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World Trade Organization
Economic Research and Analysis Division

INVESTMENT POLICIES AND
TELECOMMUNICATIONS REGIMES

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ABSTRACT

The purpose of the paper is to evaluate the GATS/Telecom Agreement. This is done by looking at the guiding principles for negotiating market access for foreign investors, by comparing the Agreement with the Telecom Agreement under NAFTA and by discussing the merits of the multilateral approach to negotiating foreign investment in the telecommunication sector. The WTO GATS/Telecom Agreement comes out rather well from this evaluation exercise.

Key Words: Foreign Investment; Telecommunications

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INVESTMENT POLICIES AND TELECOMMUNICATIONS REGIMES

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1. Introduction

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

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

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

By way of a reminder, in the area of telecommunications the important WTO agreements are GATS and the Agreement on Basic Telecommunications of 1997 (TA). In addition, FDI in telecommunications have been subject to other important international agreements. These include regional agreements such as NAFTA and several regional agreements of the European Union. Other international initiatives include a large and expanding set of bilateral investment agreements to which we shall also briefly refer in this paper. In the telecommunications sector *per se*, three main international initiatives have been particularly important. Apart from the WTO agreements already noted, another initiative was the adoption of the Revised International Telecommunication Regulations supplementing the International Telecommunication Convention of the International Telecommunication Union (ITU). Finally, the other development was the emergence of bilateral International Value-Added Network Service Arrangements (IVANS) in the OECD area.

The main aim of the paper is to assess the importance of the WTO telecommunication agreement. We shall be asking the following questions: (1) How much liberalization does the agreement allow? Or, to put it differently, how restrictive are the agreements? (2) What are the main remaining restrictions left in the Agreement? (3) How important were multilateral negotiations towards openings of telecommunication markets for foreign investors? (4) How much investment protection do these WTO agreements provide? (5) How do these agreements compare with some other important international agreements? (6) What are the main merits and shortcomings of these agreements?

These questions and concerns are already a part of a growing literature on GATS in general and on telecommunications in particular. The latter have been covered in studies such as Bronckers and Larouche (1997), Low and Mattoo (1997), Hufbauer and Wada (1997). This paper builds to some extent on these contributions, and we shall refer to these contributions in more detail in the text below. For the purpose at hand, however, these contributions are limited. None of these contributions discusses the question of international investment regimes/policies. Instead the authors address the broader issues of telecommunication services. In addition, the papers were written at the end of the

GATS negotiations and they are now somewhat out of date. Furthermore, our approach of assessing the WTO agreements will be also somewhat different from the methodologies used so far. The approach can be summarised as follows.

The aim will be to assess the quality of the agreement by reviewing the scope and depth of rules and disciplines that govern Mode 3 – commercial presence – in the WTO GATS/Telecom Agreement. In other words, we shall evaluate the main principles, standards, criteria and institutions that define the Agreement. In order to do so we shall evaluate the TA from two different angles. Our first approach will be to look at the actual commitments of countries in GATS/Telecom and assess their economic significance. We shall be asking the following specific questions: To what extent have Members actually taken over the GATS principles and eliminated restrictions on access into their markets by foreign investors? How wide or limited is the scope of the TA? What is the effect of the agreements on economic incentives? How much competition do the agreements actually allow? Do they facilitate the contestability of markets? How balanced are the agreements? Are all countries likely to benefit equally from the agreements? The second approach of evaluating the TA will be comparing its scope and structure with other relevant multilateral agreements. Is the TA in some sense a "better" agreement than the other agreements?

The paper is organised as follows. The following *Section 2* elaborates the importance of investment policies for FDI in the telecommunications industry. In *sub-section 2.1* we shall introduce our discussion of international agreements by outlining the main elements of investment agreements. The main achievements of GATS are described and discussed in *sub-section 2.2* and the impact of GATS/Telecom Agreement in *sub-section 2.3*. The outstanding and open-ended issues of the Telecom Agreement are identified and discussed in *sub-section 2.4*. *Section 3* evaluates the GATS/Telecom Agreement in relation to other investment-type agreements. In particular we shall review the relevant passages of NAFTA and several EU regional agreements. Finally, the prospects for future telecoms negotiations in the framework of new GATS are discussed in *Section 4*. The paper ends with conclusions.

2. The WTO Telecommunications Agreement: Its Role and Impact

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

Regional agreements are more numerous, but the most important ones are NAFTA and some regional agreements of the European Union. The EU has signed a large number of regional agreements ranging from agreements on free trade areas to co-operation agreements or to the so-called Association Agreements or the Europe Agreements as they are alternatively known. Free trade agreements like custom unions tend to be highly limited (i.e. often to trade only) and they do not

cover investment issues. In contrast, the Association Agreements include both investment and telecommunications as two important chapters. For these reasons, this study will not include any discussion of agreements such as MERCOSUR, which is a free trade agreement. On the other hand, we shall be discussing in more detail the Association Agreements.

Many countries have also signed bilateral investment agreements in which telecommunications do not typically feature prominently but are simply treated as any other sector. By the end of 1996, there were about 1160 bilateral investment agreements around the world. Most of these agreements have been signed during the 1990's.¹ Most of these agreements have been signed between the OECD countries and non-OECD countries. The proliferation of these agreements reflects the interests of foreign investment home countries to protect their investor interests in developing and transition countries. Most of these agreements contain a core of common provisions. Despite this similarity and areas of convergence, there are also significant differences among these agreements. For example, most of the agreements encourage mutual foreign investment. In contrast, the US bilateral treaties require the application of MFN and national treatment. Given the number of bilateral investment treaties and their non-discriminatory treatment of telecommunications, however, we shall not dwell on these treaties in further detail.²

2.1. Importance of Investment Policies for FDI in the Telecommunications Industry: General Comments.

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

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

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

Property rights. Governments may also restrict property rights with significant implications for foreign investors. Ownership rights may be restricted to minority shares or to special arrangements under which foreign investors may only purchase the country's assets in (typically minority) partnerships with domestic residents. Such restrictions have been particularly common in the

¹ See WTO (1996), p 62.

² *Ibid* for more details, a brief survey of literature and bibliography.

telecommunication industry. Governments will also play an important role in ensuring that property rights and contracts are enforced. If the judicial system of a particular country is weak, its effectiveness can only be increased through deliberate policy measures. Similarly, the safeguard of property rights is critically linked to transparency of government policies. The costs of business and of investing will be also affected by government policies targeted at parallel activities. For example, telecommunication companies may require unhindered access to land which in turn may require clear title to land ownership.

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

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

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

2.2. GATS: Main Achievements

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

The Annex on Telecommunication delineates the *scope* of the agreement. The Agreement only applies to measures that affect the access and use of public telecommunications transport networks and services. Explicitly excluded from the Agreement are "measures affecting cable or broadcast distribution of radio or television programming" (Annex, paragraph 2).

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

Trade and investment in the service sector may be subject to *trade barriers* that are qualitatively different from those applied against trade in goods. Service providers do not typically face tariffs or quotas on the delivery of their services but they are more likely to be affected by domestic regulations. For example, the entry of foreign banks or other financial institutions into the domestic markets of host countries is typically subject to prudential regulations to ensure the stability of these sectors. Similarly, professional, educational and other services can normally be provided only if the service providers meet given professional, educational and other relevant standards. These constraints are recognised through the provisions of Article VI of the Agreement which seeks to make the regulatory process and its administration "reasonable, objective and impartial".³ It also seeks to further facilitate the process by offering the Members the possibility of recognition of education and experience of service providers from other Members (Article VII).

Many services have traditionally been provided through monopolies or exclusive service providers. This means that *competition* has been completely or almost eliminated, adversely affecting both domestic and foreign new entrants. Telecommunications has been a classical example of this policy in the majority of Member countries. The GATS has made a major breakthrough to increase competition and hence market access for foreign investors even though it still offers countries "escape clauses". Members are expected to ensure that monopolies do not "act in a manner... inconsistent with the Member's obligations under Article II".⁴ The Agreement introduced (1) the so-called "facilities competition" which allows access to the existing infrastructure of the incumbent service supplier. Moreover, (2) the Agreement enables firms to enter new competing markets such cellular and cable networks. (3) Members also recognised that competition may be restrained by certain business practices, and through the provisions of Article IX, paragraphs 1 and 2 it calls for countries to co-operate "with the view to eliminating these practices". The "escape clause" somewhat mitigates the importance of the provisions of Article VIII. Under Article XXI Members "may modify or withdraw any commitment from its schedule" subject to certain conditions specifying the necessary compensation adjustment and dispute resolution (arbitration).

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

Reference Paper. For many observers, perhaps the most significant achievement of the Telecommunication Agreement was the creation and acceptance of the so-called Reference Paper. The latter provided a set of regulatory principles which greatly enhances the effective enforcement of market-access commitments made by countries in GATS/Telecom. It also provides for a set of common understandings about competition, and about the way countries were to move away from markets that were not contestable to competitive ones. The Reference Paper covers 6 main principles: (1) competitive safeguards, (2) interconnection, (3) universal service, (4) public availability of licensing criteria, (5) allocation and (6) use of scarce resources. In total, 60 out of 69 countries that made bindings offers on market access signed on the Reference Paper.

The Fourth Protocol On Basic Telecommunications. The GATS Fourth Protocol on Basic Telecommunications came into force on 5 February 1998. It was the result of a mandate from the

³ GATS, Article VI, para 1.

⁴ See GATS Article VIII, paragraph 1. By way reminder, Article II refers to the national treatment principle.

Uruguay Round Agreement which called, *inter alia*, for a continuation of negotiations on basic telecommunications. The original signatories of the Protocol were 69 countries including each European Union member state. By May 2000, the total number of Members with specific Schedules of Commitments on telecommunication services was 93. Even though the Protocol refers to basic telecommunications, many countries have also made commitments on the so-called value added services. Basic telecommunications are included in the commitments of 83 countries, and value added services was committed by 72 countries.

INSERT : Box 1: Main Features of the Reference Paper

2.3. The Impact of GATS and Telecommunication Agreements

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

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

Researchers have to rely on highly imprecise methods to quantitatively evaluate the results of the Telecom Agreement. The formal analyses have exclusively relied on the use of *frequencies* of occurrence of a particular commitment as an indicator of the relevant trade policy measure. For example, the analyses of market access would identify the number of countries which allow free market or partial market access. Similarly, the analyses of limitations on market access may identify the number of countries imposing particular types of limitation. It is this use of frequencies that is also available to us. In addition, several academics have tried to develop alternative approaches to measuring the restrictiveness of policies in services. These methods are based on the *general equilibrium models* which simulate the effects of policies on prices (estimating price-cost margins) and on quantities (estimating the difference between actual and predicted volume of imports). These are fairly traditional methods that have been used in the past to estimate, *inter alia*, the welfare effects of government interventions, exogenous shocks, changes in investment or savings behaviour.⁵

The frequency indicator technique has a number of problems. One problem with the frequency indicators is that they only provide a picture for a particular activity. Unbiased aggregation of these indicators is only possible with the appropriate weighting. Another problem is the absence of qualitative properties of these indicators making them non-comparable between activities and countries. Assume, for example, that the fixed line telephony sector is constrained by various restrictions in 25 countries. On the other hand, mobile telephony is restricted in 10 countries. Do these figures really mean that that voice telephony tends to be MORE restricted than mobile telephony? The answer is unclear since the "restrictiveness" of restrictions in each sector may vary.

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

⁵ All the existing methods are reviewed in the recent OECD (2000a) document.

in services, even worse data on restrictions in trade in services, difficulties of separating rents from costs in prices) and of the interpretation of results (e.g. separation of trade and other policy effects). The values predicted by the model (e.g. for price-cost margins or quantities) are only as good as the model and the model builder.⁶ The practical usefulness of these models is, therefore, very limited. Could, for example, negotiators use the estimates obtained from the model in the actual negotiations? If so, which model should be used?

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

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

Finally, *time* also matters. It is arguably still too early to provide a solid economic evaluation of the impact of GATS and Telecommunication Agreements. There has not yet been enough time for the Agreement to make any significant impact even assuming that countries' individual schedules of commitments provide for effective market openings. However, it is precisely the extent to which markets have been opened to foreign investors in telecommunications that we need to analyse first. Only once the extent of market opening is known shall we be in a position to evaluate the actual economic benefits of these two agreements.

Methodology. In assessing the impact of international agreements we should be ideally looking a different aspects. In the case of telecommunications this would amount to assessing the effects on international service flows, on foreign direct investment in telecommunications, market penetration, effects on costs of service providers, on prices etc. However, for reasons discussed above, an analysis of this kind would be extremely difficult and highly problematic. In the academic literature, an alternative methodology has been to look at the impact of policy liberalization on countries' welfare. The studies have been recently reviewed in two OECD papers prepared for the Working Committee on Services of the Trade Committee. The Reports conclude: "The literature overview shows that liberalization of services trade generates welfare gains under all modelling assumptions. ... As for the regional distribution of welfare effects, the studies indicate that, generally economies with initial high protection levels tend to gain most (in terms of percentage gains to GDP). As the values of estimates for services trade barriers are higher for developing countries than for developed countries, it suggests that the former are potentially the major winners from services liberalization."⁷

⁶ These are essentially also the conclusions of a recent studies prepared for the Working Party on Services of the Trade Committee of OECD. See OECD (2000 b), p.12.

⁷ OECD (2000b), p.12. Note that the text itself refers to "the latter" and thus actually refers to developed countries. However, this appears to be a typo since the word would contradict the idea in the first part of the sentence.

For all these reasons we shall adopt a rather different methodology. Our approach of analyzing the impact of the Telecommunications Agreement will be focussed on four separate issues. First, we shall analyze the impact of the Agreement on the size of the world telecommunication market. We shall do this by examining in detail the country coverage of commitments made in different modes of service delivery and individual sub-sectors. Second, there is a relationship between countries' commitments and their effects on different kinds of incentives for service providers and foreign investors. We shall be considering the following incentives: (i) incentives to encourage or discourage different telecommunication sectors, (ii) incentives to encourage specific technologies, and (iii) incentives to affect the size of the domestic firms. Third, and arguably the most important aspects international agreements is their effect on competition. We shall examine this question in the context of contestability of markets. Fourth, international agreements may also affect telecommunication services through provisions that are not specific to the industry but critical for service providers. One of such provisions concerns the availability of foreign exchange. Another element of basically the same quality is the scope of bindings. These aspects will now be discussed in turn.

Size of Telecommunications Markets. An Impressive Start to Market Globalization. The most obvious and immediate effect of international economic agreements is their impact on the size of global markets. This is also the case of GATS and the Telecommunications Agreement. Historically, the world telecommunications market has been fragmented and segmented into national and highly protected markets. GATS has made one major difference in this respect – it has globalized national commitments on market access as well as on the resolution of conflicts.

The size of the global market can be approximated by the country coverage of GATS. The total number of countries signing the Fourth Telecommunication Protocol was 89 at the end of November 1998.⁸ The number is steadily rising as new countries accede to the WTO. These countries represent the bulk of activities of the telecommunications sector. It is estimated that as of February 1998, the countries that made commitments to open their basic telecommunications market to competition represented about 82 percent of world telecommunications revenues and another 6 percent of countries have committed themselves to introduce competition by 2005. The total number of countries with commitments in basic telecommunications was 83 and the corresponding number in value added telecommunications services was 70. The Reference Paper, specifying a set of regulation principles was accepted in full or in part by 62 countries by that date.

The schedules were particularly impressive in the case of commercial presence/foreign direct investment. For example, the total of 99 countries made an offer permitting market access for foreign investment in the sector of voice telephony. This number includes 11 countries which provided a completely free access to their markets.⁹ The total number of countries providing national treatment to foreign investors in that sector was even higher – 17. In contrast, only 2 countries did not make any provision for the entry of foreign investors. The numbers are even more impressive in the case of electronic mail and other forms of data transmission.

According to an internal WTO study, the most far-reaching commitments have been made by industrialised countries. They were far more likely to make unrestricted market access than other countries. They made no "unbound" entries, adding significantly to the value of their commitments. A major contribution to the quality of the Agreement has also been made by emerging economies,

⁸ As of January 2000, the number of countries through "late" commitments by WTO Members and by commitments made by newly acceding countries. The former included Barbados, Cyprus, Kenya, Suriname and Uganda. The latter includes Estonia, Georgia, Jordan, Latvia and Kyrgyz Republic. In addition, three countries have revised their original commitments: Guatemala, Pakistan and Switzerland.

⁹ It should be kept in mind that the data in Table 1 do not take into account horizontal limitations. These may somewhat reduce the value of the so-called free access commitments.

primarily countries in transition and a selected number of countries in Asia and Latin America. These countries have made serious commitments – full or partial – to open up their markets to foreign investors. This reflected, *nota bene*, the desire of these countries to obtain access through modes of delivery which that provide the service itself, but it would also bring with it the necessary financing, new technology technical expertise and know-how.

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

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

INSERT TABLE 1: The Telecommunications Agreement: Level of Commitments by Sectors and Modes of Supply.

As noted, the market openings for foreign investors have covered virtually all sectors. The markets for value added telecommunication services have been opened up by a larger number of countries than the market for basic telecommunications. This is the case for both for MFN and national treatment principles. Perhaps somewhat surprisingly, fewer countries have imposed limitations on the national treatment principle than they have done in the case of MFN treatment. For example, the voice telephony market was fully liberalised on the MFN principles in 11 countries but the corresponding number is 17 countries with regard to the liberalization on the national treatment principle. One possible explanation could be the effect on countries commitments from regional arrangements but a more detailed analysis would be required to confirm this finding. The finding is surprising since countries normally try to protect their nationals before they protect the competitors to foreign companies investing or doing business in their countries.¹⁰

Trade and Investment Incentives and the Choice of Technique. We have seen above that countries do still impose a variety of restrictions on market access and on national treatment that vary among different modes. For example, Hoekman (1996) observed that countries have often provided for different treatment across the four modes of the GATS. A recent WTO study on market access has also confirmed that the schedules differ quite significantly among different modes of service delivery. This is also confirmed by the comprehensive data presented in Table 1.

Hoekman believes that this different treatment of different modes of delivery generate cross-modal technological biases and distortions. However, the case is not entirely clear. What is particularly unclear is the question how one can pre-judge the different technological treatment on *a priori* grounds. The most important condition is to ensure that the four different modes should be subject to neutral incentives. That, obviously, cannot be ascertained from the number of limitations on

¹⁰Another explanation could be that countries have made the appropriate restrictions in horizontal schedules.

individual modes of delivery. The dangers of market distortions from different modal incentives has been also recognized in the Telecommunications negotiations, and negotiators agreed to maintain by technological neutrality among modes of delivery.

Contestability of Markets. Unfortunately, the commitments on market access are not sufficient to ascertain the real degree of competition in the telecommunications markets. Countries use a variety of instruments to restrict *market access* to foreign investors. The most frequently restrictions notified in GATS in the countries' Schedules of Limitations include three instruments. These are limitations on the number of suppliers in the industry; restrictions on the type of legal entity; and limits on the participation of foreign capital.¹¹ The limitations imposed on the number of suppliers stem from the belief that telecom companies operate as natural monopolies, or that the entry into the market must be restricted on prudential grounds. Restrictions on legal entity may include requirements for foreign investors to set up, for example, special types of joint ventures in which foreign subjects are obliged to participate in equity partnership with the host country's subjects. Finally, restrictions on foreign ownership typically impose minority limits on foreign ownership of telecommunications companies.

In addition, the value of countries' commitments has been also constrained by the possibilities to depart from the MFN principle. This has raised a number of concerns.¹² There are two ways countries can depart from the MFN provisions. The first includes explicit departures from the MFN such as exemptions for regional integration (Article V) and general exemptions (Article XIV). The second includes measures such as domestic regulations, quantitative restrictions, restrictions arising from the reciprocity conditions tolerated in GATS and, finally, competition provisions. Not all of these departures are equally valid for each service sector. The competition provision was particularly important in the telecommunication negotiations since some countries were concerned about whether the MFN obligation was giving them enough scope to take action against foreign anti-competitive practices.¹³

INSERT Table 2: The Telecommunications Agreement: Market Access and Types of Limitations by Sector

The pattern of restrictions can be seen in Table 2. The table shows for each telecommunications sector the distribution of the total number of countries imposing particular restrictions on market access in the telecommunications industry. For example, in voice telephony, the number of countries imposing limitations on the number of suppliers in their markets was 38. Similarly, 22 countries imposed restrictions on the legal entity and 23 countries imposed restrictions on foreign participation. This pattern is basically repeated in every sector.¹⁴ In basic telecommunications, the highest frequency of limitations affected the form of legal incorporation and foreign capital participation. Limitations on the number of suppliers were relatively less frequent but still frequent enough. In value added services, the pattern was similar even though the limitations were less frequent.¹⁵ What should be emphasized at this stage is the point that all these limitations

¹¹ In principle, the GATS contains six types of restrictions – a "black list" – which countries were not allowed to impose provided they were not specifically scheduled in their list of commitments. In other words, the effectiveness of the "black list" only refers to *new* measures. The six types in the list are: (1) the number of service suppliers allowed, (2) the total values of transactions and assets, (3) the total output of services, (4) the total number of natural persons employed, (5) the type of legal entity (e.g. branch rather than subsidiary), and (6) foreign equity participation on investment.

¹² See, for example, Mattoo (1999).

¹³ *Ibid.*

¹⁴ Note that the sums along horizontal lines may exceed the total number of countries participating in the Agreement. The reason is that many countries have imposed more than one limitation on foreign investors in their markets.

¹⁵ See Adlung et al. (1999).

refer to those aspects of business management that can frequently be critical for companies in their decision to invest abroad. Restrictions on foreign ownership can be particularly damaging even though many recent deals in telecom have involved investments with minority shares.

The reluctance of countries to allow full ownership control in their telecommunications markets by foreign entities is revealed by other limitations imposed by governments *on national treatment*. This was done in GATS through "limitations on nationality requirements" and through a variety of other measures that normally fall under the heading of "domestic regulations". This includes limitations on residence requirements, tax measures, licencing requirements and requirements on standards and qualifications, registrations, authorization and limitation on ownership of land and other property. A summary of countries' schedules is presented in Table 3. It should be noted that they have been recorded in countries' schedules as horizontal measures. They are not reported in Table 3.¹⁶

INSERT Table 3: The Telecom Agreement: National Treatment, Types of Measures by Sectors and Modes of Supply

The table confirms that the countries' GATS schedules on foreign investment in the industry are often constrained by nationality, residency and authorization requirements. The nationality restriction is particularly prevalent in country schedules in mode 3 – significantly more so than in the other modes. These restrictions are more frequently imposed in developing countries than in rich countries. A WTO study concluded that "emerging markets are about five times more likely than industrialised countries to have maintained limitations on the number of suppliers and almost four times more likely to require that a particular type of legal entity be established to provide service. They were also more than three times more likely to have listed limitations under the heading "other requirements".¹⁷ According to a recent OECD study, 96 percent of the OECD market is now open to competition.¹⁸

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

Unfortunately, we do not have specific data on the level of bindings in the telecommunications sector. As a general rule, however, countries agreed that their commitments were bound unless they indicated to the contrary. It is the latter that is, unfortunately, not available in detail. What we know from anecdotal evidence, however, is that Latin American countries tended to bind, or at least phase-in their bindings. Asian countries, on the other hand, made their offer subject to less bindings even though their actual regime were more liberal.¹⁹ African countries made few bindings, developed countries tended to bind all their commitments.

¹⁶ It should be also noted that not all of these measures/regulations are necessarily discriminatory against foreigners. For example, authorisation requirements may be in theory non-discriminatory but their implementation can lead to a different treatment.

¹⁷ See WTO (1998), p.8.

¹⁸ OECD (1999), p.5.

¹⁹ For example, India and Indonesia made less than *status quo* commitments with respect to foreign equity participation. However, this was not a general pattern. For this and other examples see Low and Mattoo (1997).

The figures are impressive not so much because of their significance in relation to offers in the other modes of supply delivery (compare Table A1). As we have seen above, countries continue to maintain many restrictions on both market access and on national treatment. However, the significance of the commitments is in the change of attitude of countries towards reaching a multilateral agreement. Their schedules of commitments also represented a reversal of the highly restrictive and closed policies practised in the telecommunication sector in the past. The achievement is all the more impressive in light of the general reluctance at the time to pursue negotiations on a multilateral agreement on investment.

2.4. Open-ended and Outstanding Issues.

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

Subsidies. On subsidies, GATS is relatively "timid" and inconclusive. It is recognised in Article XV that subsidies may be distortive but leave the substance to future consultations and negotiations in terms of establishing actual multilateral disciplines, their relationship to countervailing measures and to development programmes of LDC. Injury caused by subsidies should only be addressed through mutual consultations. Members have also been aware that there continues to be an ample room for more liberalisation of services sectors and commit themselves to further negotiations in the future (Article XIX). Members have also agreed that LDCs may place "reasonable conditions" on access and use of public telecommunications networks and services to strengthen domestic telecommunication infrastructure (Annex, para 5g).

It is difficult to assess how widely are subsidies actually used by countries in the telecommunication industry. A recent review showed that the total number of countries with a subsidy policy in force was only four – Singapore, Peru, India and Trinidad and Tobago.²⁰ However, it should be kept in mind that the study is based on a rather limited definition of subsidies derived from the WTO Agreement on Subsidies and Countervailing Duties. The definition excludes, for example, services subject to cross-subsidisation under the universal service arrangements – particularly relevant in the telecommunication industry. Moreover, the number of countries that have been subject to reviews under the TPRM is limited which has constrained the size of the sample.

Market Access. For a number of reasons it is also difficult to fully assess the extent of market-access commitments. One reason concerns the problem of measurement discussed above. Another problem is that *effective market access* may be restricted not only by limitations on markets but also by various horizontal and regulatory restrictions. The latter, in particular, are extremely difficult to assess. The third reason is that countries may not have been willing to schedule the same level (value) of market access as the one actually applied in practice. Clearly, the liberalisation of the telecommunications markets started well before the WTO negotiations.²¹

²⁰ See Subsidies for Service Sectors; Geneva: WTO, S/WPGR/W/25/Add 2, 12 December 2000. The study was carried out under the TPRM mandate and for the Working Party on GATS Rules.

²¹ For a review of policies in a sample of WTO Member countries including three countries in transition (Hungary, Poland and Czech Republic) and four developing countries (Mexico, Argentina, Peru and Chile) see Cowhey and Klimenko (1999). A useful overview of policies in the APEC region can be found in Wada and Asano (1997).

How much of the market-access commitments have been made as a result of the actual WTO negotiations? According to observers who were close to the negotiations at the time, only few countries were "induced" to liberalise as a result of negotiating pressures in WTO.²² Most countries have apparently made commitments that did not go beyond their existing policies. Other countries have made commitments below the status quo, as noted above. Some countries were allowed to make commitments based on future liberalisation (several African and Caribbean countries). All these problems notwithstanding, it appears that only a handful of countries have been prepared to offer completely free access into their telecommunications industries, as already noted.

Many countries have also taken *autonomous* liberalisation measures after the conclusion of the Telecommunications Agreement.²³ These measures are not necessarily incorporated into the original countries' schedules. For example, several Central European countries – candidates for the accession to the European Union – are currently in the process of rapid harmonisation of their laws with the Aquis Communautaire. The reform process is fluid and continues, and most of the new measures are probably not in the relevant countries' schedules to GATS. In sum, the actual impact of WTO on countries' market-access commitments was at best moderate. The value of the agreement lied mainly elsewhere as we shall see below. Hence, there is clearly a considerable room to further open up domestic market through multilateral commitments.

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

Under GATS all scheduled commitments are deemed "bound" unless indicated otherwise. This is quite important to emphasise. It implies that countries were prepared to make "bound" rather than "open-ended" commitments. Nevertheless, several observers have recently complained that many countries have not scheduled the full extent of domestic liberalization measures in their WTO commitments.²⁴ In particular, these countries were typically unwilling to "*bind*" the domestic measures. If true, the value of their commitments would be diminished.

In judging the "value" of bindings it is important to distinguish two issues – the value of the bindings *per se*, that is the value of a commitment that cannot be lowered, and the value of binding in relation to existing policies – *status quo* or even in relation to future policies. The first value of binding lies in *transparency and predictability*. Given the number of countries' offers and their coverage of sectors there is no doubt that the Telecoms Agreement provides for a considerable improvement in the set up of international/multilateral disciplines on telecommunications. But has the Agreement resulted in binding a status quo or even a more progressive liberalisation in relation to the *status quo*? In other words, does the Agreement reflect the ongoing process of liberalisation around the world? The answers to these questions are more difficult since we do not have detailed evidence on a country by country basis. However, as we have already seen, the quality of bindings varies from country to country and probably from region to region. Several Asian tended to bind

²² It appears that Japan, Singapore, Republic of Korea, Portugal and Spain made additional concessions during the negotiations even though the countries would not acknowledge that this was done as a result of outside pressures. The Asian countries experience is discussed in Low and Mattoo (1997).

²³ For a historical account of countries' schedules and negotiations see Low and Mattoo (1998).

²⁴ See, for example, Hoekman (1996 and 1999).

below *status quo*.²⁵ On the other hand, Latin American countries tended to bind existing policies or sometimes future liberalization as noted above. In brief, the negotiations probably helped in some situations but probably to a limited extent only.

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

We have also seen that governments often restrict market access for new entrants while permitting and/or preferring the *infusion of foreign equity* into existing companies. Thus, competition continues to be restrained in the countries' schedules in GATS through restrictions on the choice of investment portfolio. But how serious are these restrictions and how important is the role of foreign investment? This question was considered in an earlier study by Low and Mattoo (1997) who used the case-study of Asian countries. They found no evidence of simple correspondence between market openness and the degree to which FDI occurred. The reasons may be the continued or even increased presence of domestic firms or the attempts of governments to control the speed of divestiture. In sum, there is clearly ample room for further opening of markets to foreign investors and hence for further multilateral negotiations.

Even though the GATS/Telecommunications agreement already addresses competition issues, this is done in a very rudimentary manner and is highly incomplete. Several observers have been already quite critical about the lack of precision in defining various *competition concepts* and issues or about the gaps in the agreement. For example, Crandall (1997) complains about the agreements which refers in Article VIII to "monopoly providers" while the issue may no longer be a question of monopolies but that of "*dominant suppliers*". The point is, for example, that incumbents may no longer be in the exclusive position of monopolies but since they control the *interconnections* they may be in the position to abuse their position by creating bottlenecks and other kinds of pressures on their clients.²⁷ The improvement of market access through facilities competition measures and, in particular, through interconnections was quite revolutionary. Nevertheless, it is only now that the systems are being tested. As the most recent difficulties of negotiating the access into the Mexican telecommunications market documents, we are up against issues that will only emerge through practical operation.

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

²⁵ India and Indonesia, for example, bound at less than the *status quo* with respect to foreign equity participation. Other Asian tigers such as Malaysia, Thailand and the Philippines have also made commitments below their *status quo*. See Bronckers and Larouche (1997), p.22 and Low and Mattoo (1997), p.22.

²⁶ See Petrazzini (2000).

²⁷ For more details, see for example, Wheatley (1999), pp.142-3.

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

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

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

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

Finally, an interesting national treatment issue has been brought up by Bronckers and Larouche (1997). They argue that the principle operates differently for services than for goods. As they point out, "for foreign service suppliers, being subject to the same requirements as domestic companies may mean that they are actually worse off. In the telecommunications sector, imposing some form of universal service or minimum coverage requirement to a foreign entrant can put it in a worse position than the local service provider which, although under the same obligation, has the requisite infrastructure already in place and has acquired a certain market share."²⁸

Pricing. The rules on *pricing* can be also seen as vague since they do not provide for a proper and economically rational way of pricing interconnections nor do they deal with the important issue of international settlements. The latter continues to be regulated under the ITU agreement on the settlement of international traffic and payments. This agreement specifies the accounting rates – the per minute rate used as a basis for international payments on a route. These rates vary from route to route and are typically a double of the so-called settlement rate – the rate actually paid for the delivery of an outgoing call.²⁹ Thus, international prices have been subject to bilateral agreements which regulate international price settlements through a system based on accounting rates.³⁰ This is a particularly difficult problem for WTO negotiators since the system of accounting rates violates the MFN principle.

Pricing of telecommunication services has been perhaps the most contentious and sensitive area under discussions also for domestic reasons. Pricing of telecommunication services has traditionally been subject to various forms of price control in most countries. Governments have

²⁸ Bronckers and Larouche (1997), p.16.

²⁹ For more details, see, for example, *ibid.*, pp. 401–405.

³⁰ For more details see, for example, Ergas (1997) and Wheatley (1999).

regulated domestic prices through the operations of state and private monopolies in order provide for universal service, distribution of services, generating tax revenues and mobilising investible funds.

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

3. Comparisons of GATS/Telecom Agreement with Other International Agreements.

In this section we shall compare the GATS and Telecom Agreements with other most important investment and telecommunication-related international agreements. The point of departure is the criterion that the international agreement in question must provide rules and disciplines governing foreign investment in telecommunications. We shall be referring to the following international agreements: (1) regional agreements on telecommunications, (2) regional agreements on foreign investment, and (3) bilateral agreements on foreign investment.³¹ In addition, foreign investment disciplines were also subject to the well-known and failed negotiations of a multilateral agreement on investment (MAI). In this section, we shall provide a brief comparison of GATS/ Telecom Agreements with each type of the international agreements noted above. The discussion is schematically divided into two separate parts – covering international agreements on telecommunications and on foreign investment respectively.

3.1. Telecommunications Agreements.

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

NAFTA : Main Features of the Chapter on Telecommunications.

Telecommunications are treated in NAFTA as a separate industry - Chapter 13. By treating the sector separately, the agreement adds to commitments already made under "investment" and "cross-border supply". The chapter describes three basic policies that governments must seek to implement as part of the Agreement – (i) free flow of information, (ii) non-discrimination, and (iii)

³¹ The number of bilateral treaties designed to promote foreign investment rose five-fold during the 1990's to 1857, involving 173 countries, according to UNCTAD. At the end of 1980's, the corresponding number was 385. The figures were reported in *Financial Times*, 19 December 2000.

transparency. The main provision of NAFTA and GATS are compared in Box 2 in the Annex. In certain areas, the Agreement goes beyond GATS, and these areas are identified below:

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

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

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

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

Standards. The Agreement calls on the Parties to adopt measures leading to the acceptance of test carried out by other NAFTA Parties (Article 1304).

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

A Brief Evaluation of the WTO Telecommunications Agreement.

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

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

The *scope* of the agreements and the basic rights are different in both agreements. While the scope in the WTO agreement is limited to only those sectors in which countries have made their commitments (i.e. scheduled sectors), NAFTA contains none of such limitations. This difference is reflected in the extent to which the Parties can impose extra conditions of service or additional restrictions. NAFTA is in this respect more forthcoming. For example, NAFTA makes it clear that a Party cannot be required to establish telecommunications transport network and services that are not offered to the public generally. Similarly, the agreement states that a "Party engaged in the broadcast or cable distribution of radio or TV programming to make available its cable or broadcast facilities as a public telecommunications transport network".

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

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

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

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

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

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

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

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

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

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

3.2. Foreign Investment Agreements.

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

NAFTA.

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

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

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

Minimum Standard of Treatment. GATS is not a *bona fide* investment agreement. It does not, therefore, provide for a detailed protection of foreign investors to the extent possible in investment agreements. In fact, GATS has no specific coverage of this issue – unlike NAFTA. NAFTA provisions are in this respect much more specific and detailed. Thus, according to Article 1105 investors must be treated in accordance with international law. The article further specifies the international minimum standard by requiring investments of the investor be treated in a fair and equitable manner and enjoy full protection and security.

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

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

Expropriation and Compensation. NAFTA also includes detailed provisions with respect to expropriation and compensation. This allows for an elaboration of the minimum standard of treatment required by international law (Article 1110). Quite importantly, Article 1110 (2)-(6) specifies the

criteria for compensation using the concept of "fair market value", and specifying that the compensation must be done without delay, must be fully realisable, and freely transferable.

Market Access. The treatment of market access is very different between both agreements. NAFTA contains no specific commitments. On the other hand, GATS contains specific commitments in scheduled sectors, specifies six types of measures that may not be maintained or adopted (e.g. number of service suppliers etc.).

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

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

European Union – Foreign Investment Protection under the Europe Agreements. Once again the most important of the regional investment related agreements are the Association Agreements with the countries of Central and Eastern Europe. These agreements contain fairly detailed rules to protect the interests of foreign investors in the associated countries' markets. Their coverage tends to be similar to that of NAFTA perhaps with one major exception – the EU Association Agreements cover not only foreign direct investment but also portfolio investments.³²

Multilateral Agreement on Investment - Common building blocks. The GATS provisions on commercial presence provide a number of rules and disciplines that could easily be identified with a *bona fide* multilateral agreement on foreign investment with the key exception that GATS only covers services. The rules and disciplines that are already in GATS would necessarily be a part of a MAI,³³ these are the common building blocks of both agreements.

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

³² The statement is definitely true for the agreements with the Central European countries – Hungary, Poland and Czech and Slovak Republics. It was not possible to verify the treatment of this issue in the other agreements.

³³ Since we have no MAI there is obviously no agreement on what a potentially successful negotiation of MAI would encompass. However, most observers agree that the MFN and the NT principles would have to be the real building blocks. For more discussion see Drabek (1998) and Graham (1996).

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

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

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

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

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

Concluding Remarks on the Comparisons.

Comparison between international agreements are never straightforward, and they are also subject to analysts' biases and preferences. Nevertheless, the following conclusions may be suggested on the basis of the preceding discussion: (1) Arguably the key difference between the WTO telecommunications agreement and NAFTA is the presence of a dispute settlement mechanism in

WTO. This makes the WTO agreement more effectively enforceable. (2) NAFTA provides a wider protection of foreign investors' interests. These protection provisions range from standards of treatment to detailed specifications of conditions for compensation as a result of expropriation. In contrast, the WTO agreement is not a *bona fide* investment protection agreement. This means that foreign investors are only protected in some areas but not others. An example of the former are the provisions that guarantee the investor access to foreign exchange. An example of the latter is the absence of detailed provisions on the standard of treatment. (3) With regard to telecommunications *per se*, NAFTA appears to be a more comprehensive agreement than the WTO agreement. It is less ambiguous as far as rules for pricing interconnections are concerned. It provides a detailed and separate section on provisions of value added services and it is more specific about rules on transparency, the conduct of monopolist service providers and on technical standards.

4. Prospects for Future Negotiations in the WTO.

In certain respects, the prospects for future negotiations are clear and good. As part of the built-in agenda resulting from the Uruguay Round Agreements the WTO Members agreed to continue negotiations on services and agriculture by certain dates. These negotiations have already started and they include negotiations of telecommunication services. What will come out of these negotiations is another matter, and its success will entirely depend on the negotiating strategies of countries and the main challenges in these negotiations. These challenges can be summarised as follows: (1) concerns about the effectiveness of multilateral negotiations to significantly liberalise domestic telecommunications markets; (2) main issues for negotiations, (3) negotiating approaches/methods; including, *nota bene*, questions concerning countries' interests and the way they are balanced in negotiations and the treatment of autonomous liberalisation.

4.1 Effectiveness of Multilateral Negotiations.

The existing views on the effectiveness of multilateral agreements in general and on the WTO Telecommunications Agreement in particular vary a great deal among experts. Some observers argue that the Agreement has been the next best thing since "sliced bread". For example, Cowhey and Klimenko (1999, p. 15ff) argue that the Agreement represents a major boost to domestic competition and more flexible pricing practices of cross-border supply of telecommunications services. They take even the view that the agreement was essentially instrumental in getting rid of "accounting rates", that it led to an increase of competition and opened up room for "arbitrage". The significance of GATS goes beyond individual countries' commitments. They also argue that the benefits will spill over to the rest of the world. This could partly be because international investment regimes will change. The Agreement will affect the terms of new investments!!! Perceptions of investors will change depending on how well regulated the countries are and on how fast the growth of global carriers will be. Similar positions are taken by other observers who emphasise the fact that the Agreement commits the industry to trade disciplines, the Agreement is multilateral and binding, induces changes in domestic regulatory systems and provides for a system of dispute settlement.³⁴

These views are not shared by everyone. For many observers the WTO's role and its contribution to market access has been greatly exaggerated. For example, unilateral liberalisation has been more important than the WTO negotiations, as noted above. Critics also suggest that the speed of implementation will be slow due to complexities of the Agreement and that the treatment of anti-competitive practices is extremely difficult to detect or prove. Negotiations tend to be slow and lead to the "lowest common denominator." Moreover, the negotiations will be far slower than the pace of technological progress and the changes in domestic regulations in at least the OECD countries. For all

³⁴ See Drake in Drake and Noam (1997) and OECD (1995).

these reasons, the critics suggest that the multilateral route is less efficient and that bilateral approaches would be a better alternative.³⁵

4.2 Issues for Negotiations under GATS.

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

A. *General Issues: Built-in agenda.*

(1) *Safeguards.* Many countries are concerned about the need to strengthen the safeguard mechanism. As in the case of safeguards in GATT related to trade in goods, the question is whether countries should be allowed to protect their markets if there is a "threat of serious injury as a result of a surge in imports of particular services. This pressure is resisted by a few countries who consider safeguards as an instrument of disguised protectionism.

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

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

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

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

³⁵ See, for example, Noam in Drake and Noam (1997); OECD, (1995), p.20-21.

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

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

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

B. Emerging Issues for Telecommunications.

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

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

Regulatory practices. These are under a severe test. This is a general problem for all WTO activities, and the problem is particularly evident in GATS in general and in telecommunications in particular. Once again, there are several important issues that will have to be addressed by negotiators. The most basic one concerns the countries' *freedom to regulate*. Some countries fear that a new round of negotiations would take away from national governments the right to regulate. It will take some time and some convincing that the liberalisation of GATS/Telecoms should not be equated with deregulation. Second, once it is accepted that countries will retain their right to regulate, the next question is what kind of regulations will they be allowed to pursue? Are we going to see *regulatory*

convergence? If so, how much and in which areas? What will be the criteria? All of these are open questions. Third, regulations often differ in the case of investment in different telecommunications sectors and activities. However, due to strong trends in the convergence of technology and services, the delineation of sectors is becoming more and more blurred³⁶. Moreover, due to the rapid development of the telecommunication industry, many observers suggest that *regulatory reviews* are now necessary and should be relatively frequent. The United States, for example, has such reviews done on a biennial basis. Fourth, the international community must also ensure that whatever rules and criteria are agreed upon they must be operational, unambiguous and transparent. There are good reasons to believe that the negotiators will have to identify the rules and criteria very carefully in order to minimise all the complexities.³⁷

There are also questions related to the status of regulators. Should they be independent or should they rather be a part of the state supervisory system? The current practice of OECD countries tends to favour the model of independent regulators but there are differences in the implementation leading to what is known as "independence variations".³⁸

In general, the key issue regarding regulations is how far should regulations be harmonised: The question that have been raised about regulations concerning other modes of service delivery such as the question of technological neutrality as well as the scope for convergence and harmonization of regulations among countries is equally valid in the case of commercial presence. In other words, the profession as well as many practitioners are deeply divided.³⁹

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

Pricing. It is very likely that more pressure will be put on countries to include some kind of a reform of the existing systems of international pricing and, in particular, a reform or a complete elimination of the accounting rate system. For the time being, countries have decided to "hold fire" and have agreed not to take "violators" through the dispute settlement mechanism. However, this may not last for long. The evolution in the market has been such that some countries are openly calling for dismantling the accounting rate system.⁴⁰ Moreover, the growth of competition through alternative systems such as "call back" dedicated lines have created an opportunity for arbitrage.

Monopoly, Interconnections, Exclusive Service Providers. The operation of service providers in the telecommunications industry is critically linked to the existing practices of protecting domestic monopolies and/or exclusive service providers. Much of the discussions about the future evolution of regulations concerning these monopolies are linked to various other issues elaborated in more details above and further below.

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

³⁶ A useful discussion of such regulatory issues as well as a description of recent initiatives in this area is provided in OECD (1999), p.15.

³⁷ There is by now a large literature addressing various regulatory issues. See, for example, Bhagwati and Hudec (1996) and Cottier and Mavroidis (2000).

³⁸ *Ibid*, p.9

³⁹ For a comprehensive discussion see Bhagwati and Hudec (1996) and Drabek (2001)

⁴⁰ For example, both the United States and the European Union have adopted regulations designed to dispense with settlement rates for a large amount of international traffic.

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

4.3. Negotiating Approaches.

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

There is a variety of ways of approaching the negotiations. One approach that has been pushed by more liberal observers and delegations is based on the so-called the "negative list" ("top-down") approach. However, it is the alternative one that is based on the *quid pro quo* ("bottom-up" or "request/offer") approach is the one which seems to be gaining more of the support among delegations. These approaches are fundamentally different – the former was applied in the NAFTA or in the Australia New Zealand Closer Cooperation Agreement. The latter is more characteristic of WTO negotiations.⁴¹ Some countries have also been looking for a "formula" – based type of negotiations but this approach is also resisted. Some thought has been also given to the so-called "clusters" of services relating to certain core activities. The use of clusters has been supported, for example, by the EU delegation or developing countries such as the Dominican Republic, El Salvador, Honduras, Nicaragua and Panama in the case of a "cluster" of tourism industries. Since no decision has been taken yet on the approach it would be premature to speculate in this paper.⁴² Much discussion has been also devoted to the question of *autonomous liberalization* but so far with little success.

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

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

5. Conclusions

How good is the GATS/Telecoms Agreement? Is it restrictive or does it provide a reasonable legal instrument to protect the interests of investors? Does it protect interests of host countries well?

⁴¹ The approach taken in the original Telecoms Agreement relied on the *quid-pro-quo* approach, or "positive list approach". The negotiating guidelines are described in the internal document TS/NGBT/W/1, Rev.1, 10 June 1994.

⁴² These topics are discussed in more detail in Hoekman (1999) and WTO (2001).

These are the questions that have been addressed in this paper. It should be kept in mind that whatever assessment has been made in the text of the paper and will be made in the rest of the paper will be an assessment of an economist, not one of a lawyer. The perspective is economic and perhaps business-oriented. I am, of course, painfully aware that the paper could read quite differently if the subject at hand had been evaluated by a lawyer.

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

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

But there is another, this time more controversial point that is often presented as a merit of multilateral agreements such as this one – the contribution of the Agreement to *the stability* of economic policies. The argument says that these types of agreements (i.e. WTO) promote the stability by "locking in the reforms". Some writers have doubted the value of that contribution by claiming that many countries bind well above the *status quo* or that they do not bind at all. This criticism is, in my view, very short-sighted. Take the example of China's accession and assume that China binds above the *status quo*. By signing the WTO agreements China agrees, for example, that it will maintain competition in the telecommunication industry at the level at which it bound its commitment in the WTO. In comparison to the industry structure prevailing up to that point – with the state telecommunications monopoly as the sole provider – the WTO "outcome" is not a minor achievement.

Could the Agreement be better? The answer is undoubtedly, yes and, once again, for several reasons. First, the actual domestic policies – *the status quo* - tend to be more liberal and competition much tougher than what is provided in the countries' schedules of commitments in the Agreement. The Agreement provided enough room for countries to make additional limitations on their actual policies. Second, the Agreement is not a *bona fide*, full-fledged investment Agreement. Even though it includes commercial presence as a separate mode of delivery, this is a telecommunications agreement in a much broader sense. As a result, its coverage is somewhat narrower than some other agreements with stronger investment component such as the NAFTA, Association Agreements of the EU or even many bilateral agreements (e.g. on standard of treatment). Third, the Agreement does not satisfactorily address at least two important issues - subsidies and safeguards. These are *gaps* that must be addressed in future negotiations. Fourth, the Agreement also does not address the

increasingly more relevant problem of international pricing for telecommunications services that continues to be subject of a separate agreement under the International Telecommunication Union. There are reasons to believe that some change is imminent – partly because of competition and partly because of pressures from certain countries – but there will also be strong resistance coming from developing countries that depend heavily on revenues from this system.

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APPENDIX
TABLES AND BOXES

Table 1. GATS/TELECOM AGREEMENTS: Level of commitments by sector and mode of supply¹

2.C Telecommunication Services	No. Listed	Cross border			Consumption abroad			Commercial presence		
		In per cent of listed sub-sectors								
MARKET ACCESS		Full	Partial	None	Full	Partial	None	Full	Partial	None
a Voice Telephone Services	65	12	78	9	31	58	11	11	88	2
b. Packet-Switched Data Transmission Services	59	19	75	7	42	51	7	10	90	0
c. Circuit-Switched Data Transmission Services	60	18	73	8	42	50	8	10	88	2
d. Telex Services	59	20	75	5	47	45	7	11	89	0
e. Telegraph Services	43	19	72	9	49	42	9	9	91	0
f. Facsimile Services	55	18	75	7	44	49	7	11	87	2
g. Private Leased Circuit Services	55	16	80	4	42	55	4	11	89	0
h. Electronic Mail	52	35	60	6	46	42	12	17	79	4
i. Voice Mail	48	35	58	6	44	48	8	17	81	2
j. On-line Information and Data Base Retrieval	54	31	61	7	44	43	13	17	78	6
k. Electronic Data Interchange (EDI)	45	36	58	7	51	42	7	20	76	4
l. Enhanced/Value-Added Facsimile Services	43	37	56	7	49	40	12	21	74	5
m. Code and Protocol Conversion	42	31	60	10	48	48	5	19	79	2
n. On-line Information and/or data processing	40	33	55	13	50	35	15	18	80	3
o. Other, Terrestrial-based Mobile	61	8	79	13	30	61	10	13	87	0
o. Other, Satellite-based Mobile	23	9	87	4	28	68	4	8	92	0
o. Other, other	42	5	86	10	10	81	10	2	93	5
NATIONAL TREATMENT		Full	Partial	None	Full	Partial	None	Full	Partial	None
a. Voice Telephone Services	65	23	65	12	26	63	11	17	77	6
b Packet-Switched Data Transmission Services	59	37	53	10	39	54	7	34	63	3
c. Circuit-Switched Data Transmission Services	60	37	52	12	40	50	10	30	65	5
d. Telex Services	59	40	55	5	44	47	9	31	65	4
e. Telegraph Services	43	40	51	9	42	47	12	33	65	2
f. Facsimile Services	55	40	55	5	44	49	7	31	64	5
g. Private Leased Circuit Services	55	36	56	7	40	55	5	27	65	7
h. Electronic Mail	52	50	44	6	44	40	15	48	46	6
i Voice Mail	48	46	48	6	46	42	13	42	54	4
j. On-line Information and Data Base Retrieval	54	52	41	7	48	35	17	48	44	7
k. Electronic Data Interchange (EDI)	45	56	38	7	53	36	11	49	42	9
l. Enhanced/Value-Added Facsimile Services	43	56	37	7	51	33	16	51	42	7
m. Code and Protocol Conversion	42	50	40	10	50	40	10	48	45	7
n. On-line Information and/or data processing	40	55	33	13	53	28	20	55	38	8
o. Other, Terrestrial-based Mobile	61	21	66	13	25	64	11	20	74	7
o. Other, Satellite-based Mobile	23	19	74	8	21	74	6	15	79	6
o. Other, other	42	7	83	10	10	80	10	7	88	5

Source: WTO

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

¹ Data in this table does not take into account horizontal measures listed in schedules. As such, Mode 4, movement of natural persons is not included in this table because commitments on this mode are essentially determined by the horizontal measures.

Table 2. GATS/TELECOM AGREEMENTS: Market access, types of limitations by sector and mode of supply listed¹

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

Source: WTO

Legend: CB - Cross border supply
CA – Consumption abroad
CP - Commercial presence

a) Number of suppliers
c) Number of operations
d) Number of natural persons
e) Types of legal entity
f) Participation of foreign capital
g) Other measures

¹ Data in this table does not take into account horizontal measures listed in schedules. As such, Mode 4, movement of natural persons is not included in this table because commitments on this mode are essentially determined by the horizontal measures.

Table 3. GATS/TELECOM AGREEMENTS: National treatment, types of measures by sector and mode of supply¹

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

Source: WTO

Legend:

CB – Cross border supply
CA – Consumption abroad
CP – Commercial presence

a) Tax measures
d) Nationality requirements
e) Residency requirements
f) Licensing, standards, qualifications
g) Registration requirements
h) Authorization requirements
l) Ownership of property/land

¹ Data in this table does not take into account horizontal measures listed in schedules. As such, Mode 4, movement of natural persons is not included in this table because commitments on this mode are essentially determined by the horizontal measures.

Box 1. Structure of the MAI

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

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

(Box 1, continued)

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

Source: OECD, 1998b; reprinted in UNCTAD, Lessons from MAI, Geneva 1999.

BOX 2 – MAIN INVESTMENT PROVISIONS IN THE NAFTA AND GATS AGREEMENTS

	NAFTA: Chapter 11: Investment¹	GATS
Scope	<p>Investment is defined in much greater detail². Applies to³:</p> <p>a) investors of another Party⁴ b) investments of investors of another Party in the territory of the Party⁵.</p> <p>Article 1106 lists a number of requirements which Parties may not impose in connection with establishment of an investment of an investor of a Party.</p> <p>Annex III provides that Parties are allowed to perform exclusively economic activities set out in it. In Mexico's Schedule to Annex III, the following sectors are included:</p> <p>4. Satellite Communications 5. Telegraph Services 6. Radiotelegraph Services</p>	<p>Applies to trade in services which includes the supply of a service by a service supplier of one member through commercial presence⁶ in the territory of another member.</p>
MFN	<p><u>General Rule</u> Each Party shall accord to investors and investments of investors of another Party treatment no less favourable than it accords, <i>in like circumstances</i>, to investors and to investments of investors of any other Party or of a non-party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments⁷.</p>	<p><u>General Rule¹⁰</u>. Each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than it accords to like services and service suppliers of any other country.</p>

¹ In the event of an inconsistency between this chapter and another chapter – the other chapter shall prevail as to the extent of the inconsistency. (Article 1112)

² Article 1139

³ Article 1101

⁴ means 'a Party or state enterprise thereof, or a national or an enterprise of such a Party, that seeks to make, is making or has made an investment' (Article 1139 Definitions)

⁵ means 'an investment owned or controlled directly or indirectly by an investor of such Party'. (Article 1139 Definitions)

⁶ means 'any type of business or professional establishment, including through I) the constitution, acquisition or maintenance of a juridical person, or ii) the creation or maintenance of a branch or a representative office within the territory of a member for the purpose of supplying a service. (Article XXVIII Definitions)

⁷ Article 1103

	<p><u>Qualification</u> Notwithstanding this article a Party may require an investor of another Party, or its investment in its territory, to provide routine information solely for information or statistical purposes. The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment.⁸</p> <ul style="list-style-type: none"> • The provision does not apply to subsidies or grants provided by a Party or a state enterprise, incl. government supported loans, guarantees and insurance.⁹ 	<p><u>Qualification</u> Can maintain a measure inconsistent with MFN if it has established an exception to this inconsistency. Exception provides justification for giving more favourable treatment to the country in the exception. [Such a measure must meet the conditions of Annex on Article II exemptions. No new exemptions possible (only waiver procedure under Part I). Exemptions have max. of 10yr time-limit.]</p> <ul style="list-style-type: none"> • Article XIV provides that members can maintain/adopt measures inconsistent with Article II as a result of an Agreement on the avoidance of double taxation.
<p>National Treatment</p>	<ul style="list-style-type: none"> • Each Party¹¹ to accord to investors and investments of another Party treatment no less favourable than it accords, <i>in like circumstances</i>, to its own investors and investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments¹². • no party may: <ul style="list-style-type: none"> 1) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying 	<ul style="list-style-type: none"> • applies <u>only</u> to scheduled sectors (sectors where member has made specific commitment)¹⁵. Each member, <i>in the sectors covered by its schedule, and subject to any conditions and qualifications set out in the schedule</i>, shall give treatment to foreign services and service suppliers no less favourable than it gives to its own services and suppliers¹⁶. • Specific commitments assumed under this Article shall not require any Member to compensate for any inherent competitive

¹⁰ GATS Part II : General Obligations and Disciplines

⁸ Article 111(2)

⁹ Article 1108 (7)(b)

¹¹ **and each state or province (Article 1102(3))**

¹² Article 1102

¹⁵ Part III GATS, Specific Commitments

¹⁶ According to Article XVII this can be either 'formally identical treatment or formally different treatment to that it accords to its own like services/service suppliers. It shall be considered less favourable if it modifies the conditions of competition in favour of the services or service suppliers of the Member compared to the like of any other Member.

	<p>shares for directors or incorporators of corporations. 2) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.</p> <ul style="list-style-type: none"> • The provision does not apply to subsidies or grants provided by a Party or a state enterprise, incl. government supported loans, guarantees and insurance.¹³ • Special Formalities and Information Requirements provides that¹⁴: <ol style="list-style-type: none"> 1) nothing in the National Treatment article shall be construed to prevent a party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another party such as the requirement the investors be residents of the party or that investments be legally constituted under the laws/regulations of the Party, provided they don't materially impair the protections afforded by a Party to investors of another Party and investments of investors of another Party pursuant to Chapter 11. 2) a Party may require an investor of another Party, or its investment in its territory, to provide routine information solely for information or statistical purposes. The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive 	<p>disadvantages which result from the foreign character of the relevant services/service suppliers.</p> <ul style="list-style-type: none"> • As with market access any limitations are to be specified in the schedule. • No coverage, apart from Article XV provides that any Member that considers itself adversely affected by the subsidy of another Member, may request consultations. • No coverage • Article XIV provides a general exception that a Member may maintain a measure inconsistent with Article XVII provided the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members. This must not be applied in an arbitrary manner which could constitute unjustified discrimination.
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¹³ Article 1108 (7)(b)

¹⁴ Article 1111

	position of the investor or the investment.	
Standard of Treatment	<ul style="list-style-type: none"> Each Party shall accord to investors and to investments of another Party the better of the treatment required by Article 1102 (National Treatment) and Article 1103 (MFN). <p><u>Minimum Standard of Treatment</u>¹⁷</p> <ul style="list-style-type: none"> Investment of another party to be treated in accordance with international law. Fair and equitable treatment. Full protection and security. investors and investments of investors of another Party accorded non-discriminatory treatment in relation to measures adopted relating to losses suffered by investments in it territory due to armed conflict or civil strife¹⁸. 	No coverage
Restrictions	<p><u>Denial of Benefits</u></p> <ul style="list-style-type: none"> A Party may deny the benefits of chapter 11 to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party: <ul style="list-style-type: none"> a) does not maintain diplomatic relations with the non-Party; or b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of chapter 11 were accorded to the enterprise or to its investments. a Party may deny the benefits of chapter 11 to an investor of another Party that is an enterprise of such a Party and to investments of such investors if investors of a non-Party own or 	<p><u>Denial of Benefits</u>¹⁹</p> <ul style="list-style-type: none"> A Party may deny the benefits of the Agreement if the service is supplied from or in the territory of a non-member/ member to which the denying member does not apply the WTO Agreement. May deny benefits to a service supplier that is a juridical person if it is established that its not a service supplier of another Member or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement. No coverage

¹⁷ Article 1105

¹⁸ Does not apply to existing measures relating to subsidies or grants which would be inconsistent with Article 1102, but for Article 1108(7)(b)

¹⁹ Article XXVII

	<p>control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organised.</p> <ul style="list-style-type: none"> • <u>Environmental Measures</u> a Party may adopt, maintain, enforce a measure consistent with chapter 11 which it considers appropriate to ensure investment activity is sensitive to environmental concerns. 	<ul style="list-style-type: none"> • No coverage. However, under Article XIV(b) a Party may maintain/adopt measures necessary to protect human, animal or plant life or health, as long as measures are not applied arbitrarily and do not constitute unjustified discrimination.
Market Access	No specific market access commitments	<ul style="list-style-type: none"> • applies <u>only</u> to scheduled sectors (sectors where member has made specific commitment)²⁰. • Each member to give no less favourable treatment to the services and service suppliers of other members than is provided for in its schedule. • If a Member undertakes a market access commitment in relation to the commercial presence mode of supply, it is committed to allow related transfers of capital into its territory. • Where market-access commitments in a sector are undertaken, Art. XVI provides six forms of measure which may not be maintained or adopted. They are limitations on: <ul style="list-style-type: none"> • number of service suppliers; • total value of services transactions or assets; • total number of service operations or total quantity of service output; • number of persons that may be employed in a particular sector or by a

²⁰ Part III GATS, Specific Commitments

		<p>particular supplier; and</p> <ul style="list-style-type: none"> • measures that restrict or require the supply of the service through specific types of legal entity or joint venture, and • percentage limitations on the participation of foreign capital, or limitations on the total value of foreign investment.
<p>Competition Policy/ Monopolies and Exclusive Service Suppliers provisions</p>	<p><u>Competition Policy</u>²¹</p> <ul style="list-style-type: none"> • Article 1501 states that each Party is to adopt/maintain measures to proscribe anti-competitive business conduct & take appropriate action with respect thereto. In addition, Parties are to co-operate on issues of competition law enforcement policy. However, no Party may have recourse to dispute settlement under the NAFTA Agreement for any matter arising under this competition-related Article. <p><u>Monopolies</u></p> <ul style="list-style-type: none"> • Nothing in this Agreement shall prevent a Party designating a monopoly. • where a monopoly is designated, a Party shall endeavour to introduce at the time of the designation, such conditions on the operation of the monopoly as will minimise or eliminate any nullification or impairment of benefits. • <i>Article 1502 (3) provides each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly²² that</i> 	<p><u>Monopolies</u></p> <ol style="list-style-type: none"> 1. Monopoly supplier²⁵ not allowed to act inconsistently with members MFN obligations, or its specific commitments, in the supply of the monopoly service in the relevant market²⁶. 2. Where a Member's monopoly supplier competes either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a

²¹ Chapter 15: Competition Policy, Monopolies & State Enterprises

²² defined as 'a monopoly that is owned, or controlled through ownership interests, by the federal government of a Party or by another such monopoly.

	<p><i>it maintains²³ or designates:</i></p> <p><i>a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licences, approve commercial transactions or impose quotas, fees or other charges,</i></p> <p><i>b) except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale;</i></p> <p><i>(c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and</i></p> <p><i>(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anti-competitive practices in a non-monopolised market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the</i></p>	<p>supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.</p> <p>3. [If a Member believes monopoly supplier of a service of any other Member is acting in a manner inconsistent with paras 1 or 2, the Member can ask the Council for Trade in Services to request specific information of the other Member.]</p> <p>If , after the WTO Agreement has entered into force, a country makes specific commitments to allow supply of a service and then grants monopoly rights which negate this – mechanism in place for negotiations, or failing that arbitration to reach a compensatory adjustment.</p> <p><u>Competition Policy²⁷</u></p> <p>Members recognise that certain business practices, apart from those above²⁸ may restrain competition – each shall enter into consultations with a view to eliminating such practices at the request of any other Member.</p>
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²⁵ This also applies to 'Exclusive Service Suppliers', where a Member, formally or in effect, a) authorises or establishes a small number of service suppliers and b) substantially prevents competition among those suppliers in its territory.

²⁶ GATS Article VIII

²³ means 'designate prior to the date of entry into force of the NAFTA Agreement and existing on January 1, 1994.

²⁷ Article IX Business Practices

²⁸ Article VIII

	<p>monopoly good or service, cross-subsidisation or predatory conduct.</p> <ul style="list-style-type: none"> • Para. 3 does not apply to procurement by governmental agencies of goods or services for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the provision of services for commercial sale. <p><u>State Enterprises</u></p> <ul style="list-style-type: none"> • Nothing in this Agreement shall be construed to prevent a Party from maintaining or establishing a state enterprise²⁴. • Each Party shall ensure through regulatory control, administrative supervision or the application of other measures, that any state enterprises that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment)...wherever such enterprises exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licences, approve commercial transactions or impose quotas, fees or other charges. • each Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of another Party. 	
Transfers and Payments	<ul style="list-style-type: none"> • Each Party shall permit all transfers relating to an 	Member shall not apply restrictions on international

²⁴ defined as 'an enterprise owned, or controlled through ownership interests, by a Party

	<p>investment of an investor of another Party in the territory of the Party to be made freely and without delay.²⁹</p> <ul style="list-style-type: none"> • A Party may prevent transfers through the equitable, non-discriminatory and good faith application of its laws in certain areas.³⁰ 	<p>transfers and payments for current transactions relating to its specific commitments³¹.</p> <p>If a Member undertakes a market access commitment in relation to the commercial presence mode of supply, it is committed to allow related transfers of capital into its territory.</p>
Expropriation & Compensation	<p>No party may directly or indirectly nationalise or expropriate an investment of an investor of another party in its territory, except:</p> <p>a) for a public purpose b) on a non-discriminatory basis c) in accordance with due process of law the minimum standard of treatment³²; and d) on payment of compensation</p> <p><u>Level of Compensation</u></p> <ul style="list-style-type: none"> • shall be equivalent to the market value immediately before the expropriation took place. Valuation criteria listed.³³ • shall be paid with out delay and be fully realizable. • if payment made in a G7 currency, shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.³⁴ • on payment, compensation shall be freely transferable as foreseen in Article 1109. 	<p>No coverage.</p> <p>Article XIV provides that nothing shall prevent any Member from taking any action it considers necessary to protect its essential security interests:</p> <p>i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;</p> <p>iii) taken in time of war or other emergency in international relations.</p>
Dispute Settlement	<ul style="list-style-type: none"> • Without prejudice to the rights and obligations under the main Dispute Settlement procedures³⁵ Chapter 11³⁶ establishes a mechanism for 	<ul style="list-style-type: none"> • Only Member States can initiate the dispute settlement procedures.

²⁹ Article 1109 lists transfers which are included.

³⁰ Article 1109(4)

³¹ Article XI

³² See first para Standard of Treatment (Article 1105 NAFTA)

³³ Article 1110(2)

³⁴ Article 110(5) includes provisions for payment in a non-G7 currency.

³⁵ Chapter 20

³⁶ Section B

	<p>the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal:</p> <p>1) Investor of a Party³⁷ may submit to arbitration a claim that another Party has breached an obligation under Section A or Article 1503(2) (State Enterprises), or under Article 1502(3)(a) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A on its own behalf (Article 1116), OR</p> <p>2) An investor of a party on behalf of an enterprise of another Party that is a juridical person that the investor controls or owns directly or indirectly may submit to arbitration a claim that the other person has breached an obligation under Section A or Article 1502(2) (State Enterprises), or under Article 1502(3)(a) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A (Article 1117).</p> <ul style="list-style-type: none"> • A NAFTA investor who alleges that a host government has breached its investment obligations under Chapter 11 may, at its option, have recourse to one of the following arbitral mechanisms: <ul style="list-style-type: none"> - the World Bank's International Center for the Settlement of Investment Disputes (ICSID); - ICSID's Additional Facility Rules; - the rules of the United Nations Commission for International Trade law (UNCITRAL rules). • Alternatively, the investor may choose the remedies available in the host country's domestic 	
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³⁷ Definition: a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.

	<p>courts.</p> <ul style="list-style-type: none"> • An important feature of the Chapter 11 arbitral provisions is the enforceability in domestic courts of final awards by arbitration tribunals. • Causation: the investor has to have incurred loss or damage by reason of the breach • <u>Remedies</u> Monetary damages and interest, restitution of property and costs awarded. • The Dispute Settlement Procedure³⁸ is applicable to disputes which arise concerning the interpretation or application of the NAFTA. With regard to Ch.11, Investment, it is only available where a Party considers that an actual or proposed measures of another Party is, or would be inconsistent with the NAFTA Agreement³⁹. 	<ul style="list-style-type: none"> • If a Member considers any benefit it could reasonably expect to accrue under a specific commitment is being nullified/impaired due to application of a measure which does not conflict with the Agreement→ recourse to DSU.
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³⁸ Chapter 20

³⁹Annex 2204 makes it clear that a belief in nullification/impairment as a result of the application of a measure which does not conflict with the Agreement is not a ground for action.

Box 3. Main Provisions For the Telecommunications Sector in NAFTA & GATS

	NAFTA: Telecommunications, ch.13 ¹	WTO: Annex and Reference Paper
Scope	<p>Chapter applies to:</p> <ul style="list-style-type: none"> measures adopted/maintained by a Party relating to access to and use of public telecommunications transport networks² or services³ by persons of another Party, <i>including access and use by such persons operating private networks.</i> measures adopted/maintained by a Party relating to the provision of enhanced or value-added services⁴ by 	<p><u>Annex⁵ on Telecommunications</u> Independent of the specific commitments that individual WTO members have made to open up their markets for telecommunications services. It elaborates upon the GATS provisions relating to access to and use of public telecommunications and establishes the right of the service supplier to make use of public telecommunications networks and services.</p> <ul style="list-style-type: none"> Applies to all measures of a member that affect access to and use of public telecoms transport networks⁶ and services⁷

¹ In the event of any inconsistency between this chapter and another chapter, this chapter shall prevail as to the extent of the inconsistency. (Article 1307).

² Means: 'public telecommunications infrastructure that permits telecommunications between defined network termination points'.

³ Means: 'any telecommunications transport service required by a Party, *explicitly or in effect*, to be offered to the public generally, incl. telegraph, telephone, telex and data transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information'.

⁴ Means: 'those telecommunications services employing computer processing applications that, 1) act on the format, content, code, protocol or similar aspects of a customer's transmitted information, 2) provide a customer with additional, different or restructured information; or 3) involve customer interaction with stored information'.

⁵ For the purpose of the negotiations on basic telecoms following the Uruguay Round sub-sectors a –g of the GATS Services Sectoral Classification List (MTN.GNS/W/120) and a variety of other services including mobile telecommunications, providing real time transmission of customer supplied services were generally considered basic telecommunications services. Sub-sectors h-n and any 'other' services not supplied on a real-time basis or which transform the form or content of the customers information were considered value-added telecommunications services.

⁶ Means: 'the public telecommunications infrastructure, which permits telecommunications *between and among* defined network points'.

⁷ Means 'any telecommunications service required by a member to be offered to the public generally. May include: telegraph, telephone, telex and data transmission typically involving the real time transmission of customer supplied information between two or more points without end to end change in the form or content of the customer's information'.

	<p>persons of another Party in the territory, or across the borders, of a Party.</p> <ul style="list-style-type: none"> • does not apply to measures of a Party relating to broadcast or cable distribution of radio or TV programming, <i>except to ensure that persons operating broadcast stations and cable systems have continued access to and use of public telecommunications transport networks and services</i> • nothing in Chapter shall be construed to: <ul style="list-style-type: none"> a) require a Party to authorise a person of another Party to establish, construct, acquire, lease, operate or provide telecommunications transport networks or transport services; b) <i>require a Party, or require a Party to compel any person, to establish, construct, acquire, lease, operate or provide telecommunications transport networks or transport services not offered to the public generally;</i> c) <i>prevent a Party from prohibiting persons operating private networks from using their networks to provide public telecommunications transport networks or services to third persons; or</i> d) <i>require a Party to compel any person engaged in the broadcast or cable distribution of radio or TV programming to make available its cable or broadcast facilities as a public telecommunications transport network.</i> 	<ul style="list-style-type: none"> • doesn't apply to measures affecting cable or broadcast distribution of radio and TV • nothing in annex shall be construed to require a member to authorise a service supplier of any other member to establish, construct, acquire, lease, operate or supply telecoms transport networks or services <i>other than as provided in its schedule.</i> <p><u>Reference Paper (RP)</u></p> <ul style="list-style-type: none"> • set of principles and definitions on the regulatory framework for <i>basic</i>⁸ telecommunications services. • regulation essential facilities of major suppliers⁹
<p>Access to and Use of Public</p>	<p><u>Main Obligation</u></p> <ul style="list-style-type: none"> • Each Party to ensure that 	<p><u>Main Obligation</u></p> <ul style="list-style-type: none"> • Each member is required to

⁸ No definition contained in RP, but see footnote 5

⁹ Defined in the RP as ' a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications as a result of: a) Control over essential facilities; or b) use of its position in the market.

<p>Telecommunications Networks and Services</p>	<p>persons of another Party have access to and use of any public telecommunications transport network or service, <i>incl. private leased circuits</i>, offered in its territory or across its borders for the conduct of their business, on reasonable and non-discriminatory terms¹⁰.</p> <p><u>Basic Rights</u> – each person to ensure that such persons are permitted to:</p> <ol style="list-style-type: none"> 1) to purchase/lease/attach terminal or other equipment which interfaces with the public telecommunications transport network 2) to interconnect private leased and owned circuits with public telecoms transport networks in the territory, or across borders, of that Party, <i>incl. for use in providing dial-up access to and from their customers or users</i>, or with circuits owned or leased by another person <i>on terms and conditions mutually agreed by those persons</i>; 3) use operating protocols of their choice; 4) <i>perform switching, signalling and processing functions</i>. <p>Each Party shall ensure that persons of another Party may use public telecommunications transport networks or services for the movement of information in its territory or across borders, including intracorporate communications¹¹, and for access to information</p>	<p>ensure that all service suppliers seeking to take advantage of any commitments included in the GATS schedule are allowed access to and use of public basic telecommunications on 'reasonable and non-discriminatory terms'.</p> <p><u>Basic Rights</u> of access and use for service suppliers: Can use public telecoms networks and services:</p> <ol style="list-style-type: none"> 1) to purchase/lease/attach terminal or other equipment which interfaces with the network <i>and which is necessary to supply a suppliers services</i>; 2) to interconnect private leased and owned circuits with public telecoms transport networks and services or with circuits owned or leased by another supplier; and 3) to use operating protocols of the service supplier's choice in the supply of any service, <i>other than as necessary to ensure the availability of telecoms transport networks and services to the public generally</i>. 4) to move information within and across borders including intra-corporate communications¹² and for access to information contained in databases/other machine-readable form in the territory of any member.
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¹⁰ This is defined for Article 1302 purposes as 'on terms and conditions no less favourable than those accorded to any other customer or user of like public telecommunications transport networks or services.

¹¹ Defined as 'telecommunications through which an enterprise communicates: a) internally or with its subsidiaries, branches or affiliates as defined by each Party, or b) *on a non-commercial basis with other persons that are fundamental to the economic activity of the enterprise and that have a continuing contractual relationship with it*.

¹² Defined as 'telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and subject to a Member's domestic laws and regulations, affiliates. For these purposes 'subsidiaries,' 'branches' and, where applicable, 'affiliates' shall be as defined by each Member. *Intracorporate communications excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.*

	<p>contained in databases or otherwise stored in machine-readable form in the territory of any Party.</p> <p>Each Party <i>shall ensure that no condition is imposed on access to and use of public telecommunications transport networks or services, other than is necessary to:</i></p> <p>a) safeguard the public service responsibilities of providers of public telecommunications transport networks or services, in particular their ability to make their networks or services available to the public generally; or</p> <p>b) protect the technical integrity of public telecommunications transport networks or services.</p> <p><u>Restrictions</u> Members to ensure no condition is imposed on access to and use other than necessary: → to safeguard the public service responsibilities/making networks available to the public generally → to protect the public integrity of public telecoms transport networks and services.</p> <p>Conditions for access to and use may include: 1) restrictions on resale or shared use of such services; 2) a requirement to use <i>specified</i> technical interfaces, incl. interface protocols, for interconnection with such networks and services; 3) <i>a licensing, permit, registration or notification procedure which, if adopted or maintained, is transparent and applications filed</i></p>	<p>In relation to 4) above, members <i>can take such measures as are necessary to ensure</i> the security and confidentiality of messages, as long as they are not discriminatory or restrictive of trade in services.</p> <p><u>Restrictions</u> Members to ensure no condition is imposed on access to and use other than necessary: → to safeguard the public service responsibilities/making networks available to the public generally → to protect the public integrity of public telecoms transport networks and services → <i>to ensure service suppliers of any other member do not supply services unless permitted pursuant to commitments in the members schedules.</i></p> <p>Conditions for access to and use may include: 1) restrictions on resale or shared use of such services; 2) a requirement to use <i>special</i> technical interfaces, including interface protocols, for interconnection with such networks and services; 3) <i>requirements for the interoperability of such services and</i></p>
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	<p><i>thereunder are processed expeditiously; and</i></p> <p>4) a restriction on interconnection of private leased or owned circuits with such networks or services or with circuits leased or owned by another person, <i>where circuits are used in the provision of public telecommunications transport networks or services.</i></p>	<p><i>to encourage the achievement of international standards;</i>¹³</p> <p>4) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;</p> <p>5) restrictions on interconnection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or</p> <p>6) notification, registration and licensing.</p> <ul style="list-style-type: none"> • allows developing countries to place some restrictions on access and use if necessary to strengthen their telecoms capacity. Any limitations have to be specified in their schedules.
<p>Conditions of the provision of Enhanced or Value-Added Services</p>	<p>Each Party shall ensure that:</p> <p>a) any licensing, permit, registration or notification procedure that it adopts or maintains relating to the provision of enhanced or value-added services is transparent and non-discriminatory, and that applications filed thereunder are processed expeditiously, and</p> <p>b) information required under such procedures is limited to that necessary to demonstrate that the applicant has the financial solvency to begin providing services or to access conformity of the applicant's terminal or other equipment with the Party's applicable standards or technical regulations.</p> <ul style="list-style-type: none"> • No Party may require a person providing enhanced or value-added services to: <ol style="list-style-type: none"> a) provide those services to the public generally; b) cost-justify its rates; c) file a tariff; 	<p>Only individual Member's commitments in their Schedules.</p>

¹³ Para 7a Annex

	<p>d) interconnect its networks with any particular customer or network;</p> <p>e) conform with any particular standard or technical regulation for interconnection other than for interconnection to a public telecommunications transport network.</p> <p>Notwithstanding para. c above, a Party may require the filing of a tariff by:</p> <p>a) such provider to remedy a practice of that provider that the Party has found in a particular case to be anti-competitive under its law; or</p> <p>b) a monopoly to which Article 1305 relates (see section on Monopolies in Box 2)</p>	
Transparency	<p>Further to Article 1802 (Publication), each Party shall make publicly available its measures relating to access to and use of public telecommunications transport networks or services, incl. measures relating to:</p> <p>a) tariffs and other terms and conditions of service;</p> <p>b) specifications of technical interfaces with the networks or services;</p> <p>c) information on bodies responsible for the preparation and adoption of <i>standards-related</i> measures affecting such access and use;</p> <p>d) conditions applying to attachment of terminal or other equipment to the networks; and</p> <p>e) notification, permit, registration or licensing requirements.</p>	<p>Each member to ensure relevant information on conditions affecting access to and use of public telecom networks and services is publicly available, incl¹⁴:</p> <ul style="list-style-type: none"> • tariffs; • others terms and conditions of service; • specifications of technical interfaces with such networks and services; • info on bodies responsible for the preparation and adoption of standards affecting such access and use; • conditions applying to attachment of terminal or other equipment; • notifications, registration or licensing requirements.
Pricing	<p>Each party to ensure¹⁵:</p> <ul style="list-style-type: none"> • the pricing of public telecoms transport services reflects the 'economic costs directly related to providing the services'. • private leased circuits are available on a flat-rate pricing 	<ul style="list-style-type: none"> • The RP states that Interconnection with a major supplier is to be provided at 'cost-orientated rates' that are transparent, reasonable, have regard to sufficient economic

¹⁴ Annex para 2. See also GATS Article III

¹⁵ Article 1302(3)NAFTA

	<p>basis.</p> <p>* nothing in this paragraph is to be construed to prevent cross-subsidisation between public transportation services.</p>	<p>feasibility and are sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require¹⁶.</p> <ul style="list-style-type: none"> • Interconnection with a major supplier is to be ensured 'upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities'¹⁷. <p>* RP para 1.1 and 1.2 rules out engaging in <i>anti-competitive</i> cross-subsidisation.</p>
Competition Aspects	<p><u>Monopolies</u>¹⁸</p> <ul style="list-style-type: none"> • where a Party maintains or designates a monopoly to provide public telecommunications transport networks or services, and the monopoly, directly or through an affiliate, competes in the provision of enhanced or value-added or other telecommunications-related services or telecommunications related-goods, the Party shall ensure that the monopoly does not use its monopoly position to engage in anti-competitive conduct in those markets, either directly or through its dealings with its affiliates, in such a manner as to affect adversely a person of another Party. • Such conduct may include: <ul style="list-style-type: none"> a) cross-subsidisation; b) <i>predatory conduct</i>; and 	<p><u>Monopolies</u></p> <ul style="list-style-type: none"> • The RP provides for 'Competitive Safeguards' for basic telecommunications only¹⁹. It states that appropriate measures must be maintained to prevent anti-competitive behaviour by suppliers who, alone or together, are a major supplier²⁰. • Anti-competitive practices shall include: <ul style="list-style-type: none"> a) cross-subsidisation;

¹⁶ Para. 2.2

¹⁷ Para. 2.2(c)

¹⁸ Article 1305 NAFTA, Ch.13 Telecommunications

¹⁹ See footnote 5 for definition of the scope.

²⁰ Defined as ' a supplier which has the ability to materially affect the terms of participation (having regard to price and supply in the relevant market for basic telecommunications services as a result of, a) control over essential facilities; or b) use of its position in the market.

	<p>c) the discriminatory provision of access to public telecommunications transport networks or services.</p> <ul style="list-style-type: none"> • to prevent such anti-competitive conduct, each Party shall adopt or maintain effective measures, such as: <p>a) accounting requirements; b) requirements for structural separation;</p> <p>c) rules to ensure that the monopoly accords its competitors access to and use of its public telecommunications transport networks or services on terms and conditions no less favourable than those it accords to itself or its affiliates; or</p> <p>d) rules to ensure the timely disclosure of technical changes to public telecommunications transport networks and their interfaces.</p>	<p>b) <i>using information from competitors with anti-competitive results</i>; and</p> <p>c) not making technical information about essential facilities available timely²¹.</p> <p>Interconnection with a major supplier will be ensured at any technically feasible point in the network:</p> <p>a) under non-discriminatory terms, conditions (incl. technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates.</p> <p>b) in a timely fashion, on terms and conditions (including technical standards and specifications) and cost-orientated rates that are transparent, reasonable having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided.</p> <ul style="list-style-type: none"> • Procedures for interconnection, are to be publicly available.
<p>Interconnection</p>	<p>Each person to ensure that persons of another Party are permitted to:</p> <ul style="list-style-type: none"> • interconnect private leased and owned circuits with public telecoms transport networks in the territory, or across borders, of that Party, <i>incl. for use in providing dial-up access to and from their customers or users</i>, or with circuits owned or leased by another person <i>on terms and</i> 	<p><u>Commitment</u>²³ to be provided:</p> <ol style="list-style-type: none"> 1) under non-discriminatory terms; 2) in a timely fashion on terms and at cost-orientated rates which are transparent, reasonable and sufficiently unbundled; 3) at additional points to the network termination points²⁴.

²¹ Para. 1.2

	<i>conditions mutually agreed by those persons²²</i>	<p><u>Transparency</u> procedures for interconnection, interconnection agreements or a reference interconnection offer to be publicly available.</p> <p><u>Dispute Settlement</u> service supplier requesting interconnection with major supplier must have recourse to independent body to resolve disputes on interconnection terms/conditions/rates.</p>
Standards- related measures	<p>1) Each Party to ensure that standards-related measures relating to the attachment of terminal and other equipment to the public telecommunications transport networks, incl. those measures relating to the use of testing and measuring equipment for conformity assessment procedures, are adopted or maintained only to the extent necessary to:</p> <p>a) prevent technical damage to public telecommunications networks;</p> <p>b) prevent technical interference with, or degradation of, public telecommunications transport services;</p> <p>c) prevent electromagnetic interference, and ensure compatibility, with other uses of the electromagnetic spectrum;</p> <p>d) prevent billing equipment malfunction; or</p> <p>e) ensure users' safety and access to public telecommunications transport networks or services.</p> <ul style="list-style-type: none"> • A Party may require approval for the attachment to the public telecommunications transport network of terminal or other equipment that is not authorised, provided that the criteria for the approval are consistent with 	<p>No such detailed coverage.</p> <p>Conditions for access to and use may include:</p> <ul style="list-style-type: none"> • type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of

²³ Applies on basis of specific commitments undertaken. Interconnection is referred to as 'links which allow users of one supplier to communicate with users of another supplier'.

²⁴ Subject to reasonable charges

²² Article 1302(2)(b)

	<p>para. 1</p> <ul style="list-style-type: none"> • Each Party shall ensure that its network termination points are defined on a reasonable and transparent basis. • No Party may require separate authorisation for equipment that is connected on the customers side of authorised equipment that serves as a protective device fulfilling the criteria in para. 1. <p>Each Party shall:</p> <ol style="list-style-type: none"> a) ensure that its conformity assessment procedures are transparent and non-discriminatory and that applications filed there under are processed expeditiously, b) permit any technically qualified entity to perform the testing required under the Party's conformity assessment procedures for terminal or other equipment to be attached to the public telecommunications transport network, subject to the Party's right to review the accuracy and completeness of the test results; and c) ensure that any measure that it adopts or maintains requiring persons to be authorised to act as agents for suppliers of telecommunications equipment before the Party's relevant conformity assessment bodies is non-discriminatory. <p>no later than one year after entry into force of this Agreement, each Party shall adopt, as part of its conformity assessment procedures, provisions necessary to test the results from laboratories or testing facilities in the territory of another Party for tests performed in accordance with the accepting Party's standards-related</p>	<p>such equipment to such networks.</p>
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	measures and procedures. ²⁵	
Universal Service	No coverage	Sole right of members to define Universal Service, provided its administered in a transparent, non-discriminatory, neutral, unburdensome manner.
Licencing	<ul style="list-style-type: none"> • <i>Conditions for access and use of public telecommunications transport networks and services may include a licensing, permit registration or notification procedure, which is adopted or maintained is transparent and applications filed thereunder are processed expeditiously</i>²⁶. • <i>In relation to the provision of enhanced or value-added services: Each party shall ensure that any licensing, permit, registration or notification procedure that it adopts or maintains is transparent and non-discriminatory and applications are processed expeditiously</i>²⁷. 	<p>Where a licence is required, the following must be publicly available:</p> <ul style="list-style-type: none"> • licencing criteria; • time-period required to reach a decision; • terms of individual licences; • reasons for denial of licence
Scarce Resources ²⁸	No specific coverage	procedures for allocation to be objective, timely, transparent and non-discriminatory.

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²⁵ Annex 913.5.a-2 provides for the establishment of a Telecommunications Standards Subcommittee which within 6 months of the date of entry into force of NAFTA, should develop a work program and timetable for making compatible, to the greatest extent possible, the standards-related measures of the Parties for authorised equipment as specified in Chapter 13. The Annex also states that the Subcommittee may address other appropriate standards-related matters respecting telecoms equipment or services and 'any such other matters as it considers appropriate'.

²⁶ Article 1302(7)(d)

²⁷ Article 1303(1)(a)

²⁸ e.g. frequencies, numbers, rights of way