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## The GATS Negotiations and Canadian Telecommunications Foreign Ownership Limits

By Scott Sinclair

### Summary

Canada recently co-sponsored a “plurilateral (or collective) request” pressuring World Trade Organisation (WTO) members to expand their coverage of telecommunications under the General Agreement on Trade in Services (GATS). The request, which was meant to remain confidential, has been leaked. It specifically targets the removal of foreign ownership limits, stipulating that “majority foreign capital participation and effective control to be allowed [sic].”

Although it sponsored the request, as a “deemed recipient” Canada is itself a target. Current Canadian law and regulations limit foreign ownership in telecommunications, but the federal government will be expected to meet the same standards it is demanding of others. By participating in this plurilateral GATS request, Canadian trade officials are undermining the domestic law and escalating international pressure to change it.

Key members of the Conservative cabinet favour ending Canada’s foreign ownership limits in telecommunications. The Ministers and their trade negotiators are working to change an important Canadian policy through the back-door of international trade negotiations rather than through open debate and the parliamentary process.

### Background

#### *The Doha round negotiations*

The WTO Doha round, launched in November 2001, is entering a critical period. U.S. fast-track negotiating authority (which authorizes the president to negotiate trade agreements which the Congress must either approve or reject without amendment) expires in July 2007, setting an effective deadline of early 2007 for wrapping up the talks. While there are still many significant outstanding issues, maximum pressure is being exerted to conclude a deal before this window closes.

The Doha talks deal with a wide range of trade-related issues including agriculture, industrial tariffs, intellectual property rights, investment and services. The WTO agreement governing trade in services is the GATS, which defines “trade in services” to include both foreign investment and cross-border trade.

#### *GATS “Plurilateral requests”*

At the last WTO ministerial meeting, held in Hong Kong in December, developed countries favouring an ambitious result in the services negotiations successfully pushed through a new GATS negotiating model. These countries, including Canada, had criticised the traditional bilateral request-offer approach for not producing sufficient momentum towards an ambitious services deal.

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This new negotiating model, dubbed “plurilateral request-offer,” is meant to increase pressure on governments to make substantial GATS commitments. “Plurilateral requests” are requests for greater GATS coverage made collectively by a group of countries. The deadline for submitting group requests was February 28, 2006. Eight group requests were submitted by the deadline, with a total of 22 requests anticipated. The Canadian government is co-sponsoring nine plurilateral requests.

### ***The telecommunications plurilateral request***

One of these plurilateral requests concerns telecommunications services. The confidential request (attached) was circulated in Geneva at the end of February. Canada was one of eleven sponsors. This group, chaired by Singapore, is comprised mainly of the largest developed countries, including the United States, the European Communities and Japan.

The request calls for substantial GATS commitments covering the full range of telecommunications services, including voice and data transmissions. Among other things, it proposes “no limitations on the establishment or number of services suppliers,” “no economic needs tests,” “no restrictions on the type of legal entities,” and “no limitations on nationality or residency and majority foreign capital participation and effective control to be allowed.”

Large developing countries such as Brazil, India, China, South Africa and Malaysia are the main targets. But paragraph 2 of the document notes that the sponsors of the request, including Canada, “are also deemed to be recipients of this request.” Accordingly, Canada will be expected to meet the same standards it is demanding of others.

### ***The GATS and Canadian foreign ownership limits***

In 1997, Canada made extensive GATS commitments covering telecommunications services. However, a number of important Canadian policies, including

foreign ownership limits, were exempted. Canadian law limits foreign ownership of a telecommunications operating company to 20%, and of a holding company to no more than 33%. This results in an effective limit of no more than 46.7% foreign ownership.

The GATS request stipulates that “majority foreign capital participation and effective control to be allowed.” By sponsoring the request, Canadian trade negotiators are making demands that contravene the country’s current law and regulations. Under the proposal, Canada would have to change its current limits on foreign ownership in telecommunications. Other federal regulations, including requirements that a majority of boards of directors of telecommunications service providers be Canadian are also threatened.

Canada’s limits on foreign investment in telecommunications, and their importance to economic and cultural sovereignty, have been vigorously debated. Some Canadian companies, and their shareholders, favour lifting the restrictions in hopes of increasing profits. Canadian cultural industries and artists, some provincial governments, the ministry of Canadian Heritage and many citizens oppose lifting the restrictions. They are concerned that removing restrictions in telecommunications will undermine Canadian cultural policies.

Former Liberal Industry Minister, David Emerson, now the Conservative Minister of International Trade, supports loosening Canada’s foreign ownership restrictions in telecommunications. Before joining the Conservative Cabinet, the current Industry minister, Maxime Bernier, also called for the elimination of the ownership requirements. Industry Canada officials are deeply involved in the GATS negotiations.

The removal or loosening of telecommunications ownership limits would have significant impacts on Canadian cultural industries and policies, consumers and employment. These changes should be debated openly and publicly, not decided in the backrooms of a high-pressured international trade negotiation.

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# Appendix: Confidential Telecommunications Plurilateral Request

## Introduction

1. Further to paragraphs 7 and 11 (b) of Annex C of the Hong Kong Ministerial Declaration, the Mission of Singapore is pleased to present the delegation of [ ] a collective request in telecommunications services on behalf of the following interested Members: Australia, Canada, the European Communities, Hong Kong China, Japan, Republic of Korea, Norway, Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States of America.

2. This request identifies specific objectives for telecommunications liberalization, while recognizing the flexibilities provided for individual developing country Members in accordance with Article XIX.2 of the GATS. The aforementioned interested Members are also deemed to be recipients of this request.

3. In accordance with paragraph 7 of Annex C of the Hong Kong Ministerial Declaration, this collective request is intended to complement, and not supersede, the bilateral request-offer negotiations and the specificity of bilateral requests.

4. The Mission of Singapore has the further pleasure to invite [ ] to participate in a plurilateral discussion of this request, which will be organized in Geneva during the Services cluster taking place from 27 March to 7 April, 2006.

5. Please note that 23 other Members have received this collective request in telecommunications services from the aforementioned group of interested Members, and have also been invited to this plurilateral meeting.

6. The aforementioned interested Members reserve the right to modify the content of this request. Additional interested Members may also be identified in the future.

7. Any comments regarding this request, including written questions of a technical nature in advance of the plurilateral meeting, may be addressed to:

*Muhammad Hanafiah*  
*Infocomm Development Authority of Singapore*  
*65-6211-1819*  
*muhd\_hanafiah@ida.gov.sg*

*Norain Ali*  
*Infocomm Development Authority of Singapore*  
*65-6211-0312*  
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*Peter Govindasamy*  
*Permanent Mission of Singapore in Geneva*  
*022 929 6655*  
*peter\_govindasamy@mti.gov.sg*

## Telecommunications Services Collective Request

1. Telecommunications services are not only important economic drivers in their own right but are also key enablers of trade and development with the potential to improve quality of life for developed and developing countries alike. For these reasons, we recognize telecommunications as a vital infrastructural service and request strong and commercially meaningful commitments for all telecommunications services. When scheduling commitments in this sector, Members' attentions are drawn to the agreed objectives in paragraph 1f(i) of Annex C to the Hong Kong Ministerial Declaration that Members should ensure, to the maximum extent possible, clarity, certainty, comparability and coherence of commitments through adherence to, *inter alia*, the Scheduling Guidelines pursuant to the Decision of the Council for Trade in Services adopted on 23 March

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2001. Specifically, we request that your government make commitments on telecommunications services in accordance with the following:

**(a) Sectoral Coverage:** Commitments should have commercially meaningful coverage of subsectors which are listed in 2.C. of MTN.GNS/W/120, in particular voice and data transmission services and leased circuit services (through any means of technology)<sup>1</sup>, and services listed under 2.C.h to 2.C.n. of MTN.GNS/W/120 (often referred to as value-added services during the Uruguay Round).

**(b) Mode 1:** No national treatment limitations and no substantial market access limitations, specifically:

- (i) No unbound;
- (ii) No requirement to use networks of specific suppliers;
- (iii) No requirement of commercial presence; and
- (iv) No requirement for commercial arrangements.

**(c) Mode 2:** No market access or national treatment limitations.

**(d) Mode 3:** No national treatment limitations and no substantial market access limitations, specifically:

- (i) No limitations on the establishment or number of service suppliers (eg quotas, exclusive service suppliers, or geographic restrictions within a Member state's territory);
- (ii) No economic needs tests;
- (iii) No restrictions on the types of legal entity permitted;
- (iv) No limitations on nationality or residency; and
- (v) Majority foreign capital participation and effective control to be allowed.

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<sup>1</sup> in accordance with S/GBT/W/2/Rev. 1

**(e) Subsectors 2.C.h. to 2.C.n. in MTN.GNS/W/120:** No limitations on Modes 1 to 3.

**(f) All telecommunications services provided on a non-facilities or resale basis:** No limitations on Modes 1 to 3.

**(g) Mode 4<sup>2</sup>:**

(i) Make commitments in accordance with paragraph 1(d) of Annex C of the Hong Kong Ministerial Declaration, in particular new or improved commitments on the categories of Intra-Corporate Transferees and Business Visitors.

(ii) No additional limitations beyond horizontal limitations; and

(iii) No exclusion of telecommunications services from horizontal Mode 4 commitments.

**(h) Reference Paper:** Commitments to all provisions of the Reference Paper developed in the Negotiating Group on Basic Telecommunications (see attached).

**(i) MFN Exemptions:** Removal of all MFN exemptions

## Reference Paper developed in the Negotiating Group on Basic Telecommunications

### Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

### Definitions

**Users** mean service consumers and service suppliers.

**Essential facilities** mean facilities of a public telecommunications transport network or service that

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<sup>2</sup> For this element, the United States is not a requesting Member, but shall be deemed to be a recipient.

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(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service.

**A major** supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or

(b) use of its position in the market.

## 1. Competitive safeguards

### 1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

### 1.2 Safeguards

The anti-competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;

(b) using information obtained from competitors with anti-competitive results; and

(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

## 2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.

### 2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

### 2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

### 2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

### 2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:

(a) at any time or

(b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions

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and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

### **3. Universal service**

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

### **4. Public availability of licensing criteria**

Where a licence is required, the following will be made publicly available:

- (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence and

- (b) the terms and conditions of individual licences.

The reasons for the denial of a licence will be made known to the applicant upon request.

### **5. Independent regulators**

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

### **6. Allocation and use of scarce resources**

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.