COMMUNICATION FROM THE UNITED STATES

Suggested Amendments to the Draft Annex on Access to and Use of Public Telecommunications Transport Networks and Services

The following communication is circulated at the request of the delegation of the United States to the members of the Group of Negotiations on Services.

The delegation of the United States would like to inform participants in the Group of Negotiations on Services that an annotated explanation of each suggested amendment to the draft telecommunications annex can be found on pages 8-12.

Explanatory note

The United States has included in this document suggestions aimed at improving and clarifying draft language appearing in certain provisions of MTN.TNC/W/35, pages 370-75, the Annex governing access to and use of public telecommunications transport networks and services. The United States proposals focus upon various core paragraphs of the Annex that the United States considers most important to address at this time. The United States is continuing to examine other provisions of the draft Annex, as well, but has not yet developed formal proposals in these areas.

For purposes of brevity and convenience, the suggestions set out in this document take the form of drafting proposals. They are intended to be illustrative, rather than definitive in nature, however. The proposed amendments are designed to facilitate further thought and discussion on the subjects they address and should be read in this light.

1. Purpose of the proposed amendments

In the United States' view, the existing draft provides a good basis for the development of an annex governing the Parties' obligations to foreign service providers concerning their access to and use of public telecommunications transport networks and services. The existing text can be improved in several important respects, however, to provide better overall clarity and balance.
In its final form, the Annex should at a minimum be clear on:

(a) when it applies;

(b) how it relates to the GATS "Framework";

(c) what the Parties obligations are; and

(d) what exceptions the Parties may invoke.

In addition, the text should strike a reasonable balance between the last two of the above items - a party's obligations and the exceptions to those obligations.

The suggestions made in this submission are aimed at addressing each of the above points.

2. Issues addressed by the proposed amendments

(a) When the Annex applies

In the United States view, a party should be subject to the substantive obligations of the Annex (i.e. those other than transparency) only in those services sectors or sub-sectors where it has chosen to schedule a specific commitment. This follows from the Annex's basic objective - to ensure that Parties do not undermine the value of their scheduled commitments through the application of unreasonable restrictions on access to or use of the Party's public telecommunications transport networks or services.

Stated otherwise, the obligation a party undertakes under the Annex should apply exclusively with respect to service providers operating in the sector or sub-sector scheduled by the Party. The Annex should have no application in other sectors or sub-sectors. Accordingly, it should not prevent a Party from taking measures necessary to restrict or prevent a foreign service provider from carrying out activities in unscheduled sectors.

The revision suggested for paragraph 3 of the draft Annex, below, attempts to clarify the Annex's application along these lines.

(b) How the Annex relates to the "Framework"

The GATS "Framework" text sets out a number of substantive obligations, principal among them most-favoured-nation treatment, national treatment, and market access. The latter two will apply only in services sectors in which a Party has elected to schedule them.
The Telecommunications Annex recognizes that the obligations a party undertakes through the "Framework" are susceptible to being undermined by burdensome and unnecessary restrictions on access and use of public telecommunications transport networks and services. The Annex serves to underwrite the obligations a party assumes in the "Framework" by ensuring that their value is not impaired through unreasonable restrictions of this kind.

The proposals set out below in draft paragraphs 3 and 11 clarify this point.

(c) A party's obligations under the Annex

As noted above, the Annex's substantive obligations should apply to a Party only in those sectors where the Party has scheduled a specific commitment. In those sectors, the Annex should clearly state as a basic rule that the Party will assure the value of its commitment by guaranteeing reasonable and non-discriminatory access to and use of public telecommunications transport networks and services. The first sentence of revised paragraph 11 below, states this basic rule.

While such an obligation is vital, it is by necessity very broadly worded. Thus, it may be subject to varying interpretations. In order for this general rule to be meaningful, and to provide guidance for both service providers and government regulators, it is important for the text to provide concrete examples of how it applies.

Sub-paragraphs 12(a)-(e), added in the language set out below, provide substance and meaning to the general rule through an illustrative list of what "access and use" may mean. By specifying those activities that a service provider may undertake, the amended provision also restores balance to the text, since the draft provides a similar illustrative list of exceptions to the general rule.

(d) Exceptions a party may invoke

The Annex should not prevent a party from taking regulatory action necessary to protect its public telecommunications transport networks and services from harm. Nor should the Annex limit a party's ability to prevent service providers from supplying services of a kind not subject to the Party's specific commitments. Thus, for example, a party should be free to prohibit service providers from supplying or reselling public telecommunications transport services if the Party has scheduled no commitments with regard to such services.

Exceptions of this nature should be clearly stated and should override the Party's substantive obligations under the Annex. Care should be taken, however, so that the exceptions are not so broad that they render the obligations of the Annex meaningless.
The suggested amendment to paragraph 5, below, clarifies how this general exception operates.

In the proposed revision of paragraph 16, the text has been sharpened to provide more clearly three independent exceptions to the substantive obligations of the Annex. The proposal also specifies more precisely how the exceptions apply. At the same time, the language has been tailored to ensure that this provision does not create loopholes so great that they may threaten to erase the substantive obligations of the Annex.

Finally, in its revision of paragraph 17, the United States has sought to clarify the paragraph's relationship with paragraph 16. The proposed amendment is intended to make clear that the illustrative restrictions and conditions set out in paragraph 17 may be applied only if they meet one of the tests provided in paragraph 16.
Suggested Amendments

Paragraph 3

This Annex shall apply with respect to any party in any sector or sub-sector in which the Party has scheduled a specific commitment and shall form an integral part of such commitment.

Paragraph 5

Nothing in this Agreement or Annex shall be construed to require:

(a) a party to authorize a service provider of another party to establish, construct, acquire, lease, operate, or provide telecommunications transport networks or to offer telecommunications transport services, other than as provided in the Party's schedule;

(b) a party (or to require a party to oblige service providers operated by it or under its jurisdiction):

(i) to establish, construct, acquire, lease or operate, a telecommunications transport network; or

(ii) to offer a particular telecommunications transport service or particular form of access to or use of a public telecommunications transport network that the Party does not offer (or that such service providers do not offer) to the public generally.

Paragraph 11

Each party shall ensure that service providers of other parties have access to and use of public telecommunications transport networks and services for the provision of a service, as well as for intra-corporate communications, under reasonable and non-discriminatory terms and conditions. This obligation shall be implemented, inter alia, through the application of paragraphs 12 to 14.

Paragraph 12

Each party shall ensure that service providers of other parties have access to and use of any public telecommunications transport network or service offered within or across the border of the Party, including private leased circuits. To this end, each party shall ensure that such providers are permitted to:

(a) purchase or lease and attach customer premises, terminal, and other equipment necessary to provide the provider's service, subject to the right of a party to require type approval of equipment to be attached directly to the network;
(b) inter-connect private leased circuits with the public, switched telecommunications network to permit such providers to have dial-up access to and from their customers;

(c) inter-connect, on mutually agreeable terms and conditions, their private leased circuits with other private circuits leased or owned by such service provider or, subject to national law, to private leased circuits owned or leased by another service provider;

(d) perform switching, signalling and processing functions related to inter-connected private leased circuits referred to in sub-paragraphs (b) and (c); and

(e) use proprietary operating protocols, provided that the Party may require service providers to use a mandatory or designated standard protocol to establish interfaces for inter-connection with a public, switched telecommunications transport network or as may be necessary to prevent technical harm to a public telecommunications transport network.

Paragraph 16

Nothing in paragraphs 11 to 14 shall be construed to prevent a party from imposing reasonable conditions on access to and use of public telecommunications transport networks and services necessary:

(a) to ensure the ability of the Party to discharge its responsibility to make public telecommunications transport networks or services available to the public generally;

(b) to prevent the provision or resale of public telecommunications transport networks or services in cases in which the Party has not scheduled a specific commitment in respect of such provision or resale; or

(c) to protect the technical integrity of public telecommunications transport networks or services.

Paragraph 17

Provided they satisfy the criteria set out in paragraph 16, such conditions may take the form of:

(a) specifications for technical interfaces for inter-connection with public telecommunications transport networks or services;

(b) requirements regarding the inter-operability of public telecommunications transport services;
(c) a requirement to inter-connect private leased circuits where such circuits are used to provide public telecommunications transport services pursuant to a party's scheduled commitments; or

(d) notification, registration, and licensing requirements.
Annotated Explanation

Paragraph 3

Paragraph 3 has been revised to state clearly those situations in which the Annex applies. Under the revised text, the substantive obligations of the Annex are activated only when a party makes a specific commitment. The Annex then applies with respect to those service sectors or sub-sectors covered by the Party’s commitments and becomes an integral part of those commitments.

The existing text limits the application of the Annex to measures affecting access to and use of basic telecommunications services and networks "...in the territory of a party..." This phrase has been deleted since it could be read to exclude from coverage under the Annex a critical component of services trade - namely, cross-border telecommunications. The application of the Annex to international telecommunications has been made explicit in the revised text of paragraph 12.

Paragraph 5

Existing paragraph 5 is meant to provide assurances that the Annex does not:

(a), (c) permit foreign service providers to supply telecommunications or other services that are not subject to a scheduled commitment; or

(b) require a party to provide or make available telecommunications services or other services that it already offers to the public generally.

Sub-paragraphs (a) and (c) of the existing draft are probably unnecessary, particular in light of the proposed United States’ amendments to paragraphs 3 and 16(b). Under the proposed amendment to paragraph 3, the Annex would apply only to service sectors in which a party has scheduled a specific commitment. Thus the Annex would not prevent a party from taking measures governing the activities of service providers outside such sectors.

To make the above point as clear as possible in regard to public telecommunications transport networks and services, the United States’ proposal includes sub-paragraph 16(b). That provision states that a party
may take measures necessary to prevent foreign service providers from supplying public telecommunications transport networks or services whenever the Party has not scheduled a specific commitment covering that service sector.

Although much of paragraph 5 could be deleted in light of revised paragraphs 3 and 16(b), the proposed re-draft of paragraph 5 is primarily designed to achieve greater clarity. Sub-paragraphs (a) and (c) of the existing text have been consolidated in new sub-paragraph (a). The proposed language also takes account of the fact that in some countries public telecommunications transport networks and services are provided by private or quasi-independent firms rather than by the Party itself.

Paragraph 11

Paragraph 11 sets out the governing principle of the Annex. Namely, in sectors in which a party has scheduled a specific commitment, service providers should have reasonable and non-discriminatory access to and use of public telecommunications transport networks and services. This general rule is necessary to guard against the possibility that in highly telecom-dependent services sectors a party's scheduled commitment may be of no or little value due to restrictions on the use of the Party's public telecommunications transport networks and services.

The current text may be subject to conflicting interpretations, however, because it ties the obligation to provide reasonable and non-discriminatory access and use to three provisions of the "Framework" (Articles II, VI, and XVII). The proposed amendment eliminates these references.

By virtue of Article 1:1 of the "Framework", each of the three Articles applies to all measures of a party affecting trade in services. That includes measures governing access and use by foreign service providers of public telecommunications transport networks and services. There is no need to re-apply those Articles in the Annex. Indeed, by referring to those three "Framework" Articles in the Annex, but failing to mention others (such as Articles VIII and XVI), the existing text may give rise to confusion.

As revised, paragraph 11 states unambiguously that service providers operating in a sector for which a market access commitment has been scheduled are entitled to access and use of public telecommunications transport networks and services on terms and conditions that are reasonable and non-discriminatory.

In addition, the reference to "intra-corporate communications", currently in paragraph 14 of the existing text, has been transferred to this paragraph to ensure that the Annex's general rule concerning access
and use extends to intra-corporate communications. Under the terms of revised paragraph 3, a party's obligations with respect to such communications would apply only where the communications are made in a services sector subject to a commitment scheduled by the Party.

Finally, the revised text makes clear that paragraphs 12-14 elaborate upon the general obligation of the Annex set out in paragraph 11. Under the proposed text, paragraphs 12-14 would provide specific, but not exclusive, examples of how paragraph 11 would apply. The suggested amendment thus eliminates uncertainty in the current text concerning the relationship among these four paragraphs.

**Paragraph 12**

The existing text of paragraph 12 states that service providers should have access to and use of those public telecommunications transport networks and services they require for the provision of a scheduled service. This is a desirable objective for the Annex. As written, however, the provision may not afford sufficient certainty for domestic regulators. That is because it may be difficult to anticipate or satisfy the various needs of all foreign service providers.

By comparison, the amended text makes clear that a party's obligations under this paragraph require it to make available to service providers only those public telecommunications transport networks and services already being offered by the Party or by network operators to the public generally. The new language makes it possible to delete the existing cross-reference to paragraph 5. That reference had been included to ensure that it meeting providers' requirements a party was not compelled to furnish new networks or services.

The major change in paragraph 12 is the addition of sub-paragraphs (a)-(e). These provisions give substance and meaning to the otherwise very general terms "access" and "use". They also correct an asymmetry between the detailed list of exceptions that appears in paragraphs 16-17 and the rather generalized wording of the Annex's substantive obligations.

The proposed amendment of paragraph 12 makes clear that access and use include the activities specified in sub-paragraphs (a)-(e). This adds clarity for domestic regulators and will provide companies with greater certainty in make business decisions in sectors that depend on access and use of public telecommunications transport networks and services.

The list that appears in revised paragraph 12 is not intended to be exhaustive or to limit the ways that service providers may reasonably use public telecommunications transport services. At the same time, however, the list should be read in light of paragraphs 16 and 17, which allow Parties to take regulatory action necessary to address important public policy concerns.
Paragraph 16

Under the existing text of paragraph 16, that provision functions both as an exception and as a general obligation not to impose restrictions incompatible with that exception. Such an obligation could give rise to interpretative difficulties. For example, the obligation imposed by paragraph 16 appears to overlap with and possibly subsume a number of the Annex's other substantive obligations.

As reformulated in the proposed amendment, paragraph 16 establishes an unambiguous general exception that, when applicable, overrides a party's substantive obligations under the Annex.

Under the suggested amendment, paragraph 16 allows a party to apply the exception when a measure is "necessary" and "reasonable". The latter term was added to ensure that the exception is not used to justify measures that are more restrictive than required to achieve the Party's regulatory objectives.

The proposed text also clarifies that the exception can be invoked when any one of the three texts set out in sub-paragraphs (a)-(c) is met. The existing text could be read to require a party to meet all three criteria.

In the proposed amendment, two of the three texts have been substantially redrafted to provide greater certainty of application. In sub-paragraph (a), the potentially open-ended phrase "safeguard the public service responsibilities" has been replaced by the more limited expression "make ... available to the public generally". In addition, the reference to the "prevention of by-pass" has been deleted because this notion is captured in amended sub-paragraph (b).

Existing sub-paragraph (c) has also been redrafted. (The redraft appears in the amended text as sub-paragraph (b)). The new language makes clear that a party make take steps necessary to prevent foreign service providers from providing or reselling telecommunications services in any case in which a party has not scheduled a specific commitment covering such services. This provision is, in effect, a partial restatement of paragraph 3, which limits the application of the Annex to sectors in which a party has scheduled a commitment.

Paragraph 17

Existing paragraph 17 appears to function as an illustrative list of the types of measures that a party may apply once it has met one of the texts set out in paragraph 16. The introductory language in the proposed United States' draft states this relationship explicitly.
Several provisions of paragraph 17 have been revised or deleted. For example, existing sub-paragraph (a) (relating to resale) has been dropped because it has been rendered redundant by revised sub-paragraph 16(b). In addition, existing sub-paragraph (d) (relating to attachment of terminal equipment) has been deleted since it is largely subsumed by amended sub-paragraphs 12(a) as well as by revised sub-paragraph 16(c).