2. Commonwealth Developing Countries and the WTO Telecommunications Regime

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Introduction

The importance of the telecommunications sector to developing country Members of the Commonwealth cannot be overemphasised, since it plays a crucial role in facilitating trade and economic development. However, the difficult issue that arises is to what extent should developing Commonwealth countries grant global telecommunication service providers the right to enter their markets and compete with their incumbent telecommunications service provider. This issue of domestic regulation of foreign telecommunications service providers has now, however, been largely moved onto the international plane with a comprehensive set of obligations and commitments accepted by States pursuant to the World Trade Organization (WTO) framework agreement on services. As such, the telecommunications service sector of a State, which previously seemed far removed from trade law and policy, is now fully integrated into the multilateral trading system as one part of the WTO General Agreement on Trade in Services (GATS). In the case of Commonwealth Member States, twenty-nine out of a total of fifty-four Members have made varying degrees of GATS commitments in the telecommunications sector.

This paper will explain briefly the main elements of the GATS and the 1997 WTO Telecommunications Agreement; identify the types of problems that developing countries may face when implementing the GATS in the area of telecommunications by examining how States' commitments affect their domestic incumbent telecommunications operators; and identify some of the issues of concern to developing countries in the current GATS negotiations.

The comments made in this paper are general in nature and should not be relied on as legal advice.

The WTO General Agreement on Trade in Services (GATS)

The GATS does three main things: first, it establishes a rule-based framework for international transactions in services; second, it clarifies the obligations of WTO Member States within that framework; and third it delineates a legal structure for ensuring that these obligations are observed. As one of the WTO Agreements it applies to all WTO Member States. With 144 Members, GATS today covers over 90% of the global trade in services.

The GATS is potentially applicable whenever a service supplier and the customer are from different countries regardless of the location of the actual

transaction. The GATS stipulates that its terms are applicable to four 'modes of supply' of a service, These four 'modes of supply' are where a service is supplied: from the territory of one WTO Member into the territory of any other Member (cross-border supply); in the territory of one Member to the service customer of any other Member (consumption abroad); by a service supplier of one Member through commercial presence in the territory of any other Member (commercial presence); or by a service supplier of one Member through the presence of natural persons in the territory of any other Member (movement of natural persons to supply the service).

Once a service falls within one of these four modes of supply, then the service and the service supplier receive GATS protection; the extent of that protection being determined primarily by a particular State's commitments made pursuant to the GATS. The GATS contains relatively few general obligations that are immediately applicable to WTO Member States. The most important of these general obligations are the most-favoured nation treatment obligation; certain limitations on a State's right to impose currency and other restrictions to safeguard its balance of payments position; a requirement that all laws affecting service provision be made publicly available; and a requirement that domestic regulation be reasonable, objective, impartial, and not more burdensome than necessary.

The bulk of the GATS obligations only become operational once a WTO Member has actually negotiated concessions or, in GATS language, made 'specific commitments'. These specific commitments are negotiated on a sector-by-sector basis and are inscribed in a Member's schedule of commitments. They provide a minimum level of treatment of foreign services and service suppliers. Once a Member has made these commitments, then it must ensure that they are observed not only by its national government, but by regional and local governments within its territory as well as by non-governmental bodies that exercise powers delegated to them by governmental authorities. Typical examples of GATS specific commitments relate to (i) rights of market access for foreign services and service suppliers, and (ii) non-discriminatory treatment of foreign services and service suppliers as compared to local services and service suppliers (the 'national treatment' principle). These market access and national treatment obligations are complementary, since market access aims to secure entry of foreign service suppliers into the market of a given WTO Member State irrespective of the position of national suppliers, while the national treatment obligation ensures that once in a given market a foreign service supplier will be treated like local suppliers.

The national treatment principle operates differently in the case of services than it does for goods, since if foreign service suppliers were to be subject to exactly the same requirements as domestic companies then it may mean that

they are actually worse off. For example, if a government imposed on a foreign telecommunications service provider the same universal service or minimal coverage requirement as that of the local telecommunications service provider then the foreign entrant would in practice be put in a worse position than the local service provider, since the latter already has the required infrastructure in place and has already acquired a certain market share. As such, the definition of the national treatment principle in the GATS has been refined to prohibit government regulation that modifies the 'conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member'.[1]

Although WTO Members made a number of specific GATS commitments in various service sectors, there was still, however, at the end of the Uruguay Round a number of areas on which agreement could not be reached. States had reached agreement on 'value-added' telecommunication services, but not on 'basic' telecommunication services. Value-added telecommunication services are telecommunications for which suppliers 'add value' to the customer's information by enhancing its form or content or by providing for its storage and retrieval. Examples include email, voicemail, and on-line data processing, storage, and retrieval. Basic telecommunication services include all telecommunications, both public and private, which simply involve the relay of voice or data from sender to receiver. Examples include voice telephony, data transmission, telex, telegraph, paging, and facsimile services.

The commitments by Member States on value-added telecommunication services were incorporated into the GATS when it came into force on 1 January 1995. In the case of the provision of basic telecommunication services, further negotiations were required before Members made commitments under the auspices of the separate agreement that is known as the Fourth Protocol to the GATS or the 1997 Telecommunications Agreement, which entered into force on 5 February 1998.

The GATS also contains a Telecommunications Annex that requires each Member to ensure that all service suppliers seeking to take advantage of scheduled commitments are given access to and use of public basic telecommunication networks and services on reasonable and non-discriminatory terms and conditions.

The GATS and WTO 1997 Telecommunications Agreement

States have made market access and national treatment commitments under the GATS, the Annex on Telecommunications, and the 1997 Telecommunications Agreement over the whole spectrum of public and private basic and value-added telecommunication services.

[1] Article XVII(3) of the GATS.

The four GATS modes of supply mean that market access commitments now cover not only the cross-border supply of telecommunications, but also services provided through the establishment of foreign firms, or a commercial presence, which includes the ability of foreign telecommunications corporations to own and operate independent telecommunications network infrastructure. The importance that developing States attach to the telecommunications sector is borne out by their commitments in relation to the four modes of supply as compared to those of developed States. A number of developing States have undertaken extensive obligations in the area of telecommunications by imposing fewer limitations on cross-border supply and consumption abroad than developed States, and they have recorded a higher incidence of commitments, overall, on commercial presence as compared to developed States, when both full and partial commitments are taken into account.[2] Developing States have as such put their confidence in the GATS by hoping that their commitments will stimulate foreign direct investment and thereby improve and extend their national telecommunication networks as well as universal access.

This approach has not meant, however, that developing States have not maintained significant limitations on market access in their telecommunication commitments, especially in relation to the establishment of commercial presence within their territories. Developing States are about five times more likely than industrialised countries to have maintained limitations on the number of service suppliers who can establish a commercial presence[3] and are almost four times more likely to require that particular types of legal entity be established to provide services.[4] They are also nearly three times more likely to have included restrictions on the bypassing of, or requirements to use, the incumbent operator's network facilities as well as restrictions on a foreign service providers ability to resell any excess capacity of circuits that have been leased from the incumbent telecommunications operator.[5] However, limits on foreign equity participation are not much more frequent for developing than for developed States.[6]

In addition to specific commitments made by States, the GATS Annex on Telecommunications stipulates more generally that each WTO Member is bound to 'ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions.' The content of this obligation is further specified as requiring a Member State to ensure:

[2] Telecommunication Services, Background Note by the WTO Secretariat, WTO Doc. S/C/W/74, 8 December 1998, para.23.
[3] Ibid, para.25.
[4] Ibid.
[5] Ibid.
[6] Ibid.

- Access to and use of leased lines, with the service supplier having the right, for example, to attach equipment to the network and to connect leased lines to the public network or the leased lines of a third party;
- Public networks and services must be available for the transport of information;
- That restrictions on access and use of public telecommunications transport networks and services shall not be imposed other than as necessary to ensure public availability of the network or service, to protect the technical integrity of the public telecommunications network or service, or to ensure that service suppliers do not gain market access where they have not been given such access in a State's schedule of commitments.

Competition Concerns in Telecommunications

In addition to market access commitments, it was recognised in the WTO negotiations that domestic regulation promoting competition was needed in the telecommunications sector in order to ensure in particular that new entrants would be able to compete effectively with the incumbent telecommunications operator or other major domestic service suppliers. To that end, a Telecommunications Reference Paper ('Reference Paper') containing pro-competitive principles was adopted as an optional element of the 1997 WTO Telecommunications Agreement. Out of the 29 Commonwealth States who have made GATS commitments in the telecommunications sector, 20 of these have adopted the additional commitments set out in the Reference Paper in its entirety or minor modifications, a number of these being Commonwealth developing States.[7]

The Reference Paper requires Members to provide safeguards in domestic law to ensure that the market access and foreign investment commitments that States have undertaken are guaranteed in practice. The Reference Paper contains three main obligations to which States can choose to be bound pursuant to their specific commitments as part of the 1997 Telecommunications Agreement. The first is that the State should prevent its incumbent telecommunications operator or other dominant supplier from partaking in anti-competitive practices against a foreign service supplier. The second is a set of guaranties in relation to interconnection. The third is that there must be

[7] The following Commonwealth Member States have adopted the Reference Paper as part of their telecommunication commitments: Antigua & Barbuda; Australia; Barbados; Belize; Brunei Darussalam; Canada; Dominica (the schedule containing the Reference Paper commitments will be annexed to the Fourth Protocol as soon as Dominica ratifies it); Ghana; Grenada; India; Jamaica; Kenya; Malaysia; New Zealand; Papua New Guinea (the schedule containing the Reference Paper commitments will be annexed to the Fourth Protocol as soon as Papua New Guinea ratifies it); Singapore; South Africa; Sri Lanka; Trinidad & Tobago; and Uganda.

established (and maintained) an independent regulator who can ensure these competition and interconnection requirements are enforced as well as providing an impartial forum for the arbitration of disputes between operators.

1. The Reference Paper lists three examples of anti-competitive practices:
   - Cross-subsidisation: this is the use of profits derived from one area of operations in order to finance another) often loss-making, area. This is a common business practice, yet it can, become anti-competitive when the operations in the profit-making area are conducted pursuant to exclusive or special rights or when an incumbent telecommunications operator or another major supplier holds a dominant position in the profit-making area;
   - The requirement not to use information obtained from competitors: Incumbent telecommunications operators typically operate at many levels. They will, for example, both supply leased lines to data communications providers in order to enable them to complete their network and at the same time offer data telecommunications in competition with those providers. In this example, the telecommunications operator in the course of supplying leased lines to its data communications competitor would likely obtain information from the competitor that is often precise enough to identify the customers of the competitor or to guess the intentions of a competitor. If that information is relayed to the data communications division of the telecommunications operator it can be used for anti-competitive purposes.[8] It is arguable, based on the Reference Paper, that structural measures such as the legal separation of business divisions operating in different markets are needed to prevent such anti-competitive practices; and
   - The withholding of technical and commercial information to foreign telecommunication service providers: This anti-competitive practice is defined in absolute terms and not in non-discrimination terms, which means that on the face of the Reference Paper an incumbent telecommunications operator could be forced to disclose technical and commercial information to third parties which want to provide a certain service even if neither the incumbent operator itself nor any other party is already providing that service.
2. Interconnection is defined in the Reference Paper as the 'linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with

[8] Note that the Reference Paper does not define anti-competitive purposes.

users of another supplier and to access services provided by another supplier.' This definition closely resembles the standard US and EC definitions. The Reference Paper grants foreign telecommunications providers a number of interconnection guaranties, which include:

- Interconnection is to be granted at any technically feasible point;
- The terms, conditions, and rates of interconnection must be non-discriminatory, transparent, and reasonable;
- The rates of interconnection must becost-oriented (though not necessarily cost-based);
- The quality of interconnection must be 'no less favourable' than that provided to subsidiaries, affiliates or third parties;
- Interconnection must be provided in a timely fashion;
- There must be 'sufficient' unbundling so there is no need to 'pay for network components or facilities' that are not required. Such a provision is difficult to ensure in practice unless the regulatory authority intervenes to provide a classification of network components in order to make the obligation more concrete;
- There must be transparency on licensing procedures for granting interconnection;[9] and, finally,
- There must be guidelines for the allocation of scarce resources in relation to interconnection.

Both developed and developing States have faced considerable difficulty in ensuring that their incumbent telecommunications operators comply with these obligations. The lack of compliance by a State with its Reference Paper obligations can, like other GATS breaches, be challenged under the WTO Dispute Settlement Process. The relatively high number of Commonwealth developing countries that have undertaken Reference Paper commitments means that these issues will be of increasing importance as telecommunication service providers from developed countries begin to use these obligations to try and gain a significant domestic market share. This has already occurred in the high profile case brought by the US against Mexico on the basis that Mexico had not complied with its obligations under the Reference Paper by failing to constrain the activities of its incumbent telecommunications operator (Telmex).

The *Telmex* Case

Mexico was one of the early reformers of telecommunications markets in South America. It privatized its monopoly carrier Telmex in 1990, and the

[9] But the Reference Paper does not specify the situations when a license can be required nor the terms and conditions which should or should not be found a license.

government in 1994 passed legislation to permit competition in voice telephone services. The Mexican government ended Telmex's monopoly concession for domestic and international long distance telephone services on 1 January 1997, when six entrants initiated service in 60 of Mexico's largest cities. US corporations MCI and AT&T are part owners of the largest of the new providers, Alestra and Avantel (45 & 49%, respectively). Local service opened to competition on 29 December 1998. By the end of the first year, new entrants had claimed about 25% of the contestable long-distance market and 18% of the total long-distance market. Long distance prices fell by roughly 30-40%. Despite this rapid transition from privatization to competition,there were still barriers to effective market access and competitive issues that MCI and AT&T were facing. The GATS and in particular the Reference Paper have been of considerable use to these corporations in gaining US government support for their claims (especially since Mexico has adopted the Reference Paper in its Schedule of Commitments).

On 17 August 2000, the US government initiated a formal WTO complaint and is still at present engaged in a WTO consultation process with the Mexican government; claiming, on behalf of US telecommunication corporations, that Mexico's telecommunications regime has prevented US service suppliers from availing themselves of key GATS commitments undertaken by Mexico, The US claims, for example:

- Mexico's International Long Distance Rules prevented service suppliers from obtaining competitive rates and conditions for cross-border telecommunications services provided on leased lines;
- Competitive service providers have been unable to obtain local interconnection with Telmex in a timely manner -in one case for over a year;
- Competitive service providers have been unable to obtain from Telmex cost-oriented rates for interconnection at the local, long-distance,and international levels, including for calls to regions where competitors lacked their own facilities;
- Mexico's failure to provide recourse to an independent domestic body to resolve interconnection disputes within a reasonable period of time is a violation of its Reference Paper commitments;
- The Mexican government has not maintained appropriate measures to ensure Telmex does not engage in or cease from continuing anti-competitive practices, such as anti-competitive cross-subsidisation; and
- That the Mexican government has failed to ensure that its regulator's decisions and procedures are impartial with respect to all market participants.

Policy Implications of the Telmex Case for Developing Countries

The Telmex case, although not yet resulting in a formal case before a WTO panel, sounds a clear warning to Commonwealth developing States and others that multinational telecommunications corporations will increasingly rely on telecommunications commitments to hold governments responsible for ensuring that they can effectively enter and compete in telecommunications markets. This view is supported by the telecommunications dispute that arose between South Africa and the United States over the alleged anti-competitive treatment of AT&T by Telkom (the incumbent telecommunications operator in SouthAfrica). This case was not raised formally before the WTO, since United States government intervention was sufficient to resolve the dispute. It does, however, highlight the importance of Commonwealth developing States having detailed knowledge of the WTO telecommunications regime in order to represent their interests in a dispute. The Telmex case also highlights the need for Commonwealth developing States to ensure that they have an independent telecommunications regulator, since the lack of such a regulator may in itself be sufficient grounds for WTO complaint by another Member.

In this context, the problems that developed States have themselves faced when implementing the complex obligations of the Telecommunications Reference Paper will be important for developing States in formulating their legal and policy responses. Important issues such as what constitutes 'cost-oriented interconnection', how should a local-loop be unbundled, and what should be the structure and mandate of an independent telecommunications regulator have all been the focus of particular attention within the European Community (EC). In the case, for example, of the United Kingdom, the WTO Reference Paper obligations (as also encapsulated in EC Regulations) have been used successfully by foreign telecommunications service providers to pressure the UK telecommunications regulator, Oftel, to order British Telecom (BT, the incumbent telecommunications operator) to cut its charges for local loop unbundling, and to establish a wholesale flat-rate interconnection model for Internet Service Providers such as America Online and Freeserve. The Oftel directions to BT followed an extensive review of practices within a number of other European States. It is in the interests of Commonwealth developing States and other developing States to establish quickly their own domestic telecommunications regulators and interpretations of the Reference Paper. Otherwise, a WTO panel seeking to ascertain or establish global best practice will only have the consistent practice of developed States to consider. In fact, as part of the new WTO negotiations on services (GATS 2000), the Australian government has submitted a paper that sets out its efforts to implements its interconnection obligations as well as its understanding of a

number of the interconnection provisions contained in the Reference Paper.[10] It is important both for Commonwealth developing States to contribute to this debate from their perspective as well as to contribute their views more generally on telecommunications in the GATS 2000 negotiations

The GATS 2000 Negotiations and Policy Issues for Developing Countries

There are a number of areas concerning telecommunication services where Commonwealth developing countries should be making proposals as part of the GATS 2000 negotiations. To date, however, Commonwealth developing States have not made formal proposals. A selection of issues, in addition to that of interconnection mentioned above, which require their contribution, include:

- Access to the Internet for Commonwealth developing States, including barriers like the high charges incurred by national Internet Service Providers for connection to international networks. A policy proposal that could be made here is that these charges should be reduced in the case of developing States to a cost-based level to ensure greater access for developing States to the Internet, at least for a certain duration;
- The scope of the universal service provision in the Reference Paper. The universal service provision allows a State to impose an obligation on telecommunication service providers to provide reasonable access to a standard telephone service and to payphones for its citizens. Such regulation may be necessary, since a telecommunication company will often decide not to operate in certain areas of a State's territory due to commercial reasons. The scope of the universal service provision obligation is important, since the Reference Paper expressly provides that universal service obligations imposed by a government on a telecommunications service provider will not in general be regarded as being an anti-competitive measure. A possible policy proposal that Commonwealth developing States may put forward here is that the scope of the universal service provision obligation should extend beyond coverage also to include satisfactory connectivity in terms of users' needs; and
- A response to the proposal of the European Community[11] that WTO Members should reduce limitations on access to telecommunication markets to the minimum necessary to ensure quality of service, including universal service and to address the issue of scarce

[10] S/C/W/110/Add.9, 24 June 1999.
[11] S/CSS/W/35, 22 December 2000.

resources. This proposal recommends removing such limitations on market access as limitations on the number of operators, limitations on the type of legal entity allowed, and time limitations for the phasing in of commitments. A possible response here by Commonwealth developing States may be that WTO scheduling of free market access in the telecommunications sector, especially through commercial presence, could be furthered if better conditions of market access were granted to other sectors of interest to Commonwealth developing countries.