

Appendices to the TACD background paper on Trade in Services by Ellen Gould, October 2002

Appendix A TACD GATS Recommendations - May 2002

The TACD wrote a letter to the three Presidents who attended the EU/US summit in Washington DC, on May 2, 2002 - Romano Prodi, President of the European Commission, Prime Minister Jose Maria Aznar, President of the European Council, and George W. Bush, President of the United States of America. The last section of the letter dealt with TACD's recommendations on the GATS negotiations.

Dear Presidents,

The Transatlantic Consumer Dialogue (TACD), the forum of the major consumer organizations in the United States and the European Union, awaits with interest the outcome of the EU-US summit on May 2, 2002. We are also pleased to have been invited to meet with the Presidents, as it is important that civil society's concerns have a place at the table. We hope that, at this summit, you will consider several matters that are of great concern to consumers on both sides of the Atlantic

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Trade in Services

The WTO Service negotiations raise serious concerns for consumers. The recent Enron collapse and the role of Arthur Andersen accounting firm in the scandal illustrate the dangers of a free market system lacking in government oversight and accountability. Both companies have been active participants in the WTO services negotiations. TACD urges the US and EU governments to ensure that the General Agreement on Trade in Services (GATS) negotiations do not undercut or preclude the robust regulatory environment that is needed in the service sector to protect consumers and the environment.

To address these concerns, TACD recommends that all documents in the WTO services negotiations be made public in a timely fashion. Also, the right of governments to provide and regulate basic services in the consumer interest should be broadly asserted in a new article of the WTO services agreement. The right of governments to provide access to basic services must be recognized in the agreement and the right of governments to assure the provision of critical services - health, education, telecommunications, water and energy utilities - should be protected by revising the government exemption in the agreement to make it self-defining. It has not escaped TACD's notice that both the EU and the US are requesting commitments in the energy sector, an issue of great concern to consumers and environmentalists alike.

The imposition through the GATS of "necessity tests" or requirements to only implement measures that are "the least trade restrictive" should be rejected and the GATS articles on market access and national treatment should be amended to clearly state that they do not apply to non-discriminatory domestic regulations.

Finally, we urge the EU to reconsider its WTO GATS draft requests (April 2002) that include requests for many nations to eliminate all restrictions on the distribution of alcohol and

tobacco. This could have a significant impact on public health around the world. It also underscores the need for transparency and accountability in the negotiations. We urge the US and the EU to unilaterally pledge to make WTO GATS request/offer documents publicly available in a timely fashion.

Yours sincerely,

Ben Wallis, TACD Coordinator
On behalf of the TACD Steering Committee

Anna Bartolini, President, CNCU (Italian National Council of Consumers and Users)
Benedicte Federspiel, International Director, Forbrugerrådet (Danish Consumer Council)
Jean Ann Fox, Director, Consumer Protection, Consumer Federation of America
Rhoda Karpatkin, President Emeritus, Consumers' Union
Felix Cohen, Director, Consumentenbond (Dutch Consumers Association)
Ed Mierzwinski, Director, Consumer Program, Public Interest Research Group
Jim Murray, Director, BEUC (European Consumers Organisation)
Lori Wallach, Director, Global Trade Watch, Public Citizen

Appendix B

(JOB(01)/62/Rev.2) Working Party on Domestic Regulation 12 July 2002

EXAMPLES OF MEASURES TO BE ADDRESSED BY DISCIPLINES UNDER GATS ARTICLE VI4

Informal Note by the Secretariat Second Revision

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ANNEX I n EXAMPLES CONTRIBUTED BY MEMBERS

A. These examples appear to meet the requirements set by Members, i.e. specific measures not already covered by the accountancy disciplines, which are also not XVI/XVII [Market Access or National Treatment] measures

Transparency

A Lack of opportunity for interested non-governmental market participants to meet with government officials to discuss the impact of new or proposed regulations.

A Inadequate information available, or information not readily available, to non-governmental market participants about new or proposed regulations affecting their interests.

Licensing requirements

A [Subject to Members= interpretation.] Restrictive regulations relating to zoning and operating hours, to protect small stores.

A Federal and sub-federal licensing and qualification requirements and procedures are different, making a license or qualification recognition obtained in one state not valid in other states.

A Too many licenses required in order to operate a business.

A Overly burdensome licensing requirements (e.g. minimum age required for a physiotherapist is 25 years old).

A Branches of a foreign company are required to regularly submit plan of activities to the government authority in order to be eligible to renew registration.

A Lengthy censorship procedures; too many censoring agencies with different criteria.

Licensing procedures

A It is necessary to obtain/renew the same license in every regional government.

A All the important papers necessary to establish business operation have to be certified by the Public Notary which can take a long time to process with no other alternative available.

A The effective period of licensing is very short.

A Authorization may not be handled through a single point.

A Inability of applicants to file complaints regarding review of their applications.

Qualification requirements

A Only persons who have specific certification from a government agency can take up managerial posts (e.g. managers of an insurance company must have certification from the insurance agency in that country).

A Requirement for fluency in language of the host country which in some cases not relevant to ensure the quality of service.

A Different sub-federal regulations for recognition of qualifications.

- A Minimum requirements for local hiring (accountancy).
- A Qualification procedures
- A A large number of documents is required (application procedures).
- A Need for in-country experience before sitting examinations (accountancy).

Technical Standards

- A Unreasonable environmental and safety standards (maritime transport).
- B. The following measures also appear to meet the requirements set by Members n provided they apply to sectors other than accountancy (otherwise they seem to already be covered by the accountancy disciplines)

Transparency

- A Regulatory changes without adequate prior notice, making the applicants not eligible to apply or have to find new supporting documents within a short period of time.
- A Non-transparent regulatory environment (architecture, postal and courier, audiovisual, distribution, education, energy, environmental, sporting, and tourism services).
- A Domestic laws and regulations are unclear and administered in an unfair manner; subsidies for higher and adult education, and training are not made known in a clear and transparent manner.
- A A lack of transparency in domestic town planning regulations, that might prejudice decisions on the location of installations to provide such services through commercial presence (distribution services).
- A Long delays when government approval is required, and, if approval is denied, no reasons or information given on what must be done to obtain approval in the future (postal and courier services).

Licensing requirements

- A Absence of pre-determined, clear criteria for licensing requirements (including postal and courier, and distribution services).
- A Unreasonable restrictions on licensing (legal services).
- A Restrictive licensing practices (tourism).
- A Unclear licensing and approval requirements (energy services).
- A Unspecified approval and licensing requirements (environmental, financial and tourism services).
- A Irrelevant requirements to obtain license (e.g. jewellery artists must obtain a permit or license from the National Bank).
- A Too many steps for business registration and such registration must be renewed relatively frequently (e.g. every 2 years) at considerable time and expense.
- A Non-transparent registration procedures; unpredictable timeframe for registering process.
- A Restrictions on registration (e.g. residency requirements), which prevents foreign engineers from signing off on drawings and managing projects.
- A Unduly burdensome requirements.
- A Onerous licensing requirements (consulting, engineering, construction, and distribution services).
- A As licences can be difficult or impossible to obtain, forwarders often have to resort to intermediaries or form partnerships (Other transport services).
- A Registration is required both at the central and local governments (or local commercial courts); the procedures at the local level are often not transparent and taking a long time without adequate explanation for the delay.

A Residency requirements (including computer, telecommunications, audiovisual, construction, distribution, energy, financial, sporting, and tourism services).

A Residency requirements for advertising production professionals filming in some countries and/or for employees of the advertising firm.

A Mandatory membership of a Chamber of Commerce or a local association required as a pre-condition to operate business in local areas.

A To be licensed as a professional, there is a requirement or pre-requirement to be a member of an affiliate organization. This organization has no regulatory authority over the profession (i.e. union, country club). To be a member of this organization, the licensee must be a resident of the territory or have lived in the territory for the past six months.

A Requirement to have numerous different legal entities as a pre-condition to apply for a business operation license.

A Applicant must possess indemnity insurance or be bonded prior to licensing.

A Licensing fees that are considered as expensive by international standards.

A Registration/approval is required in order to provide services.

A Special registration requirements for firms to operate in individual countries (construction service).

A Authorization requirements are cumbersome.g. a permit is required for every single project.

Licensing procedures

A Work history and letters of reference from all previous employers unrelated to the authorization sought.

A Documented proof of physical and mental well-being.

A Overly complicated licensing procedures (e.g. have to go through many steps in many agencies in order to obtain a license).

A Excessive, vexatious formalities, lacking in transparency, for professional licensing purposes, etc.

A Only original documents will be accepted.

A Only documents translated or authenticated by that country's Embassy in Bangkok will be accepted, causing unnecessary delays and expenses (especially if additional documents for an application are required at short notice).

A Delays in receiving an application.

A Delays in informing the applicant of the decision (unreasonable time).

A Where government approval is required but denied, no reasons are given for denial, and no information is given on what must be done to gain approval in the future.

A No possibility for the applicant of correcting minor errors in its application form.

A No possibility of resubmitting applications for licensing after a first rejection.

A Delays in implementing the terms of the licence.

A Lack of transparency.

A The period of time required for the processing of a license application is not very clear.

A The processing period for a license application is long.

A A great deal of documents must be submitted throughout several stages in order to obtain authorization.

A Excessive application and processing fees (including postal and courier, distribution, and educational services).

A Authorization procedures are costly.

A Authorization procedures take up a considerable amount of time.

Qualification requirements

A Residency requirements.

A The scope of examinations of qualification requirements goes beyond subjects relevant to the activities for which authorization is sought.

A Requirements needed for eligibility to take exams are more burdensome than necessary and not relevant to ensure the quality of service (e.g. must stay in that country at least 3 years to be eligible to take exam).

A Qualification requirements other than education, examinations, practical training, experience and language skills.

A Examinations that do not appear to be directly related to the concerned qualifications are required.

Qualification procedures

A Long delays in the verification of an applicant's qualifications acquired in the territory of another Member.

A Lack of a legal framework for accepting professionals with foreign qualifications, or lack of internal consistencies of such a framework.

A Non-recognition of foreign qualifications (including engineering, construction, financial and sporting services).

A Limited or no recognition of foreign qualifications (architecture, legal services).

A Non-recognition of qualifications obtained in country of origin (e.g. not accepting cooking certificate from a government institute) and refusal to consider past working experiences and/or apprenticeship in country of origin.

A Common exclusion of developing countries from mutual recognition agreements

A Unreasonable intervals for examination of applications.

A Limited openness of process (all eligible applicants do not benefit from the same level of openness).

A Unreasonable period of time for the submission of applications.

A Excessive administrative costs that do not reflect fees charged.

A Residency requirements for sitting examinations (not subject to Article XVII).

ANNEX II n EXAMPLES FROM WPPS MATERIALS

A. These examples appear to meet the requirements set by Members, i.e. specific measures not already found in the accountancy disciplines, which are also not XVI/XVII measures

Licensing requirements

A Minimum capital requirements.

Licensing procedure

A Applications to more than one licensing authority in any given jurisdiction for a particular service are required.

Technical standards

A [Subject to Members' interpretation.] Restrictions on fee-setting, and restrictions/prohibitions on marketing and advertising.

A National standards which diverge from international standards.

B. The following measures also appear to meet the requirements set by Members n provided they apply to sectors other than accountancy (otherwise they are already covered by the accountancy disciplines)

Licensing requirements

- A Restrictions on the use of firm names.
- A Residency requirements

Qualification requirements

- A Requirements which do not take account of foreign qualifications.
- A Local training requirements exceeding 12 months.

Appendix C - Potential GATS Challenges to US Accounting Reform

The US Sarbanes-Oxley Act prevents accounting firms that audit publicly traded companies from providing them with eight other types of services, such as bookkeeping, financial systems design and personnel and legal services. The company's audit committee are able to approve provision of some non-audit services, but only if this does not represent more than five percent of the audit fee. The audit partners assigned to particular firms have to be rotated every five years. Audit documents need to be kept for five years.

In the event of a dispute over the accounting reform package, the US could be called on to justify why it prevented certain combinations of services and allowed others. The restrictions on consulting may not be defensible under GATS disciplines given that there are less burdensome alternatives. In the UK, for example, rather than barring accounting firms from undertaking consulting work, the Financial Services Authority is considering the less onerous approach of requiring that consulting fees be made public.ⁱ

Accountants in Europe whose firms do legal and consulting work will not welcome the US restrictions on accounting firms providing other services. At a European meeting on the GATS where he was speaking on behalf of the accounting profession, a European partner of Andersen said professionals should be allowed to work together and the market should decide which services can be provided, not "outdated requirements of the national regulator". He said governments should take a "proportional" rather than a "sledgehammer" approach to regulations in this area.ⁱⁱ

A government challenging US accounting reforms on behalf of international accounting firms could provide evidence that less trade restrictive mechanisms could better meet the US objectives of protecting consumers and ensuring auditor integrity. They could offer as proof, for example, a January 2002 study conducted of 944 audits done in the US that found "no evidence that non-audit service fees impair auditor independence." The study could be used to argue that the US measures were ineffective at meeting their stated objectives, and that there were less trade restrictive means to ensure the integrity of the profession. The authors of this study claim: "The loss of reputation and litigation costs provide strong incentives for auditors to maintain their independence. Our study provides evidence that these incentives outweigh the economic dependency created by higher fees."ⁱⁱⁱ

The Sarbanes-Oxley Act also created a Public Company Accounting Oversight Board to set audit rules and discipline those who break them. This Board will take over many of the responsibilities currently delegated to self-governing bodies made up of accountants. Since self-regulation can be a less onerous alternative to government regulation, creation of the Board in itself could be viewed as unnecessarily burdensome. It will require mandatory contributions from all firms auditing publicly traded firms in the US, a requirement that is bound to generate opposition from European accounting firms. If the fee is levied as part of the licensing process, it may fall foul of the Accounting Disciplines requirement that fees "shall not represent an impediment in themselves to practising the relevant activity." As an agency with authority delegated by government, the Board would be covered by the GATS and any standards it set would have to meet the test of being "not more trade-restrictive than necessary to fulfil a legitimate objective."

If challenged, the US may not be able to defend a 5% limit on non-audit fees or auditor rotation every five years rather than a longer period as really necessary. As well, the

necessity test would require the US to be able to prove that the Act was effective at meeting its objective of restoring investor confidence. Since the stock market has continued to decline since the introduction of the Act, this may be a difficult thing to prove.

A key general “transparency” demand the US is making in the current round of GATS negotiations is that governments would have to give other WTO members opportunities for input and give consideration to this input prior to adoption of rules that affect trade in services. Specifically in relation to accounting, the US wants a revision in the draft accountancy disciplines to *require* countries to provide an opportunity for input rather than what the draft currently says - that governments just have to make an effort to do this. Here is the text marked up in the way the US wants it amended: “When introducing ~~measures~~ **regulations, rules, procedures and other administrative action of general applicability** which significantly affect trade in accountancy services, Members shall ~~endeavour to~~ provide opportunity for comment, and give consideration to such comments, before adoption.”^{iv}

The amended wording is significant. A requirement in a WTO agreement that Members “shall” do something means they are legally obligated to do it and can be challenged through the dispute process if they do not. If the GATS disciplines on accounting regulation had already been in place with the US amendments, quick passage of an accounting reform bill might have been held up as the US government provided sufficient opportunity for comment to all WTO members.

ⁱ The Independent, “*It Was Once a Feared Watchdog. So Why Did the SEC Fail American Investors*”, 2 July 2002

ⁱⁱ Speech by Germain J. Vantieghem, Arthur Andersen- Belgium-Luxembourg, at the ESF conference “The GATS Negotiations – New Opportunities of Trade Liberalisation for All Services Sectors”, 27 November 2000.

ⁱⁱⁱ Mark L. DeFond, K. Raghunandan, K.R. Subramanyam, “*Do non-audit service fees impair auditor independence? Evidence from going concern audit opinions*”, Leventhal School of Accounting, University of Southern California, January 2002

^{iv} WTO, Council for Trade in Services Special Session, “*Communication from the United States – Accounting Services*”, WTO Document Symbol:S/CSS/W/20, 18 December 2000

Appendix D

WORLD TRADE ORGANIZATION

S/L/64

17 December 1998

(98-5140)

Trade in Services

DISCIPLINES ON DOMESTIC REGULATION IN THE ACCOUNTANCY SECTOR

Adopted by the Council for Trade in Services on 14 December 1998

I. OBJECTIVES

1. Having regard to the Ministerial Decision on Professional Services, Members have agreed to the following disciplines elaborating upon the provisions of the GATS relating to domestic regulation of the sector. The purpose of these disciplines is to facilitate trade in accountancy services by ensuring that domestic regulations affecting trade in accountancy services meet the requirements of Article VI:4 of the GATS. The disciplines therefore do not address measures subject to scheduling under Articles XVI and XVII of the GATS, which restrict access to the domestic market or limit the application of national treatment to foreign suppliers. Such measures are addressed in the GATS through the negotiation and scheduling of specific commitments.

II. GENERAL PROVISIONS

2. Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS,¹ relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.

III. TRANSPARENCY

3. Members shall make publicly available, including through the enquiry and contact points established under Articles III and IV of the GATS, the names and addresses of competent authorities (i.e. governmental or non-governmental entities responsible for the licensing of professionals or firms, or accounting regulations).

4. Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points:

- a) where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards;
- b) requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance;

¹ The text of GATS Articles XVI and XVII is reproduced in an appendix to this document

c) information on technical standards; and

d) upon request, confirmation that a particular professional or firm is licensed to practise within their jurisdiction.

5. Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives as referred to in paragraph 2.

6. When introducing measures which significantly affect trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption.

7. Details of procedures for the review of administrative decisions, as provided for by Article VI:2 of the GATS, shall be made public, including the prescribed time-limits, if any, for requesting such a review.

IV. LICENSING REQUIREMENTS

8. Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorization to practice) shall be pre-established, publicly available and objective.

9. Where residency requirements not subject to scheduling under Article XVII of the GATS exist, Members shall consider whether less trade restrictive means could be employed to achieve the purposes for which these requirements were set, taking into account costs and local conditions.

10. Where membership of a professional organisation is required, in order to fulfil a legitimate objective in accordance with paragraph 2, Members shall ensure that the terms for membership are reasonable, and do not include conditions or pre-conditions unrelated to the fulfilment of such an objective. Where membership of a professional organization is required as a prior condition for application for a licence (i.e. an authorization to practice), the period of membership imposed before the application may be submitted shall be kept to a minimum.

11. Members shall ensure that the use of firm names is not restricted, save in fulfilment of a legitimate objective.

12. Members shall ensure that requirements regarding professional indemnity insurance for foreign applicants take into account any existing insurance coverage, in so far as it covers activities in its territory or the relevant jurisdiction in its territory and is consistent with the legislation of the host Member.

13. Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practising the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.

V. LICENSING PROCEDURES

14. Licensing procedures (i.e. the procedures to be followed for the submission and processing of an application for an authorization to practise) shall be pre-established, publicly available and objective, and shall not in themselves constitute a restriction on the supply of the service.

15. Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfil qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation.

Where minor errors are made in the completion of applications, applicants shall be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.

16. Members shall ensure that the receipt of an application is acknowledged promptly by the competent authority, and that applicants are informed without undue delay in cases where the application is incomplete. The competent authority shall inform the applicant of the decision concerning the completed application within a reasonable time after receipt, in principle within six months, separate from any periods in respect of qualification procedures referred to below.

17. On request, an unsuccessful applicant shall be informed of the reasons for rejection of the application. An applicant shall be permitted, within reasonable limits, to resubmit applications for licensing.

18. A licence, once granted, shall enter into effect immediately, in accordance with the terms and conditions specified therein.

VI. QUALIFICATION REQUIREMENTS

19. A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.

20. The scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought. Qualification requirements may include education, examinations, practical training, experience and language skills.

21. Members note the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.

VII. QUALIFICATION PROCEDURES

22. Verification of an applicant's qualifications acquired in the territory of another Member shall take place within a reasonable time-frame, in principle within six months and, where applicants' qualifications fall short of requirements, shall result in a decision which identifies additional qualifications, if any, to be acquired by the applicant.

23. Examinations shall be scheduled at reasonably frequent intervals, in principle at least once a year, and shall be open for all eligible applicants, including foreign and foreign-qualified applicants. Applicants shall be allowed a reasonable period for the submission of applications. Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practising the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.

24. Residency requirements not subject to scheduling under Article XVII of the GATS shall not be required for sitting examinations.

VIII. TECHNICAL STANDARDS

25. Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfil legitimate objectives.

26. In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of internationally recognized standards of relevant international organizations² applied by that Member.

² The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

APPENDIX

For the purpose of clarity, the text of GATS Articles XVI and XVII is reproduced below.

Article XVI

Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.³

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;⁴

limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

³ If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

⁴ Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

Article XVII

National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.⁵
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

⁵ Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service supplies.

Appendix E

REFERENCE PAPER

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:

- (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 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.

Appendix F The Crisis in the Telecom Sector

While media attention has been focused on accounting scandals in the telecom sector, the root cause of the scandals may have been with fundamental structural problems in the deregulated industry as much as with its accounting practices. Without “aggressive” accounting methods, the economic status of some companies would have been clearly unviable. Internal company documents suggest that WorldCom, which handles fifty per cent of global Internet traffic and is the second largest long distance carrier in the US, would have had to file for bankruptcy if its books had accurately represented \$3.9 billion in costs.ⁱ Before the accounting story broke in 2002, WorldCom’s share price had already declined to less than \$1 from its peak of \$64 reached in 1999.

WorldCom’s fundamental problem has been described as one shared by major telecommunications companies on both sides of the Atlantic: a “growth at all costs” strategy leading to spectacular levels of debt (estimated at \$1 trillion), acquisition of unprofitable ventures, and overinvestment in infrastructure based on highly optimistic projections of demand. The fibreoptic cable laid to serve the city of London alone is said to be enough to serve four times the needs of forty of the largest European cities.ⁱⁱ Worldwide, the telecom industry has seen an estimated half a million workers laid off in the past two years and trillions in share value wiped out.ⁱⁱⁱ

The issue of what happens to the service as these critical telecom suppliers go under is not yet resolved. The FCC can intervene to some extent to prevent widespread disruptions of service, but there are limits to what it can do if funding for telecom companies completely dries up. Even if they do not go bankrupt, the massive layoffs of staff at companies like WorldCom will inevitably have an impact on service quality. David Butler from Consumers Union has predicted that with 17,000 announced layoffs, quality will inevitably be affected. WorldCom’s customers will have a harder time getting through to the company and getting repairs done.

The Consumers Union has also expressed concerns about the future for competition and consumer prices in the industry. Although deregulation and technological innovation did initially produce a flood of new entrants into the market, the acquisition drive of dominant companies combined with the recent spate of bankruptcies has resulted in a dramatic drop in the number of suppliers. WorldCom, for example, acquired 70 companies and is finding there are only a limited number of potential buyers as assets are sold. According to the New York Times:

“In its overall structure, the telecommunications industry has returned to where it was not only before the landmark Telecommunications Act of 1996, which was meant to allow new companies and forms of competition to flourish, but to where it was 15 years ago. After the industry's financial crash and accounting implosion, the only stable major carriers remaining are the Bell local phone companies, AT&T and Sprint, just as in the late 1980's.”^{iv}

The future of the pro-competitive model in the US telecom sector seems to be in question. The chair of the FCC, Michael Powell, has said the agency might change its policy on competition and allow the merger of WorldCom, with its significant share of the US long distance business, with a Baby Bell, one of the dominant regional phone carriers. Powell suggested that although the Commission had previously rejected this kind of merger, it might be necessary in order to prevent service disruptions to WorldCom's twenty million customers. He said: "There are plenty of doctrines in antitrust and competition policy that would take into consideration the duress and state of the market."^v In relation to the GATS, it would require something like an emergency safeguard provision that would allow countries to violate their GATS obligations in the event of a crisis. A number of developing countries have advocated such a safety valve be included in the agreement, but the proposal has had a negative reception from the US and the EU.

ⁱ The Wall Street Journal, "*WorldCom Files for Bankruptcy*", 22 July 2002

ⁱⁱ USA Today, "*Bandwidth Glut Eats Up Profits*", 22 April 2002

ⁱⁱⁱ The San Jose Mercury News, "*Off-the-scale' fiber glut rocks telecom industry*", 13 April 2002

^{iv} The New York Times, "*Trying to Catch WorldCom's Mirage*", 30 June 2002

^{iiiv} The Wall Street Journal, "*Will a Baby Bell Buy WorldCom?*", 15 July 2002

Appendix G The California Experience with Pro-Competitive Electricity Regulation

California's is the most well-known experiment with electricity restructuring because of the spectacular way it failed. Opinions diverge, though, on whether the root cause of this failure was the pro-competitive model itself or not pursuing its core principles consistently enough. Proponents of the model say it could have worked if California had not capped the prices retail electricity suppliers could charge individual consumers, if the government had not created a tight supply with stringent environmental restrictions that had limited the building of power plants, and if long term contracts had been encouraged to keep traders from exploiting the volatility of the spot market.

The failures to measure up to the promises of California's 1996 electricity deregulation legislation are obvious enough. Rather than a more reliable service with increased supply, consumers had to endure rolling blackouts. Consumers Union drew attention on April, 2002 to the fact that that date was when rates were supposed to have fallen by twenty per cent from 1996 levels, and instead they were 40% higher. Rather than less reliance on government and more on market forces, the government had to step in to buy electricity on behalf of distributors who had lost their credit status. Bill Ahern, energy analyst with the Consumers Union, has observed: "When California restructured its electricity market, the system lost integrated planning, effective oversight, and investment in new energy infrastructure."ⁱ

Through the worst of California's crisis, US consumer groups were pointing out that energy companies appeared to be manipulating available supply in order to create artificial shortages. They documented a higher than normal incidence of plants being taking off line for repairs, and the fact that the supposed shortages were occurring when there was traditionally low demand. Their explanation of why California got in trouble diverged from the industry explanation that it was a clearcut supply and demand problem. Far from being a runaway consumer of energy, California ranks 48th out of 50 states in per capita energy usage and its consumption is only increasing by 4 per cent each year.

Documents emerging with the investigation into the collapse of Enron reveal that consumer groups were right to be suspicious of the inadequate supply argument. Energy companies "gaming" the California market appeared to have been manipulating both supply and demand figures, effectively frustrating regulatory reforms intended to provide consumers the benefits of a competitive market. The government of California is now trying to recoup \$9 billion in excess payments it attributes to overcharging. Some of the tactics that are being uncovered include:

- A consulting firm sold services to energy companies on the basis that they had found "a thousand loopholes" in California's regulatory system, including having a "sudden' outage of big plant so your spot market plants make more money." ⁱⁱ
- Companies are being investigated for "wash" or "round-trip" trades, which involves them buying and selling the same amount of energy to each other to artificially increase trading volumes. ⁱⁱⁱ

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- In memos penned by Enron lawyers, trading tactics such as “Death Star” transactions are described, the net effect being: “that Enron gets paid for moving energy to relieve congestion without actually moving any energy or relieving any congestion.”^{iv}
 - Precipitating a “Stage 2 Emergency” by sending power out of state in a period of extreme shortage. This was described merely as a public relations risk for the company. Concern about the reliability of power supplies in California appears to have been totally lacking.^v

Consumers whose governments are contemplating restructuring their energy sectors should note that having excess energy supplies is no guarantee of avoiding the problems California experienced. The US Consumers Union, in its research into deregulation in Pennsylvania and Texas, documented large rate hikes and other problems in those states despite ample supplies of electricity. CU pointed out that the problems were more fundamental than any particular failure of California’s experiment: “We have been warning policymakers for years that the electricity market is not suited for deregulation and the failure to move cautiously is costing consumers billions.”^{vi} A General Accounting Office review of the US Federal Energy Regulatory Commission found the commission was not able to adequately protect consumers given the sophistication of the market tactics being used and FERC’s lack of enforcement powers.

The Consumer Federation of America’s study of electricity markets in the US recommended flatly that states that had not restructured should not do so, and the seventeen states that had already begun should stop if they could or rework their approaches. They documented key reasons peculiar to electricity markets about why restructuring was doomed to fail, including “Loss of efficiency resulting from deintegration of an industry that requires high levels of coordination and cooperation among suppliers, traders, and government regulators.” This loss of efficiency would be paid for by consumers, along with other costs required to make retail competition work:

“(P)olicymakers now face the prospect that the costs of ensuring retail competition in electricity markets will greatly exceed any efficiency gains, so electricity prices will rise not decline. The new costs are caused by additional reserve requirements to prevent abuse of market power, higher capital costs to attract investment, large windfalls for existing plants, and increases in transaction costs to run the competitive network.”^{vii}

The ability of individual states to make these decisions may be compromised, though. Not only is FERC proceeding with its deregulatory program, but also states would be affected if the US commits to pro-competitive rules on energy under the GATS. The GATS obligates governments to seek compliance with their commitments by sub-national governments.

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- i) Consumers Union News Release, *“Deregulation Proponents’ April Fools Joke: No 20% Rate Cut for Californians As Promised”*, 31 March 2002
 - ii) Tampa Bay Tribune, *“Perot E-Mails Show Company Approached Edison with Trading Tips”*, 20 June 2002
 - iii) Washington Post , *“SEC Probe of Dynegy to Expand”*, 9 May 2002
 - iv) Associated Press Newswire, *“Enron Memo Describes How Energy Traders Drove Up Power Prices in California”* 6 May 2002
 - v) The Los Angeles Times, *“How Enron Manipulated State’s Power Market”*, 9 May 2002
 - vi) Consumers Union, *“Consumers Face Stormy Future: Electricity Problems that Created Havoc for Californians Are Beginning to Crop Up Across the Country”*, September 2001
 - vii) Consumer Federation of America, *“Nation’s Recent Experience with Electricity Restructuring Reveals Its Near-Fatal Flaws*, News Release, 30 August 2001