BUSINESS TRANSACTIONS, DISPUTES, AND REGULATION

The World Trade Organization Agreement on Telecommunications*

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On February 15, 1997, negotiators representing sixty-eight countries concluded an agreement on basic telecommunications services (known as the "GBT Agreement," for the Group on Basic Telecommunications) under the auspices of the World Trade Organization (WTO).[1] The sixty-eight countries—which account for more than 90 percent of the estimated $600 billion in revenues that are collected each year by worldwide telecommunications services providers—pledged in varying degrees to open their markets to foreign competition. The GBT Agreement is expected to enhance significantly competition in the provision of basic telecommunications services, leading to simultaneous decreases in service rates and growth in revenues. Perhaps more important than any specific commitment, the Agreement represents international acceptance of a shift in approach to the regulation of telecommunications. In the words of one industry analyst, "The old paradigm of monopolies confined within national frontiers is out; a new model of cross-border competition is in."[2]

I. Background

Upon the conclusion of the Uruguay Round of trade talks in 1994, which resulted in the formation of the WTO and the execution of the General Agreement on Trade in Services (GATS), participating nations concluded that issues concerning the liberalization of certain service sectors—including telecommunications, financial services, and maritime services—were

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1. The GBT Agreement is not, in fact, an "agreement" like the other Annex 1A WTO agreements (*e.g.*, The Agreement on Trade-Related Investment Measures). Rather, the GBT "Agreement" is a compilation of the schedules of the 69 GBT participants, setting out their market access commitments for basic telecommunications services under the General Agreement on Trade in Services.

2. *Cheap Talk*, FIN. TIMES, Feb. 17, 1997, at 20.

too sector-specific to be fully addressed by the general regulatory principles set forth in the GATS. The WTO's members agreed to develop a voluntary agreement to liberalize "trade in telecommunications transport and networks" within the framework of the GATS. The discussions were to conclude by April 30, 1996.

The discussions began in May 1994 and the first offers were submitted in July 1995. The United States offered to commit itself to allowing foreign-owned service providers access to most service sectors. The U.S. offer was contingent upon its receiving a "critical mass" of offers by other participants to make a sufficient commitment to market access, national treatment, and certain "pro-competitive regulatory principles." After months of discussion, and the submission of a revised U.S. offer in February 1996, momentum for an agreement began to build; by April, forty-seven of the fifty-three countries participating in the talks had submitted offers.

Shortly before the April 30, 1996 deadline, however, U.S. negotiators declared that the NGBT had not reached a "critical mass" of offers of "sufficient quantity and sufficient quality" to justify committing the United States to the liberalization measures included in its revised offer. The United States noted that the offers then on the table did not apply to 40 percent of worldwide telecommunications services revenues and identified, as inadequate, thirty-six of the forty-seven offers submitted by other countries. In light of this development, the Group on Basic Telecommunications Services, or GBT, agreed to extend the deadline for an agreement to February 15, 1997.

Following this extension, the United States and the European Union issued a joint statement in July 1996 expressing their intention to develop a critical mass of strong offers. Since that statement, virtually all of the forty-seven offers on the table in April have been improved and twenty-one additional countries, mostly developing countries, submitted offers.

II. The U.S., Japanese, and EU Offers

Effective February 9, 1998, the United States will allow service providers with up to 100 percent direct foreign ownership to provide a full range of services, including the provision of international and domestic voice, facsimile and data services, via wireline, wireless, satellite, and submarine cable facilities, on both a resale and facilities-based basis. In addition, the final U.S. offer applies to state and local regulations, as well as federal regulations, insofar as such regulations prohibit any entity from providing telecommunications services. However, the rules of state and local regulatory agencies vis-à-vis intrastate services will not be modified by the U.S. adoption of the GBT Regulatory Principles because of limits on the FCC's authority to preempt such regulators under the Communications Act of 1934. The United States excluded from its final offer certain video services, including broadcasting and direct-to-home satellite television.

Like the United States, Japan and the fifteen EU member states have agreed to allow 100 percent foreign ownership of telecommunications service providers, subject to certain caveats. In the case of Japan, foreign entities will not be allowed to hold more than 20 percent, in the aggregate, of either of the principal two carriers, NTT and KDD. The EU offer contains delays in the implementation of the requirement to permit competition against the state monopoly; rather than doing so by January 1, 1998, Spain will retain its monopoly until December of 1998, Ireland until January 1, 2000, and Portugal and Greece until January 1, 2003.

III. Developing Countries

The most significant improvements in the offers placed on the table since last April came from developing countries. While the United States, Japan, and the fifteen EU member nations account for 75 percent of worldwide telecommunications service revenues, a significant portion of the expected 100 to 200 percent growth over the next ten years in such revenues is expected to come from developing countries. U.S. negotiators and industry groups were therefore relieved to receive offers from certain countries—including Indonesia, Malaysia, and India—that are expected to develop substantial telecommunications service markets. In all, over thirty developing countries committed to liberalizing market access and foreign ownership restrictions applicable to service providers.

The offers of Eastern European nations, which have pledged liberalization from 2001 (the Czech Republic) to 2004 (Bulgaria), and the commitments made by numerous Caribbean and Latin American nations to substantial liberalization over the next few years were received favorably. Mexico's increase of foreign ownership restrictions (from 30 to 49 percent) represented a significant improvement from the standpoint of U.S. negotiators.

Singapore, the Philippines, and Hong Kong made commitments to liberalize their markets, and Korea increased its limit on foreign ownership of entities other than KT to 49 percent, but U.S. negotiators expressed some disappointment with the offers of other Asian nations. While the submissions of offers by Malaysia and India were noted as positive events, for example, the levels of permissible foreign ownership pledged by both of these countries are lower than those levels currently allowed under their respective laws.

IV. GBT Regulatory Principles

Virtually all of the parties to the GBT Agreement agreed to adopt the GBT Regulatory Principles (which are based on a July 1995 U.S. proposal), with several countries (including India, Malaysia, and the Philippines) adopting such commitments on a partial basis and others (including Brazil, Venezuela, and Turkey) committing to adopting such commitments in the future. With the conclusion of the GBT Agreement, the regulatory disciplines contained in the GATS and the Telecommunications Annex of the GATS will apply to all telecommunications services included in WTO Members' schedules. For the sixty-five WTO Members that have accepted them, however, the GBT Regulatory Principles provide additional discipline, in that they require countries that have adopted them to apply such measures to major suppliers (i.e., those suppliers that have control over essential facilities or some other form of market power) and they address issues specifically related to the telecommunications industry. Specifically, the GBT Regulatory Principles obligate those countries that have adopted them to comply with the following regulatory requirements.

A. Prevention of Anticompetitive Practices

Members are to take appropriate measures to prevent major suppliers from engaging in anticompetitive practices, including cross-subsidization, use of information obtained from competitors that provide such information in order to gain access to essential facilities, and withholding of technical information or other information necessary for the provision of telecommunications services.

B. Interconnection Terms

Members are to ensure that foreign service suppliers may interconnect with the public-switched network: (i) in a timely fashion; (ii) under nondiscriminatory terms, conditions, and rates; (iii) at rates that are cost-oriented, transparent, reasonable, and sufficiently unbundled to ensure that service providers need not pay for unneeded components or facilities; and, (iv) at any technically feasible point. Furthermore, Members are to ensure that procedures for interconnection are publicly available and that interconnection agreements or reference interconnection offers for each major supplier are publicly available. Finally, service providers are to be able to refer all disputes with respect to terms, conditions, and rates for interconnection to an independent domestic body, which must resolve such disputes within a reasonable period.

C. Universal Service

While acknowledging each Member's right to define the kind of universal service obligation it wishes to maintain, the regulatory principles require that such obligations are not more burdensome than necessary to achieve its universal service goals and are administered in a transparent, nondiscriminatory, and competitively neutral manner.

D. Licensing Criteria

Members must make publicly available all licensing criteria and the terms and conditions of all licenses that are granted, and provide the reasons for a decision to deny a license.

E. Independent Regulatory Body

Members must provide for a regulatory body that is separate from, and not accountable to, any supplier. The procedures and decisions of such regulatory body must be impartial.

F. Allocation and Use of Scarce Resources

Procedures for the allocation and use of scarce resources—including frequencies, telephone numbers, and rights of way—shall be objective, timely, transparent, and nondiscriminatory.

As GATS commitments, the GBT Regulatory Principles can be enforced through the WTO dispute settlement process.

V. Significance of the Agreement

The GBT Agreement has great significance for global telecom markets and telecom trade among nations. Among the most important implications are the following.

A. Decrease in Rates

The International Institute of Economics estimates that the increased competition resulting from the GBT Agreement will reduce telecommunications bills by $1 trillion, or 4 percent of worldwide GDP, over ten years. The FCC has stated that the GBT Agreement will contribute to its objective to decrease international service rates by up to 80 percent over the next several years. By eliminating monopolies, allowing resale, and otherwise enhancing competition, the GBT Agreement will contribute to any momentum to decrease accounting rates that results from the rules created pursuant to the FCC's settlement rates proceeding.

B. Increased Need for Telecommunications Equipment

The GBT Agreement's lowering of barriers to entry—including the elimination of monopolies, commitments to allow increased foreign investment, and the adoption of the GBT Regulatory Principles—will increase the number of telecommunications service suppliers. New suppliers will require substantial amounts of equipment to build facilities. Existing suppliers will require increased equipment in order to provide the enhanced services that will become more important in an increasingly competitive market. The provision of such equipment will be facilitated by the WTO Agreement on information technology, which was signed in March 1997 and went into effect in July 1997.

C. Increased Private Funding of Infrastructure Development

Many analysts have emphasized the importance of the adoption of GBT disciplines because of the certainty that they provide foreign investors in attracting private capital to telecommunications projects in developing countries. To date, most of the private capital funding of telecommunications infrastructure development has been through the privatization of monopoly providers. The adoption of GBT market access commitments (i.e., commitments to end national monopolies) and of the GBT Regulatory Principles will make developing countries increasingly attractive sites for construction of new competing telecommunications facilities financed by private lenders.

D. More Cross-Border Alliances

Because the GBT Agreement will reduce many barriers to cross-border mergers and other forms of acquisition, while increasing the need of telecom service providers to provide global services, it is expected to accelerate the recent trend toward cross-border telecom alliances.

E. Global Satellites Services

Proponents of global satellite systems believe that the GBT Agreement will greatly enhance their ability to surmount regulatory obstacles to the provision of satellite telecommunications services on a global basis. Forty-two countries guaranteed market access for satellite services and facilities.

VI. Implementation of the WTO Agreement On Basic Telecommunications Services

The GBT Agreement went into force on February 5, 1998. Although the signatories had agreed originally to implement the pact effective January 1, 1998, the implementation date was delayed because fifteen of the signatories had not ratified the pact by November 30, 1997, the target date established by the WTO. Further negotiations through the month of January resulted in an agreement to implement the pact on February 5, notwithstanding the fact that thirteen nations (as of this writing) have yet to ratify the accord (the nations in question, which include Argentina, Brazil, Chile, the Philippines, Poland, and Romania, represent 4 percent of the global telecommunications market). The WTO agreed to extend the ratification deadline for these countries through the end of July and decided against further postponement of the agreement's effective date upon receiving assurances from some of these nations that they will formally adopt the pact as soon as administrative and legislative processes allow.

VII. Additional Information on this Topic on the World Wide Web

1. WTO Basic Telecommunications Agreement: <http://www.fcc.gov/ib.wto.html>.
2. Statement of Ambassador Charlene Barshefsky—Basic Telecom Negotiations: <http://www.ustr.gov/agreements/telecom/barshefsky.html>.
3. Market Access Commitments on Basic Telecommunication—February 17, 1997: <http://www.wto.org/wto/press/bt-3list.htm>.
4. Data on Telecommunications Markets Covered by the WTO Negotiations on Basic Telecommunication—February 17, 1997: <http://www.wto.org/wto/press/data3.htm>.

5. The WTO Negotiations on Basic Telecommunications—Summary with Attachments—March 6, 1997: <http://www.wto.org/wto/press/summary.htm>.
6. The WTO Negotiations on Basic Telecommunications: Informal Summary of Commitments and M.f.n. Exemptions—Overview—March 6, 1997: <http://www.wto.org/wto/new/bt-summ3.htm>.
7. Overview of the Results of WTO Basic Telecommunications Negotiations: <http://www.wto.org/wto/services/tel.htm>. This table is in portable document format and requires the Adobe Reader that can be found at: <http://www.adobe.com/Acrobat/Acrobat0.html>.
8. Basic Telecommunication—Schedules of Commitments and Lists of Article II Exemption, April 1997: <http://www.wto.org/wto/new/gbtoff.htm>.