European-American Business Council

Request for U.S. and EU cooperation in tackling FDI restrictions for

the provision of convergent telecoms services in third markets

Importance of telecommunications Foreign Direct Investment (FDI)

Telecommunications is a capital intensive industry, and access to capital is key to ensuring the deployment and expansion of a robust network. Countries that have eliminated barriers to FDI have benefited from greater commitment and longer-term engagement by foreign investors as well as new management approaches, technology, and skills. FDI has typically been the driver of telecom sector growth in liberalizing economies.

For instance, between 1990 and 2001, the telecom sector drew more investment in developing countries than any other sector, totaling $331 billion. Half of this investment went to the Latin America and the Caribbean regions . However, Sub-Saharan Africa, which had no private telecoms investment at all in 1993, managed to account for 5% of the global total in the sector by 2001. The ability to attract private investment in telecoms is not confined to any one part of the globe. When investment figures are adjusted to reflect investment per head of population, countries and regions as diverse as Panama and Estonia are included among the top five countries worldwide.[1]

Foreign direct investment in telecom infrastructure brings more than hard currency. Companies investing in national telecom bring with them new technologies, business processes and methods, and valuable global brands. By far the greatest rewards to countries that have opened up their telecoms sectors to investment are the indirect revenues, the benefits that are spread throughout the economy and society as a whole as more and better communications services benefit everyone. This view is echoed by the OECD which notes:

> "ICT has had, and will continue to have, significant economic implications. Businesses are transforming their supply and demand chains, as well as their internal organization to fully exploit ICT. Governments are restructuring their internal functions and the way they deliver services and generally interact with citizens and businesses. People are modifying their consumption and spending patterns, as well as their behavior. In the process, nearly every economic variable of interest is affected." [2]

[1] *See ICC Telecom Liberalization Toolkit*, at 16 (Oct. 2007) (www.iccwbo.org/policy/ebitt/id5050/index.html).

[2] *OECD Guide to Measuring the Information Society*, November 2005.

Which countries presently impose limits? And, what potential pitfalls may have arisen in the content of converged services?

Over the last two decades, most countries have taken significant steps to allow the flow of FDI in their telecom sectors. Between 1990 and 2003, 122 of 154 developing countries financed telecommunications projects with foreign investment.[3] However, many still limit foreign ownership to less than 100%. And significantly, a guiding principle continues to control in many circumstances where investment has in fact occurred – capital goes where it is welcome, and stays where it can grow. Many investors have either limited their investments in or kept away from countries that have placed restrictive caps on the level of FDI in the telecom sector, particularly where foreign investment is restricted to a minority share and foreign suppliers are unable to exercise operational control of their affiliates.

The following countries[4] presently apply some form of cap or limit on FDI in the telecommunications and audiovisual sector that affect the provision of convergent services:

Argentina The maximum stake that a foreign shareholder can own in communication media is 30%. (Cultural Goods Law, also called "Clarín Law"). This also affects the provision of television services in Argentina, cable TV, via satellite as well as via IPTV. In addition, a new audiovisual law adopted recently in Argentina has retained existing limitations regarding the ability of telecoms operators to provide audiovisual services.

Australia Under the Telstra Corporation Act 1991 (the Act) Telstra is subject to ownership restrictions that limit foreign groups to 35% of Telstra's listed capital and a maximum holding of 5% for individual foreign entities. There are no foreign ownership restrictions regarding the Australian telecom industry as a whole.

Brazil A constitutional reform had been proposed to extend the 30% foreign stake limit currently in force for media companies (broadcasting and journalism), to include Internet access companies and other audiovisual content production, programming and distributing companies, is a paradigm of the type of threat that telecom operators expect to encounter in the provision of these services. However, this proposal remains blocked to-date.

Canada Legislated Canadian ownership and control requirements applicable to the telecom service industry were established in 1993. Canada's FDI restrictions limit aggregate direct foreign ownership in wireline and wireless carriers to 46.6 per cent. Pursuant to section 16 of the Telecom Act, Canadian carriers (i.e., companies owning or operating transmission facilities used to offer service to the public for compensation) must have at least 80% of their voting shares owned by Canadians.

China China imposes an FDI limit of 49% on basic telecom service license and a 50% limit on value added licenses. China also imposes other requirements such as high levels of capitalization requirements and partnerships with State Owned Enterprises.

[3] *Information and Communications for Development 2006*, The World Bank.

[4] Derived in relevant part from the *OECD Telecom Outlook 2009*, pages 43-49, with the exception of India (see: www.legalserviceindia.com/article/l280-Foreign-Direct-Investment-In-Telecommunications-Sector.html) and several other non OECD member countries.

India Former limitations on telecom foreign direct investment in India were increased from 49% to 74% in 2005 for most services.

Indonesia Foreign ownership in mobile and fixed-line telecommunications is now capped at 65% and 49%, respectively, down from the previous 95% cap for both sectors. Citing national security concerns, the new ruling has taken effect immediately, although existing foreign investments in the telecom sector are apparently unaffected.

Japan There are no restrictions on individuals and corporations investing in the incumbent PTO(s) in Japan. However, direct and/or indirect foreign capital participation in NTT Corp., which holds all the shares of NTT East Corp. and NTT West Corp., is restricted to less than one-third.

Korea In the case of facilities-based operators, foreign government or foreigners together cannot hold more than 49% of all shares issued.[5]

Mexico According to article 12 of the Federal Telecom Law, and pursuant to article 7 of the Foreign Investment Law, public telecom concessions may only be granted to Mexican citizens or enterprises. Foreign investors or their investments may only own up to 49% interest in an enterprise owning or operating a public telecom. Foreign investment may participate in excess of 49% in an enterprise authorized to provide cellular telephony services, in which case the enterprise will require a favorable ruling of the National Foreign Investment Commission.

New Zealand According to the Constitution of the Telecom Corp. of New Zealand Ltd. (Clause 6), no person who is not a New Zealand national shall have an interest of more than 49.9% of its voting shares without the prior written approval of the Kiwi Shareholder and the Board. There are no restrictions on other operators. Crown approval is required for all ownership of 10% or greater in Telecom NZ.

Norway According to the Norwegian government white paper, "Reduced and Improved State Ownership," a minimum of 34% of the shares in the incumbent telecom operator (Telenor ASA) are to be government held. There are no restrictions on other operators.

Poland No foreign ownership restrictions. The majority of the members of the Supervisory Board of a telecom company must be resident Polish citizens.

Switzerland No foreign ownership restrictions. The federal government is required to retain majority shareholding (capital and voting shares) in Swisscom.

Thailand Foreign direct investment in telecom is limited to 49%, up from the previous limit of 25%, which existed until December 2005.

Turkey There are no foreign ownership, size of shareholding or other ownership restrictions on individuals and corporations investing in the incumbent or other telecom operators in Turkey. However, the government retains a 'golden share' in the incumbent operator Türk Telekom.

Vietnam Facilities-based services are permitted through joint ventures, with foreign capital not exceeding 49 percent. Non-facilities-based value added service licenses are permitted through joint ventures, with foreign capital not exceeding 51 percent.

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[5] South Korea presently limits FDI into the domestic telecom sector to no greater than 49%. Korean authorities had proposed a way to remove this FDI restriction under the terms of the recently concluded free trade agreement (FTA) with the U.S. In this case, although the language of the FTA did not address the FDI limitation directly, an understanding was reached that the terms of the FTA would compel this result. However, as the U.S.-Korea FTA was not ratified by Congress, the restriction remains.

This percentage is expected to increase to 65 percent in 2010.

The EABC believes that US and EU authorities should seek to ensure the elimination of all trade barriers that impede effective market access for US and EU telecoms operators in third countries, especially limitations on ownership of capital for the provision of convergent telecommunications services, a crucial aspect to be able to compete with national operators on equal footing.

However, U.S. and EU authorities may also need to take into account that the ever increasing deployment of converged services continues to reshape the telecoms industry and blur the boundaries between traditional telecoms and audiovisual services. To ensure that no foreign ownership limitations will affect U.S. and EU telecoms operators in the provision of converged services (voice, data, video and mobile services), a new focus in trade policy might be needed. Therefore, U.S. and EU authorities should take into consideration whether or when foreign ownership restrictions for the provision of content-based services in third country markets may impact the investment interests of their telecom industry. For instance, a joint effort is needed to lead the debate for the distinction between traditional broadcasting services and other audiovisual services, such as video-on-demand, that may be provided by telecoms operators.

What can be done?

Pervasive, speedy, intelligent and affordable broadband provided through capable high-capacity networks is vital to future economic recovery and growth, and particularly, for future deployment of such in-demand services as telemedicine, high-definition video, and tele-presence applications. Consistent policies create an atmosphere conducive to investment by the private sector, which is important for the development of telecom markets, and particularly true for investment in and development of broadband.[6] The importance of market liberalization, stable and predictable regulatory frameworks, and participation in existing and future international agreements (such as the WTO General Agreement on Trade and Services) all demonstrate an openness to foreign investors and a willingness to abide by globally recognized approaches.

For instance, the deployment of high quality international and national broadband infrastructure in the Indian market has been a major driver of its growth. This expansion was made possible trough a series of public policy reforms that are world-class examples: not only increasing the FDI limit from 49% to 74%, but also, increases to competition, price decreases in international connectivity, the addition of submarine cable landing stations and backhaul, and a highly engaged national regulator. According to a review report by India's Department of Industrial Policy and Promotion (DIPP), FDI as a proportion of total investment has more than

[6] See Broadband Growth and Policies in OECD Countries, a background paper for the OECD Seoul Ministerial, June 2008, at 58: http://www.oecd.org/dataoecd/32/57/40629067.pdf.

doubled between 2003-04 and 2006-07. The share of FDI in Indian GDP has increased from 0.77% to 2.31% in the last financial year 2006-07 alone.

The U.S. and EU Member States presently permit up to 100% FDI in domestic telecom companies, despite the fact that many countries (even some developed economies) limit the percentage ownership that a non-domestic company can have to less than a controlling interest. The flexibility for FDI in both the U.S. and EU can have a leadership effect for purposes of prompting relaxation of investment restrictions in other countries, particularly in the context of free trade agreement (FTA) negotiation. In the context of any forthcoming bilateral negotiations, whether or not leading to an FTA, we would recommend that the EU and U.S. continue to pursue strategies that encourage other countries to either relax or remove restrictions on FDI in their telecommunications sector, not only to encourage broadband infrastructure investment, but also to facilitate the deployment of innovative services critical to economic recovery and growth.

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