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PROVIDING LEGAL CERTAINTY FOR TELECOM SERVICES

by

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Improving WTO Member commitments in the basic telecommunications sector should be one of the major goals in the next round of GATS negotiations. As you know, many WTO Members made no commitments whatsoever in the negotiations that concluded in 1997. Many of the commitments that were made guarantee market access only after many of us have retired. Negotiators should seek earlier dates for liberalization and commitments from those Members who have none. That's relatively straightforward — part of the "request and offer" process that occurs in all trade negotiations. I would like to address a more difficult objective — obtaining greater legal certainty that market access commitments are meaningful and can be enforced in dispute settlement.

There are a number of areas of the GATS that need to be modified in order to provide greater legal certainty. Rules need to be developed relating to domestic regulation, particularly licensing requirements. Terms in the Reference Paper need to be defined more precisely and obligations need to be expanded. The subsectors for which commitments are made in the schedules of commitments need to be clarified and standardized. Let me describe each of these in more detail.

Article VI of the GATS, which deals with domestic regulation, is one of the most misunderstood provisions in the agreement. During the negotiations on basic telecommunications, many negotiators claimed that Article VI established rules for licensing requirements and therefore no additional obligations were necessary. In reality, Article VI(4) merely requires the Council for Trade in Services, the GATS ruling body, to develop disciplines for licensing requirements, as well as for technical standards and qualification requirements, to ensure that such requirements are:

-- based on objective and transparent criteria;
-- not more burdensome than necessary to ensure the quality of the services; and
-- in the case of licensing procedures, not in themselves a restriction on the supply of the service.

In the absence of agreed-upon disciplines, a WTO Member must meet a two-part test to prevail in dispute settlement. The regulation must fail to meet one of the three criteria listed above and the complaining Member must show that it could not reasonably have expected that such a regulation would be adopted. For example, if a WTO Member requires as a condition for obtaining a facilities-based license that the licensee invest a minimum of $400 million, the WTO Member would have to show not only that the licensing requirement is more burdensome than necessary to ensure the quality of the service, but also that the United States could not have reasonably expected that such a regulation would be adopted.

Licensing requirements are a major source of frustration for new entrants in the telecommunications sector. In addition to build-out requirements (Taiwan), we've heard of extraordinarily large licensing fees (Germany proposes to charge millions of dollars, as does Italy and Spain); fifty page application forms (Belgium) and other horrors.

The Reference Paper, negotiated as part of the basic telecommunications services negotiations which concluded in 1997, does not provide any significant additional obligations on licensing. The Reference Paper obligations are limited to a requirement for public availability of licensing criteria, the period of time normally required to reach a decision concerning an application for a license and the terms and conditions of individual licenses. One of the goals of the new negotiations should be to impose solid disciplines on licensing requirements and procedures should be amended to discipline the types of license criteria, the conditions that can be imposed to obtain a license and the scope of information requested in a license application.

The provisions of Article VI(4) are a good starting place to look for additional disciplines on licensing. The licensing criteria should be objective, not more burdensome than necessary to ensure the delivery of the service and not in themselves a restriction on the supply of the service. This would allow regulators to apply different criteria to different types of suppliers. For example, in cases where an application requires allocation of scarce resources, such as spectrum or rights of way, the criteria could include financial and technical qualifications for the supplier, as well as build-out or service conditions. Where scarce resources are not at issue, the licensing criteria could be limited to determining whether entry would pose a risk to competition in the market. If these disciplines applied, a WTO Member could no longer require applicants for an ordinary wire-line license to fill in a 50-page application or meet stringent financial requirements.

In addition, the licensing provisions should be expanded to promote market access. For example, licenses should be broad in scope and allow suppliers to provide the licensed service either by building or leasing facilities, depending on their business plan and economic conditions. Commitments should be sought for blanket licensing of those services which do not use scarce resources and do not pose competitive harms.

The competitive safeguards provisions of the Reference Paper also need to be strengthened. As currently written, the Reference Paper only requires that a WTO Member have in place measures that would prevent anti-competitive practices. The

Reference Paper does not spell out what these measures should be and, more importantly, does not require a WTO Member to actually implement the measures it adopts. The Reference Paper should be amended to require countries to adopt specific types of safeguard measures, such as requirements for structural separation or cost accounting, and measures prohibiting the use of information derived from supplying facilities to other carriers.

The Reference Paper provisions on interconnection are very detailed but lacking in a few important respects. Many of the essential terms, such as "unbundled" and "cost-oriented," are not defined. There is a fundamental question of whether the unbundling obligation reaches to the "local loop." Negotiators need to set out the network elements that, at a minimum, should be available separately and the parameters for determining cost, such as use of long-run incremental cost.

While the Reference Paper requires that WTO Members provide for arbitration of interconnection disputes, it does not mandate that the results of any arbitration be imposed on the disputing parties. Without an enforcement mechanism, cost-effective interconnection will be difficult to achieve.

The Reference Paper makes no mention of number portability. In the original negotiations, the U.S. proposed a provision regarding number portability but this was dropped. The sole remaining reference is a requirement that "numbers" have to be allocated in an objective, transparent and non-discriminatory manner. This is not sufficient to allow effective competition to develop.

Many of you have heard that the Reference Paper requires an "independent" regulator. That is not quite true. In fact, it requires that the regulator be independent of the operator. This can be achieved merely by turning the operator into a private company. The ministry that owns the operator can still act as the regulator. This creates inherent conflicts of interest. In fact, even if another government ministry owns the operator, conflicts can exist. The U.S. originally proposed a significant degree of separation between the operator and any regulator but again was unsuccessful in getting others to agree. We ought to try again.

Since I was involved in the original negotiations, I have heard all of the arguments about why tighter disciplines are not possible. Many of our trading partners objected to binding themselves to the "American" regulatory system. But it was not just the foreigners that objected to more stringent regulatory principles. The FCC was adamantly opposed, for example, to setting a time within which license decisions would be made and the Justice Department opposed any binding requirement to act against anti-competitive activities. Understandably, government officials do not want to lose their flexibility to act or subject their actions to dispute settlement in Geneva. The same is doubly true for many WTO members who have had little experience regulating in the telecom sector.

But I think that with the passage of time, many WTO Members have gained experience in regulating a liberalized telecom sector. Regulators have come to realize

that certain practices are standard in the field, and the notion of "best practices" is more accepted. As a result, it may be easier to negotiate more detailed regulatory principles in these new negotiations.

How will these new obligations be undertaken? Negotiators cannot amend the GATS itself and should not try to amend the Reference Paper. Rather a new "Reference Paper" should be negotiated with new regulatory principles, which could then be added as "additional commitments" to member schedules.

The final area I would like to discuss is truly a technical legal issue. But it has a profound effect on a country's market access commitments. This issue is how do you write a GATS schedule for purposes of the telecom sector. How do you standardize schedules so everyone writes their schedules in the same manner. The problem now is how do you interpret "coverage'' when some Members, like the EU, relied on an "outdated" classification system and others, like the United States, referred to its domestic laws for purposes of interpreting the various service subsectors.

Clearly, we should not depend on the Standard Classification System, last revised by the GATT Secretariat in 1991. That system has mobile services listed separately from voice and data services, and it includes telegraph services, something no one uses any more. We need to build on the scheduling note issued by the Chairman of the basic telecommunications negotiations first by standardizing schedules. That note stated that schedules were technology neutral, unless otherwise specified. That means that schedules should list types of service — local, long distance, international, voice and data. Everything else — paging, satellites, cable — is a technical means of delivering those fundamental services. But even the United States did not totally follow the Chairman's note. Our schedule refers to mobile services, because we were afraid to make too many changes in the last month of the negotiations. Second, negotiators need to decide where voice and data services provided over the Internet fit — or whether it matters at all that the voice or data service is provided over the Internet rather than over a submarine cable. Finally, negotiators need to establish clearly that the content of the voice and data messages are covered under other services schedules, such as medical services, educational services, financial services, etc.

When we concluded the basic telecom negotiations in February 1997, industry pronounced itself "widely enthusiastic." I think that the experience of the past three years shows that more needs to be accomplished in order to maintain industry's enthusiasm.