LEGAL AND REGULATORY IMPLICATIONS OF IMPLEMENTING WTO TELECOMMUNICATION COMMITMENTS IN DEVELOPING MARKETS

“Do you want to test whether a people is given to industry and commerce? Do not sound its ports or examine the wood from its forests or the produce of its soil. The Spirit of trade will get all these things and, without it, they are useless. Examine whether this people’s laws give men the courage to seek prosperity, freedom to follow it up, the sense and habits to find it and the assurance of reaping the benefit”

Alexis de Tocqueville

I. INTRODUCTION

The focus of this paper is how developing markets can successfully implement their WTO commitments on basic telecommunications through legal and regulatory reform. Part of the power of the WTO telecommunication regime is the fact that it is reform in a multilateral context. The key to success of the WTO in developing markets is the practical implementation of the Reference Paper through concrete legal and regulatory reforms. These are the link between creating an investor-friendly environment in developing markets and allowing stakeholders in developing markets to gain access to and share in global telecommunications revenues.

Because much has been said elsewhere, and much more eloquently, about what the WTO is and the process by which countries submitted offers in basic

1 © David Satola, Counsel, World Bank Legal Department, Legal Reform and Private Sector Development Unit, delivered at London, 28 October 1997.

2 36 I.L.M. 367 (1997)
telecommunications, this paper assumes a basic understanding of the WTO. Moreover, without intending to be a regulatory primer, this paper highlights the implementation of certain key legal and regulatory issues necessary to give practical effect to WTO telecoms commitments, and is by no means exhaustive in that regard.

II. THE GLOBAL TELECOMMUNICATIONS BACKDROP

A brief overview of the global telecommunications market provides a context for telecommunications investment possibilities in the developing world and their relationship to the investor-friendly environment intended to be established under the WTO. Markets with a relatively small share of global revenues and with relatively low teledensity are among the potential growth areas in the global telecommunications market.

In 1995, global revenues in telecommunications services were over US $600 billion. The top four telecommunications markets in the world (the United States, the European Union, Japan and Australia) accounted for more than 75 percent of this revenue. The following chart shows the percentage share in global telecommunications revenue of the top markets, of other countries making WTO offers as well as countries not making WTO offers.

<table>
<thead>
<tr>
<th>Country</th>
<th>Percentage Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>29.7%</td>
</tr>
<tr>
<td>EU</td>
<td>28.27%</td>
</tr>
<tr>
<td>Japan</td>
<td>15.59%</td>
</tr>
<tr>
<td>Australia</td>
<td>1.89%</td>
</tr>
<tr>
<td>Other WTO</td>
<td>15.66%</td>
</tr>
<tr>
<td>Non WTO</td>
<td>8.56%</td>
</tr>
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</table>

It should come as no surprise that countries having the largest telecommunications markets, based on this scale, also submitted WTO telecommunications commitments. What is also striking is the number of countries whose market share is relatively small who submitted offers to the WTO; balanced

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4 See, Braga. Source, ITU and WTO data.

5 Of the “Other WTO” countries, approximately 7% have a small market share.
against the number of countries (whose market share is also small) who did not submit offers to the WTO.

Countries with high teledensity are well represented in the WTO. It should also come as no surprise that countries with low teledensity are the ones least represented in terms of WTO telecommunications commitments. The following chart, taken from Dr. Braga’s paper graphically shows this.\(^6\)

\(^6\) Id.
Countries with low teledensity who made WTO offers can compete in the global telecommunications market and share in its revenues thanks to the investor-friendly framework established by the WTO. Implementing the WTO Reference Paper through concrete legal and regulatory reform will pave the way for greater market access. Practical implementation of the WTO telecommunications commitments is one way that countries with a relatively small share of the global telecommunications pie should be able to improve their market position. As one author so aptly put it, participating in the WTO is a “competitive differentiator among developing nations.” The balance of this paper will outline some practical legal and regulatory measures that can be taken to implement these WTO commitments and transform the promise of the WTO to reality in the developing world.

III. FUNDAMENTALS OF WTO TELECOMS COMMITMENTS.

The policy hallmarks of the WTO are national treatment and transparency. Sector reform policies inhered in the Reference Paper of the WTO provide a coherent framework for attracting private investment (both domestic and foreign) in telecommunications markets. These policies, however, need to be further articulated in legal and regulatory reform instruments. As such, implementing (or operationalizing) these policies into national law is the next stage in the market liberalization process. Key legal indicators of transparency and national treatment include publication of laws, licenses, and interconnection terms, and the fair allocation of resources. In general, investors are interested in certainty, predictability, and access to profits. The Reference Paper is the starting point to address these key issues for investors in developing markets.

IV. THE REFERENCE PAPER

The Reference Paper reflects a global consensus on key regulatory issues for opening telecommunication markets to competition. These include, without limitation:

- interconnection
- universal service obligations
- the independence of regulatory authorities and
- fair and transparent allocation of scarce resources such as radio spectrum, numbering and infrastructure sharing.

The key in developing markets of attracting investment in the telecommunications sector is transforming the general policy statements set forth in the Reference Paper into a workable national telecommunication legal and regulatory framework.

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In evaluating whether to make a telecommunications investment in a developing market, investors will undoubtedly evaluate the level of reform in sector-specific laws affecting telecommunications. They will also look at regulations affecting telecommunications, especially whether they meet the test of fairness, openness and transparency. There are other very important legal reform related issues, not dealt with directly in the WTO, that affect the overall investment climate in a developing market. These include the existence of an independent judiciary to interpret telecommunications (and other) laws and regulations and how corruption is dealt with in national law. Before making an investment in a developing market, investors will also look at whether the country has modern company/corporate laws and laws concerning public enterprises (in the case of telecom privatization), private property, competition, privatization, tax, and foreign exchange and foreign investment limits.

V. TELECOMMUNICATIONS LEGAL REFORM

The first concrete step towards implementing the reforms in the telecommunications sector is passage of a telecommunication law, reflecting a regulatory regime that embraces competition.

Some key components of telecommunication laws include the structural, operational and financial separation of the regulator, the former state operator and the government policy maker. It is important in elaborating a new telecommunications legal regime that the respective roles of both the policy maker and the regulator are clearly set forth. The telecommunications law will also establish the licensing and interconnection regimes in the sector. Clear and certain provisions regarding which services will be subject to licensing, as well as which services will not be subject to licensing or authorization, by the regulator and the modality if issuing licenses are essential.

Other areas to be addressed by a telecommunications law include confidentiality of transmissions, competition concerns (whether these are stated in the telecommunications law or in a separate competition law), basic property rights, and penalties for offenses or breach of license conditions, to name a few. In many developing markets, the new telecommunication legal regime would also provide for the separation

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8 Combating corruption through legal reform is difficult but not impossible. Many concrete legal measures can be taken. These include the passage of national antibribery statutes, a freedom-of-information law, public procurement procedures (including publication of bidding processes, award criteria, and a transparent bidding process) and privatization laws. Moreover, local bar associations can be effective in promulgating judicial codes of ethics; and non-governmental organizations can play an important role in mobilizing public opinion regarding legal and judicial reform. Much work has been done in the area of corruption. See Rose-Ackerman, Susan, “Corruption and Development”, Annual Bank Conference on Development Economics, The World Bank, April 30, 1997.

9 It is assumed that by making an offer in the WTO that countries have passed a certain minimum policy threshold of telecommunications reform. In other circumstances, the first step towards legal reform would be a thorough policy analysis.
for the postal and telecommunication components of the former “PTT”. Certainty in all of these areas, including a separation of post and telecoms, is important for investor security.

VI.  REGULATORY FUNCTIONS AND COMPETENCIES

The Reference Paper addresses a number of key regulatory issues, such as interconnection, universal service and allocation of scarce resources. How these issues can be treated in a telecommunications legislation is the focus of this section.

Briefly, the functions of an independent regulator include, for example:

- issuing and compliance monitoring of licenses
- setting minimum interconnection terms
- arbitrating disputes between operators or between operators and customers
- designing and monitoring compliance with a national numbering plan
- monitoring the fairness of infrastructure sharing as provided in the law
- regulating tariffs
- managing frequencies, and
- generally enforcing rules and regulations of the sector.

A few of the key regulatory functions mentioned in the Reference Paper are discussed in turn below.

A.  Interconnection

Interconnection is a mixture of legal and technical rights and obligations. The Reference Paper deals with the fundamental interconnection matters that should be included in telecommunications legislation and sets forth some details for a legal model of legislation in the area. Interconnection should be allowed at any technically feasible point, should be provided in a timely manner on a non-discriminatory basis at cost-based rates. The quality of interconnection given to third parties should be the same as the quality which an operator provides interconnection into an affiliate. The interconnection regime should also provide a right of arbitration to the regulatory authority to resolve disputes regarding interconnection, with the right to appeal to ordinary courts against the decisions of the regulator. Finally, an important, but often an overlooked provision in a national telecommunications law, which is key for realizing interconnection, are related provisions regarding inter-operability.

B.  Frequency and other scarce resources

In many cases, newly formed regulatory bodies have little if any experience in the area of frequency management. While the responsibilities of the regulator regarding frequency are well known, and include spectrum planning (including liberating and
allocating specialty services, licensing of spectrum and monitoring compliance with spectrum use, new regulatory agencies may not necessarily have the capacity, either in terms of knowledge or experience, to meet these demands. While it may not be necessarily included in a telecommunications law, an important factor regarding frequency management is ensuring the technical capacity of the regulator in order for it to meet its mandate.

C. Universal Service

A similar situation arises with the day-to-day operational aspects of overseeing the provision of universal service. Again, the Reference Paper addresses the policy behind provision of universal service. Telecommunications legislation should reflect national policy regarding the provision of universal service. Generally speaking, universal service will be provided by a designated operator. That operator will have, as part of its license, an obligation to provide universal service as defined by the government. Usually the obligation to provide universal service is funded through a common fund to which all operators who offer “a public service” contribute. The method by which those other operators contribute to the fund should be set forth in the law. The amounts contributed to the universal service fund may not be the same from each operator, as long as any terms of contributing to the fund by each operator are fairly applied and are transparent.

It could be expected that newly-formed regulators will need training in the area of basic accounting in order to manage the universal service fund. While this is not addressed specifically by the Reference Paper, it is an important feature for the successful provision of universal service.

VII. THE SOCIAL DIMENSION

Finally, other issues affecting the success of the newly-formed independent regulator concern the social dimension. As the former PTT moves from monopoly to competitive player, and as its former postal components are separated, attention should be paid to training for workers, and perhaps redundancy compensation. While it may not be provided for in the telecommunications law, another important factor for the successful competitive ability of the former PTT is a know-how and knowledge transfer.

VIII. WORLD BANK ACTIVITY
The World Bank, through infoDev\(^{10}\) and in close cooperation with the WTO has been active in encouraging governments to submit offers to the WTO\(^{11}\). infoDev has contributed in two grant programs in connection with the development of a WTO. In its first grant in the WTO process (“WTO I”), infoDev assisted countries in gaining access to the global telecommunications market through awareness raising and information dissemination. It was assisted in this grant by the International Institute of Communications. WTO I grant funds supported 26 countries in preparing for the negotiations of the WTO basic telecommunications offers. Of the 69 offers made in February 1997, offers of 20 countries were made with the assistance of grant funds from infoDev. In a grant program currently being finalized, (“WTO II’) infoDev intends to provide funding for revising and implementing existing commitments as well as encouraging other developing countries which have not submitted offers to submit offers. The first area for WTO II concerns encouraging new commitments to the WTO, refining existing commitments made in February 1997, and assisting countries in making offers. The other area, concerning counties that have made offers, is to provide assistance with regulatory implementation of the kind described in this paper.

The World Bank also provides technical assistance in legal and regulatory reform to countries through its lending programs.

IX. CHALLENGES AND OPPORTUNITIES

In any economy, managing the transition from monopoly to competition is fraught with challenges. In telecommunications, as in other fields, technological development, in particular digitalization, is a driving force. Digitalization in telecommunications will allow developing markets to “leap frog” whole generations of technology and as such can provide countries with a basis for competing for a share of worldwide telecommunications revenues. In this case, the challenge is to put in place dynamic and flexible legal and regulatory regimes which are on the one hand attractive for investors and which also can respond to rapid changes in technology.

Among the developments which will challenge the existing orthodoxies and redefine the industry are satellite telecommunications and internet voice telephony. Satellite telephony using low earth orbiting satellites will redefine what is now conventionally referred to as roaming in the cellular context. As competition is introduced and prices for handsets and services decline, consumers will be posed with more choices of wireless telephony. Again, as technology improves, voice telephony over the internet will render the debate concerning international accounting rate reform moot.

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\(^{10}\) infoDev is a grant program administered by the World Bank which includes participation from both the public and private sector. infoDev stands for “Information for Development” and provides funds for a variety of telecommunications, information technology and related projects throughout the world.

\(^{11}\) See, also, Braga, op cit.
The telecommunications industry worldwide will be posed with these and other challenges. User groups are as yet unformed because the technology which will support them has not yet been developed.

For those countries who have decided to participate in the WTO, these challenges should be viewed more as opportunities to share in one of the world’s largest markets rather than as a threat.