

Further Liberalization of Telecommunications Services in the
Framework of the WTO in the 21st Century

Dr. Yun ZHAO: Lecturer, City University of Hong Kong; formerly researcher at Erasmus University Rotterdam, the Netherlands; Ph.D., Erasmus University Rotterdam, the Netherlands; LL.M., Leiden University, the Netherlands; LL.M., LL.B., China University of Political Science and Law, Beijing, China.

Address: School of Law, City University of Hong Kong
Tat Chee Avenue
Kowloon
Hong Kong
Tel: 00852-27887387
Fax: 00852-27887530
E-mail: lwzhao@cityu.edu.hk

1. Introduction

Telecommunications services are generally considered vital to the national economy and thus, have been subject to tight national regulatory control. This conception changed when approaching the end of the 20th century. Telecommunications, as tradable services, have been undergoing significant liberalization with the introduction of 1997 WTO Agreement on Basic Telecommunications.¹ Growing recognition by governments that competitiveness is increasingly dependent on innovative and cost-effective telecommunications services has led to telecommunications deregulation and to liberalization of the international trade environment.² The United States (US) has been a leader in this aspect and various laws have been put in place to liberalize the telecommunications sector.³ The

¹ See further Fourth Protocol to the General Agreement on Trade in Services, WTO/S/L/20, 30 April 1996. For general discussion of the achievements and definitions of relevant concepts in the present discussion, see Y. Zhao, *The Commercial Use of Telecommunications under the Framework of GATS*, 24 *Air & Space Law*, No.6, 304-328 (1999).

² Communication from Canada: Initial Negotiating Proposal on Telecommunications Services, WTO, S/CSS/W/53, 14 March 2001 (01-1410), Council for Trade in Services, Special Session.

³ See for example, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. 151-170). See also K.L. Haenicke, *The Raging Telecommunications War: The Offensive Steps the World Trade Organization Should Take*, 9 *Tulsa Journal of Comparative & International Law* 180-181 (Fall 2001).

European Union (EU) took the same attitude and is well underway towards total liberalization.⁴

The implementation of the 1997 WTO Agreement helped intensify this trend. The policies have increased liberalization, privatization and competition. While this is the first step to liberalize telecommunications in an international context, the achievements obtained therefrom have been extolled as remarkable.⁵ For example, less than five years into the implementation of the WTO Agreement, the average international accounting rates have been significantly lowered: rates on the US-UK are as low as 10 cents (US) per minute.⁶ In liberalizing the telecommunications industry, Thailand permits domestic and foreign private business to apply for licenses

⁴ Beginning in 1990, the European Commission and the Council launched a decade-long program to introduce service sector competition into the telecommunications market in Europe. See for example, Liberalization of International Telecommunications, at <<http://www.bt.com>> (last visited April 4, 2002); see also M.A. Lamb, Legislative Development: Directive 99/64/EC Amending Directive 90/388/EEC on Telecommunications Networks and Cable TV Networks Owned by a Single Operator: Telecommunications and TV Networks, 6 *Columbia Journal of European Law* 142-143 (Winter, 2000); E.J. Dommering, Article 90 of the EEC Treaty and the Telecommunications, Broadcasting and Postal Sectors, in Stuyck & Vossestein (Eds.), *State Entrepreneurship, National Monopolies and European Community Law* 53 (1993); H. Papaconstantinou, *Free Trade and Competition in EEC Law, Policy and Practice* 27 (1988).

⁵ C. Blouin, The WTO Agreement on Basic Telecommunications: A Reevaluation, 24 *Telecommunications Policy* 135 (2000).

⁶ *World Trade Organization Basic Telecommunications Agreement*, available at <<http://www.fcc.gov>> (viewed on October, 28, 2003).

to operate telecommunications services, which substantially diversify the services available in Thailand and lower the prices for the services.⁷

Nevertheless, this first attempt also raised expectations, and much remains to be accomplished. In the five years since the Agreement, rapid development in technology has produced new challenges to telecommunications.

Lots of changes have taken place since the conclusion of the 1997 WTO Agreement.⁸ Confronting the competitive situation in the telecommunications market, three international satellite organizations (INTELSAT, INMARSAT, EUTELSAT) have been privatized.⁹ Other historic events include the collapse of the dot.coms¹⁰ and failures of major telecom corporations, such as Qwest, Global Crossing and Worldcom, and bankruptcies of all the mobile satellite communication providers (Iridium, Globalstar, ICO, Orbcomm, etc.). The current state of the industry is characterized by widespread economic slowdown, overcapacity, market and

⁷ *The Forthcoming Liberalization of the Thai Telecommunications Market: Present and Future Trends*, available at <<http://www.tilleandgibbins.com>> (viewed on October 28, 2003).

⁸ See for example, C. DeFrancia, Local Competition and Telecommunications Convergence: Gauging the Need for New Legislation, 17 *Journal of Law & Politics* 739 (Fall 2001).

⁹ See further International Organizations, available at <<http://www.hunsat.hu/angol/emuholdak.html>> (last visited July 31, 2003).

¹⁰ See for example, As Dot.Coms Collapse , Sloan Applicants Speed up Study Plans, available at <<http://mitsloan.mit.edu/news/releases/2001/2003.html>> (last visited July 31, 2003).

regulatory failures, excess debt and corporate fraud.¹¹ To a certain extent, the current turmoil in the communications industry results from immature markets. The policy of self-regulation functions well in a mature market. In light of the changes above, scholars have extensively evaluated the impact of the Agreement and pointed out possible areas for further improvements.

The failure of a new round of negotiations in Seattle has not forestalled various demands for the further liberalization of telecommunications. Member States of WTO have submitted proposals and liberalization in telecommunications has been generally accepted by international society as a whole. Thus, while taking into account of the existing WTO Agreement, it is more than urgent to research into the possible areas for further liberalization of telecommunications.

This paper will be divided into several parts. Part 1 will deal with the issue of conceptual confusion. While basic and value-added telecommunications were delineated in former negotiations, further work should be done to classify the new telecommunications services. Part 2 will try to make clear the difference between relevant concepts. Based on this structure, Part 3 will elaborate on possible commitments that could be offered in the near future. While regulatory issues occupy an important position in procuring competition, Part 4 will intensively discuss further improvements in Reference Paper (RP). Conclusions shall be offered in Part 5.

¹¹ UNI World Telecom Press Conference, London & Washington DC, October 9, 2002, Telecom Meltdown Fact Sheet, available at <<http://www.union-network.org/telecom>> (last visited June 27, 2003).

2. Delineation of Telecommunications Services

Telecommunications services were defined as tradable and brought to the framework of WTO in Uruguay Round of negotiations. However, this conception should be further strengthened. The character of "tradability" constitutes the basis for including telecommunications in the arena of WTO. The complication involved in different types of telecommunications services caused much trouble to the smooth negotiations at that time.¹² Later the conceptions of basic and value-added telecommunications services were introduced, which largely solved the awkward situation.

Fifteen categories of telecommunications services were defined in the negotiations, which were further differentiated as basic and value-added services.¹³ Basic services include all telecommunications services, both public and private that involve end-to-end transmission of customer supplier information; value-added 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.¹⁴ It is to be

¹² A fundamental contribution, and subsequent influence of the US was the distinction between basic and value-added services. However this distinction was absent in the legislation of some European Union Member States and some other Members of the WTO.

¹³ See further WTO, S/C/W/120. The first eight categories of services were agreed to be examples of basic services, which include voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, private leased circuit services. Value-added services include electronic mail, on-line information and database retrieval, electronic data interchange, enhanced facsimile services, code and protocol conversion, on-line information and/or data processing.

¹⁴ See <<http://www.wto.org>> (last visited July 31, 2003).

noted there are different understandings on this differentiation in different national background.¹⁵ But the present differentiation is now well accepted within the framework of WTO.¹⁶ What may result in the meantime is the application of existing sector-specific regulation, depending on whether particular converging services are deemed to be captured by definitions that were designed for the telecommunications sector alone.¹⁷ Thus, the present task is to clarify the sub-categories for commitments concerning the different distinctions under different categories.

This division is further connected with the issue of regulation. After the Uruguay Round of negotiations, during which commitments were largely made concerning value-added services, further negotiations were held concerning basic services. Reference Paper (RP) was reached to provide guidance on domestic regulation. It is generally acknowledged that appropriate regulation should be drafted, or in place regarding basic services, but the policy of self-regulation should be adopted for value-added services.¹⁸

¹⁵ This can arise out of the flexibility of the model schedule adopted for basic telecommunications, which authorizes distinction between local/long distance/international, wire or radio-based, public or non-public, resale or facilities-based services, satellite/non-satellite, mobile/fixed services.

¹⁶ Decision on Commitments in Basic Telecommunications, 26 April 1996, para. 1.

¹⁷ W.J. Drake & E.M. Noam, Assessing the WTO Agreement on Basic Telecommunications, in G.C. Hufbauer & E. Wada (Eds.), *Unfinished Business: Telecommunications after the Uruguay Round* 53 (Washington, D.C.: Institute for International Economics, 1997).

¹⁸ P.L. Spector, Business Transactions, Disputes and Regulation: The World Trade Organization Agreement on Telecommunications, 32 *The International Lawyer*, No. 2, 217 (1998); A.J. Campbell, Self-Regulation and the Media, 51 *Federal Communications Law Journal* 715-716 (1999).

With the development of modern technology, new services are available.¹⁹ However, since the WTO Agreement was reached in 1997, new services arising thereafter are totally left out. Moreover, technological convergence brings together fiber optics, digital compression and packet switching, all having their most profound effect on communications at the network level.²⁰ While convergence encourages functional integration, it typically produces a plurality of distribution technologies and consumer devices.²¹ It is thus now important to bring these services to the WTO, especially the application of information networks whose quality, capacity and cost meet the needs of the users. Moving from the core to the periphery of the Internet, the past four years have seen a battle over so-called “open access” rules for high-speed Internet access providers, typically cable modem providers.²² In this respect, the barriers of access to the Internet, such as the requirement of connectivity with local telecom companies, should be eliminated. Furthermore, it is expected that other new services will continue to arise later on, and mechanisms should thus be provided to offer periodical review for timely inclusion of new services in the WTO Agreement. The phenomenon of the

¹⁹ R. Frieden, Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach, 55 *Federal Communications Law Journal* 211-212 (March 2003).

²⁰ D.J. Collis *et al.*, Winners and Losers: Industry Structure in the Converging World of Telecommunications, Computing and Entertainment, in D.B. Yoffie (Ed.), *Competing in the Age of Digital Convergence* 160 (Boston: Harvard Business School Press, 1997).

²¹ D. Ellis *et al.*, *New Media Networks: Selling Broadband Connections to Consumers 1* (Toronto: Omnia Communications, 1999).

²² See further J.B. Speta, A Common Carrier Approach to Internet Interconnection, 54 *Federal Communications Law Journal* 233-234 (March 2002).

increasing overlap between new and existing services could produce differential regulation for similar services²³ also justified the necessity of periodical review.²⁴

The following new services should be listed and explained: Internet delivery services; online distribution services; computer and related services; online advertising services; express delivery services; and certain financial services.²⁵ For the purpose of classification, Internet delivery services, or more exactly, packet-switched data transmission services, should be considered as basic services so that the Reference Paper which has been agreed upon in 1997 can be applied. One WTO Member has proposed that all other new services could be categorized as value-added services.²⁶ With all these discrepancies, we need to examine the services stated above and try to identify the proper categories for each of them. This requires the inputs from technical experts.

²³ B. Clements, *The Impact of Convergence on Regulatory Policy in Europe*, 22 *Telecommunications Policy*, No. 3, 200 (1998).

²⁴ Changes in technology and market development make definitions difficult. Canadian Radio-television and Telecommunications Commission (CRTC), *Report on New Media*, Broadcasting Public Notice 1999-84/Telecom Public Notice 99-14, 17 May 1999.

²⁵ See further Communication from the United States: *Market Access in Telecommunications and Complementary Services: the WTO's Role in Accelerating the Development of a Globally Networked Economy*, WTO S/CSS/W/30, 18 December 2000 (00-5571), Council for Trade in Services, Special Session.

3. Deepening Commitments in Telecommunications Services

The negotiations on telecommunications have produced fruitful results leading to successful liberalization in WTO Member States. Many scholars and politicians extolled this achievement as a great success against the traditional conception of monopoly in telecommunications services. Indeed, Member States made commitments under the framework of WTO, which is the first time in the history of telecommunications that sovereign States have agreed to submit to compulsory liberalization of the sector.²⁷

While the achievements should not be overlooked, it is indeed irrefutable that improvements could be made based on the existing commitments. The widely accepted perception that liberalization will benefit the development of this sector should naturally lead to the conclusion that full commitments should be made.²⁸

3.1. Market Access

Telecommunications liberalization originally comes from a market-based policy founded on a belief that increased competition in the domestic market brings about telecommunications innovation and cost decreases. Thus, new entrants should be

²⁶ Communication from Switzerland: GATS 2000: Telecommunications, WTO S/CSS/W/72, 4 May 2001 (01-2358), Council for Trade in Services, Special Session.

²⁷ P. Malanczuk & H. de Vlaam, International Trade in Telecommunications Services and the Results of the Uruguay Round of GATT, 3 *Telecommunications and Space Journal* 269 (1996).

²⁸ See for example, R.B. Self, Trade in Services: The Round is Underway, *The Metropolitan Corporate Counsel*, Mid-Atlantic Edition, at 6, May 2000.

welcomed to bring in new competition. However, during the Uruguay Round negotiations, this was not the case.²⁹ Market access was refused on several occasions.

Indeed, market access is a significant area for setting limitations, which are maintained generally by limiting the number of operators, limiting the type of legal entities, or setting a limit to the level of direct and indirect foreign ownership allowed.³⁰ Thus, the limitations are most often associated with commitments on commercial presence, more significantly, for basic services. Such limitations largely diminish the potential for real competition in the national market. This is because restrictions prevent foreign competitors from entering the market and displacing domestic companies that may be less efficient.³¹ From the wording of the WTO documents, limitations on market access in telecommunications are justified only on the basis of available resources.³² Technical standards shall be offered to decide whether refusal of market access is qualified or not.³³ Any artificial limitations, like

²⁹ T. Takigawa, *The Impact of the WTO Telecommunications Agreement on US and Japanese Telecommunications Regulations*, 32 *Journal of World Trade*, No. 6, 43 (1998).

³⁰ GATS Article XVI, para. 2. For example, the US has one of the stringest limitations on foreign ownership—25%.

³¹ A. Gates, *Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector*, 58 *University of Toronto Faculty of Law Review* 113 (Spring, 2000); J.G. Sidak, *Foreign Investment in American Telecommunications* 5 (Chicago: University of Chicago Press, 1997).

³² The radio spectrum is a scarce resource whose administration is the responsibility of the competent national authorities, in accordance with to the ITU Radio Regulations, allocations, allotments and assignments to different services.

³³ Communication from Australia: Negotiating Proposal for Telecommunication Services, WTO S/CSS/W/17, 5 December 2000 (00-5276), Council for Trade in Services, Special Session.

limitations based on cultural or industrial policy rationales, should be deemed against the principles of WTO and accordingly, be deleted.³⁴

3.2. National Treatment

A party may accord services and service providers of any other party by according either formally identical treatment or formally different treatment to what it accords to its own services and service providers.³⁵ Under the GATS, a country only has to apply this principle when it has made a specific commitment to provide foreigners access to its services market. However, during the negotiations, the position of reciprocity took the prevalence. Limitations were registered regarding national treatment in terms of residence, of ownership of property or land, and in particular, limitations on nationality of certain categories of personnel. This is ostensibly contrary to the original idea of national treatment, which requires that no *de jure* or *de facto* discrimination should be made between foreign and local service providers.³⁶ As discussed in market access, limitations shall be based only on the availability of resources and no other limitations are justified. Only by sticking to this point, will the idea of equality of opportunity in competition be realized.

³⁴ D.W. Conklin, Foreign Ownership Restrictions, in *Adapting to New Realities: Canadian Telecommunications Policy Conference* 33 (London, Ont.: Richard Ivey School of Business, University of Western Ontario, 1998); S. Globerman & D.A. Hagen, Foreign Investment in Telecommunications: Assessing the Policy Environment, in D. Orr & T.A. Wilson (Eds.), *The Electronic Village: Policy Issues of the Information Economy* 118 (Toronto: C.D. Howe Institute, 1999).

³⁵ GATS Article XVII.

³⁶ GATS Article XVIII, para. 3.

3.3. Most-Favored-Nation (MFN) Exemptions

The Most-Favored-Nation (MFN) principle, as one of the characteristics of multilaterality, is the most effective principle of achieving liberalization. Under the General Agreement on Trade in Services (GATS), this principle is definitely unconditional in its wording and in legal terms. However, during the negotiations, exemptions were used as leverage. The coverage of MFN for each Member is therefore determined by a so-called negative list.³⁷ It has been argued that the exemptions should be temporary, exceptional and unambiguous.³⁸ This also holds true for telecommunications services. The overuse of MFN exemptions would indeed undermine the functioning and credibility of unconditional MFN treatment. A balance needs to be struck between individual national concerns and the limitation or prevention of abusive uses of such exemptions. For further liberalization of telecommunications, Member States should at least consider the elimination of exemptions related to the following issues.

3.3.1. Satellite Services

Internet-based services are undergoing dramatic growth, similarly, satellite transport capacity will possibly become nearly important as land-based capacity within a short

³⁷ B. Hoekman & M. Kostecki, *The Political Economy of the World Trading System*, 131 (Oxford University Press, 1995).

period of time.³⁹ Audio-visual services, such as broadcasting services, were not included during the negotiations, accordingly, satellite facilities used for Direct Broadcast Satellite (DBS) and Direct-to-Home (DTH) services were excluded from their commitments out of different considerations. For example, the US took the MFN exemption for the services as a leverage for the next round of negotiations.⁴⁰ The EU reserved its right to challenge this exemption as the MFN principle applies to services which are part of the audio-visual commitments undertaken by the US in 1994 as a result of the Uruguay Round.⁴¹

The satellite services sector of the telecommunications market is growing rapidly and continues to diversify its service offerings. It is expected that the new satellite systems will bring business and other consumers a wide variety of new broadband and mobile voice and data services and connect these users in countries around the globe.⁴² The existence of this exemption will not only allow unfair discrimination, but also prevent

³⁸ See further Y. Wang, Most-Favored-Nation Treatment under the General Agreement on Trade in Services—And Its Application in Financial Services, 30 *Journal of World Trade*, No. 1, 106-107 (1996).

³⁹ Telecommunication Services, background note by the Secretariat, WTO S/C/W/74, 8 December 1998 (98-4942), Council for Trade in Services.

⁴⁰ See further Global Competition in Telecommunications, Remarks of FCC Commissioner Susan Ness before the Women's Foreign Policy Group, Washington, 23 January 1997.

⁴¹ See further Annex III to the July 2000 Communication to the 133 Committee on the Preparation of GATS 2000: Status of the Implementation of the WTO/GATS Commitments and Review of the Situation in Third Countries Telecommunications Markets, available at <<http://europa.eu.int>> (last visited July 31, 2003).

⁴² International Bureau Issues Annual Report on Developments in International Telecommunications Markets to Senator Hollings, January 18, 2000, at <<http://www.fcc.gov>> (last visited July 31, 2003).

the most efficient development of cross-border telecommunications. Thus, the issue is not whether the exemption should or can be lifted, but where and when to lift the exemption. A new round of WTO negotiations should provide the right forum for this initiative.

3.3.2. Accounting Rates

This is an issue closely related with liberalization. The vast majority of international telecommunications traffic is processed within a corresponding system, whereby the telecommunications operators of the originating country cooperate with those of the terminating country to complete the phone calls or other services. The operator of the originating country collects the fee and an “accounting rate” is agreed to among operators in different countries to compensate the latter. Generally a non-liberalized country has higher fees, which diverts the traffic to a liberalized country with lower fees. Thus, the balance of the two countries is upset as a consequence, operators of liberalized countries pay large compensation to non-liberalized countries. This in turn prevents these liberalized countries from further reducing fees.⁴³

As a result, it is vital to note the charging arrangements. The charge should represent the true costs of the traffic. Fortunately, we have witnessed the progress made

⁴³ See further M.C.E.J. Bronckers & P. Larouche, Telecommunications Services and the World Trade Organization, 31 *Journal of World Trade*, No. 3, 10-12 (1997).

concerning accounting rates by the International Telecommunication Union (ITU).⁴⁴ Building on the achievements of ITU, accompanied by the ensuing nondiscriminatory charging arrangements, this exemption could be optimistically expected to be lifted in a new round of negotiations.

3.3.3. Government Procurement

The MFN principle and specific commitments relating to market access and national treatment do not apply to government procurement. Nothing until now has touched on the non-discriminatory access by foreign operators to government bidding procedures for international services and other telecommunications services contracts. No timetable was set for the completion of the negotiations regarding this issue.⁴⁵ This policy probably has the most influence on foreign operators since in most cases governments are the largest single consumers of telecommunications services. Efforts should be made to eliminate any non-tariff barriers, which inhibit full and open market access in telecommunications services, which includes particularly limitations on government procurement.

⁴⁴ See further P. Tarjanne, Preparing for the Next Revolution in Telecommunications: Implementing the WTO Agreement, 23 *Telecommunications Policy* 54, 60 (1999).

⁴⁵ See Article XIII of the GATS.

3.4. Miscellaneous Commitments

Many States made commitments during the Uruguay round of negotiations, but they are to be implemented in a phased-in manner over long periods of time. This is not understandable in this sector, which is asked to provide very quickly to other sectors cheap, high-quality and fast-evolving services.⁴⁶ Witnessing the rapid development of telecommunications, it is time to urge the WTO Members to hasten the steps. The imbalance in commitments or incomplete competitive environment in the end will deter the implementation of the final economic gains. Furthermore, since 1997, new States have become the Members of WTO, it is also vital to urge them to conform to the regular rules in the playground.

Furthermore, the new round of negotiations on telecommunications services should be closely keeping the pace with the general WTO negotiations on issues like competition and subsidies. The agreement reached so far arguably signifies the emergence of a rudimentary international competition law governing telecommunications.⁴⁷ As fully competitive markets emerge, the provisions of competition law and subsidies should replace industry-specific regulations in many markets. It is to be expected that individual documents will be formulated in the Doha round of negotiations acknowledging the importance and universal nature of the

⁴⁶ Communication from the European Communities and their Member States, GATS 2000:

Telecommunications, WTO S/CSS/W/35, 22 December 2000 (00-5623), Council for Trade in Services Special Session.

⁴⁷ H.N. Janisch, International Influences on Communications Policy in Canada, in D. Orr & T.A.

Wilson (Eds.), *The Electronic Village: Policy Issues of Information Economy* 59 (Toronto: C.D. Howe Institute, 1999).

topics mentioned above. Thus, further liberalization of telecommunications will need to reflect this trend.

4. Pro-Competitive Regulatory Environment for Telecommunications

More and more countries are opening most or all segments of their telecommunications sector to competition. Experience reveals, however, that successfully introducing effective competition in telecommunications usually requires more than simply eliminating barriers to entry in the various segments of the market.⁴⁸ Proper regulation also plays an important part in procuring effective competition to achieve ultimate liberalization. As discussed above, value-added services should be regulated as little as possible, while market forces should play a major role in regulation. The present discussion of the regulatory environment deals only with basic services.

To be competitive, telecommunications regulations should be able to offer reasonably and competitively priced services, transparent and consistent licensing procedures, and pro-competitive and non-discriminatory policies.⁴⁹ One spectacular achievement in this aspect has been the conclusion of the Reference Paper (RP), which sets forth

⁴⁸ M. Kerf & D. Geradin, Post-Liberalization Challenges in Telecommunications: Balancing Antitrust and Sector-Specific Regulation: Tentative Lessons from the Experiences of the United States, New Zealand, Chile, and Australia, 23 *Journal of World Competition*, No. 2, 27 (2000).

⁴⁹ See further A.P. Larson, Telecommunications: The Engine for Economic Development in the New Century, at <<http://dosfan.lib.uic.edu>> (last visited April 4, 2002).

six guiding principles.⁵⁰ It is the first time that the issue of regulation will be discussed in a multilateral arena. As far as this point is concerned, it is a breakthrough against traditional idea (monopolized services).

However, the RP is annexed as an additional commitment for States. States are free to decide whether to adopt it or not, which has caused uncertainty, and arguably, has reduced the legal value of these principles.⁵¹ After more than five years of existence and experimental period, it is time to suggest including the RP as an integral part of the WTO Agreement. Meanwhile, the RP has been constantly criticized as being too general, subject to a wide degree of interpretation by national regulators. In its present form, the RP does not provide the sufficient criteria and underpinnings necessary to ensure truly effective competition and should therefore be strengthened.⁵²

First of all, the provisions of the RP are meant to protect against anti-competitive activities. However, the important concept of "major supplier" contained therein is obscure and subject to various understandings.⁵³ Moreover, no concrete measures are

⁵⁰ S.P. Montana, An Approach to the International Regulatory Issues of IP Telephony, 8 *Boston University Journal of Science and Technology Law* 699-700 (Summer 2002).

⁵¹ R. Frid, The Telecommunications Pact Under the GATS, 24 *Legal Issues of European Integration*, No. 2, 81 (1997).

⁵² Policy Paper: Future Negotiations on Telecommunications Services in the WTO, a Submission to the Department of Foreign Affairs and International Trade by the Canadian Council for International Business (CCIB), Ottawa, Ontario, June 18, 1999.

⁵³ For further discussion, see M. Fredebeul-Krein & A. Freytag, The Case for a More Binding WTO Agreement on Regulatory Principles in Telecommunication Markets, 23 *Telecommunications Policy*, 628-629 (1999); see also H.N. Janisch, From Monopoly Towards Competition in Telecommunications:

provided to fight against anti-competitive activities. Member States remain free to adopt their own enforcement and antitrust actions. Out of national considerations and different policy choices, Member States unavoidably tend to adopt discriminatory measures. Thus, appropriate unified measures to prevent and fight against such activities should be listed as both countermeasures and remedies.

The issue of interconnection is a cornerstone, which opens competitive opportunities in telecommunications services. As the world's telecommunications infrastructure has grown, so has the drive for what is termed "interconnectivity", the linking of networks.⁵⁴ Three sub-issues define the efficiency of interconnection: the rates charged, the specific network(s) connected,⁵⁵ and relevant numbering. The RP only contains general guidelines requiring non-discriminatory terms, conditions and rates. But what terms and conditions are deemed non-discriminatory? Member States are quick to argue that their measures are in accordance with the provision, which might result in *de facto* discriminations. Fortunately, the Asia-Pacific Economic Cooperation (APEC) has undertaken significant work in developing the APEC Principles of Interconnection, which aims to clarify the application of interconnection

What Role for Competition Law?, 23 *Canadian Business Law Journal* 245 (1994); OECD, Directorate for Science, Technology and Industry, Working Party on Telecommunication and Information Services Policies, Cross-Ownership and Convergence: Policy Issues, Report DSTI/ICCP/TISP(98)3?FINAL, November 1998, at 26.

⁵⁴ W. Jauk, The Application of EC Competition Rules to Telecommunications—Selected Aspects: The Case of Interconnection, 4 *International Journal of Communications Law and Policy* 100 (Winter, 1999/2000).

⁵⁵ Requirement for the interconnection of telecommunications networks may or may not be interpreted to apply to network infrastructure used for Internet broadcasting activities.

principles of the RP.⁵⁶ This document could provide the basis for further improvement of the RP.⁵⁷

The same holds true to the obligation of universal services. It is imperative both to capture the network externality⁵⁸ benefits that competitive markets cannot achieve and to implement important national economic and social policy objectives.⁵⁹ Nevertheless, no further detailed guidance is offered in the RP. One aspect to be singled out is the financial contribution burden, which could distort competition and must be done in the context of the rate balancing that competition necessitates.⁶⁰ This can be well exemplified by the US's Federal Communications Commission's (FCC's) longstanding practice of providing universal service support for telecommunications services for high cost rural and low income areas.⁶¹ The FCC has identified several

⁵⁶ See further Annex C to the Cancun Declaration of APEC Telecommunications Ministers.

⁵⁷ For further discussions on APEC's contribution to liberalization of telecommunications, see for example, WTO 2000 Preparatory Workshop on Basic Telecommunication Services, TELWG20/LSG/19, at <<http://www.apectelwg.org>> (last visited April 4, 2002).

⁵⁸ A network externality exists for a service if users of the service benefit when more people use it. Network externalities are present in telecommunications since the value of a network increases, for each user, with the number of network subscribers. See further N. Economides, *The Economics of Networks*, 14 *International Journal of International Organization* 673 (1996).

⁵⁹ W.H. Melody, *Telecom Reform: Progress and Prospects*, 23 *Telecommunications Policy*, 16 (1999).

⁶⁰ See further W.H. Melody (Ed.), *Telecom Reform: Principles, Policies and Regulatory Practices* 53 (1997).

⁶¹ Section 254 of the 1996 Telecommunications Act. This section further instructed the FCC to extend universal service support to schools, libraries, and rural health care clinics. The FCC decided to fund a program in 1997 by collecting the funds from phone companies, who in turn collect it from their customers. Hence many argue that the program involves a tax. For further discussion, see Tauzin and

key principles underlying universal services in telecommunications: quality service at reasonable and affordable rates; access for rural and high-cost areas and for low-income users at comparable rates to other users; and equitable contribution to universal service by all telecommunications carriers.⁶² The very basis of action in the telecommunications sector in the European Union (EU) was that the European Commission recognized the objective of universal service in the sector and strongly emphasized proportionality of measures to secure this goal. It generated the conviction that this goal could be secured by less restrictive means than retention of monopoly rights, e.g. by financial contributions or the creation of universal service fund.⁶³ Consequently, the obligation of universal services should not only be concerned with coverage, but also with satisfactory connectivity in terms of users' needs.⁶⁴

Burns Re-Introduce Bills to Reform E-Rate, Tech Law Journal, available at

<http://www.techlawjournal.com/educ/19990512.htm> (last visited April 4, 2002); see also J. Deprez,

International Taxation: The Telecommunications Industry in the Information Age: A case Study in Globalization, Deregulation, and Tax Competition, 23 *Loyola of Los Angeles International & Comparative Law Review* 537 (October 2001); S. Peng, Universal Telecommunications Service in China: Trade Liberalization, Subsidy, and Technology in the Making of Information Equality in the Broadband Era, 4 *University of Hawaii Asia-Pacific Law & Policy Journal* 2 (February 2003).

⁶² FCC, Report and Order Released Pursuant to s. 254 of the Telecommunications Act (1996), May 1997.

⁶³ H. Burkert, Telecommunications Developments in the European Union: Principal Papers: The Post-Regulatory Landscape in International Telecommunications Law: A Unique European Approach? 27 *Brooklyn Journal of International Law* 768 (2002).

⁶⁴ Communication from Colombia: Telecommunications Services, WTO S/CSS/W/119, 27 November 2001 (01-6058), Council for Trade in Services, Special Session.

Licensing provides the gateway for telecommunications services. This directly and closely relates to a specific commitment in the GATS: market access. While market access deals with more substantial and technical problems, the present obligation is set forth more or less from the administrative viewpoint of licensing. The RP acknowledges the legality of the practice of licensing. However, the RP does not define the situations for granting a license, nor provisions for the mutual recognition of licenses; it only contains an obligation to provide reasons in case of denying a license, but not in cases where a license would be granted with conditions which the applicant may have not desired. Concrete guidelines should thus be created to make the obligation subsidiary to the promotion of competition. For instance, according to Article 4 of the RP, Member States shall have the right to decide on the situations when to issue the license. This freedom offers the States the opportunity to formulate some potential anti-competitive measures. It would be helpful to define in a multilateral forum the licensing requirements in concrete terms, including the fees, reasonable period, etc. Moreover, further clarification of the obligation should take into account new technological developments. For example, digitization impacts on all license applications, which allows vastly more channels in existing frequency bands, so arrangements will be required to give program providers balanced, non-discriminatory access.⁶⁵

⁶⁵ H. Schadow, Essay: IV. Industries in the Process of Deregulation: 1. Telecommunications Price Control and Other Regulatory Issues, 23 *Fordham International Law Journal* 131 (2000).

One of the most important regulatory provisions has been the requirement of regulators to be independent from service providers and operators.⁶⁶ This appears all the more important in the liberalized environment as telecom investors begin to seek opportunities in countries with stable and independent regulatory environments.⁶⁷ The proper action of the regulators directly influences the actual implementation of the commitments made by the States. While Member States are not obliged to privatize their telecommunications industry,⁶⁸ this process is well underway in many States. Despite the fact that some States still maintain the ownership of the infrastructure, it is important to emphasize the independence of regulators from actual service providers. The independent regulators also play an important role in dispute settlement. As provided in the RP, service providers will have recourse to an independent body for resolving disputes regarding the terms, conditions and rates for interconnection.⁶⁹ But no indication is given as to what is meant by “resolving” the dispute: whether an agreement can be imposed on the parties or not. As a last resort, the WTO dispute resolution mechanism can be invoked. In this case, political support and resources

⁶⁶ J. H. Rohlfs & J.G. Sidak, Exporting Telecommunications Regulation: The United States-Japan Negotiations on Interconnection Pricing, 43 *Harvard International Law Journal* 355 (Summer 2002).

⁶⁷ M.R. Sanchez & A.P. Hwa, Effective Regulators: A Response to the International Telecommunications Union’s Case Study on Singapore, 4 *University of Hawaii Asia-Pacific Law & Policy Journal* 1 (February 2003).

⁶⁸ The agreement itself does not directly lay out privatization requirements or distinguish between foreign investment and foreign government investment, leaving foreign governments to decide how, when and to what extent they must privatize their historic government-owned monopolies. See C. Huther & L. Friedlander, Success in the Global Marketplace?, *The National Law Journal*, B 12, October 30, 2000.

⁶⁹ See further RP, para. 2.5.

from the States will be essential.⁷⁰ The national regulators should undertake responsibility in providing relevant support. Thus, it is essential to establish more clearly the obligations of the regulators.

Generally speaking, the regulators are responsible for the formulation of national policies in promoting the smooth development of telecommunications. Effective management of policy issues requires the regulators with adequate powers, transparent decision-making, and clear and stable policies.⁷¹ One good example is the State Telecommunications Commission (STC) in the Republic of Bulgaria. Ten obligations are clearly defined in the Telecommunications Law.⁷² Similar provisions can be adopted, offering clear guidance for the performance of the regulators.

5. Conclusion

As one of the world's largest markets, telecommunications are vital since they serve as both a backbone for other sectors and services, and as a service itself. Difficulties have arisen during the WTO negotiations regarding the disintegration of monopolies,

⁷⁰ R. Rosenthal, *United States v. Mexico: The First Telecommunications Challenge Confronting the World Trade Organization*, 10 *CommLaw: Conspectus* 335 (2002).

⁷¹ Y. Zhao, *The ITU and National Regulatory Authorities in the Era of Liberalization*, 18 *Space Policy* 294 (2002).

⁷² Article 22 of Telecommunications Law, Republic of Bulgaria, see Bulgaria Assessment: Annex D— Republic of Bulgaria, National Assembly, Telecommunications Law (published in State Gazette, Issue 93, 1998), can be found at <http://www.usaid.gov/info_technology/ied/reports/bulgaria/annexd.html>.

market access and regulations as they pertain to telecommunications services.⁷³ Thus, when the agreements were reached in 1997, the negotiators felt relieved and believed the result of the negotiations to be a historic victory.⁷⁴ However, since then, objective analysis has been carried out, which has provided more sensible evaluations. With further implementation of the commitments, more problems appeared, which pushed demands for further commitments and clarifications. This is exactly the way that the General Agreement on Tariffs and Trade (GATT) has proceeded during the negotiations in different rounds. Consequently, the agreement reached so far constitutes more of a beginning than anything else.

While calling on further liberalization, many States have started this initiation unilaterally and voluntarily.⁷⁵ Though they failed to launch a new round of negotiations in 1999,⁷⁶ the process has never stopped.⁷⁷ It is good to find in the GATS rules that periodic review will be made to evaluate the development, which to a

⁷³ M. Hill, *The WTO and Telecommunications*, at

<http://www.washington.edu/wto/issues/telecom.htm> (last visited April 4, 2002).

⁷⁴ P. Holmes, J. Kempton & F. McGowan, *International Competition Policy and*

Telecommunications—Lessons from the EU and Prospects for the WTO, 20 *Telecommunications Policy* 756 (1996); see also P. Larouche, *Competition Law and Regulation in European Telecommunications* 157 (Oxford: Hart, 2000).

⁷⁵ W.H. Melody, *Shaping Liberalized Telecom Markets*, 24 *Telecommunications Policy* 803 (2000).

⁷⁶ M. Moore, *The World Trade Organization, Globalization, and the Future of International Trade* Essay: *The WTO, Looking Ahead*, 24 *Fordham International Law Journal* 6 (November/December, 2000).

⁷⁷ *WTO Services Talks Press Ahead: Members Adopt Negotiating Guidelines at Special Session*, WTO News, Press/217, 2 April 2001.

certain extent will make up for the failure of large-scale negotiations.⁷⁸ While different States, based on their own considerations, raise different areas for liberalization in the future, the present research attempts to provide an objective opinion on possible areas for further liberalization.

It is to be noted that the liberalization of the suggested areas could be difficult to achieve in a single round of negotiations, since various factors are involved in the WTO negotiations. Also since different States are at different stages of liberalization, more time is needed to accomplish total convergence.⁷⁹ Ensuring developing countries' confidence in the WTO system for telecommunications is of paramount importance in moving forward with the new round of negotiations.⁸⁰ Furthermore, with the continued development of the telecommunications markets and industry, together with the technical cooperation of the ITU, many limitations maintained until now are likely to become meaningless and disappear in future. Consequently, while acknowledging the difficulties in further negotiations, we can optimistically expect that liberalization will proceed in a stable, constant and homogeneous way and that a unified, healthy, competitive market will become reality.

⁷⁸ GATS Article VI, para. 2 provides that WTO Members are bound to institute review procedures before independent instances for administrative decisions affecting trade in services.

⁷⁹ See for example, S. MacKnight, Weekly Review: Telecommunications and Deregulation, *Japan Economic Institute (JEI) Report*, No. 14, April 7, 2000.

⁸⁰ Keidanren, Japan Federation of Economic Organizations, Expectations on the WTO Negotiations and Requests for Liberalizing Trade in Services, March 28, 2000, at <<http://www.keidanren.or.jp>> (last visited April 4, 2002).

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