvantages from the point of view of national telecommunications regulation, and the eventual implications of the NGBT for both national and international regulatory issues.

The existing agreements affecting telecommunications (GATS, its Telecommunications Annex and the Schedules), that form part of the overall Marrakesh Agreement of 1994, despite considerable limitations and ambiguities built into them, do substantially modify the environment for national telecommunications regulation. They do

this by seeking to open national markets, by creating general "obligations and disciplines" that are binding on World Trade Organization (WTO) member governments, and (in the case of the National Schedules) committing WTO member governments. For that reason, the Marrakesh Agreement foresees a far-reaching change in international trade in telecommunications services, with direct impact on national regulatory regimes. For example, by requiring publication of regulatory rules in the interests of "transparency", and requiring national regulation to be carried on in a manner which does not impede trade, the Marrakesh Agreement will require many telecommunications regulators to adapt their rules and practices. (See Attachment 2 to this Report for a tabular description of selected obligations of the GATS and their scope of application.) They also modify the environment for national regulation, insofar as the "specific commitments" that were made (initially and primarily for value added services) in Schedules to the General Agreement open new markets to the oversight of binding multilateral trade rules.

Moreover, the negotiations currently taking place under the auspices of the NGBT may well result in Most-Favored Nation (MFN) treatment and new specific commitments which extend the open-market principles of market access, transparency of laws and regulations, and national treatment to a range of telecommunications services that in the past has mostly been supplied by monopoly or exclusive service suppliers. Of equal importance, the NGBT negotiations may well refine and extend the pre-existing general obligations of the GATS concerning regulatory practices through what are called additional commitments, also inscribed in schedules.

The inclusion of telecommunications in the Marrakesh Agreement reflects fundamental economic and technological changes in telecommunications, which can only be very briefly summarized here:

- 1) The emergence of new kinds of telecommunications networks, services and modes of commercial operation (in both developed and developing countries) which facilitate competition. For example, the private sector is engaged in the

development of global satellite based wireless systems whose capabilities and costs assume the availability of a global marketplace and the open trade access that it implies.

- 2) The transition of many advanced industrial economies towards a high degree of specialization in services and in information and communication-related economic activities.
- 3) The convergence of telephone and computer networks (e.g. voice on the Internet).
- 4) Economic pressures for further efficiency.
- 5) As a consequence, the growing importance of telecommunications as the modern trade route, that is, the mode of delivery of other services and goods.
- 6) As a further consequence, an increasing national need to treat telecommunications as a "normal industry", and not to regard it as a "special" industry or "natural monopoly" requiring governmental ownership or other treatment different from that generally afforded other sectors.
- 7) The recognition that a modernized telecommunications system is central to the economic development of all countries and that privatization and economic liberalization of telecoms is a critical condition for attracting the capital needed to achieve telecommunications modernization.

Thus, pressures for the extension of the multilateral trading system to include telecommunications (and other information-related matters such as intellectual property rights) are a natural outcome of fundamental economic and technological trends. At the same time, governments in many countries, developed and developing, are debating the balance between the economic benefits of competition, and other policy concerns such as extending service to underserved population groups, maintaining universal service obligations, and maintaining some continuing governmental role in the telecommunications sector and the stream of revenue it provides.

Trade issues in telecommunications arise for at least four distinct, but related reasons:

- 1) Because telecommunications networks are an important infrastructure for the exchange of all goods and services, such as financial services, tourism, professional services and other information-based services.
- 2) Because the transition to competition in telecommunications makes the issue of market access, always a critical part of trade negotiations (the ability to sell a service into a foreign market, for example), of central importance.
- 3) Because successful trade negotiations about telecommunications require reforms to the national telecommunications regulatory regime so as to permit genuine competitive opportunities to the domestic and foreign entities which have been afforded market access.
- 4) Because issues concerning telecommunications relationships between countries or between telecommunications operators in different countries that have traditionally been handled within the ITU framework, such as issues concerning accounting rates and correspondent relations between international telecommunications operators, also arise in the context of international trade negotiations.

Within this context, the Colloquium first sought to define the agenda of issues facing national policy makers and regulators. It then considered the impact of the new WTO regime upon the domestic telecommunications regulator, and the factors which telecommunications regulators and policy makers felt the NGBT negotiators should bear in mind. Issues emphasized in the discussion included:

- 1) Telecommunications institutions at the national and international levels need to adapt to a new agenda and approach derived from the world of competitive markets under binding international trade rules; and conversely those working in trade/policy institutions and negotiations need to become

more familiar with the operational realities of the telecommunications industry and make effective use of the expertise and capabilities of telecommunications institutions at both national and international levels.

- 2) The telecommunications legislation of WTO member countries must enable government policy-makers and regulators to fulfill the obligations they have under the GATS and the Telecommunications Annex. In particular, regulators in certain cases may need additional powers or a revised legislative mandate, in order to fulfill their new obligations.
- 3) The "general obligations and disciplines" of the GATS, and the specific commitments in Schedules to the GATS, in conjunction with the Dispute Settlement Understanding (DSU), will have a major impact on the work of national telecommunications regulators. For example, WTO dispute panels may review practices of national regulators. The possibility of such review is likely to lead over time to some changes in national regulatory practices. This has not happened yet under the existing GATS regime, but it seems likely to be only a matter of time before it does. It could become an important practical reality if the NGBT negotiations conclude successfully; the commitments made on market access and national treatment and the disciplines under GATS which those commitments imply, all will impact upon regulatory institutions, processes and policies. Such commitments would also be subject to the DSU process. A need for resorting to the DSU would be reduced if the commitments, including the "additional commitments" on regulatory frameworks which ensure real market access, were clear and sufficient to avoid the "nullification and impairment" of market access commitments which is the focus of DSU decisions.
- 4) The WTO regime will encourage foreign direct investment in the expansion and upgrading of national telecommunications infrastructures, by reducing regulatory uncertainties and hence perceived investor and operator risk. Potential investors or service suppliers who want to enter the market in a

particular country normally confront uncertainties and subsequent negotiations concerning that country's regulatory practices or "rules of the game". Both would be significantly aided if governments commit in the NGBT process to a regulatory regime that promotes investment and competition and that is subject to an independent and open review on the national level and perhaps also, on occasion, through the international dispute settlement process.

- 5) A successful outcome of the NGBT negotiations is likely to facilitate increased economic efficiencies and structural changes in the global telecommunications industry in such areas as new strategic alliances, international correspondent relationships between national carriers, and the legitimization of non-traditional suppliers of services (for example, international resellers) which are now benefitting from arbitrage among the traditional suppliers of international services, operating within the traditional correspondent framework.
- 6) Developing countries may need to devise an approach to the new business environment arising from world trade negotiations in telecommunications in order to:
 - take advantage of the potential economic benefits of open international competition, in terms of investment, innovation and entrepreneurial dynamism, including the provision of rapidly expanding international services of interest to users;
 - realize the potential benefit of easier access to distance learning, telemedicine, electronic commerce and other advanced applications of special relevance to the development process;
 - protect other public policy objectives such as rapid progress towards universal service;
 - achieve better and broader access to private capital for needed expansion and development.

The Colloquium's conclusions and recommendations can be found in Part V, below.

PART II – WTO’S PRACTICAL IMPACT ON REGULATORS

A. Overview

To summarize the close link between trade issues and national telecommunications regulation:

- 1) GATS imposes some general obligations concerning national regulation, including those relating to transparency. However, it does not require any particular form of national regulation.
- 2) Each WTO member must determine whether its national regulator has sufficient powers to fulfill its GATS obligations.
- 3) WTO members who enter the NGBT process must decide what additional changes, if any, in their domestic arrangements, may be required in order to reach agreement within the NGBT.
- 4) More specifically, the national regulator, together with the country’s trade negotiator, must carefully consider the degree and extent to which it wishes to reserve its regulatory discretion in a wide variety of different circumstances. Such “reservations” may include:
 - i) denying a foreign license applicant because of mutually exclusive demands for radio spectrum;
 - ii) limiting foreign investment in the dominant supplier; and
 - iii) limiting licenses to a specific number of providers for a fixed service. If such reservations of regulatory discretion are considered to be desirable, they need to be included as “Limitations” in a country’s Schedule.
- 5) In framing its position, the national regulator must take into account the fact that any questions which may arise later concerning its conformity with the general obligations of GATS, and with its own country’s Scheduled commitments, will be subject to the dispute settlement (DSU) process.

- 6) Should the national regulator wish to preserve its ability to exercise regulatory discretion regarding competitive supply of basic telecommunications services in ways that are inconsistent with those existing obligations of the GATS that apply to "specific commitments" (but not otherwise), (e.g. provisions requiring objective, transparent and non-discriminatory rulemaking in Article VI), then it should not schedule GATS commitments on the basic telecommunications services concerned. If no commitments are scheduled for a particular telecommunications service, then MFN treatment would be the principal obligation incurred (unless an MFN exemption is taken).
- 7) A government must also determine if it needs to take an exemption from MFN treatment, whether or not it schedules commitments. Typically, an MFN exemption would permit a regulator to use reciprocity (for example, an assessment of the degree of market access in the country of origin of the applicant) as a basis for decisions whether or not to permit a firm to supply a particular telecommunications service. If regulators were to desire to apply such "reciprocity tests", an MFN exemption would be necessary, but it is important to bear in mind that MFN exemptions by major players would certainly cause the NGBT negotiations to unravel, thereby subjecting global telecommunications liberalization to a series of costly, non-uniform, and unpredictable bilateral deals which would lack consistency and the framework for an orderly transition which addresses changes in the industry.

Part II A considers the "baseline" obligations which are undertaken by all WTO member states through their participation in the Marrakesh Agreement, such as those requiring "transparency" of the domestic telecommunications regulatory regime. Part II B then considers the impact of the WTO regime upon specific, functional responsibilities of the telecommunications regulator, such as licensing and interconnection.

1. GATS' General Obligations and Disciplines

The Marrakesh Agreement and subsequent international trade negotiations within the WTO framework can have an impact upon the work of national telecommunications regulators in several different ways:

- 1) As a result of the "general obligations and disciplines" arising from the GATS and the Telecommunications Annex relating to regulatory practices.
- 2) As a result of the general obligation of MFN treatment – not to discriminate among suppliers on the basis of national origin, unless an exemption has been taken by the government concerned.
- 3) As a result of specific market access and national treatment commitments pertaining to certain sectors and sub-sectors
- 4) As a result of "additional commitments" concerning national telecommunications regulation (substantive regulatory policies and/or regulatory process and institutions) that some WTO members may undertake in the course of the NGBT negotiations.

These general obligations and disciplines (See Attachment 2 for their substance) concern:

- MFN (GATS Article II);
- transparency (GATS Article III and Telecommunications Annex, Article 4);
- domestic regulation (GATS Article VI);
- monopolies and exclusive service suppliers (GATS Article VIII); and
- business practices (GATS Article IX).

The impact of these "general obligations and disciplines" will vary according to the structure of each country's market, along a continuum from monopolistic to highly competitive. A few examples will illustrate the impact of the GATS provisions.

- 1) *Monopolistic Settings* – Even in a country where a single telecommunications operator has been granted a comprehensive

monopoly, and the government has made no commitment in its Schedule to the GATS to change this, the combined effect of the "general obligations and disciplines" with scheduled specific commitments made concerning services *other* than telecommunications (e.g., broadcasting, tourism, professional services, financial services) may have an impact upon the regulation of telecommunications. This happens because Article VIII of the GATS requires that each Member of the WTO "shall ensure that any monopoly supplier of a service in its territory does not ... act in a manner inconsistent with that Member's obligations under ... specific commitments" and because the Annex on Telecommunications requires reasonable and non-discriminatory access by other service suppliers to such telecommunications networks for the supply of scheduled (competitive) services, e.g., financial services.

- 2) *Limited Competitive Entry* – A different situation exists where there is competitive entry and the relevant WTO member government has committed itself (via its national Schedule) to maintain market access for foreign operators, but the former monopoly retains substantial market power. There are several aspects:
 - a) Consider, for example, the case where competitive entrants need interconnection rights to the pre-existing network because the monopoly operator retains a monopoly of the local loop; although competition may exist for long distance and/or value-added services. Here a different provision of Article VIII of the GATS is particularly important: "Where a Member's monopoly supplier competes ... in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act ... in a manner inconsistent with such commitments". This presumably means that a telecommunications operator in this situation would not be permitted to abuse its monopoly of the local network in order to compete unfairly with a foreign entrant in the (competitive) value-added long distance or

international business, for example, by denying its competitor local interconnection or leased lines, overcharging for these services, or providing them at low levels of quality.

- b) Of equal importance, Article VI imposes various duties on the regulator where the Member has made specific commitments in its GATS schedules. For example: "the Member shall not apply licensing and qualification requirements ... that nullify or impair such specific commitments ...". If the government or regulator does so, the DSU may be applicable.
 - c) Even where no market access commitments have been scheduled, the regulators of a WTO member government must apply MFN treatment. As a result, where some degree of liberalization of certain telecommunications services already exists in practice, or if it is newly introduced, regulators may not discriminate in favor of foreign suppliers from any country or against suppliers from any WTO Member. Unless an exemption from the general MFN obligations of the GATS is filed with the WTO (which, if not filed by the close of the NGBT negotiations by end April 1996, is only possible through approval of a waiver by other WTO members) the regulator cannot favor, for example, Japanese suppliers over French suppliers on the basis of their nationality in granting licenses to supply any liberalized services, whether or not a Schedule commitment was taken for the service concerned. As a result of not scheduling, the criteria used for granting any such licenses cannot relate to the nationality of the foreign supplier.
- 3) *Competitive Markets* – In highly competitive markets, the provisions of Article IX of the GATS, concerning Business Practices, continue to be important to ensure that national telecommunications operators do not act in a manner calculated to unfairly disadvantage foreign participants in the national market, although Article IX mainly imposes an obligation to consent.

Another issue concerning the baseline obligations relates to “transparency” requirements. Article III of the GATS and Article 4 of the Telecommunication Annex impose a requirement on national regulators to publish tariffs and other conditions applicable to end users. These transparency requirements could in some instances conflict with local requirements for commercial confidentiality, although Article III bis provides that “Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which ... would prejudice legitimate commercial interests of particular enterprises, public or private”. More significantly, if the national regulatory practices can be shown not to be consistent with these transparency requirements imposed by the GATS, the country concerned may be subject to the DSU process.

The Colloquium concluded, however, that these transparency provisions are as yet untested, and it is not possible to be too definitive about their scope or likely practical impact.

2. Additional commitments

In international trade negotiations about basic telecommunications, achieving an agreement to remove barriers to international competition (such as that being sought in the NGBT) may involve the negotiation of “additional commitments” in Members’ schedules concerning regulatory institutions, processes and policies from a “critical mass” of countries. This need arises because, in the absence of such provisions, governments that are willing *in principle* to make commitments about market access and national treatment in telecommunications and to adhere to WTO principles may not be willing or able to fulfill the commitments in *practice*. Many negotiators believe that granting market access alone may not be sufficient without ensuring, through an effective regulatory regime, fair opportunities to compete. Governments whose negotiators take this position may be unwilling to proceed unless other governments not only make significant commitments to market access and national treatment, but also agree to accompany such commitments with “additional commitments” about regulatory matters.

Thus, market access and national treatment commitments are the chief objectives of the NGBT, but such commitments may not of themselves be sufficient to assure market access in practice. To help achieve that actual market access, additional commitments are sought. A successful outcome to the NGBT process is likely to involve regulatory elements, such as provisions concerning:

- 1) regulatory **institutions**: for example, whether the regulator is independent of the incumbent telecommunications operator and national industrial interests.
- 2) regulatory **processes**: for example, whether there are measures ensuring that the decision-making process is known, and is non-discriminatory.
- 3) **substantive regulatory policies**: for example, policies concerning interconnection between carriers (as discussed at length in the Fourth Regulatory Colloquium's Briefing Report).

Two broad conclusions emerged from the Colloquium discussion on this subject:

- 1) There is a need to ensure that the "additional commitments" are specific enough to:
 - give investors and business decision-makers confidence in the regulatory environment they will face and confidence in the willingness and ability of the regulator to ensure that the regulatory practice accords with the national commitments given concerning market access and national treatment;
 - be the basis, if necessary, of effective action in response to complaints considered by WTO panels under the Dispute Settlement Understanding (DSU);
 - in fact, represent real "additional commitments," rather than a reiteration of existing obligations;
 - be understandable to the telecommunications community.
- 2) Nevertheless, "additional commitments" should not be so detailed that they:
 - unreasonably infringe on other legitimate concerns and responsibilities of national governments and regulators;

- unreasonably infringe on the ability of national governments and regulators to determine *how* to implement and enforce the additional obligations;
- endanger a successful outcome by making the NGBT negotiations unnecessarily complex and deterring market access commitments from countries just starting on the liberalization path;
- become rapidly obsolete as market conditions and/or technology change.

Finally, the Colloquium recognized that it is simply too soon to determine whether a “critical mass” of countries will be prepared, either through the NGBT process or otherwise, to subject their national regulatory regimes within the next several years, not only to fundamental reforms (which many countries have been undertaking anyway), but also to place such hitherto national regulatory processes for basic services squarely within the multilateral trade framework, with its special disciplines, procedures, and dispute settlement mechanisms.

B. WTO’s impact on specific regulatory areas

1. Market Access

Under the heading of “market access”, the Colloquium concluded that:

- 1) National regulators may need to revise their regulatory policies in order to implement specific market access commitments that their governments have made in the Schedules to the GATS, or may make in the future through the NGBT and other future negotiations.
- 2) Market access commitments are made on an MFN basis, but MFN exemptions may be taken, once the current suspension of the application of MFN during the NGBT negotiation comes to an end. The scope and number of such MFN exemptions is not yet clear. For countries which are participants in NGBT negotiations, in the event that a substantive agreement on opening the market for basic telecommunications is

reached through the NGBT, MFN exemptions will be limited by the desire to reach an agreement.

- 3) It may (or may not) be considered acceptable, even where market access and national treatment commitments and MFN obligations apply, for national regulators to continue applying very general criteria which give the regulator wide discretion in practice and process, especially if the results or perceived results could be inconsistent with general GATS principles.
- 4) Restrictions on foreign ownership and investment may no longer be sustainable.
- 5) National regulatory policies other than licensing, considered below, may impede the achievement of market access and national treatment. "De facto" Limitations may be perceived to be the equivalent of "non-tariff" barriers.

The Colloquium's more specific conclusions in this area were:

- 1) *Review of Legislation* – National governments and national telecommunications regulators will need to closely review the adequacy and suitability of national legislation and regulation to allow for the implementation of both the "general obligations and disciplines" of the GATS, and specific commitments made in 1994 in the Schedules to the GATS (or in any subsequent Schedule commitments that arise from the NGBT and future negotiations). For example, national regulators will need sufficient powers to ensure that carriers which have monopoly rights act in compliance with Article VIII (Monopolies and Exclusive Service Providers) of the GATS.
- 2) *MFN* – Three main points emerged from the discussion of MFN:
 - The number (and scope) of MFN exemptions taken during the NGBT negotiations needs to be minimized in order to ensure that there is a sufficient "critical mass" of offers so that the negotiations can succeed, recognizing that WTO Members may fail to contribute adequately to the "critical mass" for reasons *other* than taking MFN exemptions. Thus, market access and national treatment limitations must also be minimized to ensure a "critical mass."

- The perpetuation of reciprocity as the basis for participation by service providers from one country in the markets of another country, is inconsistent with MFN, and would nullify one of the greatest potential benefits from GATS and NGBT: increased simplicity and uniformity of the regulatory environment worldwide. Thus, widespread MFN exemptions would signal a return to bilateral reciprocity.
 - An MFN exemption should not result in service providers from any member being treated *worse* than the treatment specified in a schedule, though such an exemption can legitimately allow service providers from a member to be treated *better* than the schedule specifies.
- 3) *Regulatory Discretion* – Concerning the question of how much discretion should be left to regulators, and how differing implementation and enforcement approaches by national regulators can be reconciled with market access and national treatment commitments, the Colloquium considered that handling of this subject through additional commitments may be appropriate in the context of NGBT. It is clear that a solution that is acceptable to a sufficient number of governments must be found in order to allow an agreement to be reached in the NGBT that commits members to a major move towards more open markets in both law (*de jure*) and practice (*de facto*), and one that is clear enough to provide the basis for the DSU process.
- 4) *Foreign Ownership* – Concerning the question of foreign ownership, the discussion made it clear that, at this stage, foreign ownership or control of new entrants to the telecommunications operator business may be handled differently from foreign investment and equity participation in the incumbent carrier, but that governments should eventually reconcile the two. For example, some governments have been willing to allow majority foreign ownership for new cellular services but not for established fixed services. For those WTO members with monopoly PTT's, how much foreign ownership is to be allowed in that entity?

- 5) *Relationship to Other National Policies* – Concerning the relationships between other aspects of national regulation and market access, three important issues emerged:
- National regulators may legitimately impose reasonable requirements on new operators and service providers on a non-discriminatory basis, such as requiring them to provide or support universal service or service over a defined and wide geographic area by a specified date. However, requirements of this kind can, if discriminatory or taken to an extreme, be unreasonable and constitute, in effect, a denial of market access. Where there is disagreement, the dividing line between “reasonable” and “unreasonable” may ultimately be addressed through the WTO dispute settlement machinery, and be determined by the effect of the requirement on scheduled commitments.
 - Similar considerations apply to spectrum management. The issues are considered later in this section.
 - Technical standards may also constitute an obstacle to market access being effectively achieved in practice, depending on their content and how they are applied.

2. Licensing

The Colloquium recognized that the way national regulators perform their licensing functions will change to some degree as a result of the 1994 Marrakesh Agreement, and potentially will change to a larger degree (at least in some countries) as a result of any future agreement arising from the NGBT negotiations. Such changes may affect regulators’ licensing activities in three ways:

- 1) By changing the way they must conduct their licensing **process**.
- 2) By changing **whom** they do or do not license.
- 3) By changing the **license conditions** the regulator will impose.

The first of these points has already been considered in Part II A of this report. The second and third are considered below.

The conduct of licensing in accordance with the requirements of the GATS, the Telecommunications Annex and existing GATS Schedules, and in accordance with any further agreement that may be reached through NGBT, involves significant challenges. Even if the NGBT negotiating process did not place pressures on participating WTO members to make "additional commitments" concerning regulatory processes (which it does), WTO member governments, including those *not* participating in the NGBT, will often need to enhance their national regulatory arrangements to meet these challenges, because these are general obligations under Articles VI, VIII and IX of GATS.

For example:

- 1) The relationship between license conditions and general policies (for example those concerning universal service and measures to enforce competition policy), will often need to be clarified. In practice today, for example, many regulators use licensing to implement policies concerning market structure. To take another example, license conditions are often used as a protection against anti-competitive behavior in many countries, including those that introduce competition but do not have a competition law framework that applies to this regulated sector.
- 2) If a commitment is to be made, it is extremely important to schedule any limitations or restrictions on the number of licenses granted (whether, for example, because of radio spectrum limitations or due to a desire not to grant rights to build in public rights of way to large numbers of operators). Any regulations which have not been scheduled and that in practice have the effect of denying the market access and national treatment indicated in a Schedule can be challenged through the dispute settlement machinery set up by the DSU. It is critical, then, that if the telecommunications regulator wishes to preserve any restrictions or limitations, it ensures that they appear in the relevant national schedule, or are consistent with the requirements of Article VI (e.g., objective technical standards).

Normally, telecommunications regulators reach considered judgements on the many elements involved in issuing licenses based on a weighing of the relevant financial, technical and policy considerations. But when related commitments are made within the WTO framework, these domestic telecommunications regulatory and technical considerations must be based on objective criteria and be no more burdensome on the licensee than is necessary to attain the regulator's legitimate policy goals (GATS Article VI). It is difficult to determine in advance how these obligations will be interpreted in practice. If additional commitments in this area are negotiated, it is important to ensure that they do not unnecessarily curtail the exercise of reasonable regulatory discretion, while remaining consistent with the general GATS principles.

3. Interconnection for Domestic local and/or Long-Distance Services

For national governments' commitments to market access and national treatment to be fully effective in practice, agreement on interconnection rights is required. The terms of scheduled "additional commitments" that might embody such an agreement must be specified concretely enough to be enforceable and effective, but must not be specified in so much detail as to restrict unreasonably the flexibility of national regulation. The aspects that commitments on interconnection should address are:

- 1) **Pricing of Interconnection:** General principles are needed to assure a level competitive playing field (along the lines of developing further the concept of "cost orientation"), but these should be general principles and not detailed rules.
- 2) **Quality and functionality provided:** the right of interconnecting carriers to receive interconnection services of sufficient functionality and quality, on a timely and non-discriminatory basis, is also important. For example, dialing parity (known in some countries as equal access) is an important aspect of interconnection functionality, enabling telecommunications users to choose a new carrier without having to dial a large number of extra digits. An important related aspect is the numbering plan. This, though less dramatic than the

frequency spectrum issue, is an important factor in rendering competition viable in practice. Managing the numbering plan is a regulatory function, even though the regulator can delegate all or part of it to the industry and retain only some regulatory oversight.

Once more, the challenge is to define *general* principles that, while general, are concrete enough to achieve effective commitment to make market access and national treatment a reality, and to provide a sufficient basis for resort to the DSU should that prove necessary.

- 3) **Network Architecture:** The ability of carriers to interconnect to the public network in a manner appropriate to carrier operations (e.g., co-location or "trunk side interconnection"), as distinct from interconnecting like an end-user ("line side interconnection") is important to making market access effective. Another important aspect concerns the physical locations of "points of interconnection" where interconnection is provided. Here again, the challenge is to establish the best balance between *general* principles and detail.

4. Interconnection for International Services, and Accounting Rates or Network Access Termination Charges

The future evolution of the traditional correspondent relationship between national operators, involving accounting rates and settlements for international telecommunications traffic, should be seen as part of the problem of achieving, in practice, market access, MFN and national treatment for cross-border supply of services. Alternatives to today's accounting rate system (for example, an MFN based "termination charge" or cost-oriented access charge to interconnect international traffic) have been proposed in the NGBT, OECD, and ITU. Proposed alternatives generally represent proposals for putting payment for delivery of international traffic from one national carrier to a correspondent in another country on a basis similar to the pricing of domestic interconnection. In the long run, convergence between these two types of payment for interconnection for international telecommunications traffic has merit, and is, in any case, likely to develop where specific market access and

national treatment commitments for basic telecommunications have been made, as a result of competitive market forces, technology or the breakdown of the correspondent system.

There are two practical possibilities: either the international service continues to be provided by an international operator in one country to a subscriber in another country on a cross-border supply basis ("Mode 1" in GATS terminology) or the international operator establishes itself in the corresponding country, delivers the international traffic to itself in that country and then, often via domestic interconnection arrangements, delivers the traffic to the subscriber (Mode 3). In the first case there would be some international access charge applied at the border of the corresponding country. This would replace the accounting rate. However, a means would still need to be found to compensate the corresponding carrier for the use of its international facilities. In the second case there would be no accounting rate necessary because the originating operator would deliver the traffic to itself in the corresponding country. In the first case the correspondent country would not necessarily have to commit to allowing entry to foreign operators in its international telecommunications market, though it may nevertheless make certain commitments with respect to the access charge applied to the international traffic delivered to its borders. In the second case, the government of the correspondent country would make market access and national treatment commitments with respect to the entry of foreign suppliers of international traffic. There might also be additional commitments pertaining to interconnection.

The issue of a fundamental restructuring of the existing correspondent system of accounting rates is not being addressed in the NGBT for the following reasons:

- 1) No universally accepted alternative has been proposed.
- 2) The manner in which MFN would be applied to the current system of accounting rates is uncertain.
- 3) The net hard-currency revenue from international calls is an important source of foreign exchange in some developing countries, and thus the inclusion of provisions concerning accounting rates in an agreement arising from the NGBT may

make it difficult to secure agreement among a large number of countries in relation to issues being negotiated in the NGBT. Even if there is no agreement in the NGBT on the matter, however, developing countries may be increasingly faced with a situation in which the large international carriers will no longer be willing to pay such countries as much as they are today for terminating their traffic.

- 4) Practical problems of moving from today's network of bilateral relationships to a multilateral MFN or cost-oriented framework may lead to changes in the accounting rate regime being phased-in on a bilateral and regional basis first.
- 5) While issues involving changes to existing levels of accounting rates are being discussed in the NGBT, there is a considerable disagreement about whether accounting rates are the result of "governmental measures" or the outcome of "commercial negotiations" (or both), and to what extent an intergovernmental agreement can impose changes to commercial agreements.

The Colloquium concluded that, quite apart from the impact of the WTO, the present accounting rate system itself is unlikely to survive very long because of the strong pressure on tariffs caused by competitive entry by foreign operators, and the possibility which that competition brings of "through carriers" or global alliances in the future seeking to deliver their own traffic to the destination country and interconnecting at domestic tariff rates.

5. Competition Policy

Safeguards against anti-competitive behavior by market participants are necessary parts of national regulatory regimes for telecommunications. The task of implementing such safeguards may be entirely entrusted to an industry-specific telecommunications regulator applying competition and telecommunications law; entirely entrusted to a general competition-policy body working in conjunction with the courts; or entrusted to a combination of the two. It needs also to be kept in mind that many developing countries do not have a competition policy, or competition policy institutions.

The existing “general obligations and disciplines” of the GATS already address some of the responsibilities of the agency or agencies charged with devising and applying competition policy as it applies to telecommunications.

It is possible that “additional commitments” made in the course of the NGBT negotiations will further amplify and clarify their responsibilities, at least for those countries whose governments make such commitments. Here, too, a balance must be struck: on the one hand, there is a series of requirements that must be incorporated into a country’s competition policy; on the other, too great a specificity may unduly limit the flexibility of the national regulators to implement the country’s own competitive policies. For example, how specific should a country’s proposed additional commitment on competition policy be on such matters as cross-subsidies within the operations of dominant suppliers, accounting safeguards or structural separation, and misuse of customer related information? It is not clear how far countries should go, in the NGBT process, to lay down conditions on national competition policy.

6. Frequency Spectrum Regulation

Decisions on frequency spectrum issues constitute one of the key responsibilities of national regulators. These decisions are often expressed in terms of granting licenses by deciding on the applicable technical criteria and then, for suppliers of radio communications services, selecting the “winner” or winners from among contending applicants, who may include both domestic and foreign entities. Given that spectrum is a limited resource, a variety of situations may arise:

- 1) A country adopts a certain radio standard or spectrum sharing scheme, and then rejects the license application of entities proposing the use of a different standard or scheme. Can it be challenged in the WTO regime on the grounds that it limits the number of potential operators?
- 2) The national regulatory authority rejects the application of both foreign and domestic carriers for a given portion of the

spectrum because it has reserved the use of the spectrum requested for other purposes which are also consistent with its obligations under the ITU Radio Regulations.

- 3) The use of the radio spectrum is commonly associated with state security issues, such as police and national defense. It should be noted that Article 48 of the ITU Constitution provides Member States with full freedom concerning their military radio installations. In addition, Article XIV of the GATS contains a "public order" exception. For these reasons, it is not at all clear that the transparency requirements under GATS would require publication of information related to the state security use of the radio frequency spectrum.
- 4) A national regulator has decided to license, say, six domestically owned cellular operators with frequency spectrum apportioned among the six operators. Does it have the right to reject a seventh applicant, whether foreign or domestic? Can its decision be reviewed on the grounds that the regulator could have established eight licenses and thus admitted additional foreign competitors?

Several conclusions can be drawn about these cases:

- 1) It is necessary for governments to determine the extent of the commitments they will make concerning national treatment and market access (e.g., what limitations they will indicate) concerning telecommunications services that use the radio-frequency spectrum. This decision will dictate whether the same treatment must be given equally to foreign and domestic entities, how many licenses must be granted, if any, and the limitations that can be applied to foreign equity participation in (or control of) licensees. The key point is that a commitment will mean that the rejection of a foreign applicant for a spectrum license, or the imposition of conditions, must be consistent with the scheduled commitment, with MFN treatment (except where exemptions apply), and with the disciplines of the GATS, for example, Article VI.

- 2) Once commitments are made, the possibility needs to be recognized that a losing applicant may persuade its government to initiate a dispute-settlement proceeding under the DSU, on the grounds that the GATS market access commitment has been breached by denial of the license or the imposition of restrictive conditions, even though the national regulator may have reasonably believed it was entitled and justified to act as it did.
- 3) Governments will need to decide whether, and to what extent, to take an MFN exemption, if they intend to discriminate in favor of suppliers from a particular country, in radio-based services for which they will take commitments, or even if they do not make specific commitments for such services.
- 4) Judgments about how to manage particular radio-spectrum allocations at the national level, (e.g. whether to divide a particular allocation into two blocks or four blocks for assignment purposes), can have a significant impact upon the licensing processes. These judgments involve complex technical, market and policy matters, as well as technical coordination with other governments to minimize interference in the use of the spectrum. Nevertheless, there is a possibility that differences of opinion about the reasonableness of these judgments may lead to dispute-settlement proceedings under the DSU.

PART III – IMPLICATIONS FOR DEVELOPING COUNTRIES

The Colloquium extensively considered the implications of the Marrakesh Agreement and the NGBT negotiations for developing countries.

As of 30 November 1995, of the 184 ITU members, 114 were WTO members, while an additional 39 were observers, many of which are in the process of accession to the WTO. 45 countries were participating in the NGBT (15 are represented by the European Union), 27 countries were observers, and the NGBT had before it 28 offers from 14 countries (offers from the 15 countries of the

European Union being presented as one). Of the 45 participants in the NGBT, eight were major developing countries. Of the 14 countries which had made offers, three were developing countries.

In particular, the Colloquium concluded that:

- 1) *Impact* – Even if current national policies remain unchanged and NGBT reaches no agreement, the impact of the Marrakesh Agreement on the evolution and functioning of the market for telecommunications services will be felt in developing countries as well as in advanced industrial countries through increased volumes of telecommunications traffic and easier access to sources of information.
- 2) *Participants* – There are significant potential benefits to developing countries from a fuller participation in market-opening measures negotiated through WTO, especially in terms of:
 - upgrading of telecommunications regulatory structures, as well as modifying their relationships with other parts of government, such as those managing competition policy, will increase the international flow of capital, technology and management skills necessary to accelerate the expansion and upgrading of the public network;
 - challenging and energizing the incumbent telecommunications operator to enhance its performance;
 - potential benefits of delivery of other services, e.g. telemedicine, education;
 - improving conditions of access to long-distance carriers;
 - in the case of some developing or newly industrializing countries which already have highly-capable telecommunications operators, creating opportunities for them to expand into other countries under MFN protection;
 - attracting substantial investment for telecommunications. This is because regulatory risk as perceived by investors is reduced by anchoring regulatory rules in a multilateral agreement incorporating a mechanism for dispute resolution.

On the other hand, there is a probability of some reductions (or at least reduced growth) in hard-currency revenues, resulting from a drop in international accounting rates. This potential loss will have to be balanced against long term gains from competition and better telecommunications services.

It was also recognized that in some developing countries, an agreement on telecommunications services may be part of a "package deal" involving other traded goods or services (for example, oranges, telecommunications and tomatoes may be put in the same basket).

3) *Whether and How to Participate* – As a consequence of each country's evaluation of its interests, different developing countries may adopt different positions regarding participation in NGBT; for example:

- opting out of the negotiation of market-opening commitments in basic telecommunications now taking place through NGBT, but deriving benefits not only from membership in WTO and hence participation in GATS in general, but also from the application of the MFN principle to a future NGBT agreement. Countries would thereby potentially provide their companies with access to the market in other countries participating in that agreement (the "free riders" effect);
- participating in NGBT by:
 - i) submitting offers to open up their markets to competition on whatever terms (consistent with the general GATS principles) they consider appropriate. For example, these terms might be designed to give incumbent telecommunications operators time to develop the full set of capabilities required by a competitive marketplace;
 - ii) offering to reduce, in phases, national restrictions on foreign ownership and the flow of foreign capital.

Developing countries' offers might be designed to accelerate access to new technology and experienced management via international alliances and need not involve commitments or concessions

as far-reaching (at least in the early years of their application) as those offered by advanced industrial countries.

The Colloquium reached some additional conclusions:

The governments of many developing countries are not fully aware of the significance of the negotiations underway. For this reason, it is important to disseminate information to developing countries to increase the level of awareness of the WTO regime and implications, so as to encourage the governments of these countries to join in the NGBT efforts towards market liberalization. It is also important to ensure that a country's trade negotiators are in close contact with their telecommunications colleagues and thus become fully aware of the implications for the telecommunications sector. For a series of practical recommendations addressed to a group of African countries with respect to WTO issues, see coordinated African Programming of assistance on Services (CAPAS) and Telecommunications Development Bureau (BDT) of the ITU, Report on Policy Study of Five African Countries and Negotiations and Concessions under General Agreement on Trade (GATS), Sanou and Moshiro, October 1995.

This information should clearly indicate the opportunities and benefits of joining the process, as well as the consequences of joining or not joining. For example:

- 1) A country cannot join the NGBT process until it becomes a WTO signatory.
- 2) A country that is a WTO signatory but does not commit to NGBT before it concludes its work in April 1996 can at any time submit commitments to open up its market, without having to wait until the next round of negotiations (which will begin in the year 2000 at the latest). However, a country loses the advantage of participating in the NGBT process and thus influencing the negotiation.
- 3) Likewise, a government that is a WTO signatory that signs on to an agreement arising from the NGBT, but with significant limitations built into its Schedule, may increase its commitments and reduce the limitations at any time. However, it

again loses the advantages that might have been gained by using these concessions to gain bargaining leverage during the NGBT process itself.

- 4) If a WTO signatory schedules no commitments in the context of the NGBT, it will nevertheless benefit, to the extent actually possible given the capabilities of its telecommunications operators (and given MFN exemptions that may be taken by NGBT participants), from the commitments made in the NGBT by other governments. This will only be true, however, if other governments are willing to accept the outcome of the negotiations as substantial enough to enable them to keep their offers on the table, and forego (or minimize) their MFN exemptions.
- 5) If a WTO member government has not made any commitments in telecoms (either in the Schedules to the 1994 Marrakesh Agreement, or in the context of NGBT) and takes no such action by 30 April 1996, it has no obligations to liberalize basic telecommunications service. It retains the *benefit* of the MFN approach, but would also need to apply MFN to any subsequent liberalization measures it decides to take. If it wished to retain flexibility not to apply MFN, then such an MFN exemption would need to be registered by 30 April 1996.

Developments in international telecommunications (regardless of NGBT), with global alliances whose existence puts accounting rates in question in the long term, the introduction of competition in developed countries and an increasing number of developing countries, with consequent pressure on the present very high margins on international tariffs against steadily falling technology-based costs, all lead to the conclusion that the present revenues enjoyed by developing countries through the accounting rate system are under threat. Developing countries are likely to benefit from embracing the WTO principles of market opening and allowing foreign investment as a way of keeping up investment needed to bring their networks to a level allowing them to compete internationally and attract investment in other economic activities to speed their development.

PART IV – RELATIONSHIP OF THE ITU AND THE WTO

The Colloquium recognized the complementary roles of the WTO and ITU as regards trade agreements on telecommunications, and made the following suggestions. These suggestions fall into two categories: basic issues concerning the nature of the ITU's responsibilities, and operational issues concerning cooperation between the two organizations:

Basic Issues

In addition to its impact on national telecommunications regulators and policy makers described above, the WTO regime will have a substantive impact on ITU activities with regard to such matters as accounting rates and the trade related aspects of frequency spectrum policy. Ways need to be found for the two organizations to study such potential impacts together.

The discussion in the Colloquium made it clear that the issues being addressed in trade negotiations are inseparable from many complex and technical issues which have been pursued in great depth, and over many years, through the ITU. They include:

- interconnection arrangements (operational, technical and financial)
- arrangements for the provision of (and payment for) services by one carrier to another, including, of course, the traditional correspondent relationship between international carriers
- numbering
- technical standards
- radio-spectrum management

In supporting trade negotiations in telecommunications (and administering the resulting agreements), it is important for those negotiators to bear in mind that the ITU represents a network of treaty commitments and administrative practices which have contributed to the huge growth of telecommunications in recent dates. It will clearly make sense for the WTO Secretariat (and national delegations to the WTO) to make extensive use of the deep expertise on those and other relevant matters that exists within the ITU.

Equally, ITU members and the ITU Secretariat will need to monitor closely the trade impacts of work carried out in ITU Study Groups, given that in such a dynamic industry with a clear global dimension, only in exceptional cases will there be issues which are solely technical.

Operational Issues

The following suggestions for cooperative approaches can best be undertaken on an informal and practical basis.

- 1) As trade and telecommunications officials at the national level need to cooperate more closely with each other, information should be exchanged between the two organizations and the secretariats so as to assist each in better discharging their respective responsibilities. For example, officials from the ITU member states and from the ITU Secretariat may consider providing: a) specific information concerning such matters as national and international (respectively) spectrum management policies and processes; b) specific information on accounting rates; c) expert advice requested by WTO panels in connection with DSU proceedings, to the extent such advice could be provided consistent with the time limits of the DSU. For its part, the WTO may consider providing to the telecommunications community comparable information about its procedures and processes.
- 2) The two organizations should consider collaborating in organizing regional workshops to educate those in both the public and private sectors on pending GATS/NGBT issues.
- 3) The ITU's practice of extensive private sector participation in its work, particularly in its working groups, might usefully be extended to selected joint WTO/ITU activities.
- 4) In order to implement these suggestions, and others that undoubtedly will arise, and reflecting the commitment to cooperation in the Prefaces to this Report by Director General Ruggiero and Secretary General Tarjanne, it is suggested that the two secretariats consider establishing a high level, informal working committee to explore these matters.

PART V – CONCLUSIONS AND RECOMMENDATIONS

This Part summarizes some of the Colloquium's principal conclusions and recommendations. More detailed sets of specific conclusions are found throughout the report.

- 1) Telecommunications have irrevocably been drawn into the trade regime, specifically GATS, and must increasingly conform in practice at the international and national level with accepted trade practices within a multi-lateral framework:
 - This means that the hitherto "special" status of telecommunications in many of the ITU's member countries must be reviewed, and the bilateral aspects of international relationships in telecommunications adjusted to a multi-lateral framework.
 - At the national level, cooperation between trade representatives and policy makers on the one hand, and telecommunications policy makers and regulators, on the other, should be assessed and strengthened.

On the multilateral level, each country should give priority to reviewing its interest and assessing whether and how to associate with the WTO/GATS process.
- 2) Not all ITU members are members of the WTO. Those not participating in the WTO must keep themselves informed about the impact of the Marrakesh Agreement. The large body of countries already covered by GATS and the Telecommunications Annex, and especially the significant number who may make future commitments through the NGBT, will undoubtedly lead the legal and regulatory environment for the telecommunications industry into a new phase of development.
- 3) A transition thus is underway. The end point will be:
 - i) more open market access and greater competition; and
 - ii) far-reaching changes in current international telecommunications arrangements, such as accounting rates and correspondent relations. The question is, how to most effectively manage that transition?

- 4) Much will depend on the results of the NGBT negotiations, and an evaluation of the impact of the WTO on telecommunications must await that event. A successful NGBT conclusion will bring impetus for additional change to the rapid moves towards liberalization and open market entry already apparent worldwide.
- 5) For example, the concept of market reciprocity, reflecting the current bilateral basis for international telecommunication, is fundamentally inconsistent with a multilateral regime based on the Most Favored Nation principle. Moreover, affirmative action by a WTO member government is needed by 30 April 1996 if it wishes to exempt itself from the MFN principle for basic telecommunications. This is so even if the government is undertaking no market access or national treatment commitments, or undertaking no additional commitments in the NGBT about its internal regulatory processes.
- 6) Central to the NGBT is the negotiation of market access and national treatment commitments, hopefully with a minimal number of limitations on such commitments. Market access is the key, but once committed, it is also important to assure that such market access in fact is available by appropriate safeguards in the national telecom regulatory regime. Such safeguards are conveyed by additional commitments by each WTO member concerning its regulatory regime. Market access without such regulatory safeguards may be ineffective in practice.
- 7) National trade and telecommunications officials will be faced, in the context of NGBT, with difficult choices in deciding whether and what types of additional commitments to make concerning their internal regulatory regimes for telecommunications so as to convince other countries that their market access commitments will in fact permit foreign entities to compete successfully. In making such commitments, national officials, in consultation with telecommunications regulators, must carefully balance the need for enough

specificity in those commitments to make sure market access will work, and their business decision makers reassured, with the need to preserve national discretion and flexibility in dealing with such complex public policy matters as universal service, licensing, competition policy, frequency spectrum management, and interconnection policy.

- 8) National government and telecommunications regulators will also need to review the suitability of national legislation to allow for implementation of GATS commitments concerning issues such as competition policy, market access, fairness of regulatory procedures and "transparency" spectrum management and technical standards.
- 9) The exercise of regulatory judgement by national officials may be subject to review in the new dispute settlement procedures established in the WTO regime. While the WTO is not a world regulator, and is most unlikely to become one, if governments voluntarily schedule market access or additional regulatory commitments, the DSU may address whether the member governments' actual regulatory practices are consistent with their scheduled commitments.
- 10) Developing countries should be aware that the impact of the Marrakesh Agreement on telecommunications will be felt in all countries. For a developing country, fuller participation may well bring about:
 - greater influx of private investment;
 - upgraded regulatory structures;
 - additional communications services;
 - better access to long-distance carriers.
- 11) Foreign investment in telecommunications infrastructures will be significantly promoted if investors and suppliers know that a country's regulatory practices are anchored in a multi-lateral setting and subject to an international dispute settlement process.

- 12) Developing countries should carefully weigh the advantages to them of participating in the NGBT process, and the potential costs (i.e. more limited access to private capital of not participating). Even if they decide not to participate, they need to clearly understand the processes of the WTO regime so that they are in a position to take timely decisions. They need to look at the next round under WTO likely to start before the year 2000, at the implications for those who sign up to the NGBT outcome or who will be bound by the existing GATS and Telecommunications Annex.
- 13) Recognizing that the goals and activities of the WTO and ITU are converging, there should be a close and continuing contact at the national and international levels between trade and telecommunications officials.
- 14) The WTO and the ITU secretariats should explore ways of informally cooperating, in view of the need for trade and telecommunications officials to keep closely in touch. They should consider organizing regional information workshops once the NGBT is concluded, and give wide and prompt circulation to this report.

* * *

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Attachment 1
(to Chairman's Report)

FIFTH REGULATORY COLLOQUIUM
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Attachment 2

STRUCTURE OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) AND HOW IT PERTAINS TO TELECOMMUNICATIONS²

Introduction

The General Agreement on Trade in Services (GATS) forms an integral part of the *Final Act of the Uruguay Round and the Marrakech Agreement Establishing the World Trade Organization (WTO)*. The latter, signed at a Ministerial Meeting in Marrakech on April 15, 1994, is sometimes simply referred to as the *Marrakech Agreement*.

In addition to the *GATS*, the *Marrakech Agreement* includes a *General Agreement on Tariffs and Trade (GATT 1994)* based on the text of the original GATT of 1947, an *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, rules and procedures for settling disputes, a trade policy review mechanism, plurilateral trade agreements on trade in civil aircraft, government procurement, and on dairy and bovine meat products, a number of ministerial decisions and declarations and, of course, the agreement to establish the World Trade Organization (WTO).

The *GATS* itself is divided into three parts:

- 1) the framework consisting of 29 articles which lay out the scope of the *General Agreement on Trade in Services*, the general obligations and disciplines to be observed, and how specific commitments are to be negotiated and inscribed in the *Agreement*. The framework also contains a number of institutional provisions pertaining to consultation, disputes settlement and enforcement, the creation of a Council for Trade in Services, technical cooperation and relations with other international organizations;

² The Chairman is indebted to Mr. Peter Stern for preparing the text of Attachment 2 and to Ms. Lee Tuthill for preparing the table of provisions found at the end of Attachment 2.

- 2) eight annexes clarifying exemptions and provisions on four specific sectors including telecommunications;
- 3) 115 schedules of country commitments on specific services and services sectors.

General Obligations and Disciplines

It is important to understand the difference between general obligations and disciplines on the one hand and specific commitments on the other. Every country that signs the *Marrakech Agreement* is committed to observing and implementing most of the provisions under Part II (General Obligations and Disciplines) of the GATS for *all* services, however, it is committed to observing and implementing the provisions of Part III (specific Commitments) only for the specific services and service sectors that it has listed in its schedules and only within the limits that it has described for each of these services and service sectors in these schedules. A few provisions in Part II pertain only to specific commitments (see attached table). It is important also to understand that countries must sign on to the whole *Marrakech Agreement*. They cannot accede to only parts of it, say only *GATT 1994*, the *GATS*, or the *TRIPS*.

The most important provisions under the General Obligations and Disciplines with respect to telecommunications are the following:

Article II	Most-Favoured Nation Treatment (MFN)
Article III	Transparency
Article VI	Domestic Regulation
Article VIII	Monopolies and Exclusive Service Providers
Article IX	Business Practices

Of these Most-Favoured Nation (MFN) is probably the most important of the whole *Agreement*. It is the cornerstone of a multi-lateral trade agreement without which the WTO would be little more than an overseer of bilateral and perhaps regional trade deals.

In simple terms, the MFN principle in a trade agreement means that if one country agrees to give another country certain treatment with respect to trade, it has to give treatment "no less favourable" to all other countries that have signed the trade agreement (Signatories of the *Marrakech Agreement* are referred to as Members).

Therefore, if a Member country extends some additional market opening privileges to services and service providers from another country (which does not even have to be a signatory to the *Agreement*), it would have to extend those privileges to services and service providers from all other countries which have signed the *Agreement* "immediately and unconditionally". The market opening measures are extended automatically to all other members. It is for this reason that MFN is considered to be the cornerstone of multilateralism; however, this important principle of trade can also be considered disadvantageous to a Member country that has a market which is more open than others or which is considering removing further barriers to trade. If, for example, it removes some barriers as a result of negotiations with some other country, it will have to remove them equally for all Members without necessarily getting anything in return from them. Therefore, a Member wanting to advance negotiations on a bilateral basis, and not wanting to extend the advantages gained in these bilateral negotiations to all other countries without getting anything in return from them, will take an exemption on MFN which will allow it to extend certain privileges to one or several countries without having to extend them to all Members. There are exceptions to this for countries that belong to some regional trade areas such as NAFTA or the European Union. There is a time limit on such exemptions in the *Marrakech Agreement* which, in general, had to be made at the time of signing of the *Agreement*.

Another principle, transparency, requires governments to make public their laws, rules and regulations affecting trade in services, so that service suppliers can know the rules under which they can do business. It is a key element in promoting the stability and predictability of the trading system.

Other general obligations of the GATS which are of particular relevance to telecommunications are the following: Article VI on domestic regulations sets out some rules of fair play for regulations not directly addressed by commitments entered in the schedules. Article VIII on monopolies and exclusive service providers and Articles IX on restrictive business practices are relevant because of the prevalence of monopolies and exclusive service providers in this sector and, where competition has in terms of the four modes of delivery of a service which are recognized in the GATS, namely, (ref. Article I):

- a) from the territory of one member into the territory of any other Member (cross-border supply);
- b) in the territory of one Member to the service consumer of any other Member (consumption abroad);
- c) by a service supplier of one Member, through commercial presence in the territory of any other Member (commercial presence);
- d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (presence of natural persons).

Additional commitments are listed in the fourth column. These may be with respect to interconnection, anti-competitive safeguards, licensing, type approval, numbering and other procedures, pricing related measures, rights of way, etc.

It is important to distinguish between MFN exemptions and limitations. The latter are stated in the schedules and are used to qualify conditions of market access and national treatment. The former allows a Member country to extend certain privileges to one or several countries without having to extend them to all members.

At the conclusion of the Uruguay Round (signing of the *Marrakech Agreement*), about 60 countries made commitments on telecommunications services. X countries signed the *Agreement*; therefore, Y countries did not make any specific commitment on telecommunications services; they are nevertheless committed to respecting the general obligations and disciplines contained in Part II

of the *GATS* and the Annexes (i.e. MFN, transparency, domestic regulation, etc.). Most of the specific commitments cover only value-added or enhanced telecommunications services, since basic telecommunications are the subject to extended negotiations which are to continue to April 1996. Other countries may, of course, sign on to the *Agreement* at any time.

When they do, they become bound by the general obligations and by the commitments they make with respect to specific services and services sectors.

Annex on Telecommunications

The Annex on Telecommunications was developed to elaborate on certain aspects of the *GATS* pertaining to this sector and, in particular, the dual role of telecommunications in trade, namely, as a mode of delivery for other services and for goods and as a tradable service in its own right. All services (and not only telecommunications services) listed in a Member's schedule of commitments benefit from the rules which are elaborated in the Annex on Telecommunications. There are also annexes elaborating air transport, maritime transport and financial services; however, the most elaborate by far is the Annex on Telecommunications.

This Annex is composed of seven sections, but its core obligations are contained in Section 5 on access to and use of public telecommunications. This section requires each Member to ensure that all service suppliers seeking to take advantage of scheduled commitments are accorded access to and use of public basic telecommunications networks and services on reasonable and non-discriminatory terms and conditions. Members incur these obligations whether or not they have liberalized the supply of basic telecommunications and whether or not they have scheduled commitments on basic telecommunications. However, the beneficiaries of the disciplines in the Annex will be firms that supply services included in a Member's schedule of commitments and will not only be value-added and competing basic telecommunications suppliers, but any service suppliers (e.g., banking or computer services firms) benefiting from commitments made by the country concerned.

These annex obligations strike a fragile balance between the needs of users for fair terms of access and the needs of the regulators and public telecommunications operators to maintain a system that works and that meets universal service objectives. The formulation of the Telecommunications Annex borrowed and benefited greatly from foundations established by the ITU and other organizations. It is also, in spirit, been introduced, the frequent presence of telecommunications service providers with a dominant market share and the potential to take unfair advantage of their position.

Specific Commitments and Schedules

As started, specific commitments apply only to the services and service sectors listed in each country's schedule. These contain each Member's commitments on market access, national treatment, and possible additional commitments. In the schedules, Members may grant full market access and national treatment or they may enter any limitations, conditions, and qualifications that they will maintain on these two provisions. The schedules may also indicate the time frame for implementation of a Country's commitments. Whether full or limited access is granted, signatories may not take measures that reduce the level of access inscribed in their schedules.

Limitations to market access and national treatment serve also as a starting point for subsequent negotiations towards greater liberalization. Market access limitations (Article XVI) are defined primarily in terms of quantitative restrictions, but also include some other forms of limitations such as caps on foreign equity participation or restrictions or requirements regarding the type of legal entity permitted to supply the service. National treatment (Article XVII) is defined as treatment of foreign services or service suppliers that is no less favourable than that granted to domestic services or suppliers.

There may be limitations on nationality or residency of directors, foreign ownership restrictions, or preferences given to domestic suppliers in the allotment of frequencies. Also there are additional commitments (Article XVIII) which create an open-ended possibil

ity to negotiate and agree on commitments on measures affecting trade in services, that are not expressly captured by market access and national treatment.

A country schedule has four columns. The first allows the country to list the sector or sub-sector in which it is making a specific commitment. In the second, it lists the limitations that it wishes to impose on market access and similarly in the third column, the limitation pertaining to national treatment. These limitations are stated based on the long recognized need for competition safeguards in an environment where monopoly and dominant providers could easily upset the competitive balance by restricting access and use.

The attached table shows for some key provisions of the framework and the Annex on Telecommunications those which are general obligations which apply across-the-board to all measures affecting trade in services and those which apply only where specific commitments have been undertaken in the schedules.

Table to Attachment 2

TELECOMMUNICATIONS: SELECTED OBLIGATIONS OF THE GATS AND THEIR SCOPE OF APPLICATIONS

GATS Provision	Obligations	Application	
		Across the board	Only to scheduled sectors
<i>Article II Most-Favoured-Nation Treatment</i>	With respect to any measure covered by the GATS, a Member <i>cannot discriminate amongst other Members</i> or treat other Members less favourably than a non-member country, except with respect to a measure that a Member has included in a list of m.f.n. exemptions that was permitted by the Annex on Article II. Exemptions to be filed at the end of the Uruguay Round (or, in the case of basic telecommunications, at the conclusion of the extended negotiations).	✓	
<i>Article III Transparency</i>	Members must <i>publish promptly all relevant measures</i> of general application which pertain to or affect the operation of the GATS, and any relevant international agreements to which they are a signatory. Where publication is not practicable, such information must be made otherwise publicly available. The term "measures of general application" is intended to exclude measures that concern, e.g. a ruling on decision involving an individual service supplier.	✓	
	In what is known as a <i>notification requirement</i> , Members must inform the Council of Trade in Services of new measures (laws, regulations or administrative guidelines) and changes to existing measures which significantly affect trade.		✓
	Members must <i>respond promptly to all requests by other Members for information</i> on any measures of general application and international agreements. They must also <i>establish enquiry points</i> to provide other Members with such information, and the information subject to the notification requirement, within two years from the entry into force of the GATS. Developing countries are given flexibility on this time-limit.	✓	

GATS Provision	Obligations	Application	
		Across the board	Only to scheduled sectors
Article VI Domestic Regulation	Members must ensure that all <i>measures of general application</i> affecting trade in services are <i>administered in a reasonable, objective and impartial manner</i> .		✓
	Members must maintain or establish judicial, arbitral or administrative tribunals or procedures which <i>provide service suppliers with a prompt, objective and impartial review of administrative decisions</i> , and where justified appropriate remedies.	✓	
	If any type of <i>authorization</i> is required to supply a service, Members' relevant <i>authorities must inform an applicant of their decision within a reasonable period of time</i> . They also must, upon request of an applicant, promptly provide information on the status of the application		✓
	<i>A work programme to ensure that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade</i> , must be undertaken by the Council for Trade in Services. The Council must develop any disciplines which it determines to be necessary and which aim to ensure that such requirements are based on objective and transparent criteria and not more burdensome than necessary and that licensing procedures are not in themselves a restriction on the supply of the service.		
	Pending the entry into force of any such disciplines, <i>Members must not institute any new practices that cause such measures to be applied in a manner inconsistent with the aims of the work programmed</i> . In determining conformity with this obligation, account shall be taken of international standards of relevant international organizations.		✓

GATS Provision	Obligations	Application	
		Across the board	Only to scheduled sectors
Article VIII Monopolies and Exclusive Service Suppliers	Members must ensure that any of its monopoly or exclusive suppliers do not, in the supply of the monopoly or exclusively provided service, act in a manner inconsistent with obligations relating to m.f.n. treatment and specific commitments.	✓ (m.f.n.)	✓
	Where a monopoly or exclusive supplier competes, even if through an affiliated company, in the supply of a service outside the scope of its monopoly or exclusive rights, Members must ensure that the supplier does not abuse its monopoly or exclusive position to act in a manner inconsistent with scheduled commitments on the services concerned.		✓
	To oversee compliance with the above obligations, at the request of any Member the Council for Trade in Services may request information from the relevant Member concerning the operations of such monopoly or exclusive supplier. (Exclusive service suppliers are defined as cases in which Members, formally or in effect, a) authorize or establish a small number of service suppliers and b) substantially prevent competition among suppliers.)		
	After the entry into force of the GATS, if a Member grants monopoly rights for the supply of a service covered by its commitments, that Member must notify the Council for Trade in Services and undertake the Article XXI procedures for the modification of schedules which require a member to negotiate compensatory adjustments.		✓
Article IX Business Practices	Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.	✓	

GATS Provision	Obligations	Application	
		Across the board	Only to scheduled sectors
<i>Article IX Business Practices (cont.)</i>	At the request of any other Member, <i>Members must enter into consultations with a view to eliminating such practices.</i> It must supply the requesting member with publicly available non-confidential information of relevance to the matter in question and provide other information available, subject to its domestic law and the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality.		
<i>Article XVI Market Access</i>	<p>With respect to market access through all modes of supply, each Member shall <i>accord services and service suppliers of any other Member treatment no less favourable than that specified in its Schedule.</i></p> <p>The measures which a Member shall not maintain or adopt unless otherwise specified in its Schedule, are:</p> <ul style="list-style-type: none"> a) limitations on the <i>number of service suppliers;</i> b) limitations on the total <i>value of service transactions or assets;</i> c) limitations on the total <i>number of service operations or on the total quantity of service output;</i> d) limitations on the total <i>number of persons that may be employed</i> in a service sector or by a service supplier; e) measures which restrict or require <i>specific types of legal entity</i> or joint venture; and f) limitations on the participation of <i>foreign capital.</i> 		✓
<i>Article XVII National Treatment</i>	Subject to any limitations set out in its schedule of commitments, each Member shall <i>accord to services and service suppliers of any other Member treatment no less favourable than that it accords to its own like services and service suppliers,</i> in respect of all measures affecting the supply of services.		✓

GATS Provision	Obligations	Application	
		Across the board	Only to scheduled sectors
<i>Article XVII National Treatment (cont.)</i>	A Member may meet the national treatment standard by according either formally identical treatment or formally different treatment, so long as such treatment is not less favourable than that which it accords to its own like services and service suppliers.		
<i>SPECIFIC COMMITMENTS Article XVIII Additional Commitments</i>	<i>Members may negotiate commitments on measures affecting trade in services that are not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.</i>		✓
<i>Annex on Telecommunications Transparency</i>	<i>Members must ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available.</i>	✓	
<i>Access to and use of Public Telecommunications Transport Networks and Services</i>	<i>The listed examples of relevant information are: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.</i>		
	<i>Member must ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions.</i> <i>The term "non-discriminatory" is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances".</i>		✓ (any commitments, not only those on telecom)

Attachment 3
FIFTH REGULATORY COLLOQUIUM
SUGGESTED DISCUSSION OUTLINE

PART I INTRODUCTION

1. How does the evolving world trade regime impact telecommunications? Why does it matter?

- What is the relationship between the WTO process and the broader direction of national telecom policy?
- Is the more global orientation of the industry making an effective multilateral regime of greater importance?
- Are any fundamental challenges posed to the telecom regulator by deeming international telecommunications services to be trade?

2. WTO's Unique Features

- a) What is the language of trade? Its processes and procedures?
For example:
 - Most Favoured Nation (MFN) principle.
 - Schedules of commitments on market access and national treatment.
- b) Provisions in the Marrakech Agreement concerning developing countries.
- c) What is Scope of the Dispute Settlement Undertaking (DSU)?
 - How Does it Work?
 - What Is the Likely Practical Impact?
 - On telecom regulators?
 - On the private sector?

3. Various Players

- Who are the various players, public and private? In developed and developing countries? how are monopolies and former monopolies affected? how are new entrants affected?

4. Broad Effects on Telecom Industry

- What will be the effect of the WTO regime on the telecom industry as a whole; taking account of such current trends as increasing globalization, commercial alliances and foreign investment?

PART II WTO'S PRACTICAL IMPACT ON WHAT REGULATORS DO AND HOW THEY DO IT

A. 1. Some fundamental questions

- How might the world trade regime unfold with respect to telecommunications? What strategies are available to regulators in this context?
- What benefits flow to those participating in a multilateral agreement? Where does that leave those who do not join?
- How can WTO help the telecom regulator achieve its telecom policy goals: modernizing the PTT, reforming the regulatory regime, encouraging foreign investment and infrastructure growth?

2. What are "Baseline" Obligations?

- a) What are the "baseline obligations" of WTO member states flowing from GATS and the Telecommunications Annex, if a WTO member has not or will not schedule a commitment on basic telecom?

3. What Further Obligations Exist Today?

- Flowing from:
 - GATS provisions that only have a significant impact when member states have made specific scheduling commitments.
 - The existing commitments on telecoms.

4. NGBT: What benefits may be expected from liberalizing basic telecoms in the NGBT context? Do all players “gain”? If not, who might lose and why?

5. What kinds of obligations might arise from the NGBT process?

- Market access.
- National treatment.
- “Additional commitments”: e.g. on interconnection policies or regulatory processes.

B. WTO Impact on National Telecommunication Regimes: How Does a Regulator Behave in the Light of the WTO Commitments? Transparency

1. What is the Transparency Obligation?

- a) i) Baseline obligations of GATS & Annex.
- ii) Additional obligations of scheduled commitments and NGBT process.
- b) What specific measures must be taken?
 - access to information;
 - right to comment;
 - other measures?

2. What other institutional/procedural requirements?

- For example, separation of regulatory and operational functions?

C. WTO Impact on National Telecommunications Regulatory Regimes: How Does a Regulator Behave in the Light of the WTO Commitments? Substantive Issues

1. Market Access Commitments

- a) *Operation*: How must a regulator treat foreign carriers seeking market access to operate in its territory with respect to:
- Reciprocity provisions for market access?
 - Transparency of regulatory process?
 - Pricing policies?
 - How does this differ from what regulators have done in the past?
- b) *Investment*: How must a regulator treat foreign investors in its domestic communications industry?
- For example, if a PTT is privatized, does GATS require foreign ownership in the privatized entity?
 - How do any restrictions on foreign investment in communications providers relate to market access?

2. Licensing

- a) How does WTO regime *change* what regulators license?
- Based on general provisions of the GATS?
 - Based on existing Schedules?
 - Based on new commitments that may emerge from the NGBT negotiations?
 - Applicable to what types of services?
- b) Is there a requirement or presumption in favour of open entry in issuing licenses? (For example, can a regulator turn down a third entrant (domestic or foreign) if it considers that the market could be satisfied by the first two licensees?)
- c) In what other ways is a regulator's discretion in issuing licenses affected?

3. Interconnection, and accounting rates/termination charges

- a) How might the WTO regime change regulator's decisions concerning interconnection?
- What is the baseline GATS and Annex obligation?
 - What further additional obligations may arise?
 - What will be the impact of NGBT negotiations on existing accounting rate arrangements?

4. Competition Safeguards

- How does WTO regime apply to national competition policy?
- For example, what measures should be taken to prevent dominant carriers or monopoly service providers from abusing its market power?

5. Frequency Spectrum

6. Other issues

PART III IMPACT ON DEVELOPING WORLD

- Is the WTO foray into telecommunications only a developed country game?
- What are the benefits to the developing world?
- Are there special considerations that can be identified to help developing countries evaluate where their interests lie in the new WTO regime?
- Does the WTO allow a phased introduction for the less developed and how might this be achieved?

PART IV WHO/ITU INTERFACE

- While this Discussion Outline has not directly focused on the WTO/ITU interface, questions inevitably arise concerning such matters as:
 - To what extent will tariff issues currently considered by the ITU's study groups become trade issues subject to WTO?
 - Are spectrum allocation processes at the supra-national level also likely to become trade access issues?
 - Similarly, as standards-setting can be used to develop or perpetuate trading blocs, will the ITU need to alter its standardization procedures? If so, in what way?
 - A modern key feature of the ITU is the extensive participation of the private sector; would such type of participation be of value to the WTO in its work on trade/telecom matters?

EXECUTIVE SUMMARY

INTRODUCTION

This Briefing Report was written in preparation for the Regulatory Colloquium held at ITU Headquarters in December 1995, the fifth in a series begun in 1993. The report deals with the implications for national telecommunications policy and regulation arising from the "Uruguay Round" of global negotiations that took place between 1986 and 1994 within the framework of the General Agreement on Tariffs and Trade (GATT). The Uruguay Round was concluded by the "Marrakesh Agreement"³ signed in April 1994. This Agreement established the General Agreement on Trade in Services (GATS), which applies to trade in services including telecommunication services. It also established the World Trade Organisation (WTO), the institutional framework within which the GATS operates. Active negotiations have been taking place since May 1994 within the GATS framework, aimed at further multilateral liberalization of trade in telecommunication services.

These developments have added a new and potentially powerful influence to the forces shaping national telecommunications policy⁴. How significant their effects on the telecommunications industry will be, what form these effects will take, and how soon they will be felt, remains highly uncertain. Nevertheless, it is not too soon to tackle these questions. On the contrary, it is important that decision-makers in the telecommunications field should understand what is involved *before* the outstanding issues have been settled. Such understanding is probably a precondition for success in the current negotiations, because success is likely to depend not only on

³ Formally known as the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994.

⁴ And also telecommunications policies adopted at the regional, supra-national level by the European Union.

achieving widespread agreement to extensive changes in the telecommunications policies of many countries, but also on gaining similar acceptance of major changes in the way that many national telecommunications regulators carry out their work.

The report therefore:

- Reviews the new institutions and processes for global trade negotiations concerning telecommunications that have emerged within the WTO framework since the beginning of 1994.
- Describes the provisions of the GATS and related documents, and addresses their implications for telecommunications policy and regulation.
- Identifies and discusses the key themes and issues currently being addressed by those members of the WTO who are participating in the work of the Negotiating Group on Basic Telecommunications (NGBT).
- Considers what the implications for telecommunications policy may be, depending in part on the outcome of current negotiations.

As with the Briefing Reports prepared for the four previous Colloquia, this report ("Briefing Report No. 5") represents the results of an independent study carried out to provide input for the discussions at the Regulatory Colloquium. It reflects the authors' views and not necessarily ITU policies or the conclusions of the Colloquium itself, which are to be found in the Chairman's report, a separate document. Nor does it necessarily reflect the views of the WTO or of individual national delegations to the WTO, the GATS, and the NGBT.

The authors would like to emphasise that they are not, and do not claim to be, specialists on the subject of international trade institutions, negotiations and agreements. They are telecommunications specialists, seeking to explain and interpret for the telecommunications community, in language intelligible to that community, the significance of the agreements already reached within the GATT framework, and the continuing negotiations taking place under WTO auspices.

The preparation of the Briefing Report, and the associated research, were funded by the Friedrich Ebert Stiftung, whose support is gratefully acknowledged.

Objectives of the Report

The aim of the Briefing Report is to explain and assess the WTO trade-negotiation process and its implications for telecommunications from the point of view of readers who are engaged in policy-making and/or management in the telecommunications industry (and most especially those concerned with regulatory affairs), but who are not familiar with the WTO process.

Structure of the Report

The Briefing Report, like this Executive Summary, is divided into four parts:

- **Part I** provides the essential background: an outline of the ideas, principles, and major organisational features built into the multilateral trade agreements negotiated through the GATT machinery and more recently the WTO.
- **Part II** discusses the WTO machinery and the results of the Uruguay Round (the Marrakesh Agreement) in the field of telecommunications: specifically the applicable provisions of the General Agreement on Trade in Services (GATS), the Telecommunications Annex to the GATS, and the Schedules of specific commitments. It also covers the Dispute Settlement Understanding (DSU) and the establishment of the Negotiating Group on Basic Telecommunications (NGBT).
- **Part III** concerns the themes and issues that are currently subjects of negotiation in the NGBT.
- **Part IV** concerns the practical implications for telecommunication policies and regulation in individual WTO member countries.

PART I BACKGROUND: THE URUGUAY ROUND, THE MARRAKESH AGREEMENT, THE WTO, AND THEIR SIGNIFICANCE FOR TELECOMMUNICATIONS

Expanding the scope of international trade negotiations to include services in general, and telecommunication services in particular, is a relatively new idea. In retrospect, however, its adoption now seems inevitable. The economies of advanced industrial countries have become more and more strongly oriented towards the production, distribution and export of information, and many of them have become large net importers of manufactured goods. It was therefore natural that the governments of these countries sought to link any further opening of their own markets for goods to some degree of progress in opening up markets for services on a worldwide basis. In practice, moreover, internationally-traded services are almost all concerned with information-handling: they either *are* telecommunications services, or, as in the case of banking or publishing, are very heavy users of telecommunications.

The Marrakesh Agreement that resulted from the Uruguay Round included four key elements dealing with telecommunications:

- **The General Agreement on Trade in Services (GATS)**, which lays down a broad framework of ground-rules concerning trade in services, together with institutional arrangements for administering these rules and negotiating additional market-opening measures subsequently. In the GATS there is a mixture of “general obligations and disciplines”, which apply whether or not a member⁵ of the WTO has made commitments to market-opening measures concerning specific telecommunications services, and other provisions that only apply where such specific commitments have been “scheduled” (i.e. are included in a particular member’s Schedule).

⁵ Members of the WTO are governments, but not necessarily governments of independent states. It is also important to note that in practice the European Commission represents, and negotiates in the WTO, for the 15 member states of the European Union.

- **“Trade in services”**, as defined by the GATS [Art. 1], comprises four distinct “modes”⁶ of trade:
 - Mode 1, “*cross border supply*”, consists of the supply of a service from the territory of member Country A into the territory of member Country B. For example, a service supplier of Country A provides service inside Country B, though A’s service supplier is not “present” inside Country B, i.e. maintains no subsidiary, sales office, or sales staff in Country B. Providing an on-line database service to Country B via the pre-existing public telephone network is an example of a Mode 1 activity.
 - Mode 2, “*consumption abroad*”, consists of the supply of a service by a service supplier of member Country A to a “service consumer” of member Country B who is present in Country A. Here, as in Mode 1, A’s service supplier is not “present” in Country B. This Mode covers (for example) the case where a manufacturing company of Country B uses the pre-existing telephone network in Country A.
 - Mode 3, “*commercial presence*”, consists of the supply of service by a service supplier of member Country A to service consumers in the territory of member Country B, where A’s service supplier is deemed to be “commercially present” in Country B. This is the case if the service supplier owns a company, representative office or branch in Country B, or participates in a partnership or joint venture based there. If a telephone company from Country A operates services or builds a network within Country B, that is a Mode 2 activity.

⁶ In all four modes, the following definitions apply:

- “‘Supply of a service’ includes the production, distribution, marketing, sale and delivery of a service” [Art. XXVIII, § (b)].
- “‘Service consumer’ means any person [natural or juridical] that receives or uses a service” [Art. XXVIII, § (i), (j)].

- Mode 4, "*presence of natural persons*", consists of the supply of service by a service supplier of member Country A to service consumers in the territory of member Country B by way of the presence in Country B of people who are themselves service suppliers of Country A, or employees of A's service supplier organisations.
- **The Telecommunications Annex of the GATS**, which addresses in more detail several issues affecting market entry in telecommunications (for example, regulation, licensing and certain aspects of network interconnection) in general terms.
- **The Schedules of specific commitments** provided by members. These commitments mainly concerned value-added services such as electronic mail or database access services, but some members also made commitments on basic services. In principle the Schedule of a member formally records its commitments concerning "*market access*"⁷ and "*national treatment*"⁸ for foreign providers of services, applying pro-competitive principles of the GATS and the Telecommunications Annex to specific markets for telecommunications services⁹. Such a commitment may in practice represent a change in the direction of greater openness of national markets to international competition, or it may simply codify the "*status quo*". In practice, the contents of the Schedules on telecommunications entered into as part of the Marrakesh Agreement represented in most (but not all) cases little or

⁷ "*Market access*" refers to a member's optional commitments to open any of its market sectors to the supply of service (in any of the four "*modes*" of supply) by service suppliers of other members.

⁸ "*National treatment*" refers to a member's optional commitment to treat service suppliers and services of any other Member no less favourably than it treats its "*own like*" services and service suppliers.

⁹ Technically, the entries in the Schedule (other than the "*additional commitments*" discussed in Part III of this summary) state the *limitations* on market access and national treatment that remain in force once the member's commitments have been implemented.

no advance in the direction of opening up national markets for telecommunications services to international competition. However, this is not to say that the process of negotiating those Schedules had no value. On the contrary, the Schedules have practical value in three distinct ways:

- They codify many unilateral steps which members had already taken to open their national markets.
 - For the services included in any particular national Schedule, they represent a "standstill" agreement: their effect is to commit members not to change national laws, regulations or other "governmental measures" in such a way as to make national markets *less* open to international competition than shown in the Schedule.
 - For the services that were "scheduled", the Schedules record the remaining obstacles to open international competition arising from national laws, regulations and other "governmental measures" (in WTO parlance, "limitations" on market access and national treatment), thereby defining a clear, well-documented "baseline" for future negotiation of further steps in opening markets to international competition. In most countries, these limitations have so far remained very extensive.
- **An agreement to continue negotiations on telecommunications**, initially through a newly-established WTO forum, the Negotiating Group on Basic Telecommunications (NGBT), with the objective of achieving substantial progress towards open markets.

It would be a mistake to assume that the GATS Telecommunications Annex and its Schedules are unimportant, just because they have not instantly produced a major acceleration of movement towards more open telecommunications markets. In the nature of most international agreements, especially those dealing (as this one does) with economic and social matters of far-reaching importance, their full effect is felt only over an extended period of time. In the

case of the GATS and the Telecommunications Annex, there are at least three and possibly four mechanisms through which major movement towards open markets could occur in the mid-to-long term (possibly as early as 1997):

- The implementation by WTO members of the “general obligations and disciplines” they have already agreed to (discussed in Part II of this summary), for example, those concerning the “transparency” of regulatory rules.
- The NGBT negotiations, through which some WTO members (possibly including those accounting for a very large share of world telecommunications traffic) may make (through new Schedules) further commitments to open their national markets to competition.
- The GATS process of “Progressive Liberalisation”, which provides for further “rounds” of negotiations in future. From the beginning of the year 2000 at the latest, the member countries of the GATS are pledged to enter “successive rounds of negotiations” aiming to achieve “a progressively higher level of liberalisation”. Before each such round, the GATS Council will assess the progress of liberalisation up to that time and will, on that basis, set out guidelines and procedures for the forthcoming “round”.
- Possibly, future efforts by WTO members to change the behaviour of other members in order to reduce obstacles to competition, by challenging certain of their policies, laws or practices via the WTO’s dispute settlement processes as being contrary to the general obligations that WTO members have accepted by agreeing to the GATS and the Telecommunications Annex and/or the member’s specific commitments. Whether or not the “general obligations and disciplines” are too general and too hedged about with limitations to be used in this way, and whether WTO members will wish to do so in any case, remains to be seen.

PART II THE WTO REGIME FOR TRADE IN TELECOMMUNICATIONS SERVICES

By the "WTO regime", as it affects telecommunications, we mean the set of rules and institutional arrangements that a country which has ratified the Marrakesh Agreement thereby accepts concerning:

- The access of its individuals and companies to the markets for telecommunication services in other member countries.
- The rights of individuals and companies from other member countries to operate in *its* territory (or to provide telecommunications services to or from its territory), in specified markets and under specified conditions.

These obligations and institutional arrangements are complex in detail. However, the most essential points can be stated fairly concisely. We do so under two headings:

- The "general obligations and disciplines" to which all WTO members agree.
- The "specific commitments" made by particular members concerning particular services.

"General Obligations and Disciplines"

The key obligations undertaken by WTO members in relation to telecommunications include:

- Most-Favoured Nation (MFN) treatment.
- Transparency.

These obligations are discussed below. In addition, other important (though very general) obligations require governments to ensure that their regulatory policies and practices do not "constitute unnecessary barriers to trade", and that the telecommunication monopolies under their jurisdiction (if any) do not "act in a manner inconsistent with that Member's ... obligations ... and specific commitments".

Some of the general obligations and disciplines apply unconditionally; others apply only to those combinations of members and services where specific commitments have been made. (This is explained in detail in the full Briefing Report.)

Most-Favoured Nation (MFN) Treatment

The GATS (Article II) specifies¹⁰ that the government of each WTO member must accord to service suppliers based in another member treatment (in terms of effective access to compete in the national market) "no less favourable" than the treatment it accords to "any other country". This provision, long-established in international agreements concerning trade in goods, would have far-reaching implications if applied to telecommunications. However, its application in the case of telecommunications in a WTO context is suspended until the work of the NGBT reaches a successful conclusion or the NGBT reports that it has failed to succeed¹¹.

Today, in the virtual absence of MFN in telecommunications, governments or telecommunications regulators, even in most of the countries where a pro-competitive telecommunication policy is in force and multiple competitors participate in the market, allow companies from other countries to participate only on a restricted basis¹². Whether or not companies from other countries are allowed to participate in the market in such country (Country A) typically depends on the policy being followed by the government and/or by telecommunications regulators in their home country (Country B). For example, the national government or regulator in Country A may be concerned with whether monopoly market power in Country B is being abused, or international accounting

¹⁰ A more technical and detailed discussion of the GATS obligations is provided, with extensive references to the text of the Agreement, in Chapter 3.

¹¹ *Annex on Negotiations on Basic Telecommunications (Legal Texts, p. 364)*.

¹² New Zealand is a notable exception.

rates¹³ are being kept at an excessive level. It may also be concerned with whether companies from Country A are afforded opportunities to participate in Country B's market to a degree comparable to the rights of companies from Country B to participate in Country A. As these examples illustrate, international trade-policy relationships in telecommunications today are usually bilateral, and predominantly managed on a basis of reciprocity.

The GATS obligation on members to accord MFN treatment to all other members will (to the extent that it is carried into practice) replace the current system of predominantly reciprocal bilateral arrangements with a system of multilateral agreements embodying the MFN principle. It is inherent in the MFN principle that such agreements will sometimes require Country A to extend to carriers from Country B rights which are *not* yet made available reciprocally in Country B to carriers from Country A. MFN will thus tend to enhance and accelerate the process of opening up national markets to freer trade in telecommunication services than would likely be achieved through a patchwork¹⁴ of bilateral reciprocal agreements.

However, just how far MFN will apply in practice depends on two important limitations on the application of MFN to telecommunications:

- The application of MFN is suspended until the intended completion of the NGBT negotiations in April 1996.
- WTO members can avail themselves of opportunities to take "exemptions" limiting how far MFN will apply to them, using a procedure which is explained in the full Briefing Report.

¹³ Accounting rates are the rates of payment used when a telecommunications carrier compensates a carrier in another country for carrying traffic to a destination in that country. The accounting rate system is described in Briefing Report No. 3 in this series, Michael Tyler, *Global Mobile Personal Communications Systems* (Geneva, ITU, March 1995), pp. 51ff.

¹⁴ The notable exception being the emergence in recent years of common telecommunication legislation within the European Union.

Transparency

The GATS requires each member to publish all of its laws and rules that affect trade in services. The Telecommunications Annex specifies that transparency, as defined, requires publication of further information about ,among other things:

- Tariff and other terms and conditions of access to and use of a member's "public telecommunications transport networks and services" (PTTNS).
- Technical interface requirements.
- Requirements for notification, registration, and licensing and other forms of recognition or approval needed before foreign service suppliers can do business lawfully in any particular member country.

Transparency is obviously a vital requirement for effective opening of markets. At the least, publication of all the laws, rules, regulations, and other conditions affecting entry into a market lightens the burden that potential entrants must carry when considering entry. At the worst, absence of transparency can enable a country's policy-makers, regulators, and others wilfully to delay entry of foreign services or service suppliers or to permit entry only on discriminatory terms that put foreign services or service suppliers at a competitive disadvantage vis a vis domestic services and service suppliers.

It seems likely that the general transparency obligation of the GATS will have considerable effect on the practices of telecommunications regulators in WTO member countries, and thus in spreading information about members' laws, rules, regulations and the like. Regulators in countries where regulatory rules are already published need not drastically alter their behaviour in order to conform to Article III of the GATS. By contrast, very few countries ordinarily publish, or require their PTO to publish, such matters as "tariff and other terms and conditions" for use of the PSTN; and consequently, conforming to the transparency obligation of the Annex will require significant or even radical modification of their existing regulatory regimes. It remains to be seen whether and how soon members will be willing and able to make such modifications.

“Specific Commitments”

The GATS provides for members to make, via national Schedules to the Marrakesh Agreement, commitments on specific services, as described at the beginning of this summary. The Schedules can subsequently be amended in such a way as to further reduce obstacles to international competition for the services already included, and/or to include additional services. Agreement to do this is now being pursued through the NGBT negotiations.

A key specific commitment concerns “national treatment”.

National Treatment

National treatment requires each WTO member to treat services and service suppliers of other members no less favourably than its “own”, but only in market segments that a member has “inscribed in its schedule, and subject to any conditions and qualifications set out therein” [Art. XVII, § 1]. It only applies where a member has specifically agreed, in its Schedule, to apply it to a particular service. Unlike MFN, which is in principle an obligation necessarily undertaken by every member of the GATS (subject to exemptions referred to above), the national treatment obligation does not apply comprehensively.

Although the national treatment obligation can thus be avoided by not “scheduling” it, the work of the NGBT clearly aims to induce as many participants as possible to agree in practice to unqualified acceptance of the obligation. Otherwise international trade and international competition in telecommunication services would be severely hampered. Accordingly, if the NGBT’s efforts arrive at a successful culmination, the participants in the resulting agreement will probably have moved considerably toward accepting the widespread application of the principle of national treatment.

Moreover, whatever the outcome of the NGBT process, movement toward widespread application of the principle of national treatment will eventually take place if the GATS procedure for “progressive liberalisation” (discussed in Chapter 3 of the Report)

operates as expected. However, as progressive liberalisation rounds need not begin until the year 2000, widespread achievement of national treatment may be considerably delayed, and with it the fuller opening of members' markets for telecommunication services.

Institutional Arrangements

The key elements of WTO institutional arrangement (other than the Secretariat), so far as they affect trade in telecommunication services, are:

- **The NGBT**, at present the main arena for negotiations concerning trade in telecommunication services. The NGBT is open to participation by all WTO member countries. Its "full participants" (as distinct from observer participants) are committed to actively negotiating market-opening measures.
- **The Council for Trade in Services**, to which the Marrakesh Agreement delegates authority to administer the GATS. More particularly the Council is charged by the GATS with a duty to establish "disciplines" to ensure that national regulations concerning licensing of other members' service providers, as well as other similar requirements, are objective, transparent, and neither unduly burdensome nor restrictive of cross-border competition in a manner inconsistent with the GATS principles.
- **The Dispute Settlement Body (DSB)**, has power to settle disputes by interpreting agreements "in accordance with customary rules of interpretation of public international law". The first step toward resolving a dispute that has been notified to the DSB is for the members to enter into consultation¹⁵. If the consultation and settlement process has not resolved the issue the DSB may, after investigation and

¹⁵ Each member undertakes, by virtue of membership in the WTO, "to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another member" [*Understanding*, Art. 4; *Legal Texts*, pp. 407-408].

determination of facts by a "panel" appointed by the DSB, authorize the aggrieved member to suspend the application to the offending member of "concessions or other obligations" previously entered into by the aggrieved member. Alternatively the offending member may offer compensation to the complaining member on terms that are mutually acceptable, though compensation is voluntary.

Of these three elements of the WTO machinery, the NGBT is, at least for the moment, the most important in terms of its likelihood of making a major difference to telecommunications policy in the Participants of the NGBT during the next five years.

PART III THEMES AND ISSUES BEING NEGOTIATED IN THE NGBT

The NGBT's working methods are described in detail in Chapter 7 of the report. The centrepiece of the NGBT process is the negotiation, by "full participants", of "offers" of market-opening measures, which will eventually become commitments if the NGBT negotiation is successful. Offers are put forward by governments of NGBT Participants or, in the case of the 15 countries of the European Union, by the European Commission. All offers follow, with minor variations, a standard format, shown in Exhibits ES1 (which represents the blank format) and ES2 (which reproduces the NGBT's "Model Schedule", and explains the kinds of content appropriate to the various parts of the blank format). The three columns in the table deal with:

- **Limitations on market access:** What are the barriers (such as monopoly rights of an incumbent telecommunication operator, restrictive licensing¹⁶, or foreign-ownership restrictions)

¹⁶ For example, a duopoly for fixed service and/or cellular.

to participation by foreign companies in the national market¹⁷? In what ways, if any, is the member in question offering to reduce these barriers? The general provisions of the GATS require that the level of market access indicated in the offer must be made available to service suppliers of all members on an MFN basis unless the offering member has been exempted from the MFN obligation. Some members were so exempted at the time GATS came into force; in addition, the WTO may exceptionally waive MFN obligations either by consensus of the members or, failing that, by agreement of three-fourths of the members¹⁸.

- **National treatment:** In a broadly similar way, commitments on "national treatment" concern how and to what extent national law and regulations and other "governmental measures" will ensure that foreign service suppliers are treated in the same way as domestic service suppliers. Here again, MFN applies unless a specific "exemption" is granted.
- **Additional commitments:** These concern regulatory policies (for example, as regards interconnection of competitive entrants' networks to the PSTN) and regulatory processes needed to make competitive "market access" and non-discriminatory "national treatment" a reality in practice.

As of late November 1995, 28 of the 31 full participants in the NGBT (including the European Commission, representing 15 countries) have made offers, covering a total of 42 countries, almost all of which are major markets for telecommunications services. A further 28 countries are participating as observers. Observer countries are being encouraged, by the most active participants and by the WTO Secretariat, to become full participants; and full participants who have not yet made offers are being encouraged to do so.

¹⁷ We use the general phrase "national market", for brevity, to encompass all of the four different "modes of supply" defined in the GATS, and explained on pp. ES5-ES6.

¹⁸ *Annex on Article II Exemptions (Legal Texts, p. 352)*; WTO Agreement, Art. IX, § 3, 4 (*Legal Texts, pp. 11-12*).

STANDARD FORMAT USED IN THE SCHEDULES FOR NATIONAL COMMITMENTS**COUNTRY X**

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

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
1.C. Telecommunication services			
a) Voice telephone services* (CPC 7521)	1) XXXX 2) XXXX 3) XXXX 4) XXXX	1) XXXX 2) XXXX 3) XXXX 4) XXXX	
b) Packet-switched data transmission services* (CPC 7523)	1) XXXX 2) XXXX 3) XXXX 4) XXXX	1) XXXX 2) XXXX 3) XXXX 4) XXXX	
c) Voice mail* (CPC 7523)	1) XXXX 2) XXXX 3) XXXX 4) XXXX	1) XXXX 2) XXXX 3) XXXX 4) XXXX	

* PHB note: Illustrative examples from the full list of categories used.

NGBT DRAFT MODEL SCHEDULE OF COMMITMENTS ON BASIC TELECOMMUNICATIONS

COUNTRY X

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

	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
<p>2.C. TELECOMMUNICATION SERVICES (UNCPC) (a) through (g), and (o)</p> <p>Local/long distance/international service:</p> <ul style="list-style-type: none"> - wire-based - radio-based - on a resale basis - facilities-based - for public use - for non-public use. 	<p><i>Types of measures to be listed:</i></p> <p>1) e.g., Quantitative limitations/needs tests applied to the number of service suppliers (incl. monopolies, duopolies, etc.), total value of transactions, total number of operations or quantity of output.</p> <p>2) Example not given.</p> <p>3) e.g., Quantitative limitations/needs tests applied to the number of service suppliers (incl. monopolies, duopolies, etc.), total value of transactions, total number of operations or quantity of output. Quantitative limitation on the number of available frequencies to be allotted to foreign service suppliers. Restrictions or requirements regarding the type of legal entity permitted to supply the services (also, a requirement of certain forms of commercial presence could rule out cross-border supply). Limits on foreign equity participation.</p> <p>4) e.g., Limitations/needs test applied to the total number of natural persons that may be employed.</p>	<p><i>Types of measures to be listed:</i></p> <p>1) e.g., Preferences given to domestic suppliers or restrictions imposed on foreign suppliers in the allotment of frequencies.</p> <p>2) Example not given.</p> <p>3) e.g., Preferences given to domestic suppliers or restrictions imposed on foreign suppliers in the allotment of frequencies.</p> <p>Limitations on the nationality or residency of directors or board members. Restrictions on foreign ownership of land, or foreign ownership of facilities.</p> <p>4) Example not given.</p>	<p><i>Types of measures relevant to possible undertakings:</i></p> <p>(Commitments on measures not subject to scheduling under Articles XVI and XVII, including but not limited to those regarding qualifications, standards, or licensing requirements or licensing procedures and other domestic regulations that are otherwise consistent with Article VI and the Annex on Telecommunications.)</p> <p>e.g., Separation of regulatory and operational functions.</p> <p>Safeguards against anti-competitive practices (i.e., of monopolies and dominant providers). Procedures or requirements related to:</p> <ul style="list-style-type: none"> - licensing - allotment of radio frequencies - numbering and identification codes - type approval - interconnection. <p>Pricing related measures, e.g. cost-oriented pricing.</p> <p>Participation in the standards-setting process, including review and comment prior to adoption of new standards.</p> <p>Rights of way for the construction of infrastructure.</p>

As participants in the NGBT negotiate about the contents of the "offers" that will become "schedules" of binding commitments if and when the NGBT reaches agreement, the most important substantive issues they are haggling over are:

- **Authorisation of service suppliers from one member to operate in another.** Will AT&T, for instance, be entitled to operate in Spain in its own right, and not necessarily through an alliance, unless it freely chooses that approach to market entry? Will NTT of Japan be entitled to build and operate a long-distance telephone network in Canada?
- **Foreign ownership restrictions.** Does a member limit the extent to which foreigners may own shares in any telecommunications company operating within its territory?
- **Regulatory policies.** An agreement that **in principle** allows carriers from Country B to operate in Country A, but gives them no rights to interconnect to the PSTN at reasonable prices¹⁹ (or at all), will be of limited value in opening up the marketplace to competition. Thus a degree of agreement on regulatory policies on interconnection and a number of other critical issues discussed in this report is an essential component of an overall NGBT agreement.
- **Regulatory processes.** An agreement that **in principle** grants to companies from Country A rights to operate (for example) a cellular service in Country B, subject to availability of frequencies, will be of little value in opening up the marketplace to competition if the process of assigning the limited available frequencies is so discretionary and obscure (lacking in "transparency") that a company from Country A

¹⁹ The meaning of "reasonable prices" is of course subject to a great deal of debate, and is by now the subject of a large body of experience and analytical expertise: the field is reviewed in Briefing Report No. 4 in this series, Michael Tyler et al, *Interconnection: Regulatory Issues* (Geneva, ITU, June 1995), chaps. 3-8.

can in practice be denied access to frequencies (or delayed for years) "behind closed doors", and thus effectively excluded from Country B's market. Consequently, characteristics of national regulatory processes inevitably form part of the agenda of issues that the NGBT must negotiate.

Members that already have fairly "transparent" regulatory decision-making processes²⁰ (Australia, Canada and the US, for example) may or may not be willing to accept a far-reaching agreement for the opening of national markets without significant changes in the national regulatory policies and/or processes of other countries. The indications so far are that they will insist on such changes: both Canada and the US have submitted documents spelling out the kinds of changes they are seeking.

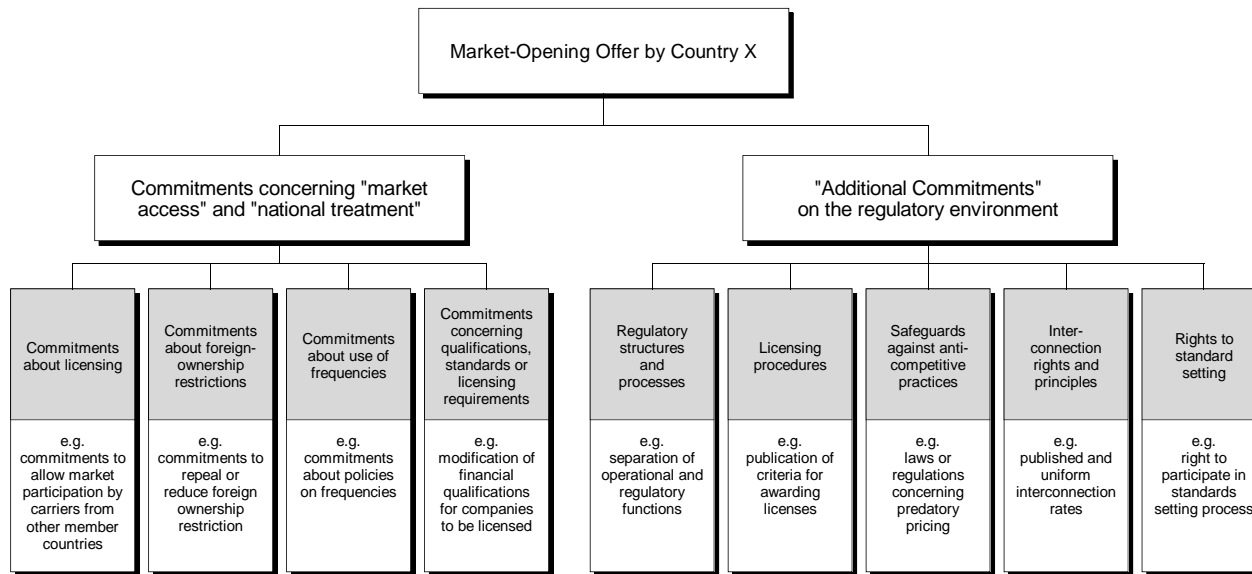
Exhibit ES3 characterises the kinds of issues addressed in national offers submitted during the NGBT process. It is intentionally a "common sense" classification chosen because the authors believe its categories will be meaningful to readers in the telecommunications community; its categories do not correspond exactly to those of the "Model Schedule".

Each national offer carries a qualifying statement similar to the following:

This offer is conditional. Country A reserves the right to modify, extend or reduce this offer at any time prior to the conclusion of the negotiations on basic telecommunications, depending, inter alia, on the number of offers by other parties; on the degree to which these offers are equivalent and mutually acceptable; and on the extent and significance of any exemptions from the MFN obligation sought by other parties.

²⁰ Regulatory regimes of various countries are analyzed and categorized in "Briefing Report No. 1": Michael Tyler, *Options for Regulatory Processes and Procedures in Telecommunications* (Geneva, ITU, May 1993).

CLASSIFICATION OF SUBSTANTIVE ISSUES ADDRESSED BY OFFERS MADE THROUGH THE NGBT PROCESS



EXH-FIG3.DRW

The process of negotiation is a subtle one, including not only interaction between Participants in the NGBT but also between each Participant's delegation and the various arms of government that determine telecommunications policy in its home country. As Exhibit ES4 illustrates, the periodic deadlines for presentations of versions of the national "offers" alternate with formal meetings of the NGBT, informal NGBT meetings at the level of senior officials, and periods set aside for bilateral negotiations about the contents of the offers. As this process goes on, offers are slowly and incrementally "improved". Broadly, the process works like this:

- Initially, the offers made by most Participants represent little or no change of position relative to the current situation concerning access to their national markets.
- A small number of Participants make offers which *do* represent substantial changes from today's situation, either by changing existing ground-rules for foreign entry to the national market, and/or by changing existing ground-rules that *do* allow such participation but only as they apply to companies in *some* other countries (as in the UK and the US today), so as to make the same opportunities available to companies from all WTO members on an MFN basis. (Offers currently on the table from the EU and the US, if converted into binding commitments, would bring about changes of both kinds.)
- Bargaining then takes place between these delegations (the authors of this Briefing Report call them the "leading bidders") and the others, in which the leading bidders seek to persuade the others to improve their offers. This bargaining takes place to a limited extent through statements at formal NGBT meetings but mainly through bilateral consultations. The leading bidders' principal bargaining cards are:
 - the threat that their offers might be withdrawn, partially or wholly, if the others do not improve their offers;

- the prospect that the leading bidders' offers might be further "improved" (i.e. modified to take them still further in the direction of open markets) if the others improve their offers;
- the argument that, quite apart from the bargaining process, the benefits which have accrued to countries that already have competitive telecommunications markets, strongly point to a self-interest on the part of the other countries in moving towards competitive market structures.
- At the next stage (which has now begun), if all goes well the others improve their offers, and additional full participants make offers for the first time, so that the process gradually moves towards a successful outcome:
 - the leading bidders keep their offers on the table and may even improve them;
 - the others gradually improve their offers; some even become leading bidders themselves and apply pressure on the remaining laggards.
- Alternatively, if the process goes badly, the others fail to improve their offers sufficiently to maintain the momentum of the process, and few additional countries among the full participants make offers. The negotiating process then winds down: the leading bidders narrow their offers or begin to withdraw them. As a result no agreement is reached at all in NGBT, or (more likely) a form of nominal agreement is reached which involves little substantive commitment by members to open their national markets.

So far, the NGBT negotiations are at the stage where delegations are being urged to improve their offers. Some delegations have in fact indicated that they will consider doing so: the European Commission, for example, has indicated that it might be possible to negotiate away all or some of its remaining restrictions on foreign ownership.

Exhibit ES.4

WORK SCHEDULE OF THE NEGOTIATING GROUP ON BASIC TELECOMMUNICATIONS (NGBT)

	1994												1995												1996											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Major WTO Events																																				
Questionnaire Process																																				
NGBT Meetings					▲ 6 May	▲ 11 July			▲ 24-26 Oct	▲ 12-13 Dec		▲ 27-28 Feb	▲ 26 April				▲ 12-13 July	▲ 20 Sept	▲ 6 Oct	▲ 17 Nov	▲ 15 Dec															
Periods Set Aside for Bilateral Negotiations																																				
Offer Process/ Finalisation of Schedules																																				
NGBT Goals																																				

Key:

<u>Formal NGBT meetings</u>	<u>Informal meetings of senior officials for NGBT</u>	<u>Periods set aside for bilateral talks in connection with NGBT meetings</u>
▲ (Date) Past or scheduled meetings	△ (Date)	■
▲ Anticipated meetings not yet scheduled		

EXH-FIG4.DRW

A critical question concerns whether major developing countries will make offers that open their markets to a significant degree. If an NGBT agreement has the effect of opening major growth markets in these countries to competition, this may be viewed very favourably by the developed industrial countries. If it does not do so, an NGBT agreement would still have some attractions for the advanced countries, but it is questionable whether they will be willing to let its requirements for MFN and national treatment prevent them from using rights to participate in the national markets (as they do today) as a bargaining counter in bilateral negotiations over issues such as reducing excessively high accounting rates or obtaining reciprocal market access.

From the point of view of the developing countries themselves, the critical question is whether there is enough benefit to *them* from joining the group of countries that have made substantial offers to open their markets to competition. One point of view argues that the resulting flow of investment, technology and management skills into their national telecommunications markets is highly desirable, and may even represent a critical precondition for their *other* industries to achieve or retain international competitiveness. Another view emphasises the "infant industry" argument: that national carriers in developing countries need time to adapt to "best practice" before being exposed to the full blast of international competition. Still other commentators argue that competitive entry is incompatible with maintaining the universal service obligations of the established ("incumbent") PTO, or at least that developing countries need an extended transition period in order to put effective arrangements in place to safeguard universal service provisions²¹.

One possibility for a compromise might perhaps be found along the following lines. If governments of some developing countries feel that their national carriers are not ready for international

²¹ The authors of this report do *not* accept this last view. As we indicated in Briefing Report No. 2, there are many ways to maintain and pay for universal service obligations other than prohibiting competitive entry. Michael Tyler, *Universal Service and Innovation: Fostering Linked Goals through Regulatory Policy* (Geneva, ITU, February 1994).

competition, they have the option of making a market-opening offer in NGBT that retains, for a fixed number of years, a limitation on the maximum allowable degree of foreign ownership but otherwise allows entry of new carriers that are partly foreign-owned. This would stimulate a flow of capital and know-how into the country concerned while, through joint ventures, strengthening the locally-based carrier or carriers rather than challenging them head-on. Concerns about universal service can be met by imposing on all carriers either obligations to provide service to rural or disadvantaged areas, or to contribute to the costs of doing so.

PART IV CONSEQUENCES AND OPPORTUNITIES OF THE WTO REGIME FOR TELECOMMUNICATIONS POLICY AND REGULATION

There is little to indicate that telecommunications policy in any country has yet changed in any major way since the Marrakesh Agreement was signed in April 1994. Nevertheless, it is likely that such changes will take place:

- As a result of general obligations arising from the GATS
or
- As a result of a future agreement arrived at through NGBT, or possibly subsequent negotiations held in fulfilment of the general GATS commitment to "progressive liberalisation".

We consider both of these aspects in turn.

Implications of existing GATS provisions

It would appear that the GATS and the Telecommunications Annex do already have significant, though limited, implications for three types of interested parties, specifically:

- **National governments and regulators**, though not yet subject to the kind of detailed WTO treaty obligations concerning independence of the regulator, transparency of regulatory decision-making and equal treatment of local and foreign

companies that may emerge from the NGBT negotiations²², do already have *general* transparency obligations under the provisions of the GATS. These general obligations imply limits on the extent to which national regulators can act in an arbitrary manner, or take decisions based on undisclosed criteria, in matters such as licensing or assignment of radio frequencies, in a manner that disadvantages foreign providers of telecommunications services.

- **Telecommunications operators**, while not directly subject to any obligations arising from the Marrakesh Agreement, may find themselves subject to decisions made by their national governments as they fulfil their own obligations under the Agreement. If, for example, their government has made commitments to unrestricted market access and national treatment for electronic-mail services in its Schedule (as 37 members did) they are likely in due course to find that (if national regulatory rules do not require this already) their national regulator will require them to interconnect foreign-owned electronic-mail networks to their PTTNS on the same terms that they provide to operators of locally-based electronic mail services.

The general nature of the language of the GATS and the Telecommunications Annex makes it difficult to be certain exactly what the practical implications of their obligations will be in the day-to-day decision-making of national telecommunications regulators and ultimately the operations of telecommunications operators. To some extent, this will depend on what interpretations of these provisions are generally accepted: the questions involved are discussed in detail in Chapters 3 and 4. It is also possible that the “General Obligations” will be clarified by the settlement of disputes, rather as case law clarifies the meaning of national legislation drafted in broad and even ambiguous terms. For example, it is possible that at

²² Although national governments and regulators in EU member states do already have such obligations, under EU legislation, in respect of the regulation of EU-based companies.

some stage a government, acting on behalf of a potential telecommunication competitor frustrated in attempting to enter the telecommunications market in another member country, may initiate a complaint under the Dispute Settlement Understanding, and that the outcome may set a clarifying precedent.

Implications of the possible outcomes of negotiations in the NGBT

The outcome of the NGBT negotiations still lies in the future (April 1996 at the earliest). It is still possible that the NGBT will produce no agreement, or an agreement that represents no large advance relative to today. In the authors' view, however, there is a reasonably high probability that such a stalemate will not occur.

If the NGBT produces agreement including a substantial degree of opening of markets in at least a major sub-category of member states (i.e. all or most of the "full participants" in the NGBT), it is likely to have some or all of the following implications for national governments and telecommunications regulators, and for telecommunications carriers, in these member states.

Possible implications for national governments and telecommunications regulators

The government and regulator of a given NGBT Participant (Country A say) may, depending on the NGBT outcome, become committed to:

- Permitting service suppliers from other WTO members to provide services to and from Country A, reselling existing infrastructure capacity such as leased lines and marketing their services in Country B²³, *without* limiting this freedom of action to suppliers based in other countries that have a similarly

²³ In GATS terms, this is an example of supply modes 3 or 4 or both.

open market (i.e., the right to operate in this way would be made available on an MFN rather than a strictly reciprocal basis)²⁴.

- Permitting telecommunications operators based in other WTO members to build network infrastructure in Country A and compete in the national market using that infrastructure, again on an MFN basis.
- Abolishing or greatly reducing limitations on foreign ownership of telecommunication operators building and operating network infrastructure in Country A.
- Ensuring that “governmental measures” in Country A concerning network interconnection give telecommunications operators from other countries (or which are wholly or partly foreign-owned) rights to interconnect with the existing public network in Country A, which rights:
 - do not exist only on paper but are sufficient to ensure practical value,
 - are equivalent to those made available to domestic telecommunications operators.
- Ensuring that where rights to use scarce resources such as radio frequencies (or privileges such as powers to carry out construction work using public rights-of-way) are granted by government, they are granted in such a way as not to discriminate against foreign operators or against domestic operators which are wholly or partly foreign-owned.
- Adjusting regulatory institutions or processes to meet agreed standards of transparency: for example, such standards might concern publication of the process for making decisions about licensing or the criteria for the decisions; publication of filings by the interested parties; or rights of appeal²⁵.

²⁴ Of course, NGBT Participants are unlikely to agree to this unless, in their judgement, enough other countries also agree to similar market-opening commitments on the basis of MFN and national treatment.

²⁵ See op. cit. fn. 18 above.

**Possible implications for telecommunications
service suppliers**

If all or some of the provisions listed above do emerge in an eventual NGBT agreement, the implications for telecommunications operators would include all or some of the following in all or some of the NGBT full-participant countries, depending on the content of their Schedules of commitments:

- The automatic right to provide cross-border services such as calling-card "country direct" or resale carrier services (often referred to generically as "light carrier" services) in NGBT countries other than their home country.
- The right to establish new network infrastructure and to become a facilities-based carrier in certain member countries.
- The right to interconnect either light-carrier service or (if Schedules permit) new facilities-based services to the PTTNS on terms that are reasonable and equal to those available to domestic telecommunications operators.
- The corresponding necessity of facing competition in their home country, if their home country has made major market-opening commitments in its NGBT Schedule, from entrants from *any* WTO member country, since these entrants will, under the MFN principle, enjoy the rights listed in the previous paragraphs.

Of course, all this is speculative. It may not happen. Nevertheless, the possibilities listed above all have a substantial foundation in offers already made in the course of the NGBT negotiation, although these offers may still be withdrawn or scaled down if the Participants making the offers consider that substantial progress towards open markets has not emerged.

