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## Conference Paper

# The bilateral approach to reducing international mobile roaming charges and the application of the GATS

19th Biennial Conference of the International Telecommunications Society (ITS): "Moving Forward with Future Technologies: Opening a Platform for All", Bangkok, Thailand, 18th-21th November 2012

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The 19th ITS Biennial Conference 2012

**“Moving Forward with Future Technologies:  
Opening a Platform for All”**

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**The Bilateral Approach to reducing International Mobile Roaming  
Charges and the Application of the GATS**

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**The Bilateral Approach to reducing International Mobile Roaming Charges and the Application of the GATS**

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**Key words:** *regulation, international trade, telecommunications, international roaming, WTO, GATS.*

*Although it is generally acknowledged that international mobile roaming charges are too high, a successful formula for achieving reduction has so far proven elusive. Direct regulatory intervention to lower prices may be required. The success of such an approach depends upon the ability of countries to implement mutual reductions in the inter-operator tariffs (“IOTs”) that mobile operators charge each other for originating and terminating roaming calls. In the absence of a multilateral response, some countries have entered into bilateral arrangements to reduce IOTs. Questions have been raised about the compatibility of such bilateral arrangements with countries’ obligations under the General Agreement on Trade in Services (“the GATS”), which generally forbids member countries from maintaining preferential arrangements with other countries that affect international trade in services. I identify and discuss two issues that arise about the application of the GATS to these bilateral arrangements: (1) How do the provisions of the GATS requiring parties to treat each others’ service suppliers “no less favourably” than they treat service suppliers of other countries and to offer non-discriminatory terms for network access apply to such bilateral arrangements? (2) Given that the GATS applies only to official “measures” affecting international trade in services, how does the GATS apply to bilateral arrangements between mobile operators which are ostensibly private in character but which are concluded at the instigation of officials? As I note in the conclusion, these issues have yet to be resolved.*

## **I. INTRODUCTION**

There is a widespread conviction that international mobile roaming charges (“IMRCs”) are too high and that the principal cause is the high level of the inter-operator tariffs (“IOTs”) that mobile operators charge each other for roaming on their networks.<sup>1</sup> IOTs, it is generally

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\* Partner, Arnold & Porter (UK) LLP, Solicitors, 25 Old Broad Street, London EC2N 1HQ, UK. Tel +44 20 7786 6155; Fax +44 20 7786 6299. Michael.Ryan@aporter.com. © Michael H Ryan 2012

<sup>1</sup> OECD, Working Party on Communication Infrastructures and Services Policy, “International Mobile Roaming Charging in the OECD Area”, DSTI/ICCP/CISP(2009)8/FINAL, 21 December 2009. Available at <http://www.oecd.org/internet/broadbandandtelecom/44381810.pdf>. IMRCs are described as “excessive” (pp. 6 and 27) and the responsibility is placed on “the high level of wholesale roaming rates which mobile operators charge each other for network use” (p. 1).

Footnote continued on next page

agreed, are significantly in excess of cost.<sup>2</sup> A key part of the solution to the problem of high IMRCs is therefore to reduce IOTs. Because of the nature of telecommunications markets and the specific characteristics of roaming services, this would be best accomplished through multilateral negotiations. While the issue has frequently been discussed in international fora such as the International Telecommunication Union (“ITU”) and the World Trade Organization (“WTO”), no consensus on a multilateral solution has emerged. In the absence of an agreed way forward, some countries have concluded bilateral arrangements. Questions have been raised about the compatibility of such bilateral arrangements with countries’ obligations under the General Agreement on Trade in Services (“the GATS”),<sup>3</sup> which generally forbids member countries from maintaining preferential arrangements with other countries that affect international trade in services.

In this paper, I describe some of the bilateral arrangements for the reduction of IOTs that are in place (Section II) and the relevant provisions of the GATS (Section III). I then identify and discuss two issues that arise about the application of the GATS to bilateral arrangements: the application to bilateral arrangements of WTO Members’ MFN commitment to treat each others’ service suppliers “no less favourably” than they treat service suppliers of other countries and their commitment under the Annex on Telecommunications to offer foreign mobile operators non-discriminatory terms for network access; and the application of the GATS to what I will term *quasi*-official measures (Section IV) before making some concluding remarks (Section V).

## II. BILATERAL ARRANGEMENTS FOR REDUCTION OF IMRCs

International mobile roaming services (“IMRS”) allow a customer of a mobile operator in Country A (the customer’s “home country”) to make (and receive) calls and texts when in Country B (the visited or “host country”). The customer pays his home operator an IMRC and the mobile operator in the host country on whose network the message originates (or is completed) will bill the mobile operator in the customer’s home country an IOT for its service. One way for a mobile operator in Country A to secure reductions in the IOT it pays to its counterparts in Country B is to offer mobile operators in that country reciprocal reductions in the wholesale charges they must pay when their customers roam on its network in Country A. But the mobile operator in Country A may not be incented to negotiate such arrangements because it will typically benefit from the high IOTs it itself levies for providing service to roamers from Country B. It is customers, not mobile operators, who are ultimately disadvantaged by this price structure because it is they who ultimately bear the inflated retail charges that are the product of high wholesale charges.

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For a follow-up discussion of the relevant policy issues, see A. Díaz-Pinés, “International Mobile Roaming Services: Analysis and Policy Recommendations,” OED, Digital Economy Papers, No. 168, 29 March 2010.

<sup>2</sup> *Ibid.*, pp. 6 and 14.

<sup>3</sup> The GATS, [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm), is one of a series of related agreements on international trade concluded in Marrakesh on 15 April 1994 as part of the Agreement establishing the World Trade Organization (“WTO”). In 1997, a protocol to the GATS (the “Fourth Protocol,” which embodies the “Basic Telecommunications Agreement” or “BTA”) (text at [http://www.wto.org/english/tratop\\_e/serv\\_e/4prote\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/4prote_e.htm)) entered into force under which 69 other countries (now more than 80) agreed to extend the application of GATS to their basic telecommunications services.

Various attempts have been made through the ITU, WTO and regional organisations to lower IMRCs<sup>4</sup> (e.g., by promoting transparency, introducing measures to address “bill shock”, encouraging competition and new pricing plans<sup>5</sup>), but the limited impact such initiatives have had suggests that some form of direct regulatory action to reduce IOTs may be required. Reciprocity seems to be fundamental to the success of any such action. In the absence of an effective multilateral strategy for implementing reciprocal reductions in IOTs, some countries have concluded bilateral arrangements to reduce IOTs. However, the GATS, which establishes the legal framework governing international trade in services, generally forbids member countries from maintaining preferential arrangements with other countries affecting trade in services. The most-favoured-nation (“MFN”) principle which underpins the GATS generally requires that the benefit of any trade concession offered by Country A to Country B must be extended to other WTO Members (Countries X, Y and Z). That requirement can be interpreted to mean that, if Countries A and B have agreed to reduce IOTs payable by each other’s mobile operators, they are required to offer the same reduced prices to mobile operators from Countries X, Y and Z -- even if those countries do not commit to reducing their own IOTs.

This presents a potential problem: Because the attractiveness of international arrangements for reductions in IOTs is so dependent on reciprocity, enforcement of a requirement that non-parties can claim the benefit of a bilateral arrangement could cause the existing arrangements to unravel and dampen the interest in expansion of such arrangements.

In the EU, intra-EU wholesale and retail roaming rates have been reduced by the EU Roaming Regulation.<sup>6</sup> (Calls to and from locations outside the EU are not covered.) Wholesale charges for Community-wide roaming calls, SMS messages, and “regulated data roaming services” (i.e., data roaming services other than SMS messaging) are capped.<sup>7</sup> Controls are also imposed on retail pricing. But the EU model is a precedent of limited utility for two reasons. First, within the EU, the necessary reciprocity was easily achieved because there are common institutions that could mandate reductions in IOTs by all member states (in this case, the Commission, Parliament and Council). Second, as noted below, intra-EU trade is not subject to the MFN commitment imposed by the GATS.

As mentioned, a few arrangements have been put in place that are aimed at reciprocal reductions in IOTs and IMRCs. These include arrangements between Singapore, Malaysia and Brunei Darussalam. The idea of a mutual lowering of IOTs was first discussed in talks

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<sup>4</sup> See, for example, ITU, Study Group 3, Recommendation ITU-T D.98: Charging in International Mobile Roaming Service”, September 2012; WTO, Council for Trade in Services, “Communication from Australia, Norway and the United States, Proposal for a workshop on international mobile roaming and the applicability of the GATS,” February 2011, S/C/W/335; OECD, “Recommendation of the Council on International Mobile Roaming Services” (C2012)7, Paris 2012; Asia Pacific Telecommunity, International Mobile Working Group, “Working Group Report”, 15 May 2012.

<sup>5</sup> See the documents cited in the preceding footnote and, for a general review, D. Ypsilanti, “International Mobile Roaming Services: A Review of Best Practice Policies”, ITU, GSR 2012 Discussion Paper, September 2012.

<sup>6</sup> Regulation (EC) No. 717/2007 on roaming on public mobile communications networks within the Community, OJ L 171, 29.6.2007, p. 32, as am. by Regulation (EC) No. 544/2009, OJ L 167, 29 June 2009, p. 12, and Regulation (EC) No. 531/2012, OJ L 172, 30 June 2012, p. 10.

<sup>7</sup> Roaming Regulation, Articles 3, 4a and 6a(4).

held by Singapore, Malaysia and Thailand in August 2009.<sup>8</sup> Singapore and Malaysia proceeded to implement the concept in April 2011. As a consequence, in Singapore, for example, incoming and outgoing voice calls with Malaysia are now cheaper by 30% and SMSs by 50%.<sup>9</sup> Similar arrangements have since been implemented between Singapore and Brunei Darussalam and between Malaysia and Brunei Darussalam.<sup>10</sup> The idea of broadening these arrangements to include additional south-east Asian countries was endorsed by a Joint Ministerial Statement of the 11<sup>th</sup> ASEAN Telecommunications and IT Ministers Meeting in Myanmar on 9 December 2011.<sup>11</sup>

The bilateral approach to reducing IOTs has been adopted by other countries. Russian and Finnish telecom ministers and representatives of some of the principal Russian and Finnish telecom operators concluded a memorandum of understanding at Helsinki on 15-16 March 2011 in which it was agreed that the level of wholesale roaming rates between Russian and Finnish operators was too high and that operators should continue bilateral negotiations with each other with the objective of agreeing new tariffs, informing regulators of the results.<sup>12</sup> (Note that the rate reductions, though introduced at the instigation of officials, were the embodied in industry agreements. Whether such arrangements are the product of official action or not is a significant issue for the discussion which follows.)

Russian and Polish mobile operators have also agreed reciprocal reductions in roaming rates following a similar meeting involving officials of the two countries and representatives of the operators a few weeks later.<sup>13</sup>

There have also been discussions between Australia and New Zealand concerning the possibility of implementation of their own reciprocal reduction in IOTs. This initiative has been delayed -- reportedly because of concern that any reciprocal reduction in wholesale rates agreed would have to be extended to other countries.<sup>14</sup> The relevant Australian and New Zealand authorities launched a market investigation instead. The results of that investigation

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<sup>8</sup> "Thailand, S'pore and Malaysia agree on cheap roaming charges," *The Nation/Business*, 3 August 2009; [http://www.nationmultimedia.com/2009/08/03/business/business\\_30108911.php](http://www.nationmultimedia.com/2009/08/03/business/business_30108911.php).

<sup>9</sup> Singapore, Malaysia to reduce mobile roaming rates from May 1," *Channelnewsasia.com*, 20 April 2011; <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1123888/1.html>; "Singapore and Malaysia reduce mobile roaming rates", *Infocomm Snapshots*, 27 April 2011; <http://www.ida.gov.sg/insg/post/Singapore-and-Malaysia-reduce-mobile-roaming-rates.aspx>

<sup>10</sup> See Joint Ministerial Statement of the 11<sup>th</sup> ASEAN Telecommunications and IT Ministers Meeting and its Related Meeting with External Parties, Myanmar, 9 December 2011, para. 10; <http://www.aseansec.org/25751.htm>

<sup>11</sup> *Ibid.*, para. 9.

<sup>12</sup> The MoU is available at [www.lvm.fi/c/document\\_library](http://www.lvm.fi/c/document_library). See also "Roaming Charges for Calls between Finland and Russia to Drop", *Cellular-News*, 17 March 2011; <http://www.cellular-news.com/Story/48361.php>

<sup>13</sup> "Poland, Russia to cut Roaming Tariffs," 'Samena Daily' News, 29 April 2011; [http://www.samenacouncil.org/samena\\_daily\\_news.Php?News=20469](http://www.samenacouncil.org/samena_daily_news.Php?News=20469); also <http://wirelessfederation.com/news/page/16/?s=roaming>

<sup>14</sup> See "Trans-Tasman mobile roaming talks hit Roadblock," *Computerworld*, 1 August 2011; <http://computerworld.co.nz/news.nsf/news/trans-tasman-roaming-talks-hit-roadblock>.

were made public in a draft report in August 2012.<sup>15</sup> Submissions from the public on the report were invited and the consultation closed on 27 September 2012.<sup>16</sup>

All of the countries mentioned above are parties to the GATS and questions have been raised about how the GATS might apply to their bilateral arrangements. The specific provisions of the GATS framework that have been flagged as potentially relevant to the issue include:

- Members' commitment to treat suppliers of other Members on an MFN basis;
- Members' commitment under the Annex on Telecommunications to ensure "reasonable and non-discriminatory terms and conditions" for the access to and use of public telecommunications transport services.<sup>17</sup>

### III. KEY PROVISIONS OF THE GATS

The GATS establishes rules (called "disciplines") governing international trade in services. The GATS disciplines apply to trade conducted through various "modes of supply," including "consumption abroad" (i.e., the provision of service by a supplier in the territory of one Member to a consumer of any other Member).<sup>18</sup> The provision of IMRS falls within this category, as it involves the provision of wholesale service by an operator in a host country (Country B) to a user who is travelling outside his home country (Country A).

#### *General Obligations*

The core disciplines to which WTO Members subscribe are set out in Part II of the GATS. Of special importance is Article II, entitled "Most-Favoured-Nation Treatment." The MFN commitment in effect prohibits Members from maintaining preferential arrangements with any other country (whether a Member or not). Article II:1 stipulates that "[w]ith respect to any measure covered by this Agreement, each Member shall accord *immediately and unconditionally* to services and service suppliers of any other Member *treatment no less favourable* than that it accords to like services and service suppliers of any other country."<sup>19</sup>

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<sup>15</sup> Department of Broadband, Communications and the Digital Economy (Australia) and Ministry of Business, Innovation and Employment (New Zealand), *Trans-Tasman Roaming, Draft Report*, August 2012. Available at [http://www.dbcde.gov.au/mobile\\_services/mobile\\_roaming/trans-tasman\\_mobile\\_roaming](http://www.dbcde.gov.au/mobile_services/mobile_roaming/trans-tasman_mobile_roaming)

<sup>16</sup> See the announcement by the Department of Broadband, Communications and the Digital Economy (Australia), *Trans-Tasman Mobile Roaming*, [http://www.dbcde.gov.au/mobile\\_services/mobile\\_roaming/trans-tasman\\_mobile\\_roaming](http://www.dbcde.gov.au/mobile_services/mobile_roaming/trans-tasman_mobile_roaming)

<sup>17</sup> See WTO, Council for Trade in Services, "International Mobile Roaming: Possible Implications for GATS, Note by the Secretariat," S/C/W/337, 13 July 2011, page 3 ("S/C/W/337").

<sup>18</sup> GATS, Article I:2. The three other modes of supply are mode 1 - cross border supply; mode 3 - commercial presence; and mode 4 - the presence of natural persons supplying the service. Alternatively, roaming can be viewed as a combination of modes 1 and 2.

<sup>19</sup> Article II:2 provides that a Member may maintain a measure inconsistent with the MFN obligation if such a measure meets certain restrictive conditions. It is not relevant in this case.

“Measure” is a defined term, and means “any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.”<sup>20</sup> It therefore embraces a wide range of official actions.

(Other provisions of Part II impose obligations on Members in relation to specific trade matters. These include Articles VI (Domestic Regulation), VII (recognition of foreign licences and qualifications), VIII (special rules relating to monopolies), IX (unfair business practices), and XV (Subsidies). Some provisions modify the application of Article II, including Articles II:3 (special regime for frontier zones), X and XIV (emergency economic safeguards and security issues, and XIII (Government Procurement).)

Article V provides that the MFN obligation does not apply where Members are parties to an arrangement for economic integration between them. (This provision allows member states of the EU, for example, to treat services and service suppliers of other member states more favourably than those of non-EU member states and explains why the issues discussed here about the application of the GATS to arrangements for reduction in roaming charges do not arise where the Roaming Regulation is concerned.)

### *Specific Commitments*

Part III of the GATS is entitled Specific Commitments. Under Part III, Members undertake additional obligations in relation to services or service sectors listed in a Member’s Schedule of Specific Commitments, subject to any terms, conditions or qualifications stipulated by the Member. Members that have filed a Schedule of Specific Commitments which includes “telecommunications services”, for example, are obliged to accord services and service suppliers of all Members access to its market for telecommunications services through the four specified modes of supply, subject to the terms, limitations and conditions specified in its Schedule. Countries which have filed Schedules that include telecommunications services include Singapore, Malaysia, Brunei Darussalam, Finland, Poland, Australia and New Zealand.<sup>21</sup>

Members subscribing to the GATS make three specific commitments. The first relates to “Market Access”. GATS Article XVI provides, in part, as follows:

“With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule [of Specific Commitments].”

The second specific commitment relates to “National Treatment.” GATS Article XVII:1 provides, as follows:

“In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of

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<sup>20</sup> GATS, Article XXVIII(a). Article XXVIII(c)(ii) defines “measures by Members affecting trade in services” to include “the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally”.

<sup>21</sup> See the WTO Services Database, available at <http://tsdb.wto.org>.



services, treatment no less favourable than that it accords to its own like services and service suppliers.”

Article XVIII provides for the negotiation of commitments additional to those provided for in Articles XVI and XVII. Numerous Members have agreed to subscribe, as an additional commitment, to the terms of a “Reference Paper” defining key elements of the regulatory regime which it will maintain or adopt.

*Annex on Telecommunication*

Members also commit to the terms of a special Annex on Telecommunications. The Annex is an integral part of the GATS. It begins with the following statement of objectives:

“Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.”<sup>22</sup>

The provisions of the Annex apply "to all measures of a Member that affect access to and use of public telecommunications transport networks and services."<sup>23</sup> For the purposes of the Annex, "public telecommunications transport network" means “the public telecommunications infrastructure which permits telecommunications between and among defined network termination points;”<sup>24</sup> and "public telecommunications transport service" means “any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally.”<sup>25</sup> In my view, it includes the facilities required to facilitate international roaming.

Paragraph 5 is of special relevance. It places a duty on Members to:

“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, for the supply of a service included in its schedule.”

The term "non-discriminatory" as used in paragraph 5(a) has two layers of meaning. In effect, it blends international trade law and regulatory concepts. A note to the official text of the Annex explains that the term refers "to the most-favoured-nation and national treatment as defined in the [GATS] Agreement, as well as to reflect sector-specific usage of the term to

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<sup>22</sup> Annex, para. 1.

<sup>23</sup> Annex, para. 2(a).

<sup>24</sup> Annex, para. 3(c).

<sup>25</sup> Annex, para. 3(b). The following examples of "public telecommunications transport services" are given: “telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the former content of the customer's information.”

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.”

Paragraph 5(a) provides that “[t]his obligation shall be applied, *inter alia*, through paragraph (b), which requires that “[e]ach Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member ...”.

#### IV. THE APPLICATION OF THE GATS

I turn now to a consideration of how these provisions of the GATS apply to bilateral arrangements of the type described in Section II. I will mention two issues. The first concerns the application to bilateral arrangements of Members’ MFN commitment to treat each others’ service suppliers “no less favourably” than they treat service suppliers of other countries and their commitment under the Annex to offer non-discriminatory terms for network access. The second is the application of the GATS to *quasi*-official measures.

##### *Scope of the MFN and Non-Discrimination Commitments*

Generally speaking, Members have an obligation to treat each others’ service suppliers on an MFN-basis -- i.e., “no less favourably” than they treat service suppliers of other countries -- in respect of services covered by the GATS (including roaming services). Are mobile operators in Countries X, Y and Z therefore entitled to claim the benefit of the IOTs Country B applies to mobile operators from Country A? *Prima facie*, yes;<sup>26</sup> but that does not necessarily mean that mobile operators from Countries X, Y and Z can claim reduced IOTs for all calls made (or received) by their roamers in Countries A and B. What the MFN commitment requires depends on what Country A and Country B actually agreed. If two countries agreed that reduced IOTs will apply to all calls made (or received) by roamers from the other country *irrespective of the destination (or origin) of their calls*, the MFN commitment may require Countries A and B to offer an across-the-board reduction in IOTs applied to calls made (or received) by roamers from Countries X, Y and Z. However, if the agreement between Country A and Country B is limited to reducing IOTs for calls *between the two countries* (the Singapore-Malaysia arrangement, for example, appears to have this limited scope), the MFN commitment may require no more than the application of the reduced IOT to calls made to (or from) roamers from Countries X, Y and Z that terminate (originate in) Country A or Country B.

There are decisions under the General Agreement on Tariffs and Trade 1949 (“the GATT”) which support the cases for reading Countries A and B’s MFN commitment more narrowly in this second type of case. The GATT requires that articles imported into a country shall be accorded treatment “no less favourable” than that accorded to like products of domestic origin.<sup>27</sup> The case law indicates that a determination concerning whether a measure meets that standard should be made by examining whether it modifies the conditions of competition in the relevant market to the detriment of the imported product.<sup>28</sup> The

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<sup>26</sup> Some possible qualifications to this statement are noted below.

<sup>27</sup> GATT Article III:4.

<sup>28</sup> Appellate Body Report on *Korea - Various Measures on Beef*, para. 137; Panel Report on *Japan - Film*, para. 10.379.

adoption by Country B of a reduced IOT for calls made to (received from) roamers from Country A modifies the conditions of competition for the supply of wholesale roaming services between Country B and Country A, but it does not affect competitive conditions for the supply of wholesale roaming services between Country B and Countries X, Y and Z. If that is the case, there is no basis for arguing that the treatment afforded mobile operators of Countries X, Y and Z is less favourable than that accorded mobile operators of Country A if the latter are denied the benefit of a lower IOT for calls to (received from) destinations other than Countries A and B.<sup>29</sup>

Similar reasoning applies where the commitments contained in paragraph 5(a) of the Annex are concerned. That provision requires that a Member ensure that access to its public telecommunications transport networks and services shall be available on “non-discriminatory” terms and conditions. Arguably, if mobile operators of Country A are only entitled to access Country B’s network at a reduced IOT when calls are made to (received from) Country A, than it is not discriminatory to withhold the reduced rate from mobile operators from Countries X, Y and Z in respect of calls made by their roamers to (or received from) other countries. Mobile operators of Countries X, Y and Z are given access to Country B’s network on the same basis as mobile operators of Country A.

#### *Quasi-Official Measures*

There is another issue to consider. The GATS applies only to official “measures” affecting trade in services -- it does not apply to the commercial activities of private entities. Therefore, an agreement entered into by mobile operators in Countries A and B providing for a reciprocal reduction in roaming charges imposes no obligation on Country A or Country B to ensure that similar arrangements are made available to mobile operators from Countries X, Y or Z. The difference between official “measures” and actions of private entities becomes blurred when ostensibly private arrangements between mobile operators are actually entered into at the instance of a Member. An order by a regulatory authority in Country A compelling a mobile operator to reduce wholesale roaming charges payable by mobile operators from Country B, whether made unilaterally or as part of a bilateral understanding with the regulator in Country B, may constitute an official “measure” affecting trade in services and may therefore trigger an obligation to extend similar treatment to mobile operators from other countries. The matter is less clear, however, where, as in the case of the Russian and Finnish Memorandum of March 2011, the role of the state is limited to identifying reductions in

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<sup>29</sup> For another approach to the issue, see the submission made by the GSM Association in the public consultation that preceded the adoption of the EU Roaming Regulation. While the GSM Association argued that the Regulation would violate Article XVII of the GATS on national treatment if it did not apply to non-EU mobile operators, it also acknowledged the possible counter-argument that the treatment afforded a non-EU mobile operator may not be “less favourable” since the withholding of benefits is compensated by the absence of a corresponding obligation on the non-EU mobile operator to offer reduced IOTs to EU mobile operators. See “GSM Association’s response to the second phase of the public consultation on a ‘Proposal for a Regulation (EC) on the European Parliament and of the Council on mobile roaming services in the Single Market’,” 12 May 2006, pp. 16-17 and Annex 4, paras. 48-50. A similar point was made in relation to the non-discrimination requirement in paragraph 5(a) of the Annex: *ibid.*, Annex 4, paras. 51-52. The GSM Association’s arguments were alluded to in a subsequent Commission Staff Working Document, but no comment was made concerning the merits of the GSM Association’s submissions on these issues: see “Impact Assessment of Policy Options in relation to a Commission Proposal a Regulation of the European Parliament and of the Council on Roaming on Public Mobile Networks within the Community”, SEC(2006) 925, 12.7.2006, p. 46.

roaming charges as a policy goal and encouraging mobile operators to conclude private agreements giving effect to that policy. Such arrangements may fall outside the scope of the GATS, with the result that the MFN obligation may not apply.

## V. CONCLUSIONS

A multilateral agreement to lower IOTs seems unattainable at present. In the short term, the surest way of achieving reductions in prices is by way of bilateral arrangements between interested parties. But there can be a tension between bilateral arrangements and Members' GATS commitments.

I have identified two areas where issues may arise. The first concerns how the GATS MFN and non-discrimination apply to bilateral arrangements to reduce IOTs. An interpretation of the GATS which requires mutual reductions in IOTs must be extended generally to trading partners that have made no similar commitment to lowers their IOTs would undermine the attractiveness of bilateral arrangements. I have suggested that, where a Member has entered into a bilateral arrangement with another country to reduce IOTs, the obligations it owes other Members under Article II:1 and paragraph 5(a) of the Annex depends on the nature of the commitments they have assumed under the bilateral arrangement. I have argued that, if these commitments are limited to reductions in IOTs between the two countries, there is no ground for imposing an obligation to implement lower IOTs generally.

I have also noted that the GATS applies only to official measures and does not apply to commercial agreements between private entities. There have been instances, however, where agreements that were nominally concluded between mobile operators were entered into as a result of official interventions. While these arrangements may achieve immediate benefits for the parties -- and, if the web of bilateral arrangements expands, may contribute to pressures for more comprehensive solution to the issue of high IMRCs -- this approach also risks imposing strains on the integrity of the WTO rules on which the conduct of international trade is so dependent.

At the opening of a recent symposium on international mobile roaming convened by WTO's Council for Trade in Services, Australia's Ambassador and Permanent Representative to the WTO, Tim Yeend, commented that:

“Because economically sensible policy responses require reciprocal arrangements to reduce IMR rates, we need to look at whether there are ways to accommodate such reciprocal arrangements under the GATS. If we do not work together to address this issue, it is likely that more and more Members will either pay scant regard to the applicable GATS multilateral trade rules, or equally as worrying fail to effectively address IMR rates, leaving businesses and consumers facing high charges. We feel that this is an opportunity for the WTO to show its ability to deal with a modern trade issue

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So far, however, discussions have not yielded agreement on how the GATS framework applies to bilateral arrangements for the reduction of wholesale and retail roaming charges or

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<sup>30</sup> Geneva, 22 March 2012. Available at [http://www.wto.org/english/tratop\\_e/serv\\_e/sym\\_march12\\_e/sym\\_march12\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/sym_march12_e/sym_march12_e.htm)

a consensus on an appropriate policy going-forward. The two issues that I have noted about the application of the GATS to bilateral arrangements for reductions in IOTs are among the issues that remain unresolved.