Return to Sender:

The impact of GATS "pro-competitive regulation" on postal and other public services

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Canadian Centre for Policy Alternatives

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http://www.policyalternatives.ca
ccpa@policyalternatives.ca

Dedicated to Mary Otto Grieshaber (1923-2002).

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Summary

"Pro-competitive" rules on government regulation, derived from the 1997 GATS Telecommunications Reference Paper, are now proposed for postal and many other service sectors in international trade treaty negotiations, including at the World Trade Organization (WTO).

These rules would undermine public service monopolies and jeopardize accountable, democratic regulation in whatever service sector they were applied.

"Pro-competitive" rules include:

- constraints on the activities of major service suppliers, which facilitate the entry of competitors into public or formerly-monopolized sectors;
- guaranteed access to, and use of, interconnected service networks;
- rule-making and licensing criteria that give prospective market entrants greater ability to comment on and influence government regulations before they are adopted;
- forced separation between regulators and service providers;
- a test of "necessity," and other limits, on Universal Service Obligations;

- non-discriminatory access to scarce public resources; and
- promotion of international standards and global standards-setting organizations.

Proponents of "pro-competitive" re-regulation are seeking to ensure that the Telecommunications Reference Paper is expanded, and adopted by more WTO members. They also propose that this type of rules should apply to many other service sectors. Target sectors include service "networks" — for example, energy, transportation, express delivery, and postal services — and other services, including: distribution services, environmental services (including sewage services and water), maritime port services, advertising services, certain financial services, computer services, information technology, communications services, and insurance services. Some proponents have even suggested that "pro-competitive" re-regulation be applied to *all services that can be delivered electronically* — in other words, to most service sectors.

Widespread application of "pro-competitive" re-regulation would seriously restrict governments' ability to constrain or direct market forces in the public interest. It would result in a radical reorientation of government regulation in support of international business.

In postal and courier services, such rules would:

- **Undercut the fundamental basis of Canada's public postal system in favour of private commercial interests.**

GATS would threaten or distort the foremost *public* purpose of Canada's postal service system: to provide high-quality, affordable postal and related services to all Canadians in all regions of the country by means of a government institution that is directly accountable to the Government of Canada and Parliament. "Pro-competitive" provisions would change the regimen of rules under which the existing system functions — exposing it to GATS rules and to inexorable, and increasing, international pressure for further market liberalization. The application of these rules would subjugate the critical role of elected Members of Parliament, who balance often-competing interests in open, democratic Parliamentary debate, to appointed dispute panelists who, with little public input, issue binding edicts on the interpretation and application of narrow, commercially focused rules.

- **Undermine Canada Post and threaten its ability to meet universal service obligations and otherwise fulfill the Crown corporation's public service mandate.**

  Applying the "pro-competitive" regimen would force Canada Post to conform to rules that conflict with many of its current activities. This would result in the Crown corporation moving away from its broad public interest functions toward a more strictly commercial role. In particular, "pro-competitive" re-regulation would:

  - transfer the use of public assets from Canada Post to commercial operators by guaranteeing

access to the public postal network, facilities and other scarce resources;
- by-pass national regulation on the contentious cross-subsidization issue, potentially forcing Canada Post to withdraw altogether from competitive postal and courier services;
- overturn Canada Post's established regulatory regime through "independent regulation" mediated under the GATS; and
- threaten the universality of postal services in Canada by imposing new restrictions on Universal Service Obligations, including a "necessity" test to ensure regulations were "no more burdensome than necessary."

- **Diminish the international regulatory ability of the United Nation's Universal Postal Union (UPU), subordinating it to the WTO.**
"Pro-competitive" re-regulation would effectively seize much of the regulatory ability that is now vested in the UPU and bestow it upon the WTO. Adopting this approach would also affect virtually all of the contentious issues relating to the international regulation of postal services, impinging directly on the Member-determined activities of the UPU, by:
  - separating UPU members' regulatory and commercial functions;
  - restricting public monopolies to basic postal services;
  - removing "terminal dues" preferences that benefit developing countries in favour of market-based pricing;

- eliminating restrictions on re-mailing; and
- shifting the primary focus of the UPU from supporting national postal administrations to facilitating international business.

This re-regulation would thus deliver many of the changes that international private courier companies have long desired but failed to attain through legitimate means from the established United Nations regulator or through national legislative and regulatory processes. Their gain would come chiefly at the expense of public postal providers, and the public systems they sustain, around the world.

If extended to other service sectors, "pro-competitive" re-regulation would:

- place constraints on existing public enterprises and services, and impede the formation of new public enterprises;
- increase pressure on governments to commercialize and privatize essential public enterprises and services, and "lock in" these policies wherever they occur;
- prevent cross-subsidization — a valuable means of ensuring more equitable supply of essential services;
- impose a one-dimensional view of government regulation that would benefit commercial interests at the expense of the broader public interest, in both developed and developing countries; and
- expose fundamental domestic regulatory matters — even where privatization and commercializa-

tion have already occurred — to WTO oversight and binding dispute settlement.

In principle, "pro-competitive" re-regulation could be applied to many government functions and most service sectors — from the supply of residential drinking water to public health care services, and electricity distribution to public education. The GATS "governmental authority" exclusion is unlikely to provide substantive protection for governments' essential roles as service provider and regulator. *The application of "pro-competitive" principles would represent not simply a preponderant reliance on market forces; it would actually privilege foreign private service providers by giving them legally binding rights backed up by trade sanctions.* The requirement for governments to demonstrate that their measures were "necessary" and the "least burdensome possible" to achieve a stated objective would force governments either to prove a negative, or adopt a less "burdensome" measure their citizens may well have already decided they do not want. The ability of democratically-elected governments to respond to their citizens' complex wishes and needs — responsible, accountable government — would be ratcheted away, and a one-sided, commercially-focused body of binding rules substituted in its place.

The negotiation of "pro-competitive" rules in other service sectors would have broader significance.

The GATS is far more than a mechanism for "locking in" policy changes that governments make domes-

tically, through the traditional legislative process. It is an instrument for fundamental regulatory change. The treaty is one of a series of "free trade treaties" that, in the words of the United States Trade Representative, "bolster property rights by . . . supporting privatization[,] attack . . . state monopolies . . . [and] drive market reforms in sectors ranging from e-commerce to farming."

There are four main avenues through which "pro-competitive" re-regulation could be pursued globally, namely:

- **sector-by-sector**, using the GATS Telecommunications Reference Paper as a model;
- **"horizontally," applying to all service sectors**, as envisioned in GATS Article VI:4;
- **in bilateral treaties and in regional treaties**, such as the proposed Free Trade Area of the Americas (FTAA) treaty;
- **in WTO negotiations on competition and investment**, if these were ever to be resuscitated after the breakdown in WTO negotiations at the September 2003 ministerial meeting held in Cancun, Mexico.

In the near future, proponents will likely pursue the application of "pro-competitive" rules most actively sector-by-sector, and in bilateral and regional treaties.

Despite the regulatory mayhem that a "pro-competitive" approach to regulation has caused in the U.S. telecommunications sector, U.S. treaty negotiators remain committed to such rules. While most proponents no longer openly advocate applying "pro-competitive"

rules across-the-board to all service sectors, for tactical reasons, many may in future support targeting these rules to particular service sectors, or to treaties between a limited numbers of countries. If applied selectively in this way, "pro-competitive" rules could facilitate the efforts of transnational corporations based in the U.S., EC, and other developed countries to gain greater access to publicly-financed foreign infrastructure and service markets in which they have a competitive advantage. These rules could enable these corporations to "strip assets" from foreign public enterprises when they are privatized, commercialized, or re-regulated to comply with treaty rules. Developing countries' service suppliers, by contrast, would not enjoy a corresponding increase in their ability to expand into the highly-competitive services markets in developed countries. Large transnational corporations would thus be the principal beneficiaries of "pro-competitive" re-regulation in whatever service sector the doctrine was applied. Their gain would come chiefly at the expense of public service providers, and the citizens they serve, around the world.

GATS "pro-competitive" re-regulation — and especially its "necessity test" — enforced through coercive international trade dispute settlement machinery, has no place in a democratic society. The fact that it remains under active discussion reinforces the view that the GATS continues to be shaped by the same narrow commercial interests that conceived and guided the treaty's creation. As a first step towards more balanced international rules, the GATS proposals for "pro-competitive" re-regulation in postal and other public

services should be rejected and stamped "RETURN TO SENDER."

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Chapter 1
Introduction:
The GATS and Canada's Postal System

Binding international rules applying to postal and express courier services are now being negotiated at the World Trade Organization in Geneva. These talks are scheduled to conclude in 2005, and are mandated to continue despite the breakdown of the WTO Ministerial meeting held in Cancun in August 2003. Negotiations are aimed to expand the reach of the WTO treaty on services — the General Agreement on Trade in Services (GATS). The multinational courier industry has vigorously promoted further liberalization of postal and express courier services, and this sector has become a major element of these negotiations.

Many proponents have advocated achieving this liberalization in the current round of negotiations by extending GATS rules that now apply to the telecommunications sector to postal and courier services. The purpose of this book is to examine the implications of applying these rules — referred to as "pro-competitive" re-regulation — to public postal services in Canada. Also explored are the public policy implications of pro-competitive re-regulation for the international regulation of postal services and of extending these rules to other major service sectors.

This **introductory chapter** provides background information necessary to understand the implications of "pro-competitive" re-regulation. It discusses the underlying tensions between the GATS and the Canadian postal system, noting the importance of Canada Post's universal and community service obligations, and the conditions necessary for the public corporation's financial sustainability. It outlines the key interests of foreign multinational courier companies and their objectives in the GATS.

Chapter 2 provides a brief history of the WTO telecommunications negotiations and describes the key elements of the GATS Telecommunications Annex and the GATS Telecommunications Reference Paper (TRP), which incorporate "pro-competitive" regulatory principles.

Chapter 3 discusses the aim of many proponents to extend "pro-competitive" rules to other service sectors. It notes that "pro-competitive" rules themselves may be tightened when they are applied to other sectors, whether in the GATS or in other international treaties. The chapter concludes by examining proponents' intentions to spur greater privatization of public enterprises, to ensure foreign corporations greater access to domestic service sectors, and to impose new restrictions on governments' ability to regulate global corporations.

Chapter 4 examines the potential impact of implementing "pro-competitive" re-regulation in postal services and other service sectors. It first focuses on analyzing the implications for Canada's postal system. It then examines the implications for international postal regulation through the Universal Postal Union (UPU) and for other service sectors. It concludes by assessing the broader significance of "pro-competitive" re-regulation in WTO negotiations.

Chapter 5, which concludes the report, provides practical options for protecting and enhancing Canada's postal services system in the face of GATS negotiations in general and binding "pro-competitive" re-regulation in particular.

The GATS telecommunications provisions, and especially the Telecommunications Reference Paper (TRP), have repeatedly been proposed as a model to achieve "pro-competitive" re-regulation of the postal and courier sector and, supposedly, as a means to reconcile universal postal services objectives with those of private sector commercial interests in the postal and express delivery sectors. For example,

- In consultation meetings on the GATS and postal services, Department of Foreign Affairs and International Trade negotiators have referred several times to the TRP as a possible means to balance universal services and increased market access by foreign postal and express delivery service providers.[1]
- Without referring specifically to the TRP, a memorandum considering the future of Canada Post prepared for the Canadian Community Newspaper Association and a number of other organizations recommended an option to "eliminate Canada Post's monopoly on first class mail and allow full competition across the range of Canada Post's activities . . . modelled on a regime similar to that which was adopted in the telecommunications sector . . ."[2]
- Most significantly, the multinational courier industry has vigorously lobbied WTO member governments to adopt key aspects of the TRP model as a means to pro-competitively re-regulate the postal and express delivery sectors.[3]

These persistent efforts raise significant concerns about the role of Canada Post and the future of public postal services in Canada and around the world. The purpose of this book is to examine the issues that would be

raised by applying the TRP model to the postal and courier sectors and, in particular, to consider the implications for public and universal services in Canada. At the outset, however, it is important to provide the context in which GATS deliberations are taking place.

Public postal services and GATS objectives

As discussed in a previous CCPA study of the GATS and postal services,[4] there is a fundamental tension between the GATS' primary purpose of advancing foreign commercial interests and Canada Post's overarching public interest objectives.

The General Agreement on Trade in Services (GATS) is first and foremost an instrument for the benefit of international private, commercial interests.[5] To serve these interests, it restricts governments' ability to take measures that might adversely affect the commercial opportunities available to foreign service providers. The GATS restrictions are legally enforceable and backed up by powerful trade sanctions.

The overarching purpose of the Canadian postal service is to provide high-quality, affordable postal services to all Canadians in all regions of this country.[6] In order to achieve this public purpose, Canada Post, a Crown corporation, has been granted an exclusive privilege to collect, transmit, and deliver letter-mail.[7] Hand-in-hand with this exclusive privilege comes a range of universal and community service obligations. Some of these obligations are mandated by law; others are grounded in what Canadian citizens and their political representatives demand of this crucial public service.

In short, the GATS primarily serves private interests whereas the Canadian postal service and Canada Post exist to serve public purposes. Therefore, it is not surprising that the GATS restrictions pose formidable challenges to universal public services such as the Canadian postal service, and to the role of Crown corporations such as Canada Post. As noted later (in Section 4.1), TRP rules would exacerbate these challenges.

Canada Post's universal and community service obligations

The Parliament of Canada gave Canada Post a broad public interest mandate.[8] This mandate includes providing a range of beneficial services to Canadians, many of which fall outside the reserved area of addressed letter-mail. Parliament recognized that Canada Post required a broad mandate in order to be socially relevant, financially viable, and, above all, capable of providing high-quality postal and related services to the Canadian public.[9]

One of the pillars of the Canadian postal service's universal obligations is that Parliament has required Canada Post, in law, to maintain services "that are comparable for communities of the same size."[10] Canada's immense territory, combined with its modest population, give it a population density of just 3.4 people per square kilometer, by far the lowest among the G-7 countries.[11] To meet this geographical challenge, Canadians have invested through Canada Post in a network of postal facilities that covers the entire country — knitting its citizens together.

Other basic elements of Canada Post's service obligations, while not legally mandated, are firmly rooted in

high community and public expectations. For example, while there is no legal requirement that postal rates be the same throughout the country, this is, in practical terms, treated by Canada Post as a binding commitment. Even within densely populated urban areas, Canadians have high expectations regarding the frequency of collection and delivery, the proximity of postal boxes and post offices, and other issues related to the quality of the service. Canadians also demand that the highest standards of security and confidentiality be applied in the handling of their mail.

Moreover, Canada Post is subject to political oversight and democratic direction. The federal cabinet has the authority to direct Canada Post on fundamental matters, such as the setting of postal rates and regarding specific standards of service across the country. For example, public outcry over post office closures and the proliferation of private postal retail outlets convinced the federal government in February 1994 — after an eight-year grassroots public campaign — to put a moratorium on the closure of rural post offices.

The universal service and community obligations of Canada Post should not be construed narrowly. They are broad, evolving, and subject to continuing democratic oversight and direction. Meeting these non-commercial obligations has also meant substantial investment by Canadians in the Canadian postal service. These essential elements of Canada Post's public interest mandate are at odds with GATS objectives. Chapter 4 examines various ways in which "pro-competitive" re-regulation would threaten Canada's existing public postal system.

Competitive services and the financial sustainability of Canada Post

The full range of formal and informal obligations that flow from its public interest mandate and democratic accountability have important financial implications for Canada Post. The prices that Canada Post charges for most of its exclusive privilege services are regulated, and increases are kept below the rate of inflation.[12] At the same time, each of its community and universal obligations imposes financial costs — costs that are not borne by its commercial competitors.

As a government-commissioned study has emphasized, to be financially viable Canada Post must be active in providing services that complement its primary focus on letter-mail, which most agree will gradually be eroded over time by electronic communication.[13] There are potential synergies available if Canada Post is obliged to keep abreast of technological developments and to develop new products and services in emerging areas such as electronic communications and commerce. Advances in customer service will require constant updates and capital investment in sophisticated technologies.[14] Conversely, if Canada Post is denied the ability to grow into new areas, its long-term prospects for financial sustainability are poor, and it will be forced to rely on increases in basic postage rates to augment dwindling revenues.[15]

A viable strategy that seeks to take advantage of Canadians' considerable investment in the postal infrastructure to lever economic efficiencies and to provide new, enhanced services for Canadians will inevitably bring Canada Post into competition with private companies in

certain areas. The largest of these private sector service providers are foreign-owned with the ability to ensure enforcement of international treaty rules, including those contained in the GATS.

Consequently, the impact of Canada's existing GATS obligations and any proposals to expand or enhance these obligations threaten to undermine, directly or indirectly, the ability of Canada Post to fulfill its broad public service mandate. This is especially true of the TRP model and other pro-competitive regulatory proposals which, as explored in Section 4.1, are deliberately designed to restrict public service monopolies from taking advantage of the potential synergies that flow from public investment, whenever these synergies might interfere with foreign commercial service suppliers.

Foreign multinational courier companies and Canadian postal services

Multinational courier companies provide a range of delivery services including, but not limited to, express letter and parcel delivery. Within Canada, as in most other countries, large multinational companies dominate intercity and international delivery, while hundreds of smaller local courier companies concentrate mainly on same-day local express delivery.[16]

The express courier industry is growing rapidly worldwide, reporting average annual growth rates of 20% for the past two decades.[17] U.S.-based express courier companies — among the world's largest and most dominant — are particularly active in their neighbour to the north.[18] In 1995, the United States International Trade Commis-

sion (USITC) concluded that, *in the opinion of the U.S. industry*, "Canada represents the most open market for U.S. courier services. The report observed that "Canada imposes few restrictions and provides for, among other things, inter-provincial and intra-provincial trucking privileges . . . and the temporary entry and stay of intra-corporate transferees." [19]

Despite this commercial success, extremely rapid growth and supportive Canadian government regulation, the foreign express courier industry has taken a highly confrontational legal and lobbying stance towards the Canadian government. The courier industry policy reform goals are clearly defined. According to government documents released under Access to Information, the Canadian Courier Association (CCA) aims to:

- "stop Canada Post from operating in both competitive and monopoly markets,
- transfer all courier services out of Canada Post and into Purolator, and
- provide CPC with a clear mandate in terms of specific commercial goals."[20]

According to the same official documents, UPS, which dominates the Canadian Courier Association, "believes that the only resolution is for [Canada Post] to be totally removed from the courier and parcel business."[21]

These industry concerns and lobbying objectives are not new; they have been expressed forcefully by courier industry lobbyists for many years. Successive Canadian federal governments have, on balance, rejected the radical market reorientation of the public postal service advocated by the private courier industry.[22]

The vision of the commercial courier industry is that Canada Post should focus on its core business of letter-mail delivery and withdraw from other activities. If the demand for core letter-mail services is eclipsed by other information technology, then, according to the industry, Canada Post should exit the stage.

Another vision with far stronger public support is that Canada Post must continue to play a vital role, not only in its core letter-mail services, but also as a strong federal government presence providing a range of beneficial services to Canadians in all regions, especially in rural Canada and the North. To fulfill this role, Canada Post must be empowered to adapt to a changing commercial and technological environment. Canada Post must innovate and pursue opportunities to provide excellent core services and to add other services desired by Canadians in all regions of the country. The former vision, while a legitimate expression of the industry's narrow interests, has been fully debated and, so far, rejected as public policy in favour of a more balanced policy vision built around Canada Post's existing public service mandate.

The multinational courier industry's trade policy objectives

In a democracy, it is natural and healthy that there should be different, and competing, philosophical visions of the role and future of a crucial public service such as the postal service. What is new, unhealthy, and arguably illegitimate in a modern democracy, is the deliberate effort by the foreign-dominated commercial courier industry, nationally and globally, to use international trade and investment

agreements to achieve its domestic policy reform objectives through secretive, extra-parliamentary means.

Rebuffed in open public debate, the industry has turned to trade litigation and behind-closed-doors negotiations to sidestep the public policy-making process, stifle public debate, and to coerce governments and the Canadian public into acceding to its policy reform objectives.

The commercial courier industry's trade policy strategy involves using existing international commercial agreements — including NAFTA and new international negotiations, such as the GATS — to challenge Canadian government postal regulation and to gain the upper hand in sectors where foreign couriers compete with Canada Post.

One powerful prong of the industry's aggressive trade policy strategy is the current NAFTA investor-state challenge by UPS. On January 19, 2000, UPS served a notice of intent to submit a claim to arbitration under Chapter 11 of NAFTA.[23] UPS claims that the Canadian government has breached its NAFTA obligations by failing to effectively regulate UPS's competitor, Canada Post. UPS is seeking damages of at least $US160 million, plus costs and tax consequences.[24]

A second important prong of industry lobbying is directed toward the ongoing GATS negotiations in Geneva. This industry pressure has already yielded results. Acting through its global lobbying associations, the courier industry has succeeded in making postal and express delivery services one of the central topics of the WTO GATS negotiations.[25]

As already noted, one goal of the industry's GATS strategy is to use these negotiations to try to achieve pro-competitive re-regulation of the postal and courier sec-

tors. Promoting the Telecommunications Reference Paper as a model to apply to the postal and courier sectors is perhaps the key means to achieve that end. Section 4.1 analyzes this aspect of the courier industry's thrust and its implications for public and universal postal services.

Chapter 1 Endnotes

[1] DFAIT officials first raised the Reference Paper approach with representatives of the Canadian Union of Postal Workers (CUPW) in early 2000. Officials working on e-commerce and the GATS stated that the Telecom Reference paper allowed countries to preserve universal service and asked CUPW representatives what they thought about this approach. At a subsequent consultation on e-commerce, which CUPW was encouraged to attend, federal officials again raised the TRP approach as a possible means to ensure universal service while opening up international electronic commerce. Again, in a November 2001 meeting on the GATS, a senior DFAIT official raised concerns that Canada Post's monopoly advantage should not be used to tip the playing field, stating "You can't use revenues generated in one area to subsidize another area. Monopoly is intended for one thing. You can't abuse it in other contexts." The same official asserted that the TRP allows a member government to define the kind of universal service obligation it wishes to maintain, while curbing abuses of monopoly powers. (Source: CUPW research internal files.) DFAIT clarified its position on postal services and the TRP in a February 2002 letter, stating ""You have asked whether Canadian negotiators are considering using the WTO Reference Paper on Telecommunications Services as a model for our negotiation on postal and courier services. The principle that members retain the right to define for themselves the nature and extent of their universal service obligation is an attractive one. However, we would only wish to consider duplicating this for postal services if were to make GATS commitments in the area of postal services. At this stage we have no such intention."

[2] Earnscliffe Government Affairs Consultants, Memorandum to CCNA, June 19, 2001.

[3] For example, the business policy forum of the 1999 World Services Congress recommended the adoption of "pro-competitive" regulation in postal services in international trade negotiations. (See Section 3.2.2, footnote 40). In addition, the Air Courier Conference of America (ACCA) and the Coalition of Service Industries (CSI) have pressured the U.S. gov-

ernment on the issue of WTO competition negotiations specifically to address the cross-subsidization of express delivery services by service providers having government-granted special or exclusive rights. (Alverno, Anthony, The WTO Doha Development Agenda; Defining the Scope of Postal Service Liberalization, page 9).

4 Sinclair, Scott, The GATS and Canadian Postal Services, Canadian Centre for Policy Alternatives, March 2001.

5 Cf. "The GATS is … first and foremost an instrument for the benefit of business…." Towards GATS 2000, European Commission web-site on services (www.gats-info.eu.int). This quotation has since been removed from the website.

6 The Canada Post Corporation Act of 1981 sets out the basic mandate of Canada Post and the Canadian postal service.

7 For the purposes of the exclusive privilege, letter-mail is defined as addressed items weighing 500 grams or less.

8 Canada Post Corporation Act of 1981. The Canada Post Corporation Act of 1981 defines Canada Post's broad public service mandate. The objects of the Corporation are: (a) to establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada; (b) to manufacture and provide such products and to provide such services as are, in the opinion of the Corporation, necessary or incidental to the postal service provided by the Corporation; and (c) to provide to or on behalf of departments and agencies of, and corporations owned, controlled or operated by, the Government of Canada or any provincial, regional or municipal government in Canada or to any person services that, in the opinion of the Corporation, are capable of being conveniently provided in the course of carrying out the other objects of the Corporation.

9 Parliament of Canada, Canada Post Corporation Act, 1981.

10 Ibid.

11 Canadian Union of Postal Workers, "Your Public Postal Service: More than just the mail, more than just the Quebec-Windsor Corridor," Ottawa, June 2000, p. 13.

12 See Sinclair, op. cit., p. 15.

13 See TD Securities Inc. and Dresdner Kleinwort Benson, "Summary Report To The Minister Responsible For Canada Post

Corporation Regarding Canada Post Corporation," April 17, 1997.

14 Ibid. passim.

15 Ibid. "Adopting a strategic vision such as that proposed by the Mandate Review [denying Canada Post the ability to compete commercially in a wide range of businesses] would severely constrain CPC's future growth and probably lead to a weakening of its financial position over time as demand for the products within the exclusive privilege business recedes." p. 20.

16 Council for Trade in Services, World Trade Organization, "Postal and Courier Services," Background Note by the Secretariat, S/C/W/39, 12 June 1998, p. 6.

17 Ibid. p. 1.

18 Official data showing the US corporations' share of the Canadian express courier market is not available. Large, integrated US companies established in Canada include Federal Express Corp. and United Parcel Service (UPS).

19 U.S. International Trade Commission, 1995, "General Agreement On Trade In Services: Examination Of Major Trading Partners' Schedule Of Commitments (Canada, European Union, Japan, And Mexico. Investigation No. 332-358. USITC publication 2940. December, chapter 5, p. 12.

20 Public Works Canada, 1999, "Memorandum Regarding 'Canadian Courier Association Report,'" Public Works and Government Services Canada, Oct. 7, released under Access to Information.

21 Ibid.

22 For example, following a mandate review of Canada Post in 1995-6, the federal government announced that Canada Post would not withdraw from most competitive services. It directed that postage rates not be increased. It announced that Purolator, a courier company controlled by Canada Post, would not be divested and that Canada Post itself would not be privatized. The government also directed Canada Post to improve the quality of services in a range of areas, especially regarding service standards in rural areas and the Canadian north.

23 Appleton & Associates (2000). "Notice of Intent to Submit a Claim to Arbitration under section B of chapter 11 of the North

American Free Trade Agreement. United Parcel Service of America Inc. v. Government of Canada. January 19, 2000.

[24] Inside US Trade, April 28, 2000.

[25] For example, postal and express delivery services is one of five priority "clusters" of services that are currently the subject of key classification discussions in Geneva.

Chapter 2
The Telecommunications Annex and Telecommunications Reference Paper (TRP)

2.1 Brief History of the WTO Telecommunications negotiations[1]

The Uruguay Round of negotiations, which concluded in April 1994, resulted in the formation of the World Trade Organization. The WTO included the General Agreement on Trade in Services (GATS) and appended to it — as "an integral part of the GATS text"[2] — a special *Annex on Telecommunications* applying to so-called "enhanced telecommunications services."

More substantive talks on basic telecommunications ended in deadlock.[3] The U.S. was dissatisfied with the level of commitments offered by other (especially developing) countries in basic telecommunications, and the deadline was "extended in the hope of achieving a more favourable outcome for U.S. companies."[4] These negotiations continued through what was called the Negotiating Group on Basic Telecommunications (NGBT). This second set of negotiations, which began in May 1994, was scheduled to conclude two years later. Initially, 33 WTO Members participated in the voluntary group, but participation eventually increased to 53, with about half again as many observers.

As the 30 April 1996 deadline approached, the U.S. again determined that the 34 offers (from 48 governments) were insufficient. Then WTO Director-General Ruggiero proposed that the negotiating results should be conserved by means of a Protocol and that yet another set of talks should begin, with a deadline be set for 15 February 1997. Members accepted this proposal and a new group called the Group on Basic Telecommunications, which included all WTO Members, resumed negotiations in July 1996.

At this stage of negotiations, participants devised the *Telecommunications Reference Paper* to determine what types of additional regulatory commitments should be made. Negotiations were concluded successfully by the February 1997 deadline. Sixty-nine Member governments had submitted schedules, and, of these, 63 had submitted schedules containing commitments to restrict their telecom regulations. Fifty-seven Member governments, including Canada, committed to the Reference Paper[5] in whole or with minor changes. These schedules of additional telecom commitments — the results of nearly three years of negotiations — were annexed to the Fourth Protocol of the GATS.

The WTO Secretariat noted:

> "As of 5 February 1998, with the entry into force of the Fourth Protocol of the GATS and its attached commitments on basic telecommunications, the vast bulk of the world market, measured in revenue terms, is subject to open markets for the supply of basic telecom services whether on the basis of simple resale or over a supplier's own infrastructure . . . [G]overments representing about 82% of world revenue committed to ensure competition . . . and another 6% have committed to [do so] on or before 2005. This scenario has dramatic implications for the way the telecom industry will be structured and the way telecom services will be provided in the future."[6]

According to the then-WTO Director of Services,

> "What the Telecom's negotiators did, both in the Annex on Telecommunications . . . and in the subsequent elaboration of the principles found in the

> Reference Paper, was to clarify and amplify some of the basic principles of the GATS, in a way that goes far beyond what has been achieved so far in any other sector."[7]

2.2 Key elements of the Telecommunications Annex and Reference Paper

The subject of regulation and trade is infused — sometimes almost imperceptibly so — with specialized language that is imprecise or even misleading.[8] Terms such as "pro-competitive,"[9] "competitive safeguard" and "non-discriminatory" can obscure legal and regulatory implications that are considerably more significant than their commonly understood meaning would suggest. In the interest of simplicity, and to facilitate greater understanding and more rigorous analysis, this study seeks to use more neutral and descriptive terms wherever possible. This examination also attempts, wherever possible, to use general terms, i.e., terminology that is not unique to the telecom sector, so that the study's conclusions may be translated more easily to other sectors. This is particularly important since, as will be shown in Chapter 3, proponents view the WTO telecom provisions as a model of so-called "pro-competitive" regulation[10] to be adopted in many other service sectors.

What, then, are the key features of the Telecom Annex and Reference Paper? They include the following:

1. Broad scope
2. Constraints on the activities of major service providers

3. Guaranteed access to, and use of, interconnected networks
4. Rule-making and licensing criteria
5. Forced separation between regulators and service providers
6. Necessity test and other limits on Universal Service Obligations
7. Non-discriminatory allocation of scarce public resources
8. Promotion of international standards and global standards-setting organizations.[11]

Each of these features will now be considered in turn:[12] both in relation to the telecommunications sector and in more general terms.

Broad scope

Like the GATS itself, the scope of the GATS Annex on Telecommunications is very broad, applying "to all measures of a Member that *affect access to and use of* public telecommunications transport networks and services."[13] The annex, however, excludes cable or broadcast radio and television programming.[14] [15]

The Reference Paper applies to "basic telecommunications services" which, while left undefined, is commonly understood to include the public or private relay of voice or data from sender to receiver by various means, including by phone, fax, cell phone, and satellite systems.[16]

The Reference Paper contains definitions of terms that hint at its potential implications were it applied to other service sectors. For example, "*essential facilities* means facilities . . . that . . . are . . . provided by a single or limited number of suppliers . . . and . . . cannot feasibly be eco-

nomically or technically substituted in order to provide a service." Also, "[*a*] *major supplier* is a supplier [that] has the ability to materially affect" the price and supply of basic telecommunications services through its "control over essential facilities . . . or . . . use of its position in the market."[17]

Constraints on the activities of major service providers

Proponents of "pro-competitive" regulation commonly assert that new rules are required to enable competitors to enter formerly monopolized markets and to constrain the market power of the incumbent or dominant service network operators in sectors that have been opened to competition. Since these dominant suppliers may compete "directly or through an affiliate in market segments opened to competition,"[18] the object of these rules is to prevent them from:

- cross-subsidizing from public network services to competitive services,
- "overcharging" competitors, and
- providing competitors less favourable access to public service networks.

These constraints may include some or all of the following illustrative requirements:

- separation of *accounting* for services that the dominant provider supplies non-competitively from those that it supplies competitively,
- separation – *structurally* – of non-competitive and competitive services provided by the dominant service provider,

- treatment of competitors no less favourably than treatment accorded to the dominant provider or its affiliates, under like circumstances,[19] and
- timely disclosure of changes to public service networks and associated technical standards.

In the case of telecommunications, the Annex contains provisions pertaining to network access, considered below, but does not contain other restrictions on dominant or major telecom service suppliers. By contrast, the Reference Paper goes further by prohibiting any "major supplier from engaging in or continuing" what it calls "anti-competitive practices." Prohibited practices include:

- "anti-competitive cross-subsidization;"
- "using information obtained from competitors with anti-competitive results;" and
- withholding technical information "about essential facilities and commercially relevant information" necessary for "other service suppliers . . . to provide services."[20]

Guaranteed access to, and use of, interconnected networks

Advocates of "pro-competitive" regulation assert that a competitive market requires rules to ensure service networks, which are often dominated by a single service provider – usually a former or current state monopoly — are interconnected. Such rules are necessary, it is argued, to ensure that the dominant network operator cannot use its power to control the price or supply of these network services to its own advantage. Proponents point to the importance of competition in

- value-added services,

- private networks, and
- basic services and their re-sale.

In particular, interconnection rules are intended to ensure new entrants have:

- access to so-called 'bottleneck' facilities,
- access to service networks equivalent to that of the dominant operator,
- access to service networks at *rates* equivalent to that of the dominant operator, and
- technical conditions of interconnection that make it easy for them to co-locate equipment or offer other network-related services.

Both the Telecom Annex and the Reference Paper contain provisions to ensure greater access to public telecommunications networks. Significantly, a number of these provisions include a so-called necessity test.

The Annex sets out a series of obligations pertaining to access and use.

For telecom services that are listed in Members' schedules, Members must ensure that foreign service suppliers are accorded access to and use of public networks on "reasonable and non-discriminatory terms and conditions."[21] In addition, and more specifically, Members are obliged to ensure foreign service suppliers are permitted "to purchase or lease and attach . . . equipment [that] interfaces with the network,"[22] to interconnect private circuits with public telecom networks,[23] and generally to use operating protocols of the service supplier's choice.[24]

Members must allow the use of public networks "for the movement of information [including intra-corporate communications and access to data bases] within and

across borders."[25] Members are permitted to take measures "to ensure the security and confidentiality of messages," but they must meet the strict criteria that the measures in question are demonstrably "necessary" for this purpose and that they do not "constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services."[26]

The Annex does allow Members to place some kinds of restrictions on public network access and use, but, as the six types of restrictions that are listed in the Annex indicate, these restrictions are technical in nature.[27] Moreover, such restrictions may only be imposed if they are "necessary" to meet the following criteria:

- to safeguard public service responsibilities (particularly suppliers' ability to make their networks or services available to the public generally),

and either

- "to protect the technical integrity" of public networks or services,

or

- to ensure that foreign suppliers' activities accord with Members' scheduled commitments.[28]

The Annex provides for developing country Members to place restrictions on telecom network and service access and use.[29] However, the stiff conditions attached to exercising this provision make it of doubtful practical value.[30]

The Reference Paper establishes other obligations involving telecom network access and use.[31]

Members have agreed that "[i]nterconnection with a major supplier will be ensured at any technically feasible

point in the [telecom] network." Specifically, such interconnection is to be provided

- *upon request*;[32]
- on a *non-discriminatory basis* with respect to "terms, conditions (including technical standards and specifications) and rates," and with respect to quality;[33]
- in a *timely* fashion;[34] and
- at *rates* that are "cost-oriented," "transparent," "reasonable" and have "regard to economic feasibility." Rates should also be "sufficiently unbundled" to allow suppliers to pay only for "network components or facilities" that it needs.[35]

The Reference Paper also stipulates that the *procedures* that are applicable for interconnection to a major supplier will be made *publicly available*,[36] that major suppliers will make *interconnection arrangements publicly available*,[37] and that service suppliers seeking interconnection with a major supplier will have recourse to "*an independent domestic body" to resolve disputes* involving the "terms, conditions, and rates for interconnection."[38]

Rule-making and licensing criteria

The fourth principle of "pro-competitive" regulation is maintaining open, transparent rule-making and an open process for dealing with complaints. According to proponents, it is particularly important that interested parties — especially prospective foreign entrants in the sector — have the ability to comment on proposed rules, and potentially influence their design, before they are passed.

The Telecom Annex expands on general provisions on "transparency" contained in GATS Article III. The Annex specifies that "each Member shall ensure that relevant

information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available . . . This information is to include

- "tariffs and other terms and conditions of service,"
- "specifications of technical interfaces" with these networks and services,
- "information on bodies responsible for the preparation and adoption of standards affecting such access and use,"
- "conditions applying to attachment of terminal or other equipment," and
- any requirements that may exist for "notifications, registration or licensing."[39]

The Reference Paper contains several provisions relating to open rule-making. As noted previously, interconnection procedures and arrangements are to be made publicly available. In addition, wherever a license is required, Members are obliged to make all the licensing criteria available to the public. Members must also make public the normal timing of decision-making, terms and conditions of individual licenses, and the reasons for denials of licenses.[40] Finally, as noted below, the Reference Paper obliges Members to administer universal service obligations in a "transparent" manner.[41]

Forced separation between regulators and service providers

Another principle of "pro-competitive" regulation involves ensuring the complete separation of the service regulator from the dominant service provider. This separation is seen to be required for governments to avoid the potential for conflicts of interest when they act as regulator at the same time they are, as owners, responsible for

the financial performance of the dominant network service provider. In this context, independence – that is, "not depending on authority or control"[42] – may be achieved by ensuring that the regulator and the dominant service provider do not remain under the auspices of the same government ministry. However, by logical extension, more complete independence may be achieved by removing one or the other, or both, from government ownership and control.[43]

The telecom Annex does not contain any provision on the independence of regulators. The Reference Paper, however, mandates that each Member's telecom regulatory body be "separate from, and not accountable to, any supplier of basic telecommunications services."[44] It also stipulates that the decisions of regulators, and the procedures they use, "shall be impartial with respect to all market participants."[45] No allowance is made for the different mandates of participants, and whether they are pursuing more than commercial objectives that could justify differential treatment.

Necessity test and other limits on Universal Service Obligations

The ability to ensure the universal delivery of certain services, at an affordable price, to all citizens in all regions of a country, is a fundamental aspect of government. Traditionally, governments have achieved universal delivery either by providing the service directly or by ensuring that arms-length providers of critical services meet certain government-mandated Universal Service Obligations. By limiting government's ability to set and maintain such requirements for universal service delivery, the

Reference Paper establishes an important GATS precedent for other sectors and future services negotiations.

The Reference Paper notes that each Member retains the right "to define the kind of universal service obligation it wishes to maintain."[46] However, more substantively, the paper goes on to set a two-pronged test that Members must satisfy in order for their measures not to be considered "anti-competitive." Universal Service Obligations:

(a) must be administered in a manner that is "transparent, non-discriminatory and competitively neutral", and
(b) *must not be "more burdensome than necessary* for the kind of universal service defined by the Member."[47]

This latter condition — another necessity test — is particularly onerous, and its implications especially important. Its potential significance for this and other service sectors is considered in Chapter 4.

Non-discriminatory allocation of scarce public resources

The Reference Paper features another provision that characterizes "pro-competitive" regulation. It states:

> "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."[48]

This provision refers specifically to telecom "frequencies, numbers and rights of way," but it is not limited to these. Also, as noted in Chapter 4 to follow, the application of a similar provision — whether for postal pick-up and sorting facilities, hospital operating room time, drink-

ing water treatment plants, or public research facilities or publicly-owned or licensed natural resources — could prove significant in other service sectors.

Promotion of international standards and global standards-setting organizations.

The Telecom Annex makes reference to the importance and role of international standards, organizations and agreements.[49] It indicates that

> "Members recognize the importance of international standards for global compatibility and inter-operability of telecommunications networks and services and undertake to promote such standards through the work of relevant international bodies . . ."[50]

Members also recognize "the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services" and, where relevant, shall consult such organizations on matters arising from the implementation of the Annex.[51]

This provision, while not particularly forceful, establishes precedents in services — in particular, for consultation with non-governmental organizations and reference to international standards — that could prove significant in other sectors.[52]

Chapter 2 Endnotes

1 The bulk of this brief history is drawn from two documents published by the WTO Secretariat, after reference to various negotiating documents. The WTO Secretariat sources are:
- History of the telecommunication negotiations, World Trade Organization (available at http://www.wto.org/wto/english/tratop_e/telecom_e/telecom_history_e.htm; accessed Oct. 23, 2003).
- Services: GATS, A Training Package, Module 6, World Trade Organization, 15 December 1998, p. 43.

2 Statement by David Hartridge, Special Session on Telecommunications Services, 25 June 1999 (Available at file://F:\WTOGATSspeech\hartridgetelecom.htm ; accessed Sept. 17, 2002).

3 Hartridge (op. cit.) indicates that "telecommunications officials from capitals first joined their WTO delegations in Geneva in 1990 for meetings of the telecommunications working group of the Uruguay Round…."

4 U.S. General Accounting Office, "The General Agreement on Tariffs and Trade, Uruguay Round Final Act should produce overall U.S. economic Gains," July 1994, p.109.

5 In late 1998, this number had increased to 62. (Telecommunications Services, Background Note by the Secretariat, Council for Trade in Services, World Trade Organization, S/C/W/74, 8 December 1998, para. 20.)

6 Ibid., para. 5.

7 Statement by David Hartridge, op. cit.. Hartidge continues with a theme that is examined in the next section of this paper: "In fact, some have since suggested that the reference paper approach might be a possible model for work in other sectors…."

8 For example, in its seminal submission to the WTO on "pro-competitive" regulation in telecommunications, the United States characterizes constraints placed principally on major service providers that seem focused mainly on ensuring new entrants gain market access as "competition safeguards." Similarly, the U.S. and many other commentators characterize specific rules on governments' legislative activities as

"transparency," and the separation of regulators and service providers as "independence."

[9] The obviously positive connotation of the phrase "pro-competitive" regulation masks some of its other more substantive connotations, including deregulation, re-regulation and privatization. Some of these other aspects are considered later in this paper.

[10] This study consistently uses quotation marks around "pro-competitive" to avoid unguarded use of this emotive term and to distinguish between the particular principles being considered and readers' everyday understanding of "competition" and "competitive."

[11] A recent paper by the OECD discusses of the use of internationally harmonized measures in trade-related regulation; this is considered later.

[12] Certain of the following items are adapted from:
Pro-competitive Regulatory and other Measures for Effective Market Access in Basic Telecommunications Services, Communication from the United States, Negotiating Group on Basic Telecommunications, S/NGBT/W/5, 9 February 1995.

[13] Annex, Article 2(a); (italics added).

[14] Annex, Article 2(b).

[15] Negotiations on audiovisual services broke down completely in 1994, mainly over US objections to EU broadcasting directives that reserve broadcasting time for European programming and EU levies on video rentals and sales of movie tickets that are used to subsidise local European artists and performers. (U.S. GAO, op. cit., p. 116.)

[16] The WTO Secretariat states:

"At the outset of the negotiations, participants agreed to set aside national differences on how basic telecommunications might be defined and to negotiate on all telecommunications services both public and private that involve end-to-end real-time transmission of customer-supplied information (e.g. simply the relay of voice or data from sender to receiver). Examples are voice telephony, data transmission, telex, telegraph, facsimile, private leased circuit services (i.e. the sale or lease of transmission capacity), fixed and mobile satellite systems and services, cellular telephony, mobile data services, paging, and personal communications systems. Partici-

pants also agreed that telecommunications infrastructure-based services sold through resale (over circuits leased from an operator), would fall within the scope of commitments. As a result, many market access commitments grant suppliers the right to own and operate their own networks.

Value-added services, or telecommunications for which suppliers 'add value' to the customer's information by enhancing its form or content or by providing for its storage and retrieval were not formally part of the extended negotiations. Nevertheless, a few participants chose to include them in their offers. Examples include on-line date processing, on-line date base storage and retrieval, electronic date interchange, e-mail or voice mail."

(Services: GATS, World Trade Organization Training Package, WTO Secretariat, Module 6, 15 December 1998, slide 26.)

[17] Reference Paper, Definitions (italics added).

[18] Pro-competitive Regulatory and other Measures for Effective Market Access in Basic Telecommunications Services, Communication from the United States, *Supra,* note 12, p. 2.

[19] This requirement is often characterized as "non-discrimination" requires no less favourable treatment between the dominant (often public) service supplier and its (almost always private) competitors. While it mirrors the National Treatment provision that is a common and key feature of international trade treaties, it is a significant extension of that provision. National Treatment requires extending the best treatment accorded to a *domestic* service/service supplier to like *foreign* services/suppliers. The provision has been interpreted very broadly to include the prohibition of "measures capable of altering the conditions of competition." Non-discrimination in this context would be very broad indeed — extending the best treatment accorded to the dominant service supplier to its competitor services/suppliers, whether domestic or foreign.

This analysis is supported by a footnote in the Annex:

"The term 'non-discriminatory' is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean 'terms and conditions no less favourable than those accorded to *any other user* of like public telecom-

munications transport networks or services under like circumstances."
(Annex Article 5, footnote 15, emphasis added).

[20] Reference Paper, Article 1, Competitive Safeguards.

[21] Annex Article 5(a). This provision reads as follows:

"(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f)."

The criteria specified in Article 5(a)—for "reasonable and non-discriminatory terms and conditions" of access and use of public networks—clearly apply only to "the supply of a service included in its Schedule."

It is not clear, however, whether the Article 5(b)-(f)—even if unintentionally—apply to *all* telecom services or only to *scheduled* services, i.e. those telecom services listed in a Members' schedule. This uncertainty results from the ambiguity in Article 5(a): In the clause:

"This obligation shall be applied, *inter alia*, through paragraphs (b) through (f)."

it is not clear whether the term "this obligation" applies to

- the conditions of reasonable and non-discriminatory terms and conditions

or

- the conditions of reasonable and non-discriminatory terms and conditions <u>for the supply of a service included in its Schedule.</u>

The placement of the comma in the text appears to suggest the former. This, in turn, would suggest that Annex Articles 5(b)-(f) apply to *all* telecom services, even if they are not listed in a Members' GATS schedule.

[22] Annex Article 5(b)(i).

[23] Annex Article 5(b)(ii).

[24] Annex Article 5(b)(iii).

[25] Annex Article 5(c).

[26] Annex Article 5(d).

[27] The Annex states that "conditions for access to and use of public telecommunications transport networks may include":

"restrictions on resale or shared use" of services (5(f)(i)); notification, registration and licensing(5(f)(vi)); restrictions on the inter-connection of private circuits with networks (5(f)(v)); and various other technical requirements, namely, a requirement to use specified interface protocols (5(f)(ii)), a requirement for "inter-operability" and the promotion of international compatibility standards (5(f)(iii), and other technical requirements relating to the attachment of equipment to networks (5(f)(iv)).

[28] Annex Article 5(e)(i)-(iii). Whether or not it was intended, the text appears to indicate that in order to meet this test of necessity, Members must demonstrate that their measures satisfy either conditions (i) and (ii) together *or* conditions (i) and (iii) together.

[29] Annex Article 5(g).

[30] Such a restriction must satisfy all of the following conditions:

- be "consistent with [the Members'] level of development",
- be "reasonable",
- be "necessary" both
- "to strengthen its domestic telecommunications infrastructure and services capacity"

and

- "to increase its participation in international trade in telecommunications services."

(This provision also requires Members to specify such restrictions in their GATS schedule, which would have the practical effect of making the measures visible and hence more vulnerable to challenge in subsequent negotiations.)

[31] It would appear that the Reference Paper's interconnection provisions apply only in telecom services that are listed in Members' schedule of specific commitments. Article 2.1 states:

"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*" (italics added).

[32] Reference Paper, Article 2.2(c).

[33] Ibid., Article 2.2(a).

[34] Ibid., Article 2.2(b).
[35] Ibid.
[36] Ibid., Article 2.3.
[37] Ibid., Article 2.4.
[38] Ibid., Article 2.5.
[39] Annex Article 4.
[40] Reference Paper Article 4.
[41] Reference Paper Article 3.
[42] "Independent", The Pocket Oxford Dictionary of Current English, Oxford University Press, 1996 (available at http://www.xrefer.com ; accessed Dec. 5, 2002).
[43] A report by the United States Trade Representative emphasizes the link between independent regulation and privatization:

"Lack of an independent regulator with adequate authority has been the Achilles heel of competition in telecommunications markets throughout the world… Aspects identified as necessary to bolster the effectiveness and independence of regulators includes strong enforcement authority, transparent procedures with adequate notice and comment, and *full privatization of government-owned operators*." (italics added)

United States Trade Representative, Results of 2003 'Section 1377' Review of Telecommunications Trade Agreements, April 2, 2003, p. 4. (available at www.ustr.gov ; accessed April 3, 2003.)

Additional material on the link between independent regulation and privatization under "pro-competitive" re-regulation is provided in Section 3.3.3.

[44] Reference Paper, Article 5.
[45] Ibid..
[46] Reference Paper, Article 3.
[47] Ibid.. The Annex contains no similar provisions.
[48] Reference Paper, Article 6. As above, the Annex contains no similar provisions.
[49] There are no similar provisions in the Reference Paper.
[50] Annex, Article 7(a). The text also notes that these international bodies include the International Telecommunication Union and the International Organization for Standardization.

It should be noted that the WTO and the ITU subsequently reached a cooperation agreement that was formally adopted in 2000. The preamble and the formal adoption is found in:

Agreement Between the International Telecommunication Union and the World Trade Organization, Council for Trade in Services, World Trade Organization, S/C/11, 21 September 2000.

The text of the agreement is found in:

Text of Proposed "Agreement Between the International Telecommunication Union and the World Trade Organization", Council for Trade in Services, World Trade Organization, S/C/9, 31 March 1999.

51 Annex, Article 7(b). The International Telecommunications Union receives particular mention in this context.

52 The WTO Sanitary and Phytosanitary (SPS) agreement contains more significant provisions of this type that are also likely to serve as a model in future services negotiations.

Chapter 3
Beyond telecommunications: Extending the application of "pro-competitive" regulation

3.1 "Pro-competitive" regulation and the Telecom Reference Paper

The *Telecommunications Reference Paper* and the WTO Agreement on Basic Telecommunications are viewed by proponents as important vehicles for spreading *"pro-competitive" regulation,* both within the global telecommunications sector and beyond it. The Reference Paper, in particular, is frequently cited as an embodiment of "pro-competitive" principles in telecommunications regulation and as an important legal precedent for extending these principles to other sectors.

For example, two prominent GATS proponents note that "pro-competitive regulatory principles [are] embedded" in the telecom agreement.[1] Former U.S. Trade Representative Barshefsky described the telecom agreement as "promoting pro-competitive regulatory principles."[2] And the U.S. government's publication on foreign trade barriers notes that "pro-competitive principles [are] set forth in the Reference Paper associated with the WTO Basic Telecommunications Agreement."[3]

A recent Australian government inquiry on productivity highlights that an "important outcome" of the WTO telecommunications negotiations was "the development of a set of pro-competitive regulatory principles, known as the Reference Paper."[4] The Coalition of Service Industries describes the agreement as "extremely important," in part because "the agreement contained commitments to implement a set of pro-competitive regulatory principles known as the 'Reference Paper'."[5] More recently, in pressing the Russian Federation for greater services liberalization, the president of the CSI notes that "[t]he Ref-

erence Paper contains key regulatory principles that provide for a pro-competitive market environment."[6] The U.S. government, itself pressing other countries at the WTO for more extensive liberalization in telecommunications, advocates "full adherence to pro-competitive regulatory principles (the Reference Paper)."[7]

For the purpose of this study, the Telecom Reference Paper is taken as a specific example where basic principles of "pro-competitive" regulation have been applied to a particular service sector.

3.2 Proponents' aim: The spread of "pro-competitive" regulation

Recent trade literature is replete with references in which proponents advocate the formal adoption of the Telecom Reference Paper by all WTO Members, as well as the adoption of "pro-competitive" regulation in other service sectors.

3.2.1 Seeking broader adoption of the Telecom Reference Paper

Broadening the formal acceptance of the Telecom Reference Paper is an important aim in negotiations at the WTO – in bilateral negotiations, in the Trade Policy Reviews process, in negotiations on the accession of new Members, and as part of the continuing GATS negotiations.

The Reference Paper remains a common benchmark for telecom liberalization in bilateral negotiations, where individual WTO Members seek more extensive market access commitments from other Members. For example,

the United States frequently uses the Paper as a point of reference, as is demonstrated by the following citations:[8]

> "In the WTO negotiations on basic telecommunications services, Switzerland made commitments in all basic telecom services, subject to legislative approval. It also adopted the reference paper on regulatory commitments associated with the WTO Agreement."[9]
>
> "Indonesia's commitments under the WTO Basic Telecommunications Agreement were modest. The government . . . did not adopt the WTO Reference Paper on pro-competitive regulatory principles."[10]
>
> "In the WTO negotiations on basic telecommunications services, Colombia made fairly liberal commitments on most basic telecommunications services and adopted the WTO Reference Paper. However, . . . concerns have been raised regarding the failure to make licensing criteria publicly available, as required by the WTO Reference Paper."[11]
>
> "In WTO negotiations on basic telecommunications, Pakistan made commitments on basic telecommunications services . . . As part of the agreement, Pakistan also adopted certain pro-competitive regulatory principles."[12]

The Reference Paper also acts as an important benchmark for liberalization in the WTO Trade Policy Review process,[13] which is used to regularly scrutinize the trade and regulatory policies of individual Members. For example, the 1998 review of Canadian policy states:

> "As part of the WTO Basic Telecommunications negotiations, concluded in February 1997, Canada made commitments to end the monopolies in the remaining areas closed to competition and to remove foreign ownership restrictions in some areas . . . Moreover, Canada agreed to abide . . . to all the regulatory principles described in the Reference Paper."[14]

This assurance was repeated two years later in the subsequent review.[15]

The Reference Paper is also used as a standard by which to judge liberalization commitments made by countries seeking to join the WTO. In discussing China's accession to the WTO, the United States Trade Representative highlights the fact that:

> "Prior to China's accession, foreign companies were prohibited from providing telecommunications services in China. After China's accession, foreign services suppliers will be permitted to provide a wide range of services . . .
>
> "Importantly, China has . . . accepted key principles from the WTO Agreement on Basic Telecommunications Services. As a result, China will have to separate the regulatory and operating functions of its Ministry of Information Industry (which has been both the telecommunications regulatory agency in China and the operator of the China Telecom monopoly). China will also have to adopt pro-competitive regulatory principles, such as cost-based pricing and the right of interconnection, which are necessary for foreign-invested joint ventures to compete with China Telecom."[16]

More significantly, prospective Members may find that acceptance of the Reference Paper constitutes a pre-condition for WTO accession. In October 2002, APEC leaders formally made just this recommendation:

> "Any Economy that is not currently a WTO Member is, in its negotiations to accede to the WTO, encouraged to offer meaningful commitments for as many services critical to electronic commerce as possible, and *agree to adopt and implement the WTO Basic Telecommunications Reference Paper*."[17]

The Reference Paper is also seen as a touchstone in negotiations of other trading arrangements and treaties. For example, APEC leaders recently agreed that, in

> "recognizing the need to implement pro-competitive regulatory reform in the telecommunications sector, [APEC] Economies will adopt and implement as soon as possible the WTO Basic Telecommunications Reference Paper."

The U.S. Chamber of Commerce and its Latin American counterparts recommend that Members of the proposed Free Trade Area of the Americas agreement (FTAA) adopt Reference Paper principles:

> "The FTAA countries should take the necessary steps to adhere to the WTO Basic Telecommunications Reference Paper, in order to elevate commitments among all 34 FTAA countries and foster effective implementation of the pro-competitive regulatory principles set forth in the WTO agreement."[18]

Early in 2002, the Information Technology Association of America urged the U.S. Trade Representative to "adopt telecommunications benchmark principles" in the proposed U.S.-Chile and U.S.-Singapore Free Trade Agreements, including "pro-competitive regulatory policies" that "[c]omplement . . . the WTO Basic Telecommunications Reference Paper."[19]

The United States and Vietnam have agreed, as part of their new bilateral trade treaty, to incorporate into it both the GATS Annex on Telecommunications and the Telecommunications Reference Paper.[20] And even more concretely, both the recently-concluded U.S.-Chile and U.S.-Singapore Free Trade Agreements incorporate "pro-competitive" principles in their chapters on telecommunications.[21]

As these examples illustrate, there is strong pressure to adopt the TRP in telecommunications sectors around the world, especially in developing countries. But this pressure is only part of the effort to spread the "pro-competitive" regulatory approach more broadly.

3.2.2 Seeking to apply "pro-competitive" regulation to "networks" and other service sectors

Proponents of "pro-competitive" regulation advocate its application to a wide variety of service sectors, especially those sectors that are considered network-based services.

"Network" services

The notion that telecommunications constitute a "network" upon which many other services relied was apparently key to the telecommunications negotiations. As Roseman explains:

> "From the beginning of the Uruguay Round it was recognized that telecommunications would play a prominent role in the services negotiations, both as an important economic sector in its own right and as a key enabler of other economic activities . . .[22]

Notably, other services share some or many of the "network" features that characterize the telecommunications sector. This has led to calls to apply the same "pro-competitive" regulation principles to those sectors.

For example, Mattoo, a prominent GATS proponent working at the World Bank, proposes "[g]eneraliz[ing] the pro-competitive principles in the Reference paper to other network-based sectors . . ."[23] Roseman notes that "[t]he new [GATS] negotiations . . . afford an opportunity to determine whether telecom-type trade disciplines can be negotiated for other service sectors."[24] Similarly, an important paper published by the U.S. Trade Representative stresses the importance of the GATS in "accelerating the development of a globally networked economy":

> "WTO Members seeking to benefit from the growth opportunities provided by an increasingly 'networked' global economy will need to attract extensive private investment to build infrastructure of telecommunications and computer facilities . . . [in part by] ensuring market access and national treatment for providers both of network infrastructure and key service sectors that use this infrastructure."

To achieve this goal, the United States proposes a "negotiating framework that elicits commitments" not just in telecommunications but also in "complementary serv-

ices which could be integrated into network transactions."[25]

What are these key network services that proponents assert should be subject to "pro-competitive" regulation? According to various commentators, the prime candidates include the following service sectors:

- Energy services[26] [27] [28] [29] [30] [31]
- Transportation services[32] [33] [34] [35]
- Express delivery services[36] [37] [38]
- Postal services[39] [40] [41] [42] [43] [44] [45]

Of these, postal services "are perhaps the closest to telecoms in terms of issues relating to cross-subsidization for purposes of universal service and traditional international settlement arrangements."[46] As services analyst Daniel Roseman points out, this is likely the result of the two sectors sharing "similar policy objectives, industrial organizations and regulations under common ministries and administrations."[47]

Other services

The same model of "pro-competitive" regulation has also been proposed for a range of other service sectors. Some of these sectors — distribution services, for example – exhibit some of the characteristics of an integrated, telecom-like network. Other sectors share few of these characteristics and applying the network concept in these sectors stretches that concept almost beyond recognition. Nonetheless, the Telecom Reference Paper has been put forward as a model for each of the following service sectors:

- Distribution services[48] [49]

- Environmental services (including sewage services[50] and water[51])
- Maritime port services[52]
- Advertising services[53]
- Certain financial services[54] [55] [56]
- Broadcasting services[57]
- Computer services[58]
- Communications services[59]
- Insurance services[60] [61]

3.2.3 Seeking to apply "pro-competitive" regulation to most – or all – service sectors

Judging from the variety of services that have been proposed for "pro-competitive" regulatory treatment, it is perhaps not surprising that some commentators and officials have proposed that the Reference Paper approach be adopted for many other – and perhaps all – service sectors.

In 1998-9, in the lead-up to the first unsuccessful bid to launch a new round of WTO negotiations in Seattle, there were several calls for the broader application of "pro-competitive" regulation. These calls were often non-specific, urging the adoption of the approach to services generally.

For example, the European Commission and the U.S. Administration held a summit in 1998 that culminated in the development of a plan for greater cooperation in trade and investment. One of the first targets of the EU- U.S. Transatlantic Economic Partnership, scheduled for completion in late 1998, was the establishment of

> "pro-competitive guidelines for national disciplines for trade aspects of services regulations to

> ensure that regulatory requirements do not create unnecessary technical barriers to services trade."[62]

One of the focuses of this transatlantic cooperation with respect to the GATS negotiations was "developing additional disciplines to . . . guarantee that services can be supplied in a pro-competitive environment."[63]

A similar theme was repeated by the then-U.S. Trade Representative:

> "[The new round of WTO n]egotiations . . . should include . . . a forward work-program and/or negotiation on . . . how the WTO can promote pro-competitive regulatory principles in services . . ."[64]

Similarly, the services industry representatives attending the 1999 World Services Congress recommended that all WTO members

> "analyze the possible transferability of the approach adopted in the Basic Telecommunications' Reference Paper to other services domains."[65]

These general propositions were followed by consideration of how "pro-competitive" could best be applied more broadly. One approach is to apply its key principles to specific sectors, as has been considered above. Another approach would entail applying these principles across-the-board, "horizontally," to all service sectors. GATS proponents still do not agree about which approach to adopt,[66] and it is important to note that the approaches are not mutually exclusive and can be pursued simultaneously.

In fact, as the following examples demonstrate, *GATS proponents have advocated that "pro-competitive" regulation*

be applied more broadly in a variety of ways — on a sector-by-sector basis, in selected key sectors, and horizontally, to all service sectors.

The Global Services Network encourages WTO member governments to:

> "*on a sector by sector basis* where appropriate, develop pro-competitive regulatory principles that promote open and efficient markets."[67]

As part of its action plan, the EU-U.S. Transatlantic Economic Partnership aims: "To develop a set of ambitious regulatory guidelines in the light of the accountancy, telecommunications and [GATS] Article VI precedents, applying them to *key sectors* selected in consultation with industry"[68]

The European Services Network states that

> "The ultimate goal of the private sector is to go beyond the disciplines of domestic regulation defined by the GATS and promote pro-competitive regulatory principles *sector by sector*."[69]

Other commentators have advocated a horizontal approach, applying "pro-competitive" regulation to most, or all service sectors. For example:

The Digital Opportunity Task Force (DOT Force), created by the G-8 Heads of State in July 2000, proposes that:

> "Developing countries should be supported in their efforts to put in place a pro-competitive policy and regulatory environment where local as well as international entrepreneurship can thrive in order to create local capacity to transform *all sectors of their economies* . . ."[70]

In considering one of the most important elements of "pro-competitive" regulation, the World Bank's Mattoo asserts that one important "desirable outcome" in GATS negotiations would be:

> "generaliz[ing] the application of a necessity test to regulatory instruments *in all sectors . . .*"[71]

Some GATS proponents are less sanguine about the advisability of applying the principles contained in the Reference Paper generally, or even to other sectors. As Roseman observes:

> "Among the lessons learned by negotiators during the Uruguay Round was the realization that services are highly heterogeneous and 'one size does not fit all,' except at a high level of generalization." Sector-specific examination is required to determine "whether or not the Telecoms Annex and Reference Paper provide a useful model for market liberalization and regulatory reform."[72]

The European Services Forum is itself divided on the issue of how widely GATS provisions – including aspects of "pro-competitive" regulation – should apply:

> "[S]ome ESF members (those with 'offensive' interests in the expansion of internationally traded services) would support the application of . . . all GATS disciplines in the interests of . . . furthering the expansion of regulatory regimes based on internationally agreed standards (the financial services sector, for instance, would favour this approach). But certain other service activities or entities, also represented on the ESF, have reservations with respect to legally binding horizontal dis-

> ciplines regarding legitimacy, necessity and proportionality, as regards activities that are based on non-economic public policy principles (such as the maintenance of cultural diversity, or the public provision of an essential service)."[73]

These words of caution appear to hold little sway with the United States Trade Representative, however. In December 2001, the U.S. submitted what many would consider a radical document to the World Trade Organization.[74] In it, as noted above, the U.S. proposes extensive GATS commitments in "network" or "complementary" services, including: distribution services; computer and related services; advertising services; express delivery services; and certain financial services. But the U.S. paper goes much further. While not employing the phrase "pro-competitive" regulation, it proposes "avoiding unnecessary restrictions on services"[75] and "maximum [market access] commitments in *all services that can be delivered electronically*[76] – in other words, *most services.*[77]

Market access for other services that can be delivered electronically

> "The demand for users of networks is much broader than the sectors identified above, and market access for any service that can be supplied electronically – i.e., most services – will have the same effect of stimulating infrastructure investment. Opening the frontier for the supply of services on a cross-border basis . . . will provide long-term growth opportunities across a broad range of sub-sectors, from *training, health care, professional*

services, and *all services* ***related*** *to the supply of digitized content."*[78]

Whether regulatory disciplines should be applied across-the-board or customized to each service sector remains a topic of contention and debate among Member governments and commentators. Relying on the allure of "e-commerce," the ambitious proposal tabled by the U.S. would apply general pro-competitive principles to all services that can be supplied electronically. Such an aggressive approach to the spread of "pro-competitive" regulation, adopted by the most powerful WTO Member, demonstrates that no service sector can reasonably be considered immune from the future application of "pro-competitive" regulatory restrictions.

3.3 Re-visiting the concept of "pro-competitive" regulation: Short-hand for privatization, full market access and "least burdensome" regulation?

Before examining the potential impacts of adopting "pro-competitive" regulation in the Canadian postal service system, it is useful to examine the Telecom Reference Paper in a broader context. Specifically, do proponents believe the Reference Paper is adequate to meet all of the regulatory challenges in the telecommunications sector? Or is the Reference Paper merely a first step towards other, more far-reaching regulatory changes? Does adopting the Reference Paper entail policy decisions that are obscure or poorly understood? Is there a broader regulatory agenda lying hidden within the concept of "pro-competitive" regulation? What conclusions can be made about

proponents' ultimate negotiating aims based on a range of recent statements about the concept? And finally, what implications do the answers hold for postal and other service sectors in ongoing and future rounds of GATS negotiations?

3.3.1 The Reference Paper model: A work in progress

The post-Uruguay round negotiations on telecommunications had not long concluded before proponents, even while celebrating the Reference Paper as a significant achievement, began pointing out its shortcomings, arguing that it didn't go far enough.

In a presentation to a 1999 World Bank/WTO conference, Mattoo characterized "pro-competitive regulation" in the GATS — namely, Articles VIII and IX (concerning monopolies and business practices) — as "weak basic provisions with limited scope . . . and limited bite." He pointed approvingly to the Reference Paper, but, in arguing that its application should be generalized to other sectors, implied a rather modest impact, stating that it "should contribute to enhanced competition."[79]

At the 1999 World Services Congress, the Business Policy Forum recommended

> "[c]larification of the Reference Paper including definitions of terms, strengthening the role of the regulator and domestic regulation."[80]

Australia's negotiators repeated this pitch in WTO proceedings the following year, proposing that "the Reference Paper should be strengthened through clarification." While professing that it thought it inappropriate to renegotiate the Paper itself, Australia's stated aim is "to promote a more comprehensive and precise application of

existing principles." This is to be achieved through "clarification" of Articles 1, 2, 5 and 6 of the Paper — concerning pro-competitive principles, interconnection principles, independence of regulators and allocation of scarce resources.[81] Australia is now pursuing this matter actively in GATS negotiations. The Australian trade minister announced in July 2002 that, in its formal requests to other GATS members,

> "we will be seeking commitments which clarify and strengthen the pro-competition principles set out in the WTO's Reference Paper on Basic Telecommunications."[82]

3.3.2 Beyond the Reference Paper . . . to a new phase in telecom regulation?

Increasingly, the Telecom Reference Paper is seen as a jumping-off point to further re-regulation in the sector. For example, the European Communities' proposed, in their December 2000 GATS negotiating proposal on telecommunications, that Members commit to the Reference Paper. But the EC went beyond that, proposing that Members make unlimited market access and national treatment commitments in telecommunications, in three modes of supply and in all sub-sectors. Significantly, the EC went even further, proposing that

> "WTO Members should *reduce restrictions to the minimum necessary* to ensure quality of service, including universal service and to address the issue of scarce resources."[83]

This approach reflects, in part, the European response to increased convergence in the sector. As U.S. Federal Communications Commission analyst J. Scott Marcus put it:

> "Not long ago, specific services and the associated networks were closely intertwined. Telecommunications networks delivered voice telephony. Broadcast systems delivered radio and television . . .. Today, one can no longer say that the service and the network are inextricably intertwined. Indeed, the Internet is fundamental to the challenges of convergence, insofar as it totally decouples the application from the underlying mechanisms of transmission.
>
> Convergence poses vexing problems for the regulator."[84]

According to Scott, the European approach represents "a bold and innovative response to the challenges of convergence" by attempting a "comprehensive, technology-neutral approach to regulation" that borrows extensively from competition law.

In addition to the convergence issue, International Telecommunication Union advisor Robert Shaw emphasizes that "the public policy stakes have become much higher. A national telecommunication infrastructure has now become . . . the fundamental underpinning layer of networked economies and information societies. . .. Not only are these networks seen as an important determinant of national competitiveness in an increasingly globalized knowledge economy, but they are also seen as offering new opportunities in areas such as education, health, and social advancement."

Shaw concludes that "[t]here are a number of reasons to think that . . . the current framework for telecommunications regulation . . . requires a fresh new look."[85]

The World Bank, the International Telecommunication Union, and two European universities are supporting a newly-established project to consider this theme. The project, entitled "The World Dialogue on Regulation of Network Economies," regards the principles contained in the Telecom Reference Paper as only the first step in telecom regulatory change.

> "The first phase of telecom reform in all countries involves the clear separation of the primary functions of network operation, policymaking and regulation. Incumbent operations are commercialized, often privatized, competition is introduced and network development objectives are established . . .
>
> Yet, even before this first phase of reform has been completed, technology and market developments are blurring industry boundaries and the effectiveness of industry specific telecom regulation. It has become evident that the objectives, scope, powers and priorities of regulation for 21st century network economies must be reassessed."[86]

Many of the challenges that recent developments in the telecommunications sector pose for regulators – particularly those resulting from convergence – do not exist or are likely to remain less important in other service sectors. However, important elements of the regulatory approach taken in telecommunications can be expected to be employed, to varying degrees, in these other sectors. In particular, increased pressure to extend "pro-competi-

tive" principles across intermingling service sectors,[87] on a horizontal basis, seems almost certain.

The current round of GATS negotiations may thus augment a second wave of telecom regulatory changes designed to go beyond the Reference Paper's current provisions. Proponents can be expected to view these changes as the new benchmark for privatization, "pro-competitive" re-regulation, and other regulatory approaches to be emulated in postal and other service sectors.

3.3.3 What's the real agenda? — Examining plainly-worded statements of intentions and implications

Proponents' carefully-crafted statements about "pro-competitive" regulation do not provide a full picture of the concept and what it connotes. An assessment of other, less guarded statements, which have often been made in less formal circumstances, provides valuable additional insights into proponents' interpretation of this concept, their market liberalization aspirations, and their view of the future role of public monopolies and government regulation generally.

Eliminating public monopolies

In the face of rising public concerns, proponents are quick to deny that "pro-competitive" regulation necessarily entails privatization. However, as the following examples show, many GATS proponents themselves perceive it to entail or at very least connote privatization. In any event, it is clear that "pro-competitive" rules, together with full GATS commitments, necessarily involve the elimination of public monopolies.

In its 1999 position paper on the development of "pro-competitive" regulatory principles, the European Serv-

ices Network urges the reform of the regulation of any remaining monopolies. In so doing, however, the ESN reveals its perspective:

> "Market liberalization requires the *removal* of state monopolies (emphasis added)."[88]

In its 1997 statement on the Telecom Reference Paper, the Coalition of Service Industries signifies its support for a fully open telecommunications market, which would necessarily entail the elimination of public monopolies:

> "During the course of the negotiations, CSI argued that, above all, business users need, and are committed to, the establishment of a *completely open and competitive* international telecommunications regime . . . (emphasis added)"[89]

During recently concluded U.S.-Chile trade negotiations, USTR explicitly demanded that Chile commit to language locking in telecommunications privatization which the U.S. could use to pressure other Latin American countries to follow suit:

> "Telecommunications, where the U.S. is pushing for a statement on privatization even though Chile's market is fully privatized, is another sore spot in the talks, officials on both sides said. The U.S. push to use the agreement as a template for future accords is meeting resistance from Chile, which argues countries should calibrate their demands to their bilateral interests."[90]

A similar view is expressed by OECD consultant Ian Martin, in outlining issues for reform of telecommunications in emerging markets. According to Martin,

> "Liberalization needs pro-competitive safeguards . . . to support effective competition."
>
> "Privatization" appears among the "pro-competitive safeguards" listed.[91]

At a November, 2002 presentation to a EU parliamentary committee studying the GATS, the Ambassador of Bangladesh to the WTO and the UN advocated greater liberalization in the services sector. In particular, the ambassador cited, as his specific example of "pro-competitive policies,"

> "*abolishing* traditional monopoly or exclusive rights" in services.[92]

The WTO Secretariat, in its 1998 background note on energy services, strongly suggests that it considers eliminating public monopolies to be an essential first step towards "pro-competitive" regulation:

> [I]n most countries, the energy sector is still dominated by state-owned utilities. The *breaking up of the public monopolies* and the unbundling of vertically integrated utilities is the first market access issue on the road of multilateral liberalization in this sector.[93]

By subsequently citing the telecommunications regulatory principles, the Secretariat makes it clear that it is indeed referring here to "pro-competitive" regulation.[94]

The United States goes further, promoting telecommunications privatization. It notes that

> "[s]ome Members have undertaken measures to corporatize and privatize their telecommunica-

> tions operator . . . [This is a] trend [that] should be continued."

Moreover, the U.S. views privatization as a prerequisite for "pro-competitive" regulation:

> "[w]hile privatization is an important first step toward a liberalized market, it must be combined with viable competition for full benefits . . . to be realized."[95]

The United States puts its position into practice by consistently pushing for privatization in telecommunications services. In its 2002 report on Foreign Trade Barriers, the U.S. Trade Representative draws attention to the pressure it exerts on European authorities to further privatize the European telecommunication sector.

> "Another positive trend in the EU is toward privatization of state-owned telecom operators . . . The United States has encouraged further privatization in Europe, through measures that could be taken both at the level of the European Commission and in individual Member States."[96]

As part of its GATS services requests, the USTR claims that

> "[t]he United States may urge members who have not fully privatized their incumbent telecommunications carrier to do so in the near future."[97]

Critically, the United States' ultimate intention for "pro-competitive" regulation is revealed in its December 2000 communication to the WTO. In it, the United States summarizes its view that a trade environment that is "con-

ducive to building and using [services] networks should include, as a goal, the "*full privatization* of telecommunications operators and networks."[98]

Tellingly, the U.S. goal for full privatization is reflected in the draft U.S.-Singapore Free Trade Agreement, concluded in mid-2003. That treaty's "pro-competitive" telecommunications chapter specifically anticipates the privatization of public telecommunications services:

> "Article 9.6 : Independent Regulation and Privatization
>
> 3. Where a Party has an ownership interest in a supplier of public telecommunications services, it shall notify the other Party of any intention to eliminate such interest as soon as feasible."[99]

In compliance with this provision, the Singapore Minister for Trade and Industry wrote to the U.S. Trade Representative on May 6, 2003, assuring him that the "Singapore Government is committed to the privatization of SingTel and ST Telemedia and to the objective of reducing its existing stakes in these companies to zero, subject to the state of capital markets and the interests of other shareholders." The Singapore Minister also assured the United States that his government "will establish a plan to divest its majority share" in the companies and that "[t]he Singapore Government understands the United States' interest in seeing such divestment completed as soon as feasible."[100]

At a minimum, the above examples provide compelling evidence that, for many GATS actors, "pro-competitive" regulation and privatization are inextricably linked. It may become increasingly difficult to reconcile claims that the forceful push for widespread adoption of "pro-

competitive" rules does not constitute, or is not accompanied by, pressure for privatization.[101]

Expanding market access and national treatment

The drive to expand market access and national treatment commitments in the GATS is also closely linked to "pro-competitive" regulation.

The European Communities clearly view the adoption of the Telecom Reference Paper as a first step toward all WTO Members liberalizing more extensively, including making unlimited market access and national treatment commitments in the GATS. The EC outlined its position on telecommunications in its December 2000 proposal to the Council for Trade in Services:

> "The EC have adopted the entire [telecom] reference paper, and its [the EC's] present regulatory framework is fully compatible with the obligations in the reference paper . . . Furthermore, the EC are now in the process of revising its internal legal framework in order to further facilitate the establishment of a *fully competitive market* for all communications services . . .
>
> Thus the EC propose that all WTO members: Commit for Modes 1, 2 and 3 all sub-sectors and all modes *without restrictions* (i.e., schedules should read "none" for market access and national treatment), and include as additional commitments the whole reference paper on B[asic] T[elecommunications]." (italics added)[102]

The United States takes a similar position, urging all WTO Members to implement the Reference Paper com-

mitments, and to make "[f]ull basic telecommunications commitments." According to the U.S., this is a key aspect of the "role of the WTO":

> "Increased market access, particularly in modes 1 and 3, bound by WTO disciplines, is one of the most important steps a government can take to create an environment conducive to private investment. Full basic and value-added communications commitments are the first step."[103]

It bears reiterating that the U.S. position is not limited to telecommunications, but extends to many other sectors. The U.S. is pressing for

> "[f]ull [GATS] commitments in complementary services . . . including distribution, computer services, express delivery, advertising, and certain financial services," and
>
> "[m]aximum [GATS] commitments in all services that can be delivered electronically."[104]

Critically, the link between making GATS market access commitments and eliminating public monopolies is both direct and unequivocal. The GATS market access provisions (Article XVI) prohibit, among other things:

- monopolies, exclusive service suppliers and other similar limitations on the number of service suppliers,
- limitations on the total number of service operations,
- restrictions on the specific types of legal entities, and
- limitations on the participation of foreign capital.[105]

Any Member that agrees to apply these provisions to a sector without limitation — that is, any Member that

agrees to make full market access commitments, as requested by the U.S. and the EC — would necessarily be agreeing to eliminate any public monopolies and exclusive service suppliers in that sector. Under these rules, full market access literally cannot be achieved without eliminating public monopolies and exclusive service suppliers.

In late 2000, European Trade Commissioner Pascal Lamy attempted to reassure critics that the EC is "not demanding, or even provoking, privatization."[106] Such reassurances divert attention from the critical issue of the impact of GATS negotiations on public enterprise around the world. *By demanding full market access under GATS rules, the EC is not only seeking to provoke, but is necessarily demanding, the elimination of public monopolies in services.*

Public interest regulation – neglected or avoided?

In analyzing numerous references, it is easy to lose sight of the fact that "pro-competitive" regulation currently does not incorporate anti-trust and other public interest provisions. A few GATS proponents have acknowledged this absence, albeit only briefly. For example, the Ambassador of Bangladesh to the WTO and the UN recently advocated the strengthening of GATS Article IX (Business Practices) to address "specific private sector restrictive practices." Apparently seeking to expand the current concept, the Ambassador stated that "pro-competitive principles would need to be developed to control restrictive business practices."[107]

Similarly, Mattoo has on several occasions noted the lack of consumer protection provisions in the GATS. In a WTO/World Bank conference on Developing Countries

in a Millennium Round held in 1999, he noted, with reference to the Telecom Reference Paper, that

> "The primary concern of the paper, as of WTO rules in general, is to ensure effective market access . . . Wider concerns about consumer interests and how they may be affected by monopolistic behaviour are not addressed . . ."

In particular, he argued,

> "regulatory authorities in developing countries where competition is slow to develop need to equip themselves, legally and technically, with the ability to regulate prices."[108]

A year later, Mattoo mused about the need for consumer protection provisions to be included in the competition provisions of the GATS:

> "The pro-competitive rules developed for the basic telecommunications sector were designed to protect the rights of foreign suppliers. Is there a need for broader competition policy disciplines in the GATS to protect the interests of consumers more directly?"[109]

But Mattoo's proposed GATS solution is to replicate the very model that he criticizes; he advocates that Members "[g]eneralize key disciplines in [the] telecom reference paper to ensure cost-based access to essential facilities." And instead of pressing for a multilateral approach to address the issue at hand, he merely proposes action "at [the] national level" to "[d]evelop pro-competitive regulation to protect consumer interests." And even this

national action is proposed only "where competitive market structures do not exist." [110] [111]

OECD consultant Ian Martin echoes the same idea, proposing "consumer protection," but only "while competition is emerging."[112]

These gaps highlight a deliberate double-standard in the "pro-competitive" regulatory model. Trade law restrictions on anti-competitive business practices are weak, while restrictions aimed at public or government-designated monopolies are much stronger. What proponents usually refer to as "competition safeguards" are in fact constraints that apply primarily to the dominant service supplier, usually the current or former public monopoly. The anti-competitive activities of new entrants are only weakly addressed (See GATS Article IX).

This bias relegates broader public interest concerns to a secondary position, behind the principal goal of attracting private investment. As a 1995 U.S. proposal states:

> "The ultimate benefit of these ["pro-competitive"] disciplines is to ensure effective market access and thereby to attract private investment, domestic and foreign, to market segments that are newly opened to competition."

There is little doubt that implementing "pro-competitive" regulation would, as the U.S. proposal intended, help to ensure that private businesses operating globally obtain greater market access. However, restricting public monopolies — many of which were established to serve the public interest — while leaving new entrants free of similar types of government restrictions, is an extreme approach that may seriously harm citizens' interests. Yet

leaving new entrants free of regulation is precisely what the U.S. suggested at the WTO in late 2000:

> "[T]he need for regulating traditional incumbent basic services is derived from the long history of operators of legacy telephone networks using their control over essential facilities to the disadvantage of new entrants. On the other hand, *new entrants* and the services that ride over these basic networks, when afforded reasonable access (as guaranteed by the Telecommunications Annex), *have demonstrated* remarkable competitive resiliency and *little need for economic regulation.*" (italics added)[113]

This approach supports an idea that the European Commission expressed on its web-site in the lead-up to the GATS 2000 negotiations: "[t]he GATS is . . . first and foremost an instrument for the benefit of business . . ."[114]

Imposing a test of "necessity" on government regulation

"Pro-competitive" regulation entails applying a test of "necessity" to government regulation to ensure, in the words of the Telecom Reference Paper, that these regulations "are not more burdensome than necessary."[115] Currently, this precedent-setting test pertains only to universal service obligations in basic telecommunications, but GATS Members could apply it to telecommunications sector regulations generally and, more broadly, to regulations in many other sectors. A necessity test could also be applied "horizontally" to all service sectors, if Members agree to this under the GATS negotiations currently underway on Domestic Regulation (Article VI:4).[116]

Australia, an ardent supporter of "disciplines" to ensure that government measures "do not constitute unnecessary barriers to trade in services,"[117] has proposed that such restrictions apply to the telecommunications sector[118] as a whole and has gone so far as to propose text for their application to services generally.[119]

The European Community is also pressing other WTO Members to "reduce restrictions [in telecommunications] to *the minimum necessary* to ensure quality of service, including universal service and to address the issue of scarce resources" (italics added).[120] Like Australia, the EC also proposes a test of necessity that would be defined and applied to all sectors in a horizontal way.[121]

By contrast, the approach of the United States may be shifting, as suggested in its recently-signed bilateral treaties with Chile and Singapore, in favour of "reference papers" modeled on the Telecom Reference Paper[122] for specific sectors. Such an approach would allow the U.S. to avoid many unwanted constraints on its domestic regulators and service suppliers in certain sensitive sectors, while taking advantage of its ability to extract concessions from other countries, through negotiations on bilateral reference papers, in selected sectors.

GATS opponents have been scathingly critical of proposals for broad application of a necessity test in the treaty. For example, one report of the Canadian Centre for Policy Alternatives calls the prospect "truly chilling."

> "There is almost always, in the abstract, a less commercially restrictive alternative to a particular policy choice. Democratic policy making, especially where there is tension between commercial interests and broader public or community interests, usually results in compromises. These policy

> compromises are frequently complex. To grant a distant and secretive panel the ability to second-guess and unravel the decisions and compromises of elected legislators, regulators, courts, stakeholders and citizens [would be] a serious diminution of democratic accountability."[123]

Tufts University Professor Joel Trachtman recently analyzed the GATT and other WTO treaty provisions in relation to the proposed GATS restrictions on domestic regulation. He noted a "significant shift towards a greater role of the [WTO] Appellate Body in weighing regulatory values against trade values."[124]

It is important to understand that the forms of necessity test now under consideration extend far beyond regulating trade. Proposals that would require regulations to be no more trade restrictive than necessary are exceptionally far-reaching, by virtue of fact that the GATS defines "trade in services" very broadly, including investment. This breadth is already reflected in the Reference Paper injunctions that universal service regulations must not be "more burdensome than necessary."[125] Feketekuty and Rogowsky express the same notion in different terms, proposing negotiations on:

> "policies, laws, or regulations that unnecessarily impede or distort the operation of *market forces*, or limit the entry and exit of firms." (italics added)[126]

Plainly put, what is being contemplated in the GATS are unprecedented, sweeping restrictions on governments' ability to constrain or direct market forces, through regulation, in the public interest. *"Pro-competitive" regu-*

lation represents a radical reorientation of government regulation in support of international commercial interests.

Chapter 3 Endnotes

1 Sauvé, Pierre and Wilkie, Christopher, "Exploring Approaches to Investment Liberalization in the GATS," Draft paper presented at the *Services 2000: New Directions in Services Trade Liberalization* Conference at the University Club in Washington, D.C., 1-2 June 1999, p. 18.
A similar formulation is used in Mattoo, Aaditya and Sauvé, Pierre, "Domestic Regulation and Trade in Services: Addressing the GATS Article VI:4 Work Program; A Look at the Issues, Draft Background Paper, OECD-World Bank Services Experts Meeting, OECD, Paris, 4-5 March 2002, p. 11. Like the previously-mentioned paper, this paper notes that "procompetitive regulatory disciplines [are] embedded in the reference paper on basic telecommunications services …."

2 Barshefsky, Charlene, "Information Technology and Trade Policy: A Look Back, A Look Ahead," Speech to the Computer and Communications Industry Association, Washington, D.C., June 5, 2000 (available at www.insidetrade.com ; accessed Nov. 19, 2002).

3 United States Trade Representative, National Trade Estimate Report on Foreign Trade Barriers, 2002, , European Union, p. 128 (available at http://www.ustr.gov/reports/nte/2002/europeanunion.PDF ; accessed Dec. 3, 2002).

4 Commonwealth of Australia, Productivity Commission 2001, Telecommunications Competition Regulation, Report No. 16, AusInfo, Canberra, Chapter 1, p. 14 (available at http://www.pc.gov.au/inquiry/telecommunications/finalreport/chapter01.pdf ; accessed Dec. 3, 2002). The Government of Australia has examined this are for some time. For example, it conducted a review of what it called "pro-competitive regulation" as early as 1992 (Commonwealth of Australia, Productivity Commission, "Pro-competitive Regulation" November, 1992; available at http://www.pc.gov.au/orr/procompe/preface.pdf , accessed Dec. 3, 2002). The Australian Productivity Review also publishes annual reviews of regulation (the most recent is available at http:/www.pc.gov.au/research/annrpt/reglnrev0102/reglnref0102.pdf ; accessed Dec. 3, 2002).

5 Coalition of Service Industries, Statement on the World Trade Organization Group on Basic Telecommunications Reference

Paper, October 1997, p. 1 (available at http://www.itu.int/osg/spu/intset/indu/cis_stat.html ; accessed Nov. 6, 2002).

6 Vastine, Robert, President of the Coalition of Service Industries, Letter to Mr. Maksim Medvedkov, Deputy Minister of Economic Development and Trade of the Russian Federation, May 21, 2002, p. 2 (available at http://www.uscsi.org/Medvedkov.pdf ; accessed Dec. 3, 2002).

7 Market Access in Telecommunications and Complementary Services: the WTO's Role in Accelerating the Development of a Globally Networked Economy, Communication from the United States, Council for Trade in Services, Special Session, World Trade Organization, 18 December 2000, S/CSS/W/30.

This document is also available on the website of the United States Trade Representative at http://www.ustr.gov/sectors/services/telecom.pdf ; accessed Nov. 6, 2002).

8 Each of the following examples are drawn from the United States Trade Representative's National Trade Estimate Reports on Foreign Trade Barriers, which are available at http://www.ustr.gov/reports/ .

9 U.S. National Trade Estimate Report on Foreign Trade Barriers, op. cit., 1998, Switzerland.

10 U.S. NTE report, op. cit., Indonesia, 2002.

11 U.S. NTE report, op. cit., Colombia, 2002.

12 U.S. NTE report, op. cit., Pakistan, 2002.

13 The Trade Policy Review reports provide a valuable, and refreshingly candid description of members' economic and trade policies, commitments and intentions that is seldom available elsewhere. Significantly, the Trade Policy Review process can itself – separate from WTO negotiations – be an important force for liberalization in part because it provides regular updates on a country's liberalization initiatives. A flavour of this effect can be detected in the following excerpts.

From the 1998 review of Canada:

"Since the last Trade Policy Review in 1996, Canada has continued the liberalization efforts in the telecommunications industry started in 1992. At the time of the last Review, statutory monopolies were maintained in overseas communications, domestics (sic) fixed satellite services and local payphone services. By late 1998, these services had been opened to competition."

(Trade Policy Review Body, World Trade Organization, Trade Policy Review, Canada, 1998, Report by the Secretariat, IV Trade Policies by Sector, 19 November, WT/TPR/S/53, para. 77.)

From the 2000 review of the European Communities:

"The main development since the last Review has been the opening to full competition of telecommunications infrastructure and services on 1 January 1998, largely as a result of EU's commitments under the Fourth Protocol to the GATS [which puts into effect members' specific and related commitments concerning basic telecommunications (see S/L/20, 30 April 1996)]"

(Trade Policy Review Body, World Trade Organization, Trade Policy Review, The European Union, 2000, Report by the Secretariat, IV Trade Policies and Practices by Measure, 14 June, WT/TPR/S/72, para. 96.)

[14] Trade Policy Review Body, World Trade Organization, Trade Policy Review, Canada, 1998, Report by the Secretariat, IV Trade Policies by Sector, 19 November, WT/TPR/S/53, paras. 82-3.

[15] "Canada has undertaken a commitment to abide by the WTO Reference Paper on Regulatory Principles."

(Trade Policy Review Body, World Trade Organization, Trade Policy Review, Canada, 2000, Report by the Secretariat, V Market Access in Selected Sectors, 15 November, WT/TPR/S/78, para. 180.)

[16] United States Trade Representative, World Regions, China, Hong Kong, Mongolia, Taiwan, China's Accession to the WTO, Telecommunications. (available at http://www.ustr.gov/regions/china-hk-mongolia-taiwan/accession.shtml ; accessed Nov. 19, 2002).

[17] (emphasis added) APEC Leaders, Statement to Implement APEC Policies on Trade and the Digital Economy, Los Cabos, Mexico, 27 October 2002 (available at http://usinfo.state.gov/topical/global/ecom/02102701.htm ; accessed Nov. 6, 2002).

[18] U.S. Chamber of Commerce; Association of American Chambers of Commerce in Latin America; U.S. Section of the Brazil-U.S. Business Council, Recommendations for the Services Workshop, Submission to the VI America's Business Forum,

Buenos Aires, 2001 (available at http://www.vi-fema-abf.org.ar/pon63dosj.htm ; accessed Nov. 6, 2002).

[19] Information Technology Association of America, "ITAA Global: ITAA Asks USTR to Adopt Telecommunications Benchmark Principles," February 2002 (available at http://www.itaa.org/ ; accessed Nov. 6, 2002.

[20] Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations, Annex F, Annex on Telecommunications, Annex on Telecommunications Reference Paper (available at http://www.ustr.gov/regions/asia-pacific/text.html ; accessed Dec.6, 2002).

[21] The draft text of these treaties is available at http://www.ustr.gov/new/fta/Chile/text and http://www.ustr.gov/new/fta/Singapore/final.htm respectively.

[22] Roseman, Daniel, 2002, Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects under the GATS, OECD-World Bank Services Experts Meeting, 4-5 March, OECD, Paris, p. 4.

[23] Matoo, Aaditya, "Developing Countries in the New Round of GATS Negotiations: From a Defensive to a Pro-Active Role", The WTO/World Bank Conference on Developing Countries' in a Millennium Round, WTO Secretariat, Centre William Rappard, Geneva, 20-21 September 1999 (available at http://redem.buap.mx/rm20.htm ; accessed Nov. 7, 2002).

[24] Roseman, op. cit., p. 3.

[25] United States Trade Representative, Market Access in Telecommunications and Complementary Services: The WTO's role in accelerating the development of a globally networked economy, p. 1. (available at http://www.ustr.gov/sectors/services/telecom.pdf ; accessed Nov. 6, 2002).

[26] Roseman, op. cit., p. 28.

[27] In May, 2000, the United States advocated a more comprehensive classification system for energy services in part to determine if "pro-competitive" rules should be applied:

"[D]evelopment of a distinct and comprehensive listing of energy services would provide service providers and WTO members the realistic opportunity to assess whether existing GATS rules are sufficient to address the needs of the energy service sector, or whether additional rules, perhaps rules akin to those in the Telecom Sector's Reference Paper, would be desirable." (para. 15)

"[A] comprehensive classification of energy services could provide the basis for developing a Reference Paper akin to that developed for the Telecom Sector that would address issues specific to the energy services sector, such as access rights to transmission networks and consumer freedom of choice to select power supplies." (para. 22)

(Classification of Energy Services, Communication from the United States, Committee on Specific Commitments, World Trade Organization, 18 May 2000,S/CSC/W/27).

In December of the same year, the U.S. proposed more clearly and explicitly that a telecom-style reference paper be considered for the energy sector. The relevant section of the document states:

"II. Negotiating Objectives: A Proposal for Energy Services

C. Consider a Reference Paper

14. Regulations and technical requirements may create significant impediments to market entry and competition. At the same time, however, regulation of the energy sector is essential to the achievement of public interest goals as discussed above, including the assurance of an open, competitive energy services market.

15. In the negotiations on basic telecommunications, WTO Members recognized the need for specific additional commitments related to a highly regulated sector that was undergoing deregulation and often was characterized by large incumbent suppliers.

16. All of the foregoing considerations pertain to energy services. With these considerations in mind, a similar paper on energy services might be developed that would address, for instance:

- Transparency in the formulation, promulgation and implementation of rules, regulations, and technical standards.
- Non-discriminatory third-party access to and interconnection with energy networks and grids, where they are dominated by government entities or dominant suppliers.
- An independent regulatory system separate from and not accountable to any supplier of energy services.
- Nondiscriminatory, objective and timely procedures for the transportation and transmission of energy.

- Requirements that parties maintain appropriate measures for the purpose of preventing certain anticompetitive practices in these sectors."

(Energy Services, Communication from the United States, Council for Trade in Services, Special Session, World Trade Organization, 18 December 2000, S/CSS/W/24).

[28] The Coalition of Service Industries considers what amounts to "pro-competitive" regulation in energy services to be a priority for WTO and other trade negotiations:

"Countries must adopt regulatory systems that provide:

- Transparency in the formulation, promulgation and implementation of rules, regulations, licenses, technical standards, and arbitration and judicial review;
- Non-discriminatory third-party access to and interconnection with energy networks and grids.
- And independent regulatory authority separate from and not accountable to any supplier of energy services.
- Transparent, objective and timely procedures for the allocation of scar[c]e network resources, such as transmission capacity and rights of way."

(Coalition of Service Industries, Services Priorities for Multilateral, Bilateral, and Accession Agreements, Annex E: Energy Services, p. 16 (available at http://www.uscsi.org/ ; accessed Nov. 6, 2002).

[29] Mattoo, Aaditya, Shaping Future Rules for Trade in Services: Lessons from the GATS, Paper prepared for an NBER Conference on Trade in Services held in Seoul, Korea, 8 August 2000, p. 12.

[30] Mattoo and Sauvé, 2002, op. cit., p. 5.

[31] The WTO Secretariat, in its 1998 background paper on energy services, asked whether it would "be desirable in the context of negotiation on energy services to agree on a set of regulatory principles bases on the example of the telecommunications Reference Paper?"

(Energy Services, Background Note by the Secretariat, World Trade Organization, 9 September 1998, S/C/W/52, Para. 71.)

[32] Roseman, op. cit., p. 28.

[33] Feketekuty, Geza, Setting the Agenda for the Next Round of Negotiations on Trade in Services, The International Commercial Diplomacy Project, p. 3 of 16 (available at http://

www.commercialdiplomacy.org/articles_news/trade_services.htm; accessed Jan. 15, 2003).

[34] Mattoo and Sauvé, 2002, op. cit., p. 5.

[35] While not explicitly suggesting the development of a reference paper, the WTO Secretariat draws attention to the 'network' feature that transport services share with energy and telecommunications:

"Some activities are in the hands of monopolies or oligopolies (pipelines, rail transport), while others may be carried on by companies of various sizes or even by individuals (taxis, urban and suburban road passenger transport, road haulage)…. [T]hese activities have certain features in common. Thus, like telecommunications or energy, transport provides a 'horizontal' service which benefits the economy as a whole, including the production of both goods and services, and if it is paralysed, then it is the economy as a whole that suffers."

(Land Transport Services, Part I – Generalities and Road Transport, Background Note by the Secretariat, World Trade Organization, Council for Trade in Services, 28 October 1998, S/C/W/60, Paras. 5 and 6.

[36] Market Access in Telecommunications and Complementary Services …, Communication from the United States, op. cit.. para. 15, 18.

[37] In a 2001 paper prepared for the Universal Postal Union, Alverno indicates that the European Express Organization (now part of the European Express Association) "advocated for a set of binding principles that would:

"ensure equal application of all laws to all providers, prohibit unfair cross-subsidies; prevent the abuse of market power by the universal service provider; [and] require the establishment of national regulatory authorities."

(European Express Organization Position Paper Regarding the Inclusion of Postal and Express Delivery Services in GATS 2000 (October, 1999). Cited in: Alverno, Antony, Impact on the Universal Postal Union (UPU) and its members of the World Trade Organization (WTO) and its General Agreement on Trade in Services (GATS), Annex 1 in circular letter, No 3600(A/B)1028 of 29 January 2001, p. 31. (Available at http://www.upu.int/relations_with_wto/impact_en.pdf ; accessed 19 Feb. 2003).)

[38] Alverno, of the U.S. Postal Service, notes that the Air Courier Conference of America "has advocated in favor of pro-competitive regulatory principles for integrated express services".

(Alverno, Antony, Impact on the Universal Postal Union (UPU) and its members of the World Trade Organization (WTO) and its General Agreement on Trade in Services (GATS), op. cit., p. 31.)

[39] Since the postal service seen to share many of the characteristics of the telecommunications services sector and to be undergoing similar developments, the sector has been identified as warranting a "pro-competitive" regulatory approach:

"To the extent that corporatization, privatization and competition in postal services could become more common, regulatory authorities will face issues similar to those recognized in the liberalization of the telecommunications sector. Re-regulation to safeguard against anti-competitive practices, to ensure the benefits of open markets and to protect consumers in a new environment may become relevant. Some of the kinds of regulatory decisions involved could relate to tariff setting, cross-subsidization, universal service obligations, and standards for service quality."

(Postal and Courier Services, Background Note by the Secretariat, World Trade Organization, Council for Trade in Services, 12 June 1998, S/C/W/39, part IV, para. 2.)

[40] Roseman, op. cit., p. 28.

[41] The World Services Congress, held in 1999, had, as its "particularly important goal" the provision of "private sector guidance to governments as they prepare for the World Trade Organization's Services 2000 negotiations." At it, the business policy forum recommended the adoption of "pro-competitive" regulation in postal services:

"The services' industry representatives participating in the World Services Congress … [c]all on the WTO members to develop pro-competitive regulatory principles, while strengthening regulatory frameworks. Domestic regulation should find the right balance between competition and reliability…. [I]n industries like telecommunications or postal services competition is paramount."

Global Services Network, Recommendations of the Global Services Network and Business Policy Forums for Services 2000 Trade Negotiations, Achieving Regulatory Trans-

parency and Pro-Competitive Regulatory Reform Through Trade Negotiations, BPF12, World Services Congress, held November 1-3, 1999 in Atlanta, Georgia, U.S.A., p. 14 (available at http://www.worldservicescongress.com/library/Resolutions.pdf ; accessed Dec. 12, 2002).

[42] The European Communities have recently suggested the development of a telecom-style Reference Paper that would consider the universal service obligations, and reserved and non-reserved areas:

"The fact that there is an existing forum dealing with international postal services between public Posts, i.e. the UPU, makes it necessary to clarify the relationship between the UPU Convention and its Regulations and the GATS, including, in particular, the question of terminal dues. Experience in the telecommunications sector could be a useful reference in this context. This could mean agreeing upon a Reference Paper in the postal/courier sector, which would describe the scope of the universal service and reserved and non-reserved areas."

(GATS 2000: Postal/courier services, Communication from the European Communities and their Member States, Council for Trade in Services, Special Session, World Trade Organization, 23 March 2001, S/CSS/W/61, para. 10.)

The WTO Secretariat's report of this portion of the Council for Trade in Services meeting can be found at:

(Note by the Secretariat, Report of the Meeting Held on 3-6 December 2001, Council for Trade in Services, Special Session, World Trade Organization, 26 February 2002, S/CSS/M/13, para. 196).

[43] At the WTO, Switzerland has proposed what amounts to a "pro-competitive" Reference Paper by another name:

"While bearing in mind that Members should be free to determine any public service obligations as well as to chose the regulatory method to ensure such public service, the trend towards de-monopolisation should be taken as a basis for a new series of commitments to be negotiated under the GATS." (para. 15)

"Switzerland proposes that Members… [c]onsider the elaboration of regulatory disciplines in order to ensure undistorted conditions of competition in the liberalized fields of activities." (para. 16)

(GATS 2000 : Postal and Courier Services, Communication from Switzerland, Council for Trade in Services, Special Session, World Trade Organization, 4 May 2001, S/CSS/W/73).

[44] The issue of alleged cross-subsidization of express delivery services by public postal service providers has long been hotly contested. The Air Courier Conference of America proposes that the GATS incorporate a commitment to prevent such cross-subsidization – a key element of "pro-competitive" re-regulation. (See: Spence, David W., Trade Sub-Committee Presentation, ACCA Annual General Meeting, May 20, 2002, slides 3 and 4, available at http://www.key-mail.com/newsite/full_mail_frame.html).

Alverno and Levy, of the U.S. Postal Service, also point out that like the ACCA, the Coalition of Service Industries (CSI) has "asked the U.S. government to address cross-subsidization of express delivery services" in GATS competition disciplines.

(Alverno, Anthony and Levy, Allison, The WTO Doha Development Agenda; Defining the Scope of Postal Service Liberalization, p. 9, in: M.A. Crew and P.R. Kleindorfer (eds.), *Competitive Transformation of the Postal and Delivery Sector*, Boston/Dordecht/Longon: Kluwer Academic Publishers, 2003.)

[45] PostEurop has also expressed support for a "reference framework." "This would be a collection of general principles on the regulation of the sector, inspired by the [EU] Postal Directive [97/67/EC], such as the independence of the regulator in relation to the companies of the sector regulated, non-discrimination, definition of the universal service obligation, etc."

(PostEurop, Press Release of European Postal Universal Service Providers on the Start of WTO Negotiation Round, November 26, 1999. Cited in Alverno, Antony, Impact on the Universal Postal Union (UPU) and its members of the World Trade Organization (WTO) and its General Agreement on Trade in Services (GATS), op. cit., p. 32.

[46] Roseman, 2002, op. cit., p. 28 (Roseman's footnote 82).

[47] Roseman, 2002, op. cit., p. 28 (footnote 82).

[48] The WTO Secretariat highlights the important economic function that distribution services now play:

"In modern market economies, the distribution sector is the crucial link between producers and consumers. The per-

formance of the sector, inevitably, has a strong influence on consumer welfare…. Failures of the distribution sector to perform its rule adequately can lead to a significant misallocation of resources and economic costs…"

The Secretariat later poses the following "Possible question":

"Do private practices create welfare-reducing barriers to trade in distribution services? If so, is there a case for developing certain pro-competitive regulatory principles of the kind contained in the Reference Paper for basic telecommunications?"

(Distribution Services, Background Note by the Secretariat, 10 June 1998, S/C/W/37, Para. 44).

[49] USTR, Market Access in Telecommunications and Complementary Services, op. cit..

[50] In considering the regulation of sewage collection and treatment and other environmental service monopolies, the WTO Secretariat asks:

"How far do the disciplines of GATS Article VIII [dealing with monopolies and exclusive service suppliers] ensure that the behaviour of monopolies supplying environmental services is not discriminatory? Is there a case for developing certain pro-competitive regulatory principles?"

The Secretariat also emphasizes that – somewhat akin to networks in other services – environmental goods and services are increasingly being supplies on an "integrated basis", noting that these services are "therefore important not only in their own right but also increasingly integral to the effective utilisation of environmental technologies and products in pollution and resource management projects."

(Environmental Services, Background Note by the Secretariat, 6 July 1998, S/C/W/46, Paras. 41-2).

[51] "Article VI could also include a general restatement of the competitive safeguards built into the Telecommunications Annex of the GATS and the Agreement on Basic Telecommunications Services. Such a provision would help to ensure that monopoly providers of essential services would not abuse their position by charging unreasonable fees or by giving themselves preferential access to essential services in the competitive provision of downstream products. This provision could apply not only to 'transport services' provided

over electric conduits or pipelines but also to a variety of other monopoly inputs such as water."

(Feketekuty, Geza, 1998, Setting the Agenda for the Next Round of Negotiations on Trade in Services, The International Commercial Diplomacy Project, (available at http://www.commercialdiplomacy.org/articles_news/trade_services.htm; accessed Dec. 16, 2002)).

[52] Mattoo, 2000, op. cit., p. 15.

Mattoo observes that "[i]n some respects, the approach to port services, which can be seen as 'essential facilities' often controlled by 'major' or monopoly suppliers, was analogous to the approach to basic telecommunications networks established in the regulatory principles referred to above." (footnote 21).

[53] USTR, Market Access in Telecommunications and Complementary Services, op. cit..

[54] "GATS 2000 … general objectives [should include]: developing a common set of pro-competitive regulatory principles i.e. the precondition of a 'necessity' test to ensure that regulation does not become unduly burdensome or protectionist …."

"Global Financial Services: The need for greater liberalization in Market Access," The Futures and Options Association, June 1999, cited in European Banking & Finance News Network (available at http://www.eubfn.com/arts/liberalisation.htm accessed Nov. 7, 2002).

[55] Mattoo, 2000, op. cit., p. 12.

[56] Market Access in Telecommunications and Complementary Services …, Communication from the United States, op. cit..

[57] Roseman, op. cit., p. 28.

[58] Market Access in Telecommunications and Complementary Services …, Communication from the United States, op. cit..

[59] "[A] fundamental requirement for reducing the digital divide is for countries to give priority to the development of their communications infrastructure and to provide universal and affordable access to individuals and all geographic areas of their country. A pre-requisite for this is to put in place *pro-competitive policies in the communications sector* and a regulatory framework that will support such competition."

"[A]wareness must be encouraged among developing countries to help their governments to undertake the reforms

necessary to ensure that pro-competitive policy and regulatory frameworks are in place to allow for the development of efficient and sustainable *communication infrastructures and services*." (italics added)

Digital Opportunities for All: Meeting the Challenge, Report of the Digital Opportunity Task Force (DOT Force) [created by the G8 Heads of State in July 2000] including a proposal for a Genoa Plan of Action, May 11, 2001, (available at http://www.dotforce.org/reports/DOT_Force_Report_V_5.0h.html ; accessed Nov. 7, 2002.

60 "John Cooke [Association of British Insurers] noted that, in their paper on pro-competitive regulatory principles for insurance, the Financial Leaders Working Group Insurance Evaluating Team representatives had effectively attempted to transpose the telecoms principles to their sector."

(Liberalization of Trade in Services (LOTIS) Committee, Minutes of meeting, Thursday, 23 September 1999 in the Corporation of London's Marketing Suite, Chair, Sir Nicholas Bayne, KCMG, (available at http://www.gatswatch.org/LOTIS/1967.html ; accessed Nov. 7, 2002).

61 "Governments should develop and implement pro-competitive insurance regulation in a way and at a pace that ensures adequate protection of the public but that proceeds without undue delay and is subject to a reasonable implementation timetable."

(Skipper, Harold D., Jr. and Klein, Robert W., Insurance Regulation in the Public Interest: The Path Towards Solvent, Competitive Markets, Prepared for the Coordinating Committee on International Insurance Issues, Coalition of Service Industries, August 23, 1999 (available at http://rmictr.gsu.edu/Papers/Competitive_Markets.pdf ; accessed Jan. 15, 2003).

62 Transatlantic Economic Partnership, Action Plan, p. 20 (available at http://www.ustr.gov/regions/eu-med/westeur/nov98.pdf ; accessed Dec. 17, 2002).

63 Transatlantic Economic Partnership, op. cit., p. 3.

64 Former-U.S. Trade Representative Charlene Barshefsky, April 28, 1999, USTR Barshefsky on Vision for WTO, Accession by China, USIS Washington File, (available at http://www.usis-australia.gov/hyper/Wf990428/epf304.htm ; accessed Nov. 7, 2002).

[65] World Services Congress, 1999, op. cit., p. 20.

[66] At the OECD-World Bank Services Experts Meeting, held in March 2002, Mattoo and Sauvé note:

"Both the accountancy and telecommunications experiments raise the still unresolved question of the desirability and feasibility of horizontal versus sectoral approaches to the domestic regulation/market access interface. A key question confronting participants at the 3rd Services Experts Meeting will thus be how far can focusing on the various rationales for regulatory intervention provide the basis for developing meaningful horizontal disciplines on domestic regulation under the GATS, and where may it be necessary to take a sector-specific approach?"

(Mattoo and Sauvé, 2002, op. cit., p. 8).

[67] Global Services Network, Statement on WTO Negotiations on Services, 1999, op. cit., p. 2, italics added.

[68] Transatlantic Economic Partnership, Action Plan, 1998, op. cit., p. 20, italics added.

[69] European Services Network, ESN Position Paper on GATS Disciplines for Domestic Regulation and the Development of Pro-Competitive Regulatory Principles, April 23, 1999 (available at http://www.esf.be/pdf/procomp.pdf ; accessed Dec. 17, 2002), italics added.

[70] Digital Opportunities for All: Meeting the Challenge, Report of the Digital Opportunity Task Force (DOT Force), including a proposal for a Genoa Plan of Action, May 11, 2001, (available at http://www.dotforce.org/reports/DOT_Force_Report_V_5.0h.html ; accessed Nov. 7, 2002), italics added.

[71] Matoo, Aaditya, 1999, "Developing Countries in the New Round of GATS Negotiations: From a Defensive to a Pro-Active Role", op. cit., Table 1, italics added.

[72] Roseman, 2002, op. cit., p. 28 (footnote 82), p. 29.

[73] European Services Forum, Domestic Regulation: Preliminary Discussion Paper, 5 June 2001, Section 2.2, (available at \l "top" http://www.esf.be/f_e_docs.htm#top ; accessed Jan. 15, 2003).

[74] Market Access in Telecommunications and Complementary Services: the WTO's Role in Accelerating the Development of a Globally Networked Economy, Communication from the United States, Council for Trade in Services, Special Session,

World Trade Organization, 18 December 2000, S/CSS/W/30.

75 Ibid., para. 1.

76 Ibid., para. 21, italics added.

77 Ibid., para. 21, italics added.

78 Ibid., para. 21, underlining and italics added.

79 Mattoo, 1999, op. cit., page 28, table 1. Mattoo also decried the paper's lack of consumer interest protection; this is considered below.

80 World Services Congress 1999, The Basic Telecom Agreement: Securing the Gains & Framing the Services 2000 Agenda, BPF6, op. cit..

81 Negotiating Proposal for Telecommunication Services, Communication from Australia, Council for Trade in Services, Special Session, 5 December 2000, S/CSS/W/17, paras. 2-7.

82 Australia Outlines WTO Services Negotiations Requests, GATS to Open Doors for Australian Exporters, Media Release, 1 July 2002, Inside US Trade (available at http://www.insidetrade.com ; accessed Oct. 23, 2002).

83 GATS 2000: Telecommunications, Communication from the European Communities and their Member States, Council for Trade in Services, Special Session, 22 December 2000, S/CSS/W/35, para. 9 (italics added).

84 Marcus, J. Scott, The Potential Relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications, OPP Working Paper Series No. 36, Federal Communications Commission, July 2002 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-224213A2.pdf ; accessed Dec. 19, 2002).

85 Shaw, Robert, Regulation: what changes are needed?, Keynote speech before Il Rio Telecom, Rio de Janeiro, Brazil, 30 July 2002 (available at http://people.itu.int/~shaw/docs/rio-30-jul-2002.html ; accessed Nov. 7, 2002).

86 The Next Step in Telecom Reform: ICT Convergence Regulation or Multisector Utility regulation, World Dialogue on Regulation for Network Economies, Theme 2002 (available at "http://www.regulateonline.org/theme2002.htm" http://www.regulateonline.org/theme2002.htm ; accessed Nov. 7, 2002).

87 In this context, it is interesting to note that even the poorly-defined tourism services sector is seen as constituting a clus-

ter of closely intermingling, but otherwise often unrelated, service sectors. The WTO Secretariat's background note on Tourism services describes this interconnectedness:

"A Swiss tourism representative has stated that tourism involves 'economies of scope' rather than economies of scale, due to the fact that … many different sectors of the economy – most of which are only partially concerned with tourism – must cooperate together closely…

"As noted by the World Tourism Organization, adequate infrastructure must be in place (and sufficiently maintained) to support any intended tourism activities, both for domestic and international tourism. This most obviously includes airport facilities, port facilities[,] road systems and telecommunications, as well as water supplies, electric power and sewage treatment facilities. Regarding actual tourism facilities, adequate consideration must be given to lodging and food, as well as local transportation."

The Secretariat lists 12 major service sectors (many of which include numerous sub-sectors) that together can be construed as comprising tourism services. These range from business services to cultural services, and from construction services to educational services. The Secretariat also highlights the importance of the sector, particularly to developing countries.

"Tourism, broadly defined, is regarded as the world's largest industry and one of the fastest-growing, accounting for over one-third of the value of the total world-wide services trade… [I]nternational tourism has a very substantial impact on trade levels, as well as on foreign exchange earnings. For developing countries, it is one area where they run consistent trade surpluses."

Such a cluster of disparate services seemingly invites the horizontal application of rules so as to avoid inconsistencies in coverage for sub-sectors that can be classified either as tourism services or as other services.

(Tourism Services, Background Note by the Secretariat, Council for Trade in Services, 23 September 1998, S/C/W/51, pp. 1, 3, 7, 13-15).

[88] European Services Network, ESN Position Paper, April 23, 1999, op. cit., p. 4.

[89] Coalition of Service Industries, Statement on the World Trade Organization Group on Basic Telecommunications Reference Paper, op. cit., p. 2.

[90] Inside US Trade, Oct. 11, 2002.

[91] Martin, Ian, Issues for the Reform of Telecommunications in Emerging Markets, undated, slide #17 (available at http://www.oecd.org/pdf/M00024000/M00024651.pdf ; accessed Jan. 8, 2003).

[92] Ali, Toufiq, Presentation to the European Union Committee on Industry, External Trade, Research and Energy public hearing on "GATS, The Future of Services", 26 November 2002, p. 36 of 49, para. 38 (available at http://www.europarl.eu.int/hearings/20021126/itre/contributions.pdf ; accessed Jan. 8, 2003).

[93] Energy Services, Background Note by the Secretariat, Council for Trade in Services, 9 September 1998, S/C/W/52, p. 2.

[94] The WTO Secretariat leaves little doubt that it considers "breaking up of the public monopolies" an aspect of "pro-competitive" regulation. It states, immediately following the sentence cited above:

"Once Members have chosen to liberalize this sector, major regulatory aspects need to be addressed in order to ensure that such liberalizing effort is not nullified by the market power of existing suppliers, especially those who control the transmission and distribution networks. This situation is similar to that of telecommunication services where market access and national treatment commitments have been supplemented by additional commitments on regulatory principles aimed at ensuring some basic conditions of competition in the liberalized markets (including interconnection to the network for new entrants).

It would thus appear that, according to the WTO Secretariat, the breaking up of public monopolies is the first issue on the road to pro-competitive regulation.

(Energy Services, Background Note by the Secretariat, Council for Trade in Services, 9 September 1998, S/C/W/52, p. 2.)

[95] Market Access in Telecommunications and Complementary Services …, Communication from the United States, S/CSS/W/30, op. cit., para. 7.

Like the WTO Secretariat, the U.S. communication emphasizes that privatization "must be combined with viable competition". Like the Secretariat, the U.S. also makes reference in this context to the telecom Reference Paper:

"As reflected in the 1997 Basic Telecommunications Reference Paper, this requires effective oversight through an independent regulator, because privatized operators generally occupy a dominant position in the market and have resources and incentives to engage in anticompetitive conduct to maintain such dominance." (Ibid., pp. 2-3).

96 United States Trade Representative, National Trade Estimate Report on Foreign Trade Barriers, 2002, op. cit., p. 130.

97 United States Trade Representative, U.S. Proposals for Liberalizing Trade in Services; Executive Summary", 1 July 2002, (available at http://www.ustr.gov/sectors/services/2002-07-01-proposal-execsumm.PDF ; accessed Jan. 15, 2003).

98 Market Access in Telecommunications and Complementary Services …, Communication from the United States, S/CSS/W/30, op. cit., para. 22.

99 The treaty is available at http://www.ustr.gov/new/fta/Singapore/final.htm ; accessed Sept. 27, 2003.

100 The text of this letter is provided at http://www.ustr.gov/new/fta/Singapore/final.htm , ("Side Letter on Telecom Divestment", accessed Sept. 27, 2003.

101 For example, see Lamy, Pascal, "The GATS 2000 Negotiations", cited below.

102 GATS 2000: Telecommunications, Communication from the European Communities and their Member States, Council for Trade in Services, Special Session, 22 December 2000, S/CSS/W/35, paras. 11-12.

103 Market Access in Telecommunications and Complementary Services …, Communication from the United States, S/CSS/W/30, op. cit., paras. 1, 8, 22.

104 Ibid., para. 22.

105 GATS Article XVI (a), (c), (e) and (f).

106 Trade Commissioner Lamy outlined his key objectives for the GATS 2000 negotiations in late 2000:
"So what are we looking for in detail?...

- Stronger regulatory disciplines to underpin market access and national treatment commitments, including pro-competitive principles….

- Awareness of public policy implications. Let me be very clear. *We are not demanding, or even provoking, privatization …*"

(Lamy, Pascal, The GATS 2000 Negotiations, speech to the European Services Forum International Conference, Brussels, Speech/00/468, 27 November 2000, italics added. (available at http://www.insidetrade.com ; accessed Nov. 19, 2002).

Mr. Lamy is quoted to have made a similar claim in a media interview in March, 2003:

"…Mr. Lamy said the EU's proposals in the World Trade Organization's service sector talks 'do not seek to dismantle public services, nor to privatize state-owned companies.'"

Osborn, Andrew, EU denies strongarm tactics in trade talks, The Guardian (UK), March 7, 2003.

[107] Ali, Tofiq, 2002, op. cit., p. 29.

[108] Mattoo, 1999, op. cit., p. 13 of 41.

[109] Mattoo, 2000, op. cit., p. 14.

[110] Mattoo, 1999, op. cit., p. 12 of 41.

[111] At the OECD-World Bank Services Experts Meeting on the GATS, held in 2002, Mattoo and Sauvé repeat these same proposals, augmenting them only slightly by the vague notion of "[s]trengthened disciplines to deal with anti-competitive conduct." It is not clear whether they mean anti-competitive conduct by a former monopoly, or by new entrants into the sector. (Mattoo and Sauvé, 2002, op. cit., p. 5.)

[112] Martin, op. cit., slide #17.

[113] Market Access in Telecommunications and Complementary Services …, Communication from the United States, S/CSS/W/30, op. cit., para. 13.

[114] Cited in Sinclair, Scott, GATS: How the World Trade Organization's new "services" negotiations threaten democracy, Canadian Centre for Policy Alternatives, 2000, p. 4.

[115] This clause requires members to ensure that any universal service obligations it wishes to maintain are "not more burdensome than necessary for the kind of universal service defined by the Member." Telecom Reference Paper, Article 3.

[116] Opposition from within the United States appears to make this increasingly unlikely. However, if members were to agree to apply a necessity test to "measures relating to qualification requirements and procedures, technical standards and licensing requirements," one of its aim would be to ensure

that these requirements are "not more burdensome than necessary to ensure the quality of the service" (Article VI:4(b)) .

[117] This wording appears in Article VI:4.

[118] Australia states:

"Rules should be Developed on Domestic Regulation such as Licensing Requirements and Technical Standards Affecting Trade in Telecommunications Services.

Australia considers that technical standards and licensing requirements can constitute a significant barrier to the provision of telecommunications services. We are exploring how to ensure that domestic regulation of telecommunications services is the most transparent and least trade-restrictive possible."

(Negotiating Proposal for Telecommunications Services, Communication from Australia, Council for Trade in Services, Special Session, World Trade Organization, 5 December 2000, S/CSS/W/17, para. 16).

[119] Australia has proposed that government regulations be required to meet a two-part test to determine if they (a) achieve a legitimate policy objective" and (b) there is no other measure, reasonably available, that "is significantly less restrictive to trade":

Australia considers that the following text could be used as the basis for such disciplines [on domestic regulation]:

A measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves a legitimate policy objective and is significantly less restrictive to trade."

(Necessity and Transparency, Communication from Australia, Working Party on Domestic Regulation, S/WPDR/W/8, 15 September 2000, para. 4, (bolding in original).

[120] GATS 2000: Telecommunications, Communication from the European Communities and their Member States, Council for Trade in Services, Special Session, S/CSS/W/35, 22 December 2000, para. 9.

[121] The EC has also introduced the concept of "proportionality", that is, a measure would not be considered more trade restrictive than necessary if it were "proportionate" to the objective[s] pursued.

(Domestic Regulation: Necessity and Transparency, Communication from the European Communities and their Member States, Working Party on Domestic Regulation, S/WPDR/W/14, 1 May 2001, paras. 14, 17).

However, as Gould has pointed out, European Court of Justice rulings on challenges to regulations have often required governments to pursue the least trade restrictive option. This suggests that "proportionality" is unlikely to moderate the strictness of GATS disciplines on domestic regulation.

(Gould, Ellen, WTO Disciplines on Service Regulation: Assessing the Risks for Consumers, draft paper, August 23, 2002, pp. 13-14).

[122] Sharma, Shefali, WTO Agenda: Moving Forward?, Domestic Regulations: 'Stuck between a Rock and a Hard Place', Geneva Update #8, Institute for Agriculture and Trade Policy, Geneva, November 4, 2002. Circulated by e-mail.

[123] Sinclair, 2000, op. cit., p. 80.

[124] Trachtman, Joel, Lessons for GATS Article VI from the SPS, TBT and GATT Treatment of Domestic Regulation, Fletcher School of Law and Diplomacy, Tufts University, 20 January 2002. Quoted in Gould, 2002, op. cit., p. 14-15.

[125] Note that this formulation avoids use of the term "trade" altogether.

[126] Feketekuty, Geza and Rogowsky, Robert A., The Scope, Implications and Rationale of a Competition-Oriented Approach to Future Multilateral Trade Negotiations, Centre for Trade and Commercial Diplomacy, Monterey Institute of International Studies, undated (available at http://www.commercialdiplomacy.org/rokowsky.htm (sic); accessed Nov. 26, 2002).

Chapter 4
Implications of "pro-competitive" re-regulation for postal and other service sectors

What would be the impact of implementing "pro-competitive" re-regulation in postal services or in other service sectors?

This chapter considers the potential impact of such re-regulation on the Canadian postal system generally, and on Canada Post in particular. It describes how "pro-competitive" principles would transform the basis of the Canadian postal system, change the rules under which it operates, reduce governments' regulatory choice in the postal sector and, critically, undermine Canada Post and its ability to fulfill its public service mandate. The chapter also highlights some of the implications "pro-competitive" re-regulation would have on the international regulatory activities of the Universal Postal Union (UPU).

After reviewing the experience of "pro-competitive" re-regulation in the telecommunications sector, the chapter examines the concept from a broader perspective. It explores the implications for other service sectors, most notably the blocking of new public enterprises, increasing pressure to commercialize and privatize public services, and the promotion of a limited, one-dimensional view of government regulation. The chapter also explores the strategic significance of the "pro-competitive" initiative in current negotiations to expand the reach of the GATS.

The chapter concludes by reviewing some of the main conclusions that should be drawn — in developed and developing countries alike — from proposals to apply "pro-competitive" re-regulation to postal and a range of other important service sectors.

4.1 The implications for Canada's public postal system

4.1.1 Transforming the basis of the postal system

Applying "pro-competitive" principles would undermine the fundamental basis of Canada's postal system.

The primary purpose of the nation's postal service system is to provide high-quality, affordable postal and related services to all Canadians in all regions in the country by means of a government institution that is directly accountable to the Government of Canada and Parliament.[1] This foremost purpose is supported by other related aims, many of which reflect Canada's geographical and political imperatives. For example, Canada Post is required to have due regard for providing a standard of service that is "similar with respect to communities of the same size" and that "meets the needs of the people of Canada".[2] This has led to the creation of a network of postal facilities that cover the entire country and that, in many rural areas and in the North, provide "the most visible, and often the only, bricks-and-mortar presence of the Canadian government."[3]

Canada Post is also legally required to maintain high standards of security and confidentiality. Critically, the corporation is subject to political oversight and democratic direction; the federal government has the authority to direct Canada Post on a range of basic and operational issues.

In addition to these central principles, the postal system is obliged — not legally, but in order to meet community and public expectations — to meet various other important requirements that continue to require substantial public investment. These include:

- maintaining postal rates that are the same throughout the country,
- maintaining standards regarding frequency of collection and rapidity of delivery, and
- maintaining appropriate proximity of postal boxes and post offices throughout the country.

Taken together, these various features and activities constitute fundamental characteristics of the existing postal system in Canada that are at odds with certain GATS provisions, and with the GATS principles of "pro-competitive" re-regulation in particular.

In very broad terms, "the GATS primarily serves private interests, whereas . . . the Canadian postal service and Canada Post exist to serve public purposes."[4] The nation's postal system is also designed to serve the economic and social needs of Canadians rather than, as would be the case under a "pro-competitive" regimen, the economic needs of international business. These fundamental conflicts are not surprising since, like many Canadian public institutions, the postal system was designed to address Canadian geographical, social and political needs unmet by market forces and not, like the GATS, to facilitate international commerce.

The conflict is even more extensive, however.

As considered in greater detail below, implementing "pro-competitive" re-regulation could threaten the very existence of Canada Post.[5] The full application of "pro-competitive" regulation would also strike at a range of other key aspects of the current system. The assurance of affordable service being provided to all Canadians in all regions in the country, at the same price and at a standard of service that is similar in communities of similar size;

the maintenance of democratic accountability to Parliament; the potential for delivery of other government-related services using the postal network; the existence of adequately paid employment in small communities throughout the nation; the maintenance of a vibrant physical presence of the Canadian government, especially in remote communities – all of these features would be threatened or distorted by the application of "pro-competitive" re-regulation.

4.1.2 Changing the ground rules

A decision by the Canadian government to fully apply "pro-competitive" rules in the GATS to the Canadian postal system would fundamentally alter the regimen of rules under which it functions.

Such a decision would mean that the Canadian government agreed, in principle, to ensure that all existing measures affecting the postal system — and all *future* postal measures — conformed to these international trade rules. At a stroke, the federal government would have agreed to abandon all of those domestic policies and future policy options in the sector that do not conform to "pro-competitive" principles.

The government would also have agreed to abandon, or subjugate, the critical role of elected Members of Parliament. To the extent that it occurred at all, balancing the often-competing interests involved in the public postal system would no longer occur through open, democratic debate in Parliament. Henceforth, this critical task would be passed to appointed dispute panelists who issue binding edicts on the interpretation and application of narrow, commercially focused rules.

Some treaty proponents view such a transfer of democratic accountability with favour. From their perspective, it has the salutary effect of enabling governments to implement changes that otherwise could prove politically untenable. In other words, it makes it possible for governments to make politically unpopular decisions by stealth. As the WTO Secretariat put it:

> "[T]here are various economic and political advantages associated with liberalization commitments under the GATS . . . [including] . . . [*o*]*vercoming domestic resistance to change . . .*"[6]

One prominent WTO official went so far as to imply that GATS commitments provided governments with a valuable means to evade the democratic will of its citizens. He likened governments' GATS commitments "to Ulysses' decision to have himself tied to the mast in order to resist the sirens."[7] This disturbing view was also espoused by the then-director of the WTO services division, David Hartridge, with respect to telecommunications:

> "[c]ountries which want and badly need investment . . . can use the negotiations as a way of circumventing vested interests which may not favour liberalization."[8]

Significantly, uncertainty or ambiguity pertaining to the application of "pro-competitive" regulation and other GATS rules would be decided not by Parliament or the federal government, but by appointed WTO panelists. Even former deputy U.S. Trade Representative Jeffery Lang has underscored the extent of this uncertainty. There is, he said,

> "overwhelming uncertainty about the meaning of the provisions of the GATS. Virtually every normative provision of the GATS is interesting and even novel. Some of these provisions are so obviously problematic that they cry out for substantive renegotiations. So little is known about their origin and intention that it may be years before we discover the impact of these provisions."[9]

Leaving critical determinations about such "overwhelming uncertainty" to appointed panelists could be characterized as making Canada's postal services system a "hostage to fortune" under the treaty. However, this characterization may be overly optimistic. The likely outcome of such deliberations are quite clear: GATS panelists are obliged to make their determinations solely on the basis of WTO rules, with no deference to domestic Canadian law. A more disturbing outcome of such uncertainty is that it provides governments with political cover for unpopular actions. In effect, faced with citizens' concerns, uncertainty can offer government representatives and officials (to borrow a phrase from a previous era) "plausible deniability" of the likely impacts of "pro-competitive" re-regulation. When the uncertainty is ended by the decisions of WTO dispute panels, almost always in favour of commercial interests, governments can claim they are powerless to do anything about the resulting impacts, however negative they may be.

Once exposed to "pro-competitive" rules under the GATS, Canada's postal system would be subjected to continuously increasing trade pressure.[10] The application of even some of the "pro-competitive" principles to only selected aspects of the postal system could result in parts of

the postal system being the target of international trade challenges as never before.[11] Applying "pro-competitive" rules would also be likely to result in increased international pressure for the federal government to extend the application of existing GATS rules by, for example, making market access and/or national treatment commitments, or reducing limitations on existing commitments, in some or all sub-sectors of the postal services system. Changes to the classification system used for postal services, which are under negotiation in the current round of negotiations, could also result in additional exposure to trade challenges.

Even the most innocuous sounding "pro-competitive" re-regulation provisions could affect domestic postal policy in Canada. For example, transparency provisions, especially those giving foreign service providers the ability to comment on proposed rules, would increase the ability of these foreign operators to exert pressure on domestic policy-makers more effectively. This pressure could extend beyond the particular rules that are being proposed to affect many aspects of Canada's negotiating position in the current or future rounds of GATS re-negotiations.

Finally, acceptance of the "pro-competitive" re-regulation approach in the GATS would almost certainly influence negotiations of other international treaties. At a minimum, Canada would make commitments in other bilateral and multilateral treaties, including the Free Trade Area of the Americas (FTAA) agreement, that are at least as extensive.[12] This in turn would augment the pressure against the Canadian postal system and increase the likelihood of trade challenges under these other treaties.

A decision by the Canadian government to apply the principles of "pro-competitive" re-regulation to the nation's postal system would thus amount to placing it in the WTO "hot seat." Essentially, *the federal government would knowingly be acquiescing to the exposure of the postal system to GATS rules and to inexorable – and increasing – international pressure for further, even complete, market liberalization.*

4.1.3 Restricting regulatory choice

The application, under the GATS, of "pro-competitive re-regulation" in postal services would sharply reduce governments' policy flexibility in the sector.

At a stroke, many domestic policies would be "frozen," and a wealth of future policy options would be foreclosed. Rather than fashioning postal policy according to the nation's evolving needs, all future Canadian governments would be confined to regulatory changes that conform to "pro-competitive" principles. Domestic legislation that violated these principles — even if necessary to fulfill critical public needs — would be subject to punitive trade sanctions.

"Pro-competitive" re-regulation of postal services would "lock-in" market-oriented changes. It is exceptionally difficult to change WTO rules, as this requires the agreement of all WTO Members. It is also difficult for individual Members to alter WTO commitments, once they have been made, to make them more inconsistent with the treaty. Under the GATS, Members that make such reversals must compensate affected members with beneficial commitments in other sectors. As a result, if Canada or any other Member were to agree to apply "pro-

competitive" re-regulation to postal services, this decision would effectively be irreversible.

In unguarded moments, proponents have touted the effective irreversibility of GATS commitments as one of the treaty's chief benefits. Then-WTO services director Hartridge emphasized this in a speech to a business audience in 1997:

> "The GATS can and will speed up the process of liberalization and reform, and make it irreversible . . . [It] will speed up the process and lock in the results."[13]

The WTO Secretariat reiterated the same point in the GATS training package it published the following year, noting that "[i]nternational bindings . . . are particularly important if used to lock in a currently liberal regime or map out a future liberalization path."[14] Similarly, the WTO Secretariat's overview of recent developments in services trade draws attention to the fact that "bindings undertaken in the GATS have the effect of protecting liberalization policies, regardless of their underlying rationale, from slippages and reversals..."[15]

"Locking-in" market-based domestic policy changes through GATS rules is a powerful means of entrenching these changes wherever they occur. Under repeated renegotiations, this has the effect of expanding GATS restrictions over an ever-broader range of public policy, which, to GATS proponents, is a singularly salutary result. However, from the perspective of addressing public service priorities, this approach is perverse. For those governments that cross into open market regulation — even on an experimental basis — applying "pro-competitive"

rules amounts to burning the regulatory bridges behind them.

Subjecting the Canadian postal system to an international regimen of rules that are beyond the ordinary reach of Canadian elected representatives would itself be a radical undertaking. Doing so in the full knowledge that such a decision is effectively irreversible would be a grave matter indeed.

4.1.4 Radically transforming Canada Post to favour new commercial operators

We have seen how a decision to fully apply "pro-competitive" re-regulation would fundamentally alter the basis and rules under which the Canadian postal system operates. In addition to the general effects noted above, such a transformation would also directly affect Canada Post. It is to these effects that we now turn.

Indirectly undermining Canada Post by increasing pressure to commercialize, privatize and make other GATS commitments.

Applying "pro-competitive" rules to postal or courier services would undermine Canada Post's pre-eminent role in several ways.

Firstly, these rules would be an explicit acceptance, and a unilateral concession, that Canada Post from then on would be subject to rules that conflict with many of its current activities. To put it simply, the government would be clipping the wings of Canada Post – forcing it to cease all current activities that do not conform to the new, binding rules.

There would be a second, related effect. "Pro-competitive" rules would almost certainly result in Canada Post moving away from its broad public interest functions

towards a more strictly commercial role, since, as considered below, each of the key elements of the TRP would apply to Canada Post.

These new constraints placed on Canada Post and its resulting shift in emphasis would, in turn, undermine political support for the corporation itself. The more restricted Canada Post became in its ability to fulfill its previously broad public interest mandate, the greater would be the public perception that the corporation no longer served any important public policy purpose, and — critically — the greater would be the pressure on future governments to further commercialize or privatize it.

Thirdly, while subjecting Canada Post's activities to "pro-competitive" rules would not entail making full Market Access or National Treatment commitments, it would make such commitments rather more likely in the future. "Pro-competitive" rules would concretely demonstrate the Canadian government's willingness to apply more than the most basic of GATS rules to Canada Post. The GATS Most-Favoured Nation Treatment obligation already applies to Canada Post, and the treaty also stipulates that all monopoly service suppliers such as Canada Post would be bound by any specific commitments affecting postal or related services.[16] Thus, Canada has already formally accepted that maintenance of a public postal monopoly is, in principle, contrary to GATS rules. Significantly, however, Canada has not agreed to subject postal services to any of the more onerous GATS constraints, among them Market Access, National Treatment, and "pro-competitive" rules. Concessions on any of these would signal a major shift in Canada's negotiating approach and, since it would require only a minor extension of negotiating logic, could be expected to in-

tensify pressure on Canada to make Market Access and National Treatment commitments in postal services.

In this context, it is useful to recall that most of the countries that made significant Market Access and National Treatment commitments in telecommunications also adopted "pro-competitive" rules in the sector.[17] Despite the acknowledged differences between these two service sectors, it is difficult to foresee a result in postal services that differed radically from the telecommunications example. And, once "pro-competitive" constraints, having concrete, practical effects were agreed to, they would likely be accompanied, sooner rather than later, by more extensive specific commitments.

In each of these ways, the imposition of the Telecom Reference Paper approach would augment pressure that already exists on the Canadian government to further commercialize and privatize key activities of Canada Post.

Significantly, however, these general effects would be overshadowed by other, more direct effects of "pro-competitive" re-regulation.

Transferring public assets from Canada Post to commercial operators by guaranteeing access to the public postal network, facilities, and other scarce public resources

Granting access to Canada's postal network according to "pro-competitive" rules would have a direct impact on Canada Post and Canadian citizens.

As noted in Chapter 2, the TRP contains provisions to guarantee access to, and use of, interconnected networks. To recap, Members have agreed that "[i]nterconnection with a major supplier will be ensured at any technically feasible point in the [telecom] network." Specifically, such interconnection is to be provided

- *upon request*;
- on a *non-discriminatory basis* with respect to "terms, conditions (including technical standards and specifications) and rates," and with respect to quality;
- in a *timely* fashion; and
- at *rates* that are "cost-oriented," "transparent," "reasonable," and have "regard to economic feasibility." Rates should also be "sufficiently unbundled" to allow suppliers to pay only for the "network components or facilities" that it needs.

The Reference Paper also stipulates that the *procedures* that are applicable for interconnection to a major supplier will be made *publicly available*, that major suppliers will make *interconnection arrangements publicly available*, and that service suppliers seeking interconnection with a major supplier will have recourse to "*an independent domestic body" to resolve disputes* involving the "terms, conditions and rates for interconnection."[18]

The Reference Paper also requires "the allocation and use of scarce resources, including frequencies, numbers and rights of way" to be carried out "in an objective, timely, transparent, and non-discriminatory manner."[19]

Canada Post operates a vast network of services that have significant similarities to telecommunications networks. Even accepting that these provisions may translate unevenly into the postal sector, it is clear that similar types of provisions would have a major impact on Canada Post. For example, the principle of interconnection itself suggests the presence of other competing postal service providers who must be granted rights to interconnect with the Canada Post network. This would entail the erosion of Canada Post's monopoly in basic postal services.

Even in the less extreme case, where access rights were provided for only certain services — express delivery services, for example — these provisions would require Canada Post to provide competing service providers access to its array of infrastructure, drop-off, collection, tracking, and other network systems. Granting such access to competing providers would have particularly adverse impacts on Canada Post in those aspects of the postal network that are considered essential or so-called bottleneck facilities, or those that are deemed to comprise "scarce resources." Significantly, Canada Post would be obliged to provide such access upon request, in a timely fashion, on a non-discriminatory basis, and at specified rates that are suitably unbundled to meet the purposes of the competing operators. Moreover, the rates Canada Post set for these interconnections would, according to "pro-competitive" interconnection rules, be subject to review by an independent domestic body.

The Canadian public, through its successive governments, has spent decades and huge sums of public monies establishing and maintaining an impressive postal service network that spans the country. This entire integrating network is, in effect, a valuable public asset held, in Canada Post, by the citizens of Canada. Granting competing service providers favourable access, at favourable rates, to this network amounts to transferring network assets from the public to private postal service providers, be they domestic or foreign. Granting such access to only express delivery or some other subset of postal services, by unbundling the services Canada Post provides, would not alter the fact; it would merely make such asset-stripping potentially more politically palatable.

Bypassing national regulation on cross-subsidization

The issue of whether Canada Post uses infrastructure or profits derived from its core letter-mail services to subsidize express delivery or other of its activities or products has been hotly contested for many years. Domestic investigations and reviews have consistently concluded that there is no cross-subsidization of Canada Post's courier services by revenues from its basic letter-mail services. In 1993, when reviewing the acquisition of a controlling interest in Purolator Courier by Canada Post, the National Transportation Agency concluded that "there is no evidence to support the allegation that cross-subsidization between Canada Post would occur as a result of the proposed transaction."[20] A concurrent review of the acquisition by the Competition Bureau of Canada reached the same conclusion.[21] Similarly, in its 1997 review of Canada Post, TD Securities "did not find any evidence of cross-subsidization from CPC to Purolator during the course of our review."[22] Finally, Canada Post's auditors are required to report specifically on any potential cross-subsidization between Canada Post and Purolator and have never reported any evidence that it occurs.[23] While these investigations may have put the issue to rest domestically, multinational courier companies have turned to trade negotiations and litigation to assert their interests internationally.

In April 2000, U.S.-based United Parcel Service filed a NAFTA investor-state challenge against Canada, alleging among other things that Canada Post was engaged in cross-subsidization to the detriment of UPS.[24] In its decision, which is pending, the dispute settlement panel is expected to rule on the cross-subsidization issue and on whether UPS is owed compensation. In so doing, it will

effectively be ruling on the accuracy and suitability of the corporation's audited statements, the decisions of Canada's competition authorities, and their acceptance by the Parliament of Canada. Moreover, in the event the panel finds that Canada Post has cross-subsidized to the detriment of UPS, it has the power to order the government to pay financial compensation to the company.

Whatever ruling the panel ultimately makes, a crucial point is that this fundamental issue will be determined outside of the process that Parliament established explicitly for the purpose. The ruling — together with a determination of whether Canadian taxpayers should pay compensation to UPS — will *not* be made by elected Parliamentarians or their delegates on the basis of Canadian domestic jurisprudence, carefully balancing the many complex, often conflicting priorities of Canadians. Instead, the binding panel decision will be made by appointed trade panelists in a process that is largely closed both to the public and to organizations having a direct interest in the outcome,[25] and then solely on the basis of NAFTA rules, not Canadian law.

Imposing "pro-competitive" rules on Canada Post would further expose the Crown corporation, and the government, to similar types of trade challenges under the GATS. The GATS already contains restrictions on the ability of public monopolies to compete in covered sectors outside their monopoly. But, even though Canada has made commitments covering courier services under the GATS, a quirk in the GATS classification system now insulates Canada from challenge.

Currently, GATS commitments are classified according to a document developed during the Uruguay Round known as the Services Sectoral Classification List (or W/

120).[26] Each category in W/120 is cross-referenced to a more detailed classification system developed by the United Nations, the UN Provisional Central Product Classification (the provisional CPC).[27]

Importantly, the provisional CPC classification of postal and courier services is built around the traditional distinction between public postal services and private delivery services. For example, the provisional CPC defines "the pick-up, delivery and transport services" of letters, parcels and other printed matter as *postal services* (7511) when they are "rendered by the national postal administration." The provisional CPC defines similar "pick-up, delivery and transport" services of letters, parcels and packages as *courier services* (7512) if they are rendered by service providers "other than the national postal administration."[28]

In other words, the provisional CPC classifies similar services differently depending on whether they are provided by the national postal administration or a private carrier. This unusual feature of the provisional CPC significantly insulates Canada Post and other national postal administrations against possible GATS challenges that their activities violate GATS rules.

However, as discussed in Chapter 2, the TRP prohibits any "major supplier from engaging in or continuing . . . anti-competitive practices . . . [including] anti-competitive cross-subsidization."[29] Under these rules, foreign investors could, after obtaining the support of their home governments, request panels to determine precisely what "anti-competitive cross-subsidization" means, whether Canada Post is engaged in the practice, and, if it is, what remedies the Government of Canada should make to the aggrieved investor's government. In short, applying *pro-*

competitive" rules would provide foreign postal service providers seeking entry into the Canadian postal system a further means of bypassing Parliament and Canada's court system to challenge, with the support of their home governments, those activities of Canada Post that could be construed as "anti-competitive cross-subsidization."

Given that Canada Post is already under attack by UPS through the NAFTA, it is difficult to imagine why the Canadian government would even consider exposing public postal services to further harassment under GATS-enforced reference paper restrictions. Indeed, Canadian government lawyers are currently arguing, with some success, that UPS should be denied recourse to similar articles of NAFTA that prohibit alleged abuse of Canada Post's monopoly position.

The hostility of the multinational express delivery industry and other proponents of "pro-competitive" regulation to public postal services is clear. For example, the OECD's competition committee presents governments' choices for assuring no cross-subsidization as: either privatize, liberalize, or separate the functions in question.

An OECD paper entitled "Promoting Competition in Postal Services," published by the Committee on Competition Law and Policy in 1999,[30] states:

> "Given the difficulties in obtaining reliable cost information, anti-competitive cross-subsidisation may only reliably be prevented through structural or regulatory measures such as privatization (as in the Netherlands), liberalization (i.e., elimination of the remaining reserved areas) or horizontal or vertical separation . . ."

The committee elaborates its understanding of the meaning of the latter two terms:

> "Horizontal separation involves preventing the incumbent Postal operator from providing competitive services such as express or parcel services. Several countries require such competitive services to be provided through an arms-length subsidiary. Vertical separation would involve separating final delivery from the remaining segments of the postal business."

The policy implications of the OECD analysis, the UPS case, and the effort to impose pro-competitive regulation through the GATS are the same: that is, to force Canada Post and other national post offices either to ensure watertight separation of their letter-mail and courier operations, or to withdraw altogether from competitive services. This is not simply, or properly, a trade matter; it is a coordinated effort to use trade treaties to change public policy in Canada and in other countries with public postal services to suit a single set of corporate interests.

Overturning Canada Post's established regulatory regime through "independent regulation"

Foreign service providers could use "pro-competitive" provisions to challenge another fundamental aspect of the Canadian postal system: the regulatory oversight of Canada Post.

The Reference Paper stipulates that each Member's telecommunications regulatory body be "separate from, and not accountable to, any supplier of basic telecommunications services."[31] The application of this key "pro-competitive" principle would mean that Canada would

be required to maintain a postal services regulatory body that is "separate from, and not accountable to" Canada Post.

Put bluntly, there is no independent regulator for Canada Post in the sense used in the Reference Paper. To require one would mean overhauling the regulatory system governing Canada Post.

Canada Post was brought into existence under the Canada Post Corporation Act and, as a Crown Corporation, falls within the authority of the Financial Administration Act. It is, as a result, responsible to a Board of Directors, to the Department of Finance and Treasury Board, and ultimately, through the Minister responsible for Canada Post, to Parliament. The Government of Canada approves corporate plans, approves corporate borrowing, and makes appointments and can make directives. The Government also oversees basic rate changes and evaluates the quality of postal services. Thus, as is the case with similar Crowns in other sectors, the Government of Canada is both the owner/shareholder and the regulator of the corporation.

This arrangement — which is well-established in parliamentary democracies — accords with one aspect of these "pro-competitive" criteria, namely, that the regulatory body — that is, the government — is not "accountable" to Canada Post. But it cannot plausibly be asserted that Canada Post is "separate" from Parliament; it is specifically designed, for accountability and a range of other public interest purposes, *not* to be separate from Parliament. To impose a separation between Parliament and Canada Post, through a "pro-competitive" regulatory body under WTO oversight and enforcement, would be to strip the corporation of its underlying purpose and to

deny Canadian citizens a key instrument of national public policy. Canada Post would no longer be a directly accountable Crown Corporation.

Threatening universality; Imposing new restrictions on Universal Service Obligations (USOs)

One of the most important and long-standing roles of governments has been to ensure that all citizens in all regions of a country have access to certain services, at an acceptable quality and an affordable price. Traditionally, this goal of universality — of providing services universally — has been achieved either through governments providing the services directly or by governments making sure that arms-length service providers meet government-mandated delivery requirements. These requirements, commonly known as Universal Service Obligations, or USOs, have become increasingly prevalent as governments themselves withdraw from service delivery in favour of privatization and commercialization. In these countries, USOs are one of the primary means by which governments retain control over the delivery of essential services to their citizens.

The European Commission defines the concept in the following terms:

> "Universal service, within an environment of open and competitive … markets, is defined as the minimum set of services of specified quality to which all users and consumers have access in the light of specific national conditions, as an affordable price."[32]

It is sometimes suggested that the TRP could serve as a model for GATS negotiations on postal services, in part

because it would help meet citizens' requirements for universal postal services.[33] A close examination of the relevant provisions, however, reveals that, *far from facilitating universality in postal services, "pro-competitive" re-regulation would in fact undermine governments' ability to maintain effective Universal Service Obligations.*

The Reference Paper's two-prong transparency test

(i) core principles

As noted in Chapter 2, the Reference Paper states that a Member government retains broad rights "to define the kind of universal service obligation it wishes to maintain."[34] It should be noted that this permissive provision merely re-confirms the pre-existing right of Members to define the kind of universal service obligations that they would like. It merely allows a Member to *define* the kind of USO that it *wishes* to maintain; it does not in fact permit Members to establish or maintain USOs in the manner they see is the most effective.

The Reference Paper contains a number of provisions that constrain universal service obligations. Specifically, in order not to fall into the category of prohibited "anti-competitive practices,"[35] USOs must meet a two-pronged test. To satisfy the first of the two tests, Members must ensure that Universal Service Obligations are "administered" in a manner that is at once

- "transparent,"
- "non-discriminatory," and
- "competitively neutral."

These provisions are closely associated with what are becoming known as the three core principles of trade and

competition policy that are under active discussion at the WTO, particularly following the Doha Ministerial Declaration that mandated intensive work on these issues as part of the new round of WTO negotiations.[36] These core principles are now characterized as:

- "transparency,"
- "non-discrimination," and
- "procedural fairness."[37]

While a rigorous examination of each of these criteria is beyond the scope of this paper, even a brief investigation of the seemingly most innocuous of them — transparency — reveals that satisfying these provisions could have important ramifications for Canada Post.[38]

The OECD Secretariat produced a paper on these issues that apparently served as the basis for a September 2002 meeting of the Working Group on the Interaction between Trade and Competition Policy.[39] That paper states:[40]

> "The core principle of transparency in the multilateral trading system encompasses two broad obligations: (i) to publish, or at least make publicly available, all relevant laws, regulations, and decisions; and (ii) to notify various forms of governmental action to the WTO Secretariat and WTO Members. Transparency is important in this context for various reasons. It provides vital information to market participants about the conditions under which commercial transactions can take place, and it facilitates monitoring of compliance with WTO law."

For their part, the European Community has highlighted transparency as

> "a fundamental principle both for the multilateral trading system and for competition authorities seeking to develop and establish a 'competition culture'."[41]

The United States has noted that

> "transparency is necessary to preserve trade liberalization and to ensure that regulatory regimes do not become barriers to trade and investment."[42]

Few people would question the importance of the role of openness in promoting greater government accountability to citizens in particular and, more broadly, of democratic governance. Not surprisingly, proponents of injecting so-called transparency provisions into the WTO frequently expound on just these types of benefits and a range of others.[43] What remains contentious, however, is the degree to which these provisions can result — directly or indirectly — in the pursuit, and "locking-in," of domestic regulatory policy that citizens might reject if the matter were put to them clearly and directly.

Would Canadian citizens favour "prior notification," that is, guaranteeing powerful foreign companies the ability to influence Canadian postal policy that is designed to serve the needs of Canadians, before it is even introduced?[44]

Would Canadians favour forcing their government to take into account, give consideration to, or otherwise respond to every objection to prospective postal legislation that is lodged by foreign postal interests seeking entry into the Canadian market?[45]

Would Canadians favour a system whereby the onus would be placed on the Canadian government to justify denying foreign companies access to the Canadian postal system?[46]

And finally, would Canadians favour transferring control over these and related issues from their elected representatives to WTO dispute settlement panels?[47]

These questions have not been put to Canadians. But one thing is clear: WTO-enforced transparency provisions would privilege foreign corporate interests.[48] Such interests already have the right to be heard and to comment on domestic policy in Canada. Granting them special and exclusive rights, over and above those available to Canadians, would distort the democratic policy-making process and disadvantage Canadian citizens.

(ii) necessity test

The second of the Reference Paper's two tests on transparency is more onerous than the administrative transparency provisions just considered. Governments instituting USOs must be able to prove that they are not "more burdensome than necessary for the kind of universal service defined by the Member." In other words, all domestic regulatory measures involving universal service obligations must pass a stiff, WTO-sanctioned necessity test.

The imposition of necessity tests would have a profound impact on governments' ability to regulate in the public interest. Necessity tests are one of most controversial elements of the GATS. They are designed particularly to target non-discriminatory regulations, that is, regulations that treat domestic and foreign services and providers evenhandedly.[49]

It is difficult to avoid the conclusion that a Reference Paper-style test of necessity, requiring USOs in postal services to be "no more burdensome than necessary," would establish foreign companies' preferred option for mounting concerted attacks against universal service delivery in Canada, and could ultimately be its "poison pill." It is, after all, almost always possible to conceive of a regulatory option that is "less burdensome" than those generally favoured by governments because they may be cheaper, easier to administer, socially preferable, or politically more sustainable.

The recent history of USOs under the Reference Paper and the GATS has already raised concerns. As the Trans-Atlantic Consumer Dialogue has pointed out in a recent discussion paper on trade in services, firms in the troubled telecommunications sector have complained to governments that they are having trouble meeting universal access obligations, including — of particular relevance to the postal sector — providing service to remote areas.[50] More specifically, the TACD publication notes that Reference Paper provisions were used to challenge Canada's program requiring long-distance carriers to subsidize local phone service in remote areas. In response to a complaint from AT & T, then-United States Trade Representative Charlene Barshefsky asserted that Canada's program needed to be administered "in a manner that is more transparent, non-discriminatory, and competitively neutral."[51]

In considering the potential impact of a WTO-sanctioned necessity test on Universal Service Obligations in postal services, it is instructive to review the types of USO measures that Reference Paper proponents advocate. This exercise reveals that there is likely to be considerable interest in, and scope for, GATS challenges being brought

against a range of government requirements for universality.

The U.S. Coalition of Service Industries (CSI) is clear about its prescriptions. In its 1997 statement on the Reference Paper,[52] the CSI stipulates its position on USOs:

- "Only essential features, such as basic . . . service" should be included in the definition of universal service.[53]
- "The obligation to build facilities for the provision of universal service should apply only to the major supplier providing local service . . ."[54]
- "[A]ny universal service subsidy should cover only the shortfall between what the user can afford to pay and the cost to provide the basic level of service."[55]
- "Only users who cannot afford the basic level of . . . service should receive subsidies. These narrowly-targeted subsidies for low-income users should be: (1) based on clearly defined individual economic means tests; (2) given to the individual user's supplier of choice as competitive service options develop . . ."[56]
- "The cost of universal service should be cost-based and allow for a reasonable return on investment."[57]
- "Subsidy funds should be managed at the national level by a neutral third party . . . [that would] direct payments from the pool to the user's supplier of choice. Alternatively, in some instances, vouchers could be provided to eligible users for their own use in the purchase of services."[58]

CSI members could be expected to put pressure on their home governments to use a Reference Paper necessity test to challenge foreign USOs that did not conform to their very narrow vision of universality.

Significantly, in describing the Reference Paper provisions on USOs, other GATS proponents have raised questions about its potential impact. For example, the World Bank's GATS enthusiast, Aaditya Mattoo, indicates that achieving the "desirable social objective" of "ensuring universal service" in an economically efficient manner "is a major challenge for national policy makers." He rightly notes that governments have frequently relied on public monopolies to pursue USOs, either through cross-subsidization across different segments of the market, or through transfers from the government.[59] However, he points out that "the current handicap of universal service obligations can in principle also be imposed on new entrants, through, for example, making these a condition of new entrants' licenses." Mattoo argues that "recourse to fiscal instruments has proved more successful than direct regulation." He then calls particular attention to vouchers as an instrument for universality:

> "A third instrument [for ensuring universal service] is to fund the consumer rather than the provider. . . Governments have experimented with various forms of vouchers, from education to energy services. This last instrument has a least three advantages: first in can be targeted more directly at those who need the service and cannot afford it; secondly, it avoids the distortions that arise from artificially low pricing of services to ensure access; and finally, it is an instrument that does not discriminate in any way between providers."

The emphasis that these prominent GATS proponents place on vouchers in the specific context of USOs and the Reference Paper raise the spectre that vouchers — an op-

tion that governments frequently avoid for a range of sound social and political reasons — could be one of the few types of measures that would be assured a good chance of passing a Reference Paper necessity test.[60]

Canadians currently have access to universal postal services by means of Canada Post, their public Crown corporation, which was established in part specifically to achieve that purpose and which is accountable to the Government of Canada. The concept of Universal Service Obligations as defined in the Reference Paper would apply to postal services in Canada only if Canada Post were privatized or commercialized. For example, prohibiting cross-subsidization between urban and remote regions of the country, requiring the "competitively neutral" administration of USOs, and requiring USOs to be "no more burdensome than necessary" — all "pro-competitive" requirements — fly in the face of the current activities of Canada Post. Moreover, the "pro-competitive" requirement that universal services are administered on a "non-discriminatory" (i.e., national treatment) basis could be achieved only if Canada Post were no longer the exclusive supplier of basic postal services in Canada.

In the event, however, that Canada Post's role were severely curtailed, the imposition of Reference Paper provisions would place important new constraints on Universal Service Obligations in postal services in Canada. It would compel Canada and all other GATS Members to define precisely the objectives by which their USOs would subsequently be judged in WTO disputes. It would also set rigorous criteria for the administration and implementation of these requirements that were binding and subject to WTO oversight and sanction. In particular, the imposition of a necessity test could threaten a wide range of

measures, including cross-subsidization, that Canada and many other governments use to achieve universality in postal services. A necessity test would also perversely place the onus for proving that universality measures were "no more burdensome than necessary" on the Members seeking to ensure equitable universal postal service for their citizens rather than on foreign service providers seeking merely to gain access to the national postal market.

Finally, by agreeing to impose this type of necessity test in postal services, governments would give up much of their role in defining the critical concepts, and balancing the competing interests, that are involved — largely abandoning these sensitive tasks to unelected international dispute panelists. In short, *"pro-competitive" restrictions on Universal Service Obligations are at odds with Canadian citizens' chosen public policy direction: the exclusive use of Canada Post, their public Crown corporation, to provide universality in basic postal services throughout the nation.*

4.2 Lessons for the future

4.2.1 Implications for international postal regulation through the Universal Postal Union (UPU)

Applying "pro-competitive" re-regulation to postal services would have grave consequences for the multilateral regulation of postal services. These impacts would almost certainly extend beyond those that have already been acknowledged by the Universal Postal Union, the specialized United Nations agency responsible for regulating international postal services.

The MFN problem

After the GATS was signed in 1994, international postal officials became concerned about the possible inconsistency between GATS Most-Favoured Nation (MFN) obligations and the long-standing multilateral rules that regulate international postal services under the UPU.[61] Two particular problems were identified. Firstly, developing countries pay lower fees — known as "terminal dues" — to developed countries that process and deliver inbound international mail. Secondly, UPU rules prevent these preferential rates from being abused by commercial "re-mailers" who transport mail in bulk from one country to be posted in another having lower rates. Both arrangements probably violated the GATS MFN provisions. Both of these rules were intended to staunch the loss of revenues to national postal administrations in developed countries, while preserving the lower postal rates afforded to mail from *bona fide* residents of poorer countries. Since almost all member government failed to take the one-time opportunity to lodge MFN exceptions that could have insulated these arrangements from GATS challenge,[62] and since it is now too late to do so,[63] the UPU is apparently adjusting its regime to conform to GATS rules.

When UPU representatives became aware of GATS provisions, they began a detailed examination of the potential conflicts between the UPU and the GATS. In his 1999 report to the UPU Convention, Secretary-General Leavey described relations between the WTO and the UPU and reviewed possible incompatibilities between the two regulatory regimes. His report, which is based on communications between the organizations and on legal analysis conducted for the UPU,[64] does not deal with detailed regulations,[65] but instead focuses on the broader

UPU Acts that might conflict with the GATS. The report considers possible conflicts between the GATS and three articles of the Universal Postal Convention concerning the posting abroad of letter-post items (also known as remailing), terminal dues, and the issue of postage stamps. In each case, the Director-General's report adopts optimistic conclusions. For example, he asserts that:

- While "A-B-A remailing do not appear to be restricted by the GATS … A-B-C remailing may cause more problems;"[66]
- "The present provisions [concerning "Terminal Dues"] do not seem to cause any significant problems in relation to the GATS;"[67] and
- The issuance, only by postal administrations, of postage stamps "should not cause any problems [under the GATS]."

Despite these assertions, the Director-General also acknowledges that, with respect to terminal dues, "developing countries are, to some extent, given preferential treatment" and that "it has to be admitted that, if these advantages took on sizeable dimensions, they might easily cause some problems within the framework of the application of the MFN principle."[68] Also, "[b]ilateral agreements [for the settlement of terminal dues accounts] containing provisions more favourable than those of the Convention could cause a problem in relation to the principle of most favoured nation contained in the GATS."[69]

It is, perhaps, understandable that the Director-General should seek to put the best possible light on the potential conflicts between the two regulatory regimes, especially since, in the event of a conflict, the binding rules of the more recent WTO regime, which are backed up by

the threat of trade sanctions, will likely prevail. Perhaps to balance his optimistic assertions, the Director-General concludes on a more ominous note. In discussing "options open to Member countries", he notes:

> "If, despite efforts to avoid conflict, there is any incompatibility between the Acts of the UPU produced by the Beijing Congress and the Acts of the WTO, governments will have to choose which one of the treaties to comply with."[70]

The essential point is that there are indeed apparent conflicts between UPU and GATS provisions. The legal analysis subsequently prepared for the UPU identifies the conflict between the GATS MFN and the UPU terminal dues provisions, citing other investigators' conclusion that the "preferential treatment that . . . the UPU Convention grants to developing countries . . . is another violation of the MFN principle and of WTO law."[71] The UPU analysis does suggest that it is "conceivable" that terminal dues arrangements "could be" defended on the grounds that they are based on objective criteria.[72] But this hope may be misplaced since the GATS non-discrimination rules clearly apply to cases of *de facto* as well as formal discrimination.[73]

Examining another avenue through which developing countries could obtain relief from GATS rules, the UPU analysis considers the WTO's "Decision on Measures in Favor of Least Developed Countries," but concludes that "[t]hese provisions do not explicitly create exceptions to MFN in favor of least developed countries."[74] Even the prospect for developing countries to exploit certain transitional mechanisms in the terminal dues system — and so avoid exposure to MFN challenges — is rejected. "As a

transitional measure," the report notes, "the UPU terminal dues system may be defensible as a flexible, supportive device to bring least-developed countries into MFN compliance."[75] But, the report adds, "[i]n view of the fairly clear language of Article II [MFN], . . . the argument may have more appeal in a political than a legal context"[76] In any event, such a device would only delay, and not avoid, the requirement for developing countries to comply with the GATS MFN provision. Even an unofficial agreement by Members not to pursue MFN challenges in this area would "not provide legal certainty" and may not be agreed to by WTO Members.[77]

David Hartridge, former Director of the WTO's Trade in Services Division, responded to developing countries' concerns about the application of the GATS MFN provision by stating:

> "Members of the UPU who are also WTO Members may need to ensure that the terminal dues system would entail no discriminatory measures on their part . . ."[78]
>
> "WTO Members have an obligation to ensure that monopoly and exclusive suppliers of postal services do not behave in a manner that is discriminatory, i.e., inconsistent with MFN treatment . . . This would apply with respect to any of the practices of such suppliers, including their terminal dues arrangements."[79]
>
> "[I]t is not the case that [Article IV or XIX] . . . or any other provision of the GATS permit preferential treatment for or among developing countries

> in a manner that is inconsistent with the MFN obligation."[80]

What lessons can be drawn from the UPU's experience with the GATS? As previously noted:

> "The GATS unconditional MFN obligations pose a clear threat to the long-standing international regime that has successfully regulated international mail."[81]

The GATS MFN obligation will almost certainly result in the UPU terminal dues system being overturned or overhauled, to the detriment of many developing countries.

But there is far more to the GATS than its MFN rules. The treaty's National Treatment, Market Access, Monopoly ,and Domestic Regulation provisions, together with classification issues, all pose threats to the activities of the UPU and postal service systems around the world. These issues are beyond the scope of this book. Instead, we will focus briefly on some of the implication of adopting a "pro-competitive" regime for postal services in the GATS.

The UPU and "pro-competitive" re-regulation

The adverse impact of the GATS MFN constraints on UPU activities would pale in comparison with the implications of a telecom-style Reference Paper in postal services.

A "pro-competitive" regulatory approach adopted by WTO members would affect virtually all of the contentious issues relating to the UPU that have arisen in recent years. Not only would Members' own postal systems be

affected, as we have seen, but these rules would also impinge directly on the Member-determined activities of UPU, many of which are at odds with "pro-competitive" rules.

Over the last decade, transnational courier companies and others have exerted intense pressure on the UPU to change its focus and activities. According to one postal observer, the UPU has been forced to respond to this external pressure since at least 1979.[82] Partly in response to such pressure, the UPU recently formed the Postal Development Action Group (PDAG) to assist Posts to convert into what the UPU calls "competitive, customer-oriented businesses," starting with a four-year work-plan.[83] [84]

UPU Members and others may disagree about the advisability or adequacy of this initiative and other recent examples of UPU "reform". While these types of actions are clearly influenced by powerful external — even global — forces, it cannot be disputed that they are being undertaken by UPU Members themselves rather than being formally imposed upon them. Under a "pro-competitive" regime, that would change. UPU Members could still regulate international postal services. The UPU would still exist in name. But all measures Members took with respect to the UPU would have to conform to the strict provisions of a Reference Paper, which would be backed up by WTO dispute settlement procedures and threat of trade sanctions. In effect, in a short time this important United Nations organization would be drawn into the WTO orbit, to function according to its rules that are designed primarily to facilitate international business.

How would forcing the UPU to adapt to GATS rules affect its activities? A Reference Paper approach would

be an ideal vehicle for implementing the regulatory changes that international couriers have been pressing for. The following is a representative list of regulatory changes proposed by the influential International Express Carriers Conference (IECC)[85] and/or the Air Courier Conference of America, (ACCA):[86]

- **Separate regulatory and commercial functions** "The UPU should completely separate regulatory and commercial functions. Regulatory activities should be open to public participation; membership in the regulatory council should be limited to governmental officials who are not associated with national postal administrations . . ."[87]

- **Separate express and postal markets; restrict public monopoly to postal services** "The UPU should . . . give official, worldwide recognition to the legal approach . . . that . . . distinguishes between express and postal services and limits traditional postal monopoly laws to the latter."[88]

- **Adopt market-based pricing, including for terminal dues** "The UPU should . . . [require] international postage to cover long-term marginal costs and, in developed countries, a reasonable share of institutional costs."[89]

  "Assistance for developing countries . . . should be more carefully targeted. Aid should be independent of traffic flows. he definition of 'developing country' should be reviewed to ensure that aid is focused on those countries that are most in need or using such aid most efficiently."[90]

- **Eliminate differential treatment based on legal standing, and for customs** "The UPU should adopt a principle of equal legal treatment for all operators, public and private," particularly with respect to customs treatment, transport law and taxation.[91]
  "Customs laws comprise the single greatest impediment to the growth of modern international delivery services."[92]
- **Eliminate restrictions on re-mail** "The UPU should delete Article 25 [that] . . . authorizes each postal administration to refuse to forward or deliver mail that is posted in a country other than the country in which the mailer resides" [remailing].[93]
  "'Freedom of transit' could embrace . . . an obligation for each Member country to provide transit services where necessary . . . and to permit any international operator to make its own arrangements for the transit of documents and parcels without undue interference."[94]
- **Alter focus to facilitate international commerce** "The system of public and private delivery services — not merely delivery services offered by public postal operators — is today vital to the economic welfare of every modern economy and to the growth of the global economy generally. or this reason, it is appropriate for a new convention to facilitate the operation of such services by means of simplification and standardization of regulatory practices which impede their development."[95]
  "Focus on . . . [a] customer-defined market . . . further implies that the guiding spirit motivating provisions of the new convention must be the need to de-

velop a 'level playing field' for all operators" [public or private].[96]

"In a new convention — in a market of global delivery services — the cornerstone should be a formal right of establishment for *international* delivery services. That is, an international delivery service should have a legal right to open an office in any Member country and provide for collection and delivery of international (not domestic) documents and parcels."[97]

All of these recommendations reflect a "pro-competitive" approach. Placing specific constraints on public postal service providers that benefit private operators; guaranteeing private couriers unimpeded access to the international postal network; separating regulators and service providers; ensuring cost-based pricing; eliminating cross-subsidization; eliminating regulatory distinctions between public and private operators — all of these features of the courier lobby effort against the UPU are key elements of "pro-competitive" re-regulation described above.[98]

The private courier sector has actively promoted the extension of Telecom Reference Paper-style rules to the postal sector. For example, in its GATS 2000 position paper, the European Express Organization advocated binding GATS rules for postal and express delivery services that would:

"ensure equal application of all laws to all providers, prohibit unfair cross-subsidies; prevent the abuse of market power by the universal service provider; [and] require the establishment of national regulatory authorities."[99]

Similarly, the Air Courier Conference of America has proposed an extensive list of "pro-competitive" principles in the sector for adoption at the WTO.[100] So, too, has Post Europe, proposing "a collection of general principles on the regulation of the sector, inspired by the [EU] Postal Directive [97/67/EC], such as the independence of the regulator in relation to the companies of the sector regulated, non-discrimination, definition of the universal service obligation, etc."[101]

If "pro-competitive" re-regulation were ever adopted in postal services, it would mean the subordination of the UPU to the WTO. The result would be the same no matter how this form of re-regulation was introduced — whether sectorally, through adoption of a Reference Paper for postal services, or horizontally, applying to all service sectors as a result of negotiations under GATS Article VI:4. Alternatively, re-regulation could be achieved through WTO negotiations on investment or competition policy. "*Pro-competitive" re-regulation would seize much of the regulatory authority now vested in the Universal Postal Union, and bestow it upon the World Trade Organization.*

In practical terms, the most immediate casualty would be those developing countries that benefit greatly from a variety of UPU policies designed to address their pressing needs. The immediate beneficiaries of re-regulation would be international private courier companies. They would finally have obtained, through the secretive process of WTO negotiations, almost everything they have desired but long failed to attain through national legislative and regulatory processes or through the established United Nations postal service regulator, the UPU. Their gain would come chiefly at the expense of public postal providers around the world.

4.2.2 Implications of "pro-competitive" re-regulation in other service sectors

"Pro-competitive" re-regulation has been proposed or advocated for a wide range of service sectors, not just for postal services. It is thus important to begin to explore the implications this could have in those other sectors.

"Pro-competitive" re-regulation would apply very broadly

What sectors could be affected? As noted in Section 3.2.2, a "pro-competitive" regulatory approaches have been suggested not just for postal services and express delivery services, but also for energy services, transportation services, distribution services, water and other environmental services, insurance and financial services, and computer, advertising and communications and broadcasting services. Ultimately, no service sector may be fully immune from the application of "pro-competitive" restrictions on government regulation. The list of candidates ranges from accounting services to agriculture services; corrections services to customs services; electricity services to education services; ferry services to food inspection; library services to liquor distribution. *In principle, "pro-competitive" re-regulation could be applied to most service sectors and most government functions.*[102] In addition, "pro-competitive re-regulation" could affect virtually all *types* of services.

Furthermore, in any sector where it was adopted, a pro-competitive regulatory approach would apply to all the various ways in which services are supplied, such as across borders through the Internet or by direct foreign investment.[103] "Pro-competitive" restrictions would also apply, as does the GATS itself, to all kinds of actions taken by governments that "affect" trade in services. This would

include any government measure — whether a "law, regulation, rule, procedure, decision, administrative action, or any other form" of government action[104] — taken by all levels of governments: federal, First Nation, provincial, state, regional, and local.[105] [106] "Pro-competitive" restrictions would also apply to all forms of legal entities involved in service delivery, whether these are public or private, not-for-profit agencies, for-profit companies, or co-operatives.

The GATS "governmental authority" exclusion

The near universal coverage of the GATS is critical to an understanding of the likely impact of "pro-competitive" re-regulation. The GATS' all-inclusive framework already binds Member governments to certain rules, including MFN, that apply across all sectors — even where no specific commitments have been made. Similarly, the full application of a "pro-competitive" regime in any sector or group of sectors would be limited only by the GATS exclusion for "services provided in the exercise of governmental authority." However, *the GATS "governmental authority" exclusion is unlikely to provide substantive protection for governments' regulatory authority under a "pro-competitive" regulatory regimen.*[107]

Article I:3 of the agreement states:

"For the purposes of this Agreement . . .

(b) 'services' includes any service in any sector except services supplied in the exercise of governmental authority;

(c) 'a service supplied in the exercise of governmental authority' means any service which is supplied neither *on a commercial basis,* nor *in competi-*

tion with one or more service suppliers." (emphases added)

If this exclusion had left individual governments to define its scope, it may have provided broad protection against the application of "pro-competitive" rules in critical areas. But the exclusion is much narrower that it may appear. Firstly, in order for a service to be excluded, both criteria must apply. That is, a service must be supplied on a non-commercial basis and its delivery must not be in competition with another service supplier. As a result, all services that are in competition with another, *and* all services provided on a commercial basis, would be subject to "pro-competitive" rules. In addition, however, while the precise scope of this exclusion is not defined in the GATS text and so remains unclear, the ordinary meaning of its terms point to a very narrow exclusion.[108]

Taken together, these elements indicate that the GATS "governmental authority" exclusion is very narrow and, in the event of a dispute involving "pro-competitive" regulation, is almost certain to be interpreted restrictively by a WTO dispute tribunal. In fact, the exclusion is so narrow that it is difficult to conceive of what, if any, protection it would afford to regulatory measures that were allegedly anti-competitive. Even though it does not provide an effective shield against challenges to government policies[109], this GATS clause is used by advocates of the agreement to counter charges that the GATS intrudes deeply into governments' legitimate authority.[110]

Impact: transforming government regulation of vital services

"Pro-competitive" re-regulation would have significant effects in any service sector where it was applied.

For each Member government, and in each service sector involved, "pro-competitive" re-regulation under the GATS would transform the basis of government regulation. Instead of addressing such criteria as social or geographical equity, or political feasibility, governments at all levels would be obliged to satisfy all of the "pro-competitive" criteria specified in any applicable Reference Paper. In other words, the sensitive domestic task of balancing often-competing interests through the democratic process would be subordinated to a binding, overriding requirement to satisfy international rules designed to facilitate international business.

This would amount to a radical shift in the ground rules under which governments operate — a shift that would be locked in by GATS treaty commitments. Under threat of trade sanction, governments would be compelled to ensure that all existing laws, procedures and practices — and all *future* government measures — met "pro-competitive" criteria, which in any dispute would be defined by WTO trade tribunals. Market-oriented changes would be entrenched wherever they occurred. Subsequent rounds of GATS re-negotiations would further chip away at governmental regulatory measures if "pro-competitive" criteria are tightened. In turn, the changes brought about by such radical re-regulation would establish the new basis for service liberalization being negotiated in other bilateral and multilateral treaties. The ability of democratically-elected governments to respond to the complex set of their citizens' express wishes and needs would be severely curtailed.

These general impacts of "pro-competitive" re-regulation would be matched by specific effects. As the above analysis of the postal sector indicates, a "pro-competitive"

Reference Paper would place onerous constraints on public enterprises and government regulation of public services in any sector to which it applied. A Reference Paper approach would:

- place constraints on existing public enterprises and services, and block the formation of new public enterprises;
- increase pressure on governments to commercialize and privatize essential public enterprises and services, and "lock it in" wherever it occurs;
- prohibit cross-subsidization to ensure equitable supplies of essential services; and
- impose a one-dimensional, strictly commercial view of government regulation.

The following hypothetical examples illustrate the wide range of issues that could be expected to arise in the event "pro-competitive" GATS rules were implemented in any of the service sectors in question.

Supply of residential drinking water

Having recently privatized aspects of a city's water distribution system, a developing country faces complaints from international water corporations that the universal service obligation to continue to serve customers who cannot afford increased prices is "more burdensome than necessary."

Supply of domestic electricity

An established provincial public electrical company and a non-profit rural electrical co-operative pool their expenses within a shared area and restrict access to their respective grids to maximize accountability to the public

and financial returns to the company and the local co-operative. A major foreign supplier seeking increased market share uses "pro-competitive" rules to demand access to the "interconnected network," and at a low price that it contends is "cost-based."

Supply of health care services

A foreign private, for-profit health care corporation that operates primarily in selected urban areas in a developing country refuses to accept the government's new licensing requirement that such companies also provide similar services to residents in poorer or more remote areas. The company argues that this requirement is "discriminatory," not "competitively neutral," and is "more burdensome than necessary" to achieve the kind of universal service defined by the government.

Another GATS member, having a public health insurance system, allows some for-profit private hospitals to provide certain insured services. The parent corporations demand greater "transparency" to ensure that the government is not "cross-subsidizing" health care services or being discriminatory in the allocation of operating room theatres and other jointly-used "scarce resources."

Supply of education services

A GATS Member proposes curriculum changes to instill a greater appreciation among youth for their cultural heritage, and solicits comments from the public — complying with Reference Paper transparency provisions. Sensing the potential for regional competition in curriculum development and delivery, a foreign corporation spares no expense in successfully lobbying government

representatives to adopt its cheaper, generic e-commerce version instead.

Another country faces a GATS Reference Paper challenge from an international commercial education provider on the basis that the country's school licensing provisions are not overseen by an independent regulator and are unjustifiably more onerous than international standards. The corporation also asserts that the requirement for union membership for teachers as a condition of professional certification is, under newly agreed GATS restrictions on Domestic Regulation, "more burdensome than necessary."

Provision of broadcasting services

A foreign broadcaster seeking entry into a new market complains that the country's regional content requirements effectively limit its access to the public network and so are discriminatory. It also complains that the existing regulator that oversees the national restrictions on tobacco and alcohol advertising directed towards young people is not fully independent of the dominant domestic broadcaster.

Many other issues, in other sectors, affecting vital aspects of democratic governance, could be expected to arise in whatever service sector "pro-competitive" rules were implemented. The hypothetical examples considered above may be overly conservative; they only reflect the rules contained in the existing Telecommunications Reference Paper. In that Paper, as noted above, a "necessity test" applies only to governments' Universal Service Obligations and does not extend more broadly to other telecom regulatory measures. However, as we have seen, there is already pressure to toughen up the Telecommu-

nications Reference Paper itself, and tougher versions of it would probably be used in its application to other sectors. In particular, "pro-competitive" re-regulation in other service sectors could entail a "necessity test" that applied not just to USOs, but horizontally, to all regulatory measures in the particular sectors in question. The likelihood of this warrants a brief examination of the implications of a broadly-applied necessity test.

Beyond privatization: a GATS "necessity test" would impose a one-dimensional view of regulation

There is an underlying conflict between a "pro-competitive" test of "necessity" and many of the key roles of government in modern societies — even where privatization and commercialization are prevalent.

So far, we have mainly emphasized the conflicts between the Reference Paper approach to regulation and a variety of important values inherent in responsible government regulation. While the impact of "pro-competitive" re-regulation is closely associated with privatization and commercialization, it is important to recognize that its impacts extend more broadly to encompass government regulation generally. Even those governments pursuing privatization and commercialization would have to contend with the potential for "pro-competitive" rules curtailing government regulation in liberalized sectors.

A recent United Nations Report of the High Commissioner on Human Rights and Liberalization of Trade in Services[111] draws attention to the role regulation plays in services affecting citizens' basic human rights:

> "Human rights law does not place obligations on States to be the sole provider of essential services; however, States must guarantee the availability, ac-

> cessibility, acceptability, and adaptability of essential services, including their supply, especially to the poor, vulnerable, and marginalized."
>
> "[T]he High Commissioner emphasizes that States, in spite of their diminishing role in service supply, should not rely solely on market forces to resolve problems concerning human welfare."[112]

The application of "pro-competitive" principles would represent not simply a preponderant reliance on market forces; it would actually privilege the rights of foreign private providers by giving them legally binding rights backed up by trade sanctions.

There is a rich literature concerning government regulation and its role in meeting diverse and often conflicting objectives.[113] While most of the myriad issues involved are beyond the scope of this book, several points bear directly on this analysis.

Firstly, there are many conflicting values associated with what are traditionally seen as public services (or, as they have recently become known in Europe, "Services of General Interest"). Among the competing values are ensuring service *quality* and ensuring service *affordability*. One of the most fundamental roles of public authorities is to mediate and resolve tensions between competing values. As Colin Scott, of the London School of Economics and Political Science Law Department, notes:

> "The definition, adjustment and reconciliation of public service values are political tasks *par excellence*."[114]

Secondly, there are many forms of regulatory regimes through which governments seek to control the public sector in the various interests of its citizens. In the European context, Scott classifies these types of regulatory regime into seven distinct types: hierarchical models, competition models, community-based models, and four other types that are hybrids between the first three. He notes:

> "As the EC Member States move from a welfare state/provider model to a regulatory state model for governance of public services, it is clear that there is a wide range of institutional design choices and that there are rich examples of innovation."[115]

He emphasizes the need for "structural coupling" – that is, aligning the regulatory regime with the regulated domain. However, given the history of diversity:

> "[i]t would be surprising if [EC] Member States found it appropriate to converge upon any one model for any particular sector .. ."[116]

What is particularly troubling about a test of "necessity," backed up by threat of WTO trade sanctions, is that it would constitute just such a convergence on a single model — and, at that, a simplistic model that undermines key values that many governments pursue.[117]

The risk: subordinating democratic government to the WTO

How would a "necessity" test undermine legitimate, democratic rule-making?

As Sinclair[118] has noted, the purpose of a necessity test, which originally developed as a WTO "escape hatch" to allow governments to save otherwise inconsistent measures, has been reversed. Under "pro-competitive" rules,

it is now designed to capture "governments' routine and non-discriminatory exercise of their regulatory authority." It would provide corporate interests that already wield enormous influence with a ready-made opportunity to frustrate regulatory initiatives. They could be expected to initiate numerous GATS complaints against regulatory measures merely on the grounds that they are "more burdensome than necessary." Sinclair states:

> "There is almost always, in the abstract, a less commercially restrictive alternative to a particular policy choice. Democratic policy making, especially where there is tension between commercial interests and broader public or community interests, usually results in compromises. These policy compromises are frequently complex. To grant a distant and secretive panel the ability to second-guess and unravel the decisions and compromises of elected legislators, regulators, courts, stakeholders and citizens is a serious diminution of democratic accountability."[119]

In a discussion paper prepared for TACD, Gould cites numerous examples where a test of "necessity," implemented through negotiations on GATS Domestic Regulation provisions, could affect public interest regulation in such diverse areas as

- licensing requirements for nursing homes,
- conditions of licenses for utility providers,
- mandated universal access to health services,
- restrictions on the advertising of prescription drugs,
- prohibitions on broadcast advertising directed at children, and

- many environmental regulations regarding pesticide spraying, toxic waste disposal, pipeline construction, and services related to mining and agriculture.[120]

In his review of WTO "necessity" tests, Tufts University International Law Professor Joel Trachtman draws particular attention to the unsettling notion, based on a recent WTO Appellate Body report, that WTO panels may even begin to second-guess legislators on the importance of the *values* underlying regulation in relation to trade impacts. He refers to the Appellate Body's 2000 ruling in the Korea Beef case, in which the Body states:

> "[D]etermination of whether a measure, which is not 'indispensable,' may nevertheless be 'necessary' . . . involves in every case a process of weighing and balancing a series of factors which prominently include[:]
>
> - the contribution made by the compliance measure to the enforcement of the law or regulation at issue,
> - *the importance of the common interests or values protected by that law or regulation,* and
> - the accompanying impact of the law or regulation on imports or exports."
>
> (emphasis and bulleting added).[121]

As Trachtman puts it, the Appellate Body's statement, which "will be breathtaking to some[,] . . . constitutes a significant shift toward a greater role of the Appellate Body in weighing regulatory values against trade values. [Moreover, it] appears to be intended to speak . . . to all necessity testing, including that under . . . the GATS."[122]

Under a GATS "pro-competitive" regime incorporating a broad "necessity" test, governments at all levels would be obliged to take on several daunting responsibilities.

Firstly, they would have to specify, precisely, the regulatory objectives they wish to achieve through regulation. This would constitute the descriptive "umbrella" under which every disputed aspect of existing and future government measures must be sheltered. As difficult as this prospect seems for national governments, it would be impracticable for municipal, regional, state, provincial, territorial, and First Nations governments – with far fewer resources at their disposal — to accomplish such a task within their respective jurisdictions.

Secondly, in the event of a challenge to a set of regulations, governments would have to prove to the satisfaction of a dispute panel that each of the measures involved is demonstrably "necessary" and the "least burdensome possible" to achieve the described objective.[123] As previously noted, there are almost always approaches that would in principle be less burdensome than the complex trade-offs achieved through democratic rule-making. Thus, this requirement could be characterized as compelling governments either to prove a negative, or adopt a less "burdensome" measure their citizens have, through their elected representatives, already decided they do not want.

Finally, governments would be expected to alter disputed regulations that failed to meet the trade panel's particular interpretation of the "necessity" test in question — upon threat of punitive trade sanctions.[124]

Under a "pro-competitive" necessity test, the ability of governments at all levels to exercise their legitimate

authority would be severely curtailed by a provision seemingly designed almost exclusively to benefit international corporate interests. In practical terms, "pro-competitive" re-regulation would preclude much public interest regulation and place its proponents permanently on the defensive. In broader terms, key aspects of the democratic exercise of government itself would be subordinated to WTO rules and dispute settlement process.

4.2.3 The broader significance of "pro-competitive" re-regulation in WTO and other treaty negotiations

> "*The negotiations on WTO services should be used to achieve a contestable, competitive market in every services sector in every WTO Member country.*"
>
> — Global Services Network, 1999[125]

This ambitious aim, expressed by a newly-formed corporate coalition established to lobby for increased liberalization of world services trade, set the context for the Services 2000 negotiations. Recognizing that services liberalization was unlikely to be achieved quickly, the GATS contains an overarching commitment requiring continuous rounds of re-negotiation. As a result, the current GATS negotiations can be seen as one in a succession of rounds to expand the treaty's reach.

Robert Vastine of the U.S. Coalition of Services Industry described the goal of the current GATS negotiations as: "to achieve maximum liberalization in all modes of supply across the widest possible range of services, as soon as possible."[126] The GATS has only recently begun to receive the kind of public scrutiny that such a radical agenda deserves. The treaty is far more than a mecha-

nism for "locking in" domestic policy changes adopted through the traditional legislative process. The WTO Secretariat and other GATS proponents have stated that the GATS and similar treaties can themselves *promote* privatization and other domestic regulatory changes.[127] As the WTO Secretariat noted in a background paper on services:

> "The national monopolies which have dominated the [telecommunications] industry in almost all countries are now facing competition and in many countries are being privatized. This process was reflected in, *and stimulated by,* the commitments made in the GATS negotiations." (emphasis added)

In March 2003, the United States Trade Representative told the U.S. Senate Committee on Finance that:

> "Trade agreements bolster property rights by . . . supporting privatization . . . Free trade agreements attack . . . state monopolies and oligarchies . . . Trade agreements drive market reforms in sectors ranging from e-commerce to farming."[128]

More specifically, as noted earlier in this report, prominent GATS proponents have trumpeted the "significant role" of "multilateral disciplines on domestic regulations . . . in promoting and consolidating domestic regulatory reform."[129]

Not only does the treaty indirectly pressure governments to privatize and commercialize key public services, but it is also being used as a method — even by governmental negotiators professing the contrary — to directly pressure other governments to privatize their public serv-

ices.[130] This is most obvious from the leaked EU requests which aspire to export the European Commission's hotly debated partial privatization of postal services to the rest of the world.[131] Critically, however, increased privatization is not the only outcome of applying GATS provisions. *Even in previously-privatized or commercialized sectors,* the treaty restricts governments' regulatory options. It exposes domestic regulatory matters, long seen as the legitimate purview solely of elected governments, to WTO oversight and binding dispute settlement.

"Pro-competitive" re-regulation, along the lines of the Telecommunications Reference Paper, is obviously not the only international instrument spurring domestic regulatory change. Nor, indeed, is the GATS itself. For many years critics have condemned tough regulatory constraints that the World Bank and the International Monetary Fund have imposed on developing countries. Critics have also drawn attention to numerous bilateral and multilateral treaties, including NAFTA and the EC Treaty, that also promote and consolidate neoliberal domestic regulatory change. Notably, in several WTO agreements,[132] various permutations of the "necessity" test affect governments' regulatory ability. However, the GATS and the "pro-competitive" regime that is modelled in its Telecommunications Reference Paper will be important instruments for driving domestic regulatory change favouring the interests of transnational service corporations.

In what negotiating venue might "pro-competitive" proposals next emerge?

It is too early to ascertain what effect the acrimonious breakdown of the current round of WTO negotiations in Cancun, Mexico, will have on the future of the Doha round

in general, and "pro-competitive" re-regulation in particular. Until the situation becomes clearer, it should be recognized that there are four main routes through which "pro-competitive" rules could be pursued. These approaches are not mutually exclusive; each could be pursued independently, or simultaneously, as follows:

- **Establish "pro-competitive" regulatory constraints sector by sector**, using the Telecommunications Reference Paper as a model;
- **Negotiate regulatory constraints that apply "horizontally" to all service sectors**, which can be accomplished through negotiations on GATS Article VI:4;
- **Enshrine "pro-competitive" regulatory constraints in bilateral treaties and regional treaties**, such as the proposed Free Trade Area of the Americas (FTAA) treaty;
- **Pursue "pro-competitive" regulatory constraints in planned WTO negotiations on competition and investment**, according to the Ministerial Declaration that was adopted at the start of the Doha round of negotiations.

At the September 2003 WTO Ministerial meeting held in Cancun, negotiations broke down over investment and competition policy. This suggests that "pro-competitive" regulatory constraints are unlikely to be considered in this particular WTO arena in the near future. It is not clear which of the other three options the EC, the U.S., and other developed countries might now pursue. Much will depend on whether fundamental differences that caused the breakdown in Cancun are addressed. However, perceptions about the potential gains and losses resulting from international "pro-competitive" rules will also be a key

factor in determining whether WTO members advance these rules in trade treaty negotiations. Members will be assessing the relative importance of the potential gains for international business on the one hand, and the disruption that "pro-competitive" rules could cause to long-established domestic regulatory regimes, on the other.

Reviewing the U.S. experience of "pro-competitive" re-regulation in telecommunications

Perceptions of potential "winners and losers" under "pro-competitive" rules will be affected by the recent unsettling experience in the United States involving telecommunications, the flagship of "pro-competitive" re-regulation. This example provides some valuable clues on how the U.S. and, by extension, other developed and developing countries, may approach the application of such rules in future service sectors negotiations.

An exhaustive examination of telecommunications re-regulation in the United States is beyond the scope of this report. It is evident, however, that the model is being questioned within corporate circles. Although incumbent telecommunications companies were among those who originally promoted pro-competitive regulations, they are now asking for these rules to be rolled back. In an engaging paper entitled *Telecom undone—a cautionary tale*, Peter W. Huber, a senior fellow of the Manhattan Institute and lawyer for several Bell telecommunications companies, articulates the complaints of companies such as Bell about the re-regulation of the U.S. telecommunications industry.[133]

Huber explains that, under the U.S. Telecommunications Act of 1996,

> "[e]xisting (or 'incumbent') local companies would be required to interconnect, on reasonable terms, with their upstart competitors, and also to provide non-discriminatory access to such things as 411 data-bases. In addition — crucially, as it would emerge — incumbent local phone companies were required to 'unbundle' parts of their existing networks and lease them to competitors at wholesale rates. This would allow the competitors to get a foothold without having to replicate every last wire and switch from the get-go. In other words, unbundling would lower the costs of competitive entry."

However, this "unbundling" was "unlike anything that had occurred before." It amounted to "a wholesale unbundling of a wide variety of 'network elements'. . . [that] were to be leased not to consumers but to competitors." Huber states that the new rules "unbundled absolutely everything." He adds:

> "Astonishingly, the new rules also required incumbents to offer all the unbundled elements as a single re-bundled package — at a new wholesale rate. New entrants, in other words, would not have to build a single new item or a single new inch of network themselves if they did not care to. They could compete simply by placing a new label on the facilities that they had requisitioned, customer by customer, from the old phone company.
>
> "No less astonishing were the prices of [these] unbundled elements. They were tied not to what it had actually cost to build things, but to models that predicted what it would cost a perfectly effi-

> cient competitor to rebuild them from scratch, using the latest technology at the latest price. In an industry characterized by rapid innovation and inexorably falling prices, the models thus effectively wrote off about half the book value of the existing investment . . .
>
> "In the meantime, the one thing that was really growing was the regulatory enterprise. Regulating networks inch by unbundled inch required much finer oversight than regulating them by the bundled mile; setting prices by means of computer models required much keener judgment than setting prices on the basis of historical costs. In short order, the FCC added over 10,000 new pages to the Federal Register."

Huber quotes Michael Powell, Federal Communications Commission (FCC) Chairman (and son of the Secretary of State), giving his assessment of the state of the United States telecommunications companies at the end of 2002:

> "'Few are prospering. Few are growing. Few are spending. Few are investing. The status quo is certain death.'"

According to Huber,

> "[A]ll this quick and painless competition required a stupefyingly complex labyrinth of rules. Such rules regulated the price of everything, not once but twice; they suppressed competition rather than promoting it; and they enriched no one but legions of lawyers . . . plus accountants, economists, and still more legions of expert witnesses for hire.[134]

> "Implementing [the 1996] rules has been a logistical nightmare all around.
>
> "Climbing out of this quagmire will be far more difficult than sliding into it."

Whither "pro-competitive" re-regulation?

What conclusions can be drawn from this critique of the U.S. telecom experience?[135]

Firstly, it is possible that U.S. policy-makers would be unwilling to replicate the telecom re-regulation experience, whether in other service sectors or "horizontally" across all service sectors. From the broad perspective of United States' national interest, the telecom experience makes the proposal to adopt "pro-competitive" rules "across-the-board" in all service sectors now seem ill-advised.

Support for radical re-regulation has doubtless declined in the United States in the last few years, an effect that would reduce the likelihood of an extension of the pro-competitive telecom model "across-the-board" to all sectors. However, in the energy sector, even after the experience in California's re-regulated electricity sector and of the blackout in the eastern United States, the current U.S. administration continues to pursue broad re-regulation. The U.S. is still advocating that "pro-competitive" rules be applied internationally in this sector.

Secondly, many U.S.-based transnational corporations are likely to increase their support for "pro-competitive" rules if the rules are applied selectively to meet their interests. The kind of re-regulation that occurred in the U.S. telecommunications sector, important aspects of which are reflected in the Reference Paper, can be likened to an enforced "stripping of assets" from established companies,

including public providers, in favour of new market entrants. Whatever the motivation and in whatever sector, *imposing "pro-competitive" regulation in sectors having established public monopolies (or recently-privatized former-monopolies) would effectively transfer assets from the public to the relevant market's new corporate players.* As the U.S. telecom experience has shown, such re-regulation is also likely to leave the domestic regulatory regime in chaos.

If these rules were applied only in specific sectors, or only in treaties with particular countries, domestic political fallout could be reduced, and enterprising corporations based in the U.S., the EC, and other developed countries could extract enormous profits. They could gain guaranteed access to publicly-financed foreign infrastructure and service markets, while foreign suppliers would have little prospect of gaining footholds in developed countries' services markets.

Citizens in developed countries would, however, face adverse effects from "pro-competitive" re-regulation, as noted above in this analysis. These effects would be felt even in sectors and regions where this may not generally be anticipated. In Europe, for example, where "pro-competitive" re-regulation appears to complement European Commission priorities for further integration, a GATS "pro-competitive" regime would mean regulatory decisions involving contentious issues would be made by individuals less accountable than is now the case. In contrast to the European Court of Justice, WTO dispute panels would rule on the basis of WTO, not European, rules, with no deference to European jurisprudence or to national laws and priorities.

"Pro-competitive" rules would also provide privatization proponents a powerful new tool for challenging

existing public services and suppliers. In continuous rounds of re-negotiation and endless WTO scrutiny, governments' regulatory authority at all levels would face wave upon wave of demands and potential GATS challenges. This never-ending pressure would apply to government measures in the sectors in question — ensuring that they meet new "pro-competitive" strictures, including the requirement that they are "no more burdensome [to international business] than necessary."

For most developing countries and their citizens, global or sectoral "pro-competitive" re-regulation would entail few benefits and potentially serious losses. Such an initiative could attract foreign direct investment, but this would come at a high cost. Much of the investment would be volatile, mobilized to maximize short-term financial return rather than to serve the long-term interests of local citizens. Foreign investment on "pro-competitive" terms would also entail loss of local control and accountability and, as previously noted, restrict future governments' regulatory options. The result would be a proverbial "playing field" that is tilted against developed countries' priorities; developed country negotiators would seek to apply such rules only in sectors where their home-based corporations have distinct competitive advantages. New, binding "pro-competitive" rules would also place almost insurmountable barriers in the way of new public enterprises in developing countries. It would render the establishment of such public enterprises in the public interest an even more distant, seemingly unattainable dream.

In assessing the prospects for "pro-competitive" re-regulation in international trade treaties, it is important to recall that there have now been two major setbacks to WTO negotiations. As noted elsewhere, "in Seattle in late

1999, deep-seated public opposition was a critical factor in turning back plans by the WTO to launch a new 'millennium round' of comprehensive negotiations."[136] A subsequent attempt to launch a new negotiating round was achieved, but remained controversial and was more limited than proponents desired. Dramatically, in Cancun last August, 2003 fundamental disagreements among WTO trade ministers caused them to break off their crucial meeting, stalling the current round of trade talks.

These developments demonstrate that the support from powerful global corporate interests for particular types of trade treaty provisions does not guarantee that those provisions will be adopted. It is even conceivable that Cancun may signal that the tide of public opinion is beginning to turn against the current model of international trade treaties. If this is true, opposition to "pro-competitive" re-regulation in international treaties can be expected to grow, and the spread of the doctrine reversed in favour of regulatory approaches rooted in the public interest.

Chapter 4 Endnotes

[1] The chief objects of Canada Post are set out in the Canada Post Corporation Act as follows:
Canada Post Corporation Act
CHAPTER C-10
5. (1) The objects of the Corporation are
(a) to establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada;
(b) to manufacture and provide such products and to provide such services as are, in the opinion of the Corporation, necessary or incidental to the postal service provided by the Corporation; and
(c) to provide to or on behalf of departments and agencies of, and corporations owned, controlled or operated by, the Government of Canada or any provincial, regional or municipal government in Canada or to any person services that, in the opinion of the Corporation, are capable of being conveniently provided in the course of carrying out the other objects of the Corporation.
Idem
(2) While maintaining basic customary postal service, the Corporation, in carrying out its objects, shall have regard to
(a) the desirability of improving and extending its products and services in the light of developments in the field of communications;
(b) the need to conduct its operations on a self-sustaining financial basis while providing a standard of service that will meet the needs of the people of Canada and that is similar with respect to communities of the same size;
(c) the need to conduct its operations in such manner as will best provide for the security of mail;
(d) the desirability of utilizing the human resources of the Corporation in a manner that will both attain the objects of the Corporation and ensure the commitment and dedication of its employees to the attainment of those objects; and

(e) the need to maintain a corporate identity program approved by the Governor in Council that reflects the role of the Corporation as an institution of the Government of Canada.

The CPC Act is available online at: http://laws.justice.gc.ca/en/c-10/text.html .

[2] Note that Canada Post's mandate is broader than generally recognized, embracing a range of other public interest activities. In addition to the task of supplying postal services, Canada Post is also mandated to "provide [other] products and … services as are … necessary or incidental to the postal service" (Canada Post Corporation Act, Section 5.(1)(b), see previous footnote) and to provide to or on behalf of government departments or agencies "services that … are capable of being conveniently provided in the course of carrying out the other objects of the Corporation" (Section 5.(1)(c)).
This public service mandate extends even further, however. In carrying out its function, Canada Post is required to "have regard to" a range of other criteria, including

- Operating on a "self-sustaining financial basis;"
- "[p]roviding a standard of service that will [a] meet the needs of the people of Canada and [b] that is similar with respect to communities of the same size;"
- conducting its operations "in such a manner as will provide for the security of mail;"
- "utilizing … human resources" in a manner that will "ensure the commitment and dedication of its employees" to Canada Post's objectives;
- maintaining a "corporate identity program … that reflects the role of … an institution of the Government of Canada." (Section 5(2))

[3] Sinclair, Scott, The GATS and Canadian Postal Services, op. cit., p. 15.

[4] Ibid., p. 14.

[5] It is important to understand that the TRP is not merely a set of voluntary guidelines. The document represents legally binding rules which, if a country violates them, can land it in the WTO dock.

The US is aggressively enforcing compliance with the Reference Paper's provisions, and has raised complaints with a number of countries. The US has pursued Mexico through

the stages of the WTO dispute system, and a ruling by a WTO panel will be made in December 2003. The US complaint against Mexico cites the reference paper's requirement to argue that Mexican company Telmex has to provide interconnection to foreign telecom companies "at any technically feasible point in the network; under non-discriminatory terms, conditions, and rates; and on terms, conditions and cost-oriented rates that are transparent, reasonable, and sufficiently 'unbundled' so that suppliers need not pay for network components or facilities they do not require." The US faults Mexico in particular for not forcing Telmex to unbundle the fees it charges foreign companies so that they end up paying for "network components and facilities that US basic telecom suppliers do not need". This argument points out how pro-competitive rules could leave domestic service providers with the full burden of developing and maintaining a country's infrastructure.

(Mexico-Measures Affecting Telecommunications Services, Request for the Establishment of a Panel by the United States, 18 February 2002, WT/DS204/3)

The U.S. also has an ongoing process for monitoring other countries' compliance with telecommunications agreements.

(Cf. Request for Comment Concerning Compliance with Telecommunications Trade Agreements, 67 Fed. Reg. 71229, Notice of request for public comment and reply, November 29, 2002. Noted in Federal Register Alert, Harmonization Alert, September-December 2002, p. 11, circulated by Mary Bottari, Public Citizen.)

6 Sinclair, Scott, GATS, op. cit., p. 65, italics added.

7 Rolf Adlung, WTO Secretariat, Trade in Services Division, The Political Economy of Adjusting to Services Trade Liberalization: Developed and Developing Country Perspectives. Adlung cites Frieder Roessler as first using the metaphor, in: The Scope, Limits and Function of the GATT Legal System, World Economy, Vol. 8, no. 3, 1985, p. 287. Sinclair, 2000 (op. cit., p. 65, endnote 87) notes that "Mr. Adlung invokes this metaphor as capturing "the *domestic* policy rationale" for arguing in favour of multilateral liberalization (emphasis in original).

8 Hartridge, David, What the General Agreement on Trade in Services (GATS) Can Do, in *Opening markets for Banking World-*

wide: The WTO General Agreement on Trade in Services, Proceedings of a conference organized by British Invisibles and Clifford Chance that was held in London, U.K, on 8 January 1997. The proceedings were originally available at http://www.1999.cliffordchance.com/library/publications/wto/section3.html but no longer appear on that site.

[9] Lang, Jeffrey and Lake, Charles D., II, The First Five Years of the WTO: General Agreement on Trade in Serivces, Law & Policy in International Business, Spring 2000, Vol. 31. Cited in Sinclair and Grieshaber-Otto, 2002, p. 72.

[10] As one example, former WTO services director David Hartridge freely acknowledges that for members like China and Russia that are newly acceding to the WTO, their accession "will produce schedules evolving real commitments and disciplines and *there will be permanent pressure to liberalize further*."
Hartridge, 1997 op. cit., italics added.

[11] A brief review of the recently-leaked EC GATS requests to other countries reveals a key way in which this pressure can be expected in practice. The EC is specifically targeting for further liberalization many of the GATS limitations for policies that members' specifically aimed to protect by listing them in their respective schedules.

[12] Note that commitments can't be less than what is already decided in other treaties. Where obligations overlap, it is the more restrictive that will apply.

[13] Ibid.

[14] World Trade Organization, "Services: GATS," Training Package, December 15, 1998, p. 57.

[15] World Trade Organization, Council for Trade in Services, Recent Developments in Services Trade; Overview and Assessment, Background Note by the Secretariat, S/C/W/94, 9 February 1999, para. 23. Cited in Gould, 2003.

[16] Article VIII(1) states:

"Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

Article II(1) states:

"With respect to any measure covered by the Agreement, each Members shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country"

(Canada and many other countries opted not to protect postal services from the only reasonably-broad exception to this important MFN rule. These countries failed to list any measures affecting postal services in their annex of exemptions, which is allowed for in Article II(2) and would have provided time-limited protection against this otherwise sweeping coverage.)

17 The WTO Secretariat reported in late 1998 that "[s]ixty-eight, or 9 out of 10 … governments [initially making telecom commitments] committed on some or all aspects of the Reference Paper." Also, "all industrialized countries committed either fully or partially on all basic [telecom] services, there being no cases of 'unbound' entries listed for any of the services or modes of supply." (Telecommunications Services, Background Note by the Secretariat, S/C/W/74, op. cit., paras. 20, 22.

18 Please see Section 2.2 (3) for references.

19 See Section 2.2 (7) for references.

20 National Transportation Agency, National Transportation Agency Of Canada Decision On The Proposed Acquisition Of Purolator By Canada Post, Press release and decision., Sept. 29, 1993, p. 7.

21 Competition Bureau, News Release And Backgrounder, November 26, 1993.

22 TD Securities Inc, op. cit., April, 1997, p. 17. TD Securities also observed that "It was apparent that Canada Post and Purolator have an arms-length relationship with separate cost and revenue centres. Furthermore we found no evidence to suggest that CPC is funding Purolator's capital expenditures." (Ibid.)

23 Sinclair, op. cit, p. 26 and Campbell, Robert M., The Politics of Postal Transformation; Modernizing Postal Systems in the Electronic and Global World, McGill-Queen's University Press, Montreal & Kingston, London, Ithaca, 2002, p. 304.

24 Documents and other Information about the UPS NAFTA dispute can be obtained on the website of the Government of

Canada's Department of Foreign Affairs and International Trade, http://www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp.

[25] The Canadian Union of Postal Workers (CUPW) and the Council of Canadians (CoC) petitioned the NAFTA tribunal considering the UPS-Canada dispute involving Canada Post. These petitioners requested "standing as parties" or, in the alternative, "the right to intervene in such proceedings in accordance with the principles of fundamental justice."

(The Canadian Union of Postal Workers and of the Council of Canadians, Petition to the Arbitral Panel in the NAFTA dispute between United Parcel Service of America, Inc. and the Government of Canada. November 8, 2000 (available at http://www.dfait-maeci.gc.ca/tna-nac/documents/08Nov00.pdf ; accessed October 1, 2003).

On October 17, 2001, the NAFTA tribunal rejected these petitions, declaring simply that the tribunal "has the power to accept written *amicus* briefs" and that it "will consider them at the merits stage of the arbitration … exercising its discretion" in doing so. (http://www.dfait-maeci.gc.ca/tna-nac/documents/IntVent_oct.pdf ; accessed October 1, 2003). The Tribunal confirmed this ruling on 1 August 2003, and set tight limits on the form and subject matter it would accept in such *amici* submissions.

(http://www.dfait-maeci.gc.ca/tna-nac/documents/AMICICURIAE.pdf ; accessed October 1, 2003).

[26] World Trade Organization, Document MTN.GNS/W/120 dated 10 July 1991.

[27] Although the use of W/120 was not mandatory, most WTO members (with the notable exception of the United States) adopted W/120 and the provisional CPC as the basis for their GATS scheduling.

[28] As the WTO secretariat, rather obliquely, observes, "[t]he distinction between these [items listed under courier services] and similar UNCPC items under postal services is that these are presumed to be services that can be provided by suppliers other than national postal administrations (WTO, op. cit., June 1998: p.2 n1.)."

[29] Reference Paper, Article 1.

[30] Promoting Competition in Postal Services, Committee on Competition Law and Policy, Directorate for Financial, Fis-

cal and Enterprise Affairs, OECD, DAFFE/CLP(99)22, 31 October 1999, p. 11.

31 Reference Paper, Article 5.

32 Services of General Interest in Europe, Communication from the Commission, Annexe II: Definition of Terms, COM/2000/0580 final.

33 Suggestions of this type have emerged obliquely at meetings between DFAIT officials and CUPW representatives, see Chapter 1, note 1. Observers sometimes neglect to point to another purported advantage that TRP-style USO provisions would achieve at the same time, namely, helping satisfy foreign commercial interests in the domestic postal and express delivery sectors.

34 Article 3.

35 Section 1.1 of the Reference Paper stipulates that "anti-competitive" practices are prohibited:

"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."

36 The WTO's Working Party on Domestic Regulation (WPDR) has focused much of its activities on the issues of transparency and necessity (see below). Since Doha, a significant amount of activity in these areas has been taken up by the Working Group on the Interaction between Trade and Competition Policy (WGTCP).

37 Recent consideration of these concepts can be found in:

Core Principles in a Trade and Competition Context, Working Group on the Interaction between Trade and Competition Policy, 6 February 2003, WT/WGTPC/W/221, and

Core Principles, Communication from the European Community and its Member States, Working Group on the Interaction between Trade and Competition Policy, 19 November 2002, WT/WGTCP/W/222.

It is unclear to what extent the concept of "competitively neutral" accords with "procedural fairness".

38 The transparency provisions of the Reference Paper are more explicit than those contained in GATS Article III and so are not likely to be seen to be "redundant" with that article, as suggested in a recent note by the WTO Secretariat. However, the Secretariat appears to be correct in highlighting the

significance of the non-discrimination and competitively neutral criteria—both of which warrant further attention:

"[The Reference Paper] reference to non-discrimination would appear to oblige governments to administer USOs in a manner consistent with both MFN and national treatment. Furthermore, its obligation to administer USOs in a 'competitively neutral' manner might be construed as being covered by the Article VI:1 requirement to be impartial…."

(Additional Commitments under Article XVIII of the GATS, Note by the Secretariat, Committee on Specific Commitments, 16 July 2002, S/CSC/W/34, para. 17.)

39 WT/WGTCP/W/221, op. cit..

40 "Transparency", page 1, para. 3.

41 WT/WGTCP/W/222; op. cit., para. 19.

42 Transparency in Domestic Regulation, Communication from the United States, Council for Trade in Services, Special Session, S/CSS/W/102, 13 July 2001, para. 2.

43 For example, the United States has asserted:

"In addition to enhancing commercial relations, regulatory transparency provides a citizentry with a better understanding of domestic policy objectives and thereby contributes to public confidence in government, providing support for domestic policy objectives and the rationale for trade liberalization. Transparent regulatory regimes can lead to benefits for both small and large economies, such as good governance, improving public confidence in, and legitimacy of the regulatory regime, and increasing investment while promoting trade in goods and services."

(Transparency in Domestic Regulation, Communication from the United States, Council for Trade in Services, Special Session, S/CSS/W/102, 13 July 2001, para. 1.)

Note that even in this passage, however, one of the purported benefits of transparency includes providing citizens "the rationale for trade liberalization".

For an uncritical examination of some of the various types of benefits that regulatory transparency can offer, see:

Ann M. Florine, Does the Invisible Hand Need a Transparent Glove? The Politics of Transparency, Paper prepared for the Annual World Bank Conference on Development Economics, Washington, D.C., April 28030, 1999, available at

http://www.worldbank.org/wbi/governance/pdf/florini.pdf ; accessed April 14, 2003.

[44] Cf. Section 2.2, item 4.

In its paper on Accounting Services, the United States has proposed that:

"when introducing regulations, rules, procedures and other administrative action of general applicability which significantly affect trade in accountancy services, Members shall provide opportunity for comment, and give consideration to such comments, before adoption."

Accounting Services, Communication from the United States, Council for Trade in Services, Special Session, S/CSS/W/20, 18 December 2000, p. 4, III Transparency. 6.

[45] In its paper on Financial Services, the United States has proposed that Members ensure "transparency in [the] development of regulations" by, in publishing new regulations or amendments, including "explanations which address major concerns raised and alternatives proposed in the comments received."

Similarly, in ensuring "transparency in applying regulations," Members should "[o]n request, and as appropriate, provide applicants information on reasons which could justify denial of authorization or license."

(Financial Services, Communication from the United States, Council for Trade in Services, Special Session, S/CSS/W/27, 18 December 2000, Attachment, Items I(b) and II(f).

[46] In its paper on disciplines on transparency in domestic regulation, the United States quotes approvingly of a Working Party description of the transparency provisions of the WTO's TBT Agreement:

"Members are required to take the comments of other Members into account before adopting the regulations or conformity assessment procedures and publishing them."

GATS Article VI:4: Possible Disciplines on Transparency in Domestic Regulation, Communication from the United States, Working Party on Domestic Regulation, S/WPDR/W/4, 3 May 2000, para. 6.

In a subsequent paper, the United States proposes transparency provisions that would stipulate that governments would have to justify denials of applications. These justifications would be subject to WTO oversight.

"If an application [for a license or qualification] is denied, regulators should provide a sufficient explanation justifying the action. Applicants should be given the opportunity to resubmit or amend their applications."

Transparency in Domestic Regulation, Communication from the United States, Council for Trade in Services, Special Session, S/CSS/W/102, 13 July 2001, para. 8.

47 In its paper on disciplines on transparency in domestic regulation, the United States suggests the importance it places on the adoption of these types of provisions:

"As a general consideration, the United States believes that Members should promote the widest possible application of transparency commitments in domestic regulation."

GATS Article VI:4: Possible Disciplines on Transparency in Domestic Regulation, Communication from the United States, Working Party on Domestic Regulation, S/WPDR/W/4, 3 May 2000, op. cit., para. 10.

48 The issues of transparency, non-discrimination and procedural fairness warrant more detailed examination. As an entry into these issues, in addition to the aforementioned articles, interested readers may wish to begin further work on transparency by consulting:

- Keiya Iida and Julia Nielson, Transparency in Domestic Regulation: Practices and Possibilities, OECD-World Bank Services Experts Meeting, Paris, 4-5 March 2002, available at http://www1.worldbank.org/wbiep/trade/pdfs/transparency.pdf.

  Interestingly, this paper considers the possibility and potential elements of a reference paper on transparency.

  Another papers of direct relevance is:

- Regulatory Issues and the Doha Development Agenda, An Explanatory Issues Paper prepared by Elisabeth Roderburg for the OECD Secretaritat, OECD Forum on Governance, 25 March 2003, available at http://www1oecd.org/ech/7-8dec/pdf/honeck.pdf.

49 As pointed out elsewhere, under the GATS, the logic of necessity tests has been turned on its head. Instead of their original purpose of protecting discriminatory measures from trade challenge, necessity tests have recently been transformed into a means of attacking non-discriminatory measures.

(Sinclair and Grieshaber-Otto, Facing the Facts, op. cit., p. 66.)

[50] TACD Background paper on Trade in Services, prepared by Ellen Gould, October 2002, p. 24. available at http://www.tacd.org/docs/?id=190 ; accessed March 1, 2003.

[51] While the TACD paper does not indicate that U.S. pressure was the sole reason for Canada's subsequent policy change, it notes that Canada revised its subsidy program after the U.S. intervention, and the USTR reported its concerns had been resolved. (Ibid., pp. 22-23)

[52] Coalition of Service Industries, Statement on the World Trade Organization Group on Basic Telecommunications Reference Paper, October 1997, op. cit..

[53] Ibid., 3. Universal Service, para. 3.

[54] Ibid., 3. Universal Service, para. 4.

[55] Ibid., 3. Universal Service, para. 5.

[56] Ibid., 3. Universal Service, para. 5.

[57] Ibid., 3. Universal Service, para. 7.

[58] Ibid., 3. Universal Service, para. 10.

[59] In relation to USOs in telecommunications, Roseman observes that

"Few developing countries can afford the luxury of subsidizing companies that bear universal service obligations, and the governmental sectors in these countries do not generally possess sufficiently large budgets to stimulate the rollout of telecom services and infrastructure with procurement contracts. Consequently, developing countries tend to rely on cross-subsidies from high-revenue to low-revenue routes, as well as privatization and licensing processes, to implement their universal service objectives."

Roseman, Daniel, Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects under the GATS, op. cit., para. 70.

[60] In this context, it is interesting to note that the oft-purported emphasis on economic efficiency in relation to the GATS nowhere incorporates the question of sustainability or political durability. In fact, imposing a necessity test would appear to drive governments towards vouchers and away from traditional policy options that have proved politically popular and sustainable in part because they are widely perceived to be equitable. Particularly in a democratic society, it seems axi-

omatic that a practical definition of "economic efficiency" should incorporate the notion of political sustainability.

61 The potential conflicts between the GATS and the activities of the UPU were highlighted in Sinclair, *The GATS and Canadian Postal Services,* op. cit. and Sinclair and Grieshaber-Otto, *Facing the Facts*—from both of which this introductory paragraph is drawn.

62 Only Turkey listed an MFN exemption in relation to postal services when the GATS came into force.

(Letter from David Hartridge, then-Director, Trade in Services Division to UPU Director-General Thomas E. Leavey, 4 May 1999, appended to the Secretary-General's report to the 22nd UPU Congress held in Beijing, 1999. UPU Congress Document 72.Add1.Annexe 1.

63 See GATS Article II and, in Article XXIX, the Annex on Article II Exemptions.

64 The most recent UPU summary of the legal issues involved is:

Alverno, Antony F., Impact on the Universal Postal Union (UPU) and its members of the World Trade Organization (WTO) and its General Agreement on Trade in Services (GATS), Annex 1 to circular letter, No 3600(A/B)1028, 29 January 2001. It is available online at http://www.upu.int/relations_with_WTO/impact_en.pdf ; were it was accessed Feb. 19, 2003).

65 The Director-General indicates that :

"This report deals only with the Acts of Congress [of the UPU], as the Detailed Regulations, which are at a lower level, can be easily amended by the POC [Postal Operations Council] in the event of conflict with the GATS."

(UPU Secretary-General's report, 1999, op. cit. para. 19)

Note that such amendments would be made specifically to conform to GATS rules.

66 UPU Secretary-General's report, 1999, op. cit., paras. 20, 21.

67 Ibid., para. 22.

68 Ibid., para. 23.

69 Ibid., para 24.

70 Ibid., para. 28.

71 Perrazzelli, Alessandra and Vergano, Paolo, R., 2000, Essay: Terminal Dues under the UPU Convention and the GATS: An Overview of the Rules and of Their Compatibility, 23

Fordham International L. J.. Cited in Alverno, 2001, op. cit., p. 20.

[72] Alverno, op. cit., p. 20. The source of this notion may have come from a letter from David Hartridge, then-Director of the WTO Trade in Services Division, dated 4 May 1999, to the Director-General Leavey. Hartridge states:

"Members of the UPU who are also WTO Members may need to ensure that the terminal dues system would entail no discriminatory measures on their part, and that differential charges, if any, would be based on **objective criteria**, such as the volume of mail, rather than on the national origin of the service or the supplier."

(Congres-Doc. 72.Add1.Annexe 1, emphasis added)

However, a defense of discriminatory differential rates is almost certain not to be saved by the use of otherwise "objective criteria". See note below.

[73] For example, Chile recently failed in its use of just this kind of defense in a WTO case involving the country's differential taxation of liquor (based on the "objective criteria" of alcohol content) for revenue, health and social purposes.

In 1997 the EC initiated a WTO complaint against Chile, arguing that its revised tax code had the effect or protecting its domestic alcohol industry by favouring the locally-produced pisco to the detriment of foreign spirits having high-alcohol content. Chile claimed that it was not discriminating against foreign imports but was instead basing differences in its tax rates on the objective criteria of alcohol content and product value rather than the subjective criteria of alcohol types. The panel eventually ruled against Chile, determining that the country's tax system was applied "so as to provide protection" to its domestic producers. In other words, notwithstanding the criteria involved, Chile's tax system had the effect of discriminating against foreign alcohol products. . (WTO, Chile: Taxes on Alcoholic Beverages – Report of the Panel, WT/DS87/R, 15 June 1999).

The potential implications of this case and other trade-related issues on public health are considered in Gould, Ellen and Schacter, Noel, 2002, Trade Liberalization and its Impacts on Alcohol Policy, *SAIS Review*, Vol. XXII, No. 1 (Winter-Spring), pp. 119-139.

[74] Alverno, 2001, op. cit., p. 22.

[75] Alverno, 2001, op. cit., p. 23.

[76] Ibid.

[77] Ibid.

[78] Letter from David Hartridge, then-Director of the WTO Trade in Services Division, dated 4 May 1999, to UPU Director-General Leavey, Congres-Doc. 72.Add1.Annexe 1, p. 1.
Mr. Hartridge's entire sentence on this subject may unfortunately have led some readers to the false inference that the use of "objective criteria" could protect otherwise discriminatory measures. Mr. Hartridge states:

"Members of the UPU who are also WTO Members may need to ensure that the terminal dues system would entail no discriminatory measures on their part, and that differential charges, if any, would be based on objective criteria, such as the volume of mail, rather than on the national origin of the service or the supplier."

A careful reading of the statement confirms that the essential requirement is the absence of discrimination. "Differential charges" do not violate the MFN provision when they are non-discriminatory and so would be allowed. Those differential charges that are based "on the national origin of the service or the supplier"—as is the case with terminal dues—are prohibited.

[79] Ibid., p. 2.

[80] Ibid., p. 4.

[81] Sinclair, op. cit., p. 25.

[82] See, for example, Cambell, James I., Jr., 2001, *The Rise of Global Delivery Services, A Case Study in International Regulatory Reform*, Overview: UPU Reform, Washington, D.C., JCampbell Press, p. 681-749.

[83] Reform and Postal development, UPU website, (http://www.upu.int/postal_dev_reform/en/resolution_c25_1999_en.pdf ; accessed Apr. 17, 2003).

[84] It should be noted that at its 1999 Beijing Congress, the UPU also highlighted the recognition of "the right to communicate … as a fundamental human right" and adopted the Beijing Postal Strategy authorizing the permanent bodies of the UPU to advance this right. (1999 Beijing Congress, Resolution C 103 and Doc 64, Cited in Campbell, op. cit., pp. 695-6.)

[85] International Express Carriers Conference, A Six-Point Plan for Reform of the Universal Postal Union, Private Operators-UPU Contact Committee meeting of Oct. 18, 1993. Reproduced in Campbell, op. cit., p. 699.

[86] Air Courier Conference of America, Petition for a Rulemaking to Develop a Statement of Policy of the United States Towards the Universal Postal Union, November 18, 1998, Submitted to the U.S. Department of State. Reproduced in Campbell, op. cit., p. 715.

[87] IECC, op. cit., point 1.

[88] Ibid., point 2.

[89] Ibid., point 3.

[90] International Express Carriers Conference, Submission of the International Express Carriers Conference to the High Level Group of the Universal Postal Union, Apr. 7, 2000, Part 6, Item H. Reproduced in Campbell, op. cit., p. 730-749.

[91] Ibid., point 4.

[92] IECC Submission to UPU High Level Group, 2000, op. cit., Item G.

[93] Ibid., point 5.

[94] IECC Submission to UPU High Level Group, 2000, op. cit., Item E.

[95] IECC Submission to UPU High Level Group, 2000, op. cit., Item G.

[96] IECC Submission to UPU High Level Group, 2000, op. cit., Item A.

[97] IECC Submission to UPU High Level Group, 2000, op. cit., Item B.

[98] See Section 2. Note that none of these statements draw particular attention to what would be one of the most powerful constraints on the UPU and its members—the GATS "necessity test".

[99] European Express Organization Position Paper Regarding the Inclusion of Postal and Express Delivery Services in GATS 2000, October 1999. Cited in Alverno, 2001, op. cit., p. 31.

[100] These rules would:

"prohibit a foreign government from determining unilaterally the basic conditions of express service to and from the United States (market entry, price regulation, operating restrictions, and extraordinary or discriminatory taxation); ensure that a foreign postal monopoly does not have an out-

right prohibition against the provision of international service by U.S. express delivery providers; prohibit profits derived from services provided by national postal authorities from subsidizing services that compete with foreign companies; prohibit taxation of private sector companies from subsidizing a national postal administration's services; ensure that [a] national postal administration's parcel and non-monopoly document services that compete directly with foreign companies would be subject to effective and impartial regulatory scrutiny to protect against illegitimate cross-subsidy; ensure that a postal administration's competitive service be subject to the same laws and regulations imposed on private companies; prohibit a foreign country from unilaterally selecting the U.S. express carrier that may service an international market with restricted entry; and prohibit discriminatory treatment of U.S. carriers."

Statement by the Air Courier Conference of America Regarding the World Trade Organization's Multilateral Negotiations, May 12, 1999. Cited in Alverno, 2001, op. cit., p. 32.

101 PostEurop, Press Release of European Postal Universal Service Providers on the Start of WTO Negotiation Round, November 26, 1999. Cited in Alverno, 2001, op. cit., p. 32.

102 "Pro-competitive" re-regulation would, in effect, set the bounds of accepted regulatory practice. In so doing, it would have an indirect but significant adverse impact on the exercise of critical executive and judicial functions at all levels of government.

103 As set out in Article I:2(a)-(d), these are: (mode 1) cross-border supply, (mode 2) consumption abroad, (mode 3) commercial presence, and (4) presence of natural persons.

104 Cf. GATS Article XXVIII(a)

105 Cf. Article I:3(a).

106 Even licensing requirements—including a requirement for union membership for purposes of collective bargaining—would be subject to WTO oversight and review under a "pro-competitive" regulatory regime.

The Transatlantic Consumer Dialogue recently drew attention to the significance of measures the WTO Secretariat reports GATS Members to have highlighted informally as examples of measures to be addressed by GATS Article VI:4 (Domestic Regulation) negotiations. (Trans Atlantic Con-

sumer Dialogue Background Paper on Trade in Services, op. cit., cf. pp. 9-16, Appendix B. (available at http://www.tacd.org/docs/?id=190 ; accessed March 4, 2003). This list of otherwise GATS-conforming measures was contributed by Members with a view that they be addressed in the VI:4 negotiations. Most if not all of the items on the list could also be construed as violating "pro-competitive" principles. The list contains the following entry, which, surprisingly, has to date elicited almost no public attention:

"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)….."

(The document continues by noting the further restriction that "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.")

Examples of Measures to be Addressed by Disciplines under GATS Article VI:4, Informal Note by the Secretariat, Second Revision, Working Party on Domestic Regulation, JOB(01)/62/Rev.2, 12 July 2002. (Reproduced as Appendix B in the TACD paper noted above.)

[107] Useful discussions of the GATS governmental authority exclusion can be found in:

- GATS and Public Service Systems: The GATS 'governmental authority' exclusion is narrower than it first appears, may undergo urgent review, discussion paper, Ministry of Employment and Investment, Government of British Columbia, Canada, April 2, 2001. This paper originally appeared at www.ei.gov.bc.ca/Trade&Export/FTAA-WTO/WTO/governmentalauth.htm and is now available at http://members.iinet.net.au/~jenks/GATS_BC2001.html
- Krajewski, Markus, Public Services and the Scope of the General Agreement on Trade in Services, research paper, Center for International Environmental Law (CIEL), May 2001. (available at http://www.xs4all.nl/~ceo/gatswatch/markus.html).
- Sinclair and Grieshaber-Otto, *Facing the Facts*, op. cit., pp. 17-25.

- Grieshaber-Otto, J. and Sanger, M., 2002, *Perilous Lessons, The Impact of the WTO Services Agreement (GATS) on Canada's Public Education System*, Canadian Centre for Policy Alternatives, pp. 24-29.

[108] The likelihood of a narrow meaning of the exclusion is bolstered both by an examination of relevant WTO documents and by European jurisprudence involving a "similar" exclusion contained in the EC treaty. See GATS and Public Service Systems, op. cit.

[109] Even the European Commission's Pascal Lamy does not argue the merits of the case that the exclusion is provides effective protection for public services. He side-steps the issue, seemingly advocate members employ other means to avoid GATS coverage:

"[w]here a member has any doubts about whether a sector, which in its view is involved with the provision of public services, is covered by the exemption of Article I:3 they always retain the possibility of not making any GATS commitments."

Pascal Lamy, Letter to Mrs. Carola Fischbach-Pyttel and Mr. Hans Engelberts, European Federation of Public Services Unions and Public Services International, April 14, 2003. circulated by email.

[110] In a widely-published opinion piece, then-Director-General Michael Moore baldly asserted that "GATS explicitly excludes services supplied by governments." This statement is clearly untrue; it is at odds with the GATS text. ("Liberalization? Don't reject it just yet," Mike Moore, *Guardian*, 26 February 2001. Cited in Facing the Facts, op. cit.).

[111] Liberalization of trade in services and human rights, Report of the High Commissioner, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fourth session, Economic and Social Council, United Nations, E/CN.4/Sub.2/2002/9, 25 June 2002, p. 4; para. 69.

[112] The report continues:

"While increasing investments from the local and overseas private sector can assist States in the provision of basic entitlements, the State has the responsibility of ensuring the delivery of services on a non-discriminatory basis, even where this might be unprofitable. Consequently, the High Com-

missioner encourages States to take action to ensure universal supply of essential services, including through the use of affirmative action to ensure provision of services to the poor, isolated and marginalized, taking into account national circumstances and capacities."

Interestingly, the report also emphasizes the importance, from a human rights context, of cross-subsidization, which the GATS and "pro-competitive" rules explicitly restrict:

"Although subsidies are tools of disputed value, they have been used successfully, in particular to protect domestic industry and services as well as to promote greater equality in service delivery. 'Cross-subsidization' … can be a means of reducing poverty, assisting the development of local infant service suppliers, increasing universal access to essential services and thus promoting human rights." (para. 60)

[113] The following references are relevant to many issues considered here:

- Regulatory Issues and the Doha Development Agenda, An explanatory Issues Paper, Global Forum on Governance, OECD, 25 March 2003 (Available online at http://www1.oecd.org/ech/7-8dec/pdf/honeck.pdf).
- "Core Principles" in a Trade and Competition Context, Joint Group on Trade and Competition, Directorate for Financial, Fiscal and Enterprise Affairs, Trade Directorate, OECD, COM/DAFFE/TD(2002)49/FINAL, 11 September 2002.
- An Analysis of Patterns in Trade-Relevant Regulatory Practices, Working Party of the Trade Committee, Trade Directorate, OECD, TD/FC/WP(2002)25/REV1, 11 September 2002.
- Productivity Commission 2001, Telecommunications Competition Regulation, Report No. 16, AusInfo, Canberra. (Available on the Productivity Commission website at www.pc.gov.au .
- Palast, Greg, Oppenheim, Jerrold and MacGregor, Theo, *Democracy and Regulation: How the Public Can Govern Essential Services*, Pluto Press, London and Virginia, 2003. (Information available at http://democracyandregulation.com/ ; Accessed Apr. 25, 2003).

[114] Scott, Colin, 2000, Services of General Interest in EC Law: Matching Values to Regulatory Technique in the Public and

Privatised Sectors, *European Law Journal*, Vol. 6, No. 4, December, pp. 310-325.

115 Ibid., p. 325.

116 Ibid..

117 Proponents are inclined to point out that the WTO restrictions do not *require* a single regulatory approach, and that countries would thus remain free to experiment. However, countries can experiment to only a limited degree; the regimes they design would have to be no more trade restrictive or burdensome than necessary.

118 Sinclair, Scott, 2000, GATS, op. cit., p. 78.

119 Ibid., p. 80.

120 Trans Atlantic Consumer Dialogue, 2003, op. cit., pp. 11-14.

121 WTO Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS/161,169/AB/R, para. 164, adopted 10 January 2001.

122 Trachtman, Joel P., Lessons for GATS Article VI from the SPS, TBT and GATT Treatment of Domestic Regulation, Fletcher School of Law and Diplomacy, Tufts University, 20 January 2002. (Available online, after clicking the 'download' button, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=298760 ; accessed Jan. 16, 2003.

123 Trachtman notes that the formulation contained in Article VI:4 "could be very interventionist." In this Article, government measures must be "no more burdensome than necessary" not to *achieve a specified regulatory goal*, but to "*ensure the quality of the service*." This formulation "could restrict not just the means to attain a given regulatory goal but even the types of regulatory goals that might be achieved…." In other words, it could preclude measures that are not related to the quality of the service but instead are designed to avoid externalization or other regulatory harm by the service provider. (Ibid., p. 18.)

If this analysis is correct, both the GATS Article VI:4 formulation and the formulation contained in the Telecommunications Reference Paper—which specifies that Universal Service Obligations must not be "more burdensome than necessary *for the kind of universal service defined by the Member*"—may be even more interventionist than generally recognized even among GATS critics. A future Reference Paper that used a similar formulation may therefore be even more destruc-

tive of governments' regulatory ability that suggested in the text, where the focus is on describing regulatory *objectives*.

[124] Note that only national governments, and not sub-national governments, would have the automatic right to be directly involved in these trade dispute procedures. Sub-national governments would therefore have to rely on their national governments to defend disputed sub-national measures.

[125] Global Services Network, Statement on WTO Negotiations on Services, November 1999, p. 1, (emphasis added).

[126] Statement of Robert Vastine, President, Coalition of Services Industries, Testimony before the Subcommittee on Trade of the House Committee on Ways and Means, US Congress, February 8, 2000.

[127] In its 1999 background note on recent developments in services trade, the WTO Secretariat highlights the importance of the GATS in promoting privatization in the telecommunications sector. The Secretariat states that

"External liberalization combined with internal deregulation and privatization in core infrastructural sectors [are] developments directly related to negotiations under the GATS."

Recent Developments in Services Trade: Overview and Assessment, Background Note by the Secretariat, Council for Trade in Services, S/C/W/94, 9 February 1999, p. 7.

As noted earlier in this paper, the World Bank's Aaditya Mattoo has emphasized the importance of the GATS in "promoting and consolidating domestic regulatory change":

"[T]here are likely to be benefits from strengthened multilateral disciplines on domestic regulations…. [T]he development of such disciplines can play a significant role in promoting and consolidating domestic regulatory reform. The telecommunications negotiations, which led to the early institution of independent regulators in many countries, provide an example of this possibility." (underlining added)

Mattoo also notes the utility of the GATS in overcoming domestic opposition to services liberalization:

"[F]or countries … who are open to reform but whose ability to implement reform is constrained by domestic opposition, multilateral negotiations can be useful."

Mattoo, Aaditya, 2000, Shaping Future Rules for Trade in Services: Lessons from the GATS, op. cit., pp. 10, 23.

The same point is made in Sauvé, Pierre and Mattoo, Aaditya, 2002, Domestic Regulation and Trade in Services, op. cit., pp. 3, 8.

128 Zoellick, Robert B., Statement of the U.S. Trade Representative before the Committee on Finance of the United States Senate, March 5, 2003.
(Available at http://www.insidetrade.com/secure/pdf4/wto2003_1145_3.pdf ; accessed Mar. 6, 2003.)

129 Mattoo and Sauvé, op. cit.

130 It has already been noted that Pascal Lamy asserted that the EC is neither "demanding" nor "provoking" privatization (cf. Chapter 3, footnote 107). However, according to initial GATS requests to Canada and other countries that were leaked and posted on the internet, the EC is in fact demanding the elimination of limitations for alcohol in Canada's GATS Distribution Services commitments. By requesting full Market Access and National Treatment commitments, the EC is requesting something that Canada could not accomplish with impunity without privatizing its public alcohol distribution monopolies.

131 Documents that were leaked and posted on the internet show that the EC, in its initial GATS requests to other countries, is requesting other countries make full Market Access and National Treatment commitments (in modes 1,2 and 3) for the following:

- Handling of addressed parcels and packages
- Handling of addressed press products
- Express delivery services …
- Handling of non-addressed items
- Document exchange.

In addition, the EC is requesting that other countries make at least some GATS National Treatment and Market Access commitments for

- Handling of addressed written communications on any kind of physical medium, including hybrid mail services [and] direct mail; and
- Handling of addressed written communication and addressed press products as registered or insured mail.

The leaked initial EC GATS requests to particular countries are available free online at http://www.polarisinstitute.org/gats/main.html . Select the

desired country and scroll to "Postal and courier services".

[132] In addition to the GATS, the WTO agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) measures contain permutations of 'necessity' tests.

[133] The paper is available free online at http://www.manhattan-institute.org/html/_comm-telecom.htm .

[134] Huber also notes that this process was presided over by Clinton-appointee Reed Hunt, "an old and trusted friend of Vice President Al Gore." According to Huber,

"Very soon after he left the FCC in 1997, [Hundt] was advising or on the boards of " a range of telecommunications companies—reportedly making "over $15 million on stock options received for his services."

Huber also notes that at least some new network competitors were "founded and run by lawyers, bankers, management consultants" and anti-trust litigators. "Such companies have brought to telecom the same talents that Enron brought to electricity. They build networks out of paper, and whatever actual money they invest is poured into complex software and computer systems developed and optimized for playing the regulatory game."

[135] The following points are not diminished by the fact that Huber's account is from the perspective of a lawyer who has been employed by companies among the most adversely affected by telecom re-regulation.

[136] Sinclair, Scott, 2000, op. cit., pp. 13-14.

Chapter 5
Conclusion: Return to Sender

Canada's public postal system is purposefully designed to meet an important array of social, political and economic needs of the nation and its citizens. *It is intended to provide high-quality, affordable postal and related services to all Canadians in all regions of this vast country by means of a government institution that is directly accountable to citizens' elected representatives*. To meet these needs, Canadians have created a network of postal facilities that span the entire country and that — especially in many rural areas and in the north — provide a notable presence of the Canadian government.

The postal system, which is financially self-sustaining, strives to meet other important public expectations that require substantial public investment. These include: maintaining postal rates that are the same throughout the country; maintaining acceptable frequency of collection, rapidity of delivery, and proximity of postal boxes and post offices; and maintaining high standards of security and confidentiality. In short, *Canada Post and Canada's postal system exist to serve the public interest of Canadians.*

The GATS stands in sharp contrast. *The GATS exists to serve private interests.* The treaty, which restricts the activities of governments but not private corporations, is, in the words of proponents, "first and foremost an instrument for the benefit of business."[1] GATS rules restrict governments' ability to take measures that might adversely affect the commercial opportunities available to foreign service providers. These restrictions are legally enforceable and backed up by powerful trade sanctions.

The fundamental characteristics of the existing postal system in Canada are at odds with certain GATS provisions, and with the GATS principles of "pro-competitive" re-regulation in particular.

With respect to general GATS provision, the CCPA (2002)[2] provides an extensive assessment of the threats that the existing treaty, and its ongoing re-negotiation, pose to Canada's postal system. The study recommends that a number of steps be taken to protect the current system from GATS exposure. Specifically, Canadian negotiators should be instructed to:

- oppose expanded coverage of postal and related services;
- oppose classification changes that would expand coverage;
- oppose the proposed restrictions on domestic regulation;
- prevent air cargo services from being included in the GATS; and
- critically examine any proposals to regulate e-commerce through the GATS.

The study stresses that it is important that deeper, structural flaws in the treaty also be addressed. It recommends, at a minimum, that

- GATS Article I:3 be amended to effectively exclude from the treaty postal and other mixed public-private, social service systems;
- GATS Article XVI (Market Access), which constrains governments' non-discriminatory exercise of regulatory authority, should be excised; and
- the provisional application of GATS Article VI (Domestic Regulation) should be eliminated, and negotiations to develop new restrictions on non-discriminatory domestic regulations should be terminated.

More broadly, rather than the current negotiations to expand the reach of the treaty, there should be a thorough assessment of its impact on public interest measures, and concrete proposals for fundamental changes to the treaty.

Regrettably, rather than pausing to conduct such an assessment of the consequences of the existing GATS, governments are currently engaged in negotiations to *extend* the treaty's reach, potentially through the application of so-called "pro-competitive" re-regulation in postal and other service sectors.

This book examines the potential implications of this "pro-competitive" approach, which is modelled on the GATS Telecommunications Reference Paper. It concludes that the application of such rules to postal services would conflict with the very basis of Canada's existing postal system. If the Canadian government were to apply these rules to the nation's postal system, it would knowingly be exposing the system to GATS rules and to steadily increasing international pressure for further — even complete — market liberalization. More specifically, the full application of "pro-competitive" rules would threaten or undermine key features of the Canadian postal system:

- the assurance of affordable service being provided to all Canadians in all regions in the country, at the same price and at a standard of service that is similar in communities of similar size;
- the maintenance of democratic accountability to Parliament on postal service issues;
- the existence of adequately paid employment in postal services in small communities throughout the nation;
- the maintenance of a vibrant physical presence of the Canadian government, especially in remote communities.

All of these elements of our postal service would be at risk under GATS "pro-competitive" re-regulation.

GATS "pro-competitive" re-regulation would also affect the activities of the Universal Postal Union (UPU), the specialized United Nations agency responsible for regulating international postal services. Such new rules would impinge upon many of the contentious global issues that have been deliberated at the UPU.

Adoption of a "pro-competitive" approach would:

- place specific constraints on public postal service providers to the benefit of private operators;
- ensure private couriers greater access to the international postal network;
- promote the oversight of public service providers by separate regulators; and
- facilitate cost-based pricing; eliminate prospects for cross-subsidization; and eliminate regulatory distinctions between public and private operators.

If "pro-competitive" re-regulation were ever adopted in postal services, it would subordinate the UPU to the WTO. Much of the regulatory authority now vested in the Universal Postal Union would be bestowed, instead, upon the World Trade Organization. The most immediate casualties would be those developing countries that benefit greatly from a variety of UPU policies designed to address their pressing needs. The direct beneficiaries of re-regulation would be international private courier companies. They would finally have obtained, through the closed process of WTO negotiations, almost everything they have desired but long failed to attain through open national legislative and regulatory processes or through the established United Nations postal service regulator,

the UPU. Their gain would come chiefly at the expense of public postal providers around the world.

If imposed in *other* service sectors, "pro-competitive" re-regulation would also have serious implications. For every country and in each service sector involved, the basis of public interest regulation would be transformed. Instead of addressing criteria such as social or geographical equity, and political feasibility, governments at all levels would be obliged to comply with "pro-competitive" rules. The sensitive domestic task of balancing often-competing interests through the democratic process would be distorted or superseded by binding international rules designed to facilitate international business. This approach would:

- place new constraints on existing public enterprises and services, and impede the formation of new public enterprises;
- increase pressure on governments to commercialize and privatize essential public enterprises and services, and "lock it in" wherever it occurs;
- prohibit cross-subsidization to ensure equitable supplies of essential services; and
- impose a one-dimensional, strictly commercial view of government regulation.

The application of a "pro-competitive" necessity test would itself have damaging effects. It would preclude much public interest regulation and place its proponents permanently on the defensive. Key aspects of the democratic exercise of government itself would be constrained by GATS rules and the WTO dispute settlement process.

Following the acrimonious breakdown of WTO negotiations at Cancun, Mexico, in mid-September, 2003, it

is difficult to ascertain the future of the Doha round of WTO negotiations in general and prospects for "pro-competitive" re-regulation in particular. However, the pursuit of "pro-competitive" rules through planned WTO negotiations on competition and investment is now unlikely for the foreseeable future. Prospects for "pro-competitive" rules to be applied "horizontally" to all service sectors, accomplished through GATS Article VI:4, also seem unlikely, but cannot be ruled out. *What seems most likely is that proponents will pursue the application of "pro-competitive" rules* ***sector-by-sector*** *through the built-in GATS negotiations (using the Telecommunications Reference Paper as a model) and* ***in bilateral and regional treaties,*** *such as the recently signed U.S.-Chile FTA or the proposed Free Trade Areas of the Americas (FTAA) treaty.*

In whatever sector or trade arrangement, imposing a "pro-competitive" regulatory regime in sectors having established public monopolies (or recently-privatized public enterprises) would effectively transfer assets from the public to the relevant market's new corporate players. The fact that "pro-competitive" re-regulation, and especially its "necessity test" component, remain under active discussion reinforces the view that the current generation of international trade treaties, including the GATS, continue to be shaped by the narrow commercial interests that conceived and guided their creation.

The GATS is fundamentally an illegitimate treaty. It may remain beyond redemption even after fundamental structural amendments. As noted elsewhere:[3]

> "If services are to be regulated multilaterally, the GATS should eventually be replaced by a far more balanced set of rules that value and support pub-

> lic interest regulation, universal health and social services, environmental protection, and other public and social goods — not just private, commercial interests. The focus of international rule-making should be shifted from measures that regulate only what governments do to measures that also regulate corporations. There is a pressing need to replicate the regulatory and redistributive functions of the nation-state at the international level. If the GATS cannot be radically reformed to better reflect the public interest, then it should be relentlessly criticized, strongly resisted, and eventually shunted aside to make way for more progressive multilateral rules."

As a first step towards more balanced rules on international trade, the GATS proposal for "pro-competitive" re-regulation in postal and other services should be rejected and stamped "RETURN TO SENDER."

Chapter 5 Endnotes

1 Towards GATS 2000, European Commission website on services, (accessed in December, 1999).
2 Sinclair, Scott, *The GATS and Canadian Postal Services*, op. cit.
3 Ibid., p. 50.

Appendix 1:
The GATS Annex on Telecommunications

Annex on Telecommunications

1. Objectives

Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.

2. Scope

(a) This Annex shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services.[1]

(b) This Annex shall not apply to measures affecting the cable or broadcast distribution of radio or television programming.

(c) Nothing in this Annex shall be construed:

  (i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or

  (ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to

establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally.

3. Definitions

For the purposes of this Annex:

(a) "Telecommunications" means the transmission and reception of signals by any electromagnetic means.

(b) "Public telecommunications transport service" means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.

(c) "Public telecommunications transport network" means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points.

(d) "Intra-corporate communications" means telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and, subject to a Member's domestic laws and regulations, affiliates. For these purposes, "subsidiaries", "branches" and, where applicable, "affiliates" shall be as defined by each Member. "Intra-corporate communications" in this Annex excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

(e) Any reference to a paragraph or subparagraph of this Annex includes all subdivisions thereof.

4. Transparency

In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.

5. Access to and use of Public Telecommunications Transport Networks and Services

(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).[2]

(b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:

(i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;
(ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and
(iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

(e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunica-

tions transport networks and services other than as necessary:

(i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;

(ii) to protect the technical integrity of public telecommunications transport networks or services; or

(iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.

(f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:

(i) restrictions on resale or shared use of such services;

(ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;

(iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);

(iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;

(v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or

(vi) notification, registration and licensing.

(g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

6. Technical Cooperation

(a) Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers of public telecommunications transport networks and services and other entities in the development programmes of international and regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

(b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

(c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to

assist in strengthening their domestic telecommunications services sector.

(d) Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

7. Relation to International Organizations and Agreements

(a) Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.

(b) Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union. Members shall make appropriate arrangements, where relevant, for consultation with such organizations on matters arising from the implementation of this Annex.

Annex on Negotiations on Basic Telecommunications

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for basic telecommunications only on:

(a) the implementation date to be determined under paragraph 5 of the Ministerial Decision on Negotiations on Basic Telecommunications; or,

(b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Basic Telecommunications provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on basic telecommunications which is inscribed in a Member's Schedule.

Appendix 1 Endnotes

[1] This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers of public telecommunications transport networks and services by whatever measures are necessary.

[2] The term "non-discriminatory" is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances".

This document is part of the General Agreement on Trade in Services, which was published on April 15, 1994, and is available online at: http://docsonline.wto.org/DDFDocuments/t/UR/FA/26-gats.doc (accessed Feb.06, 2003).

Appendix 2: The GATS Telecommunications Reference Paper

Negotiating Group on Basic Telecommunications

24 April 1996

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 para-

graph 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.

This document is available at: http://www.wto.org/wto/english/tratop_e/serv_e/telecom_e/tel23_e.htm

Rules that are "pro-competitive" are "anti-public services"

"Pro-competitive" rules on government regulation, first introduced for telecommunications in 1997, are now being planned for postal and other service sectors in the General Agreement on Trade in Services (GATS) negotiations now under way in Geneva.

Such rules, if adopted, would undermine public service agencies such as the Post Office and jeopardize accountable, democratic regulation in whatever service sector they were applied. To be enforced by non-elected WTO international trade dispute settlement panels, these rules have no place in a democratic society.

In this insightful new book, CCPA trade experts Jim Grieshaber-Otto and Scott Sinclair explain how "pro-competitive" re-regulation would open up essential services to the private sector. Transnational corporations would be free to "strip assets" from public enterprises when they are re-regulated or privatized, at the expense of public service providers and the citizens they serve.

The fact that such regressive new rules are being seriously considered in the current GATS negotiations shows that the GATS continues to be shaped by the same narrow commercial interests that conceived this treaty's creation.

As a first step toward more fair and balanced international trade rules, the proposed "pro-competitive" re-regulation of postal and other public services should be rejected and stamped:

"Return To Sender!"

$19.95

Canadian Centre for Policy Alternatives
http://www.policyalternatives.ca

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