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REGULATORY AND TRADE DEVELOPMENTS

THE IMPACT OF THE WORLD TRADE ORGANIZATION'S AGREEMENT ON BASIC TELECOMMUNICATIONS ON CANADA'S TELECOMMUNICATIONS REGULATORY ENVIRONMENT

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Introduction

On February 15, 1997, a landmark agreement liberalizing global trade in basic telecommunications services under the General Agreement on Trade in Services ("GATS") was announced. Fifty-five World Trade Organization ("WTO") members, representing the sixty-nine nations that generate over ninety percent of global telecommunications revenue, agreed in principle to the Agreement on Basic Telecommunications (the "Agreement"). WTO member nations have until November 30, 1997 to become signatories to the Agreement, with the Agreement itself coming into effect on January 1, 1998.

History of the Negotiations

On April 15, 1994, the member countries of the GATS announced their intention to enter into negotiations to liberalize trade in basic telecommunications.¹

These negotiations were originally scheduled to be completed by April 30, 1996, but the deadline was extended to February 15, 1997 after some participants felt that the then tabled offers were insufficient.

The talks resumed in July 1996, with numerous bilateral discussions occurring during the fall, and in January 1997, the negotiations began in earnest with a view to reaching an agreement by mid-February.²

What Is Not Covered by the Agreement

The Agreement does not cover the following areas:

- (a) direct broadcast satellite ("DBS") services, direct to home satellite services as well as broadcasting services generally; and
- (b) value-added services, such as on-line data processing, on-line data base storage and retrieval, electronic data interchange, e-mail and voice mail.³

The Agreement

The Agreement consists of Schedules of Specific Commitments (the "Schedules") and Lists of Exemptions from Article II⁴ of the GATS (the "Exemptions"). Each Schedule describes each

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country's commitment on market access by non-residents and national treatment (making non-residents subject only to the same regulations and policies as are residents) as well as other commitments. Each Exemption also lists each country's exclusions from most-favoured-nation tariff treatment concept.⁵

The Schedules and Exemptions are not yet available to the public. It is expected that these documents will be released sometime in the Spring of this year.⁶ Thus, this article is largely based on summary information that is publicly available from the WTO's World Wide Web site.⁷

The provisions of the Agreement are generally expected to enter into force on January 1, 1998, subject to the country-specific Schedules and Exemptions.

Of particular importance is the Reference Paper on Regulatory Principles (the "Principles") to which 57 of the 69 nations made a commitment to implement as part of their Schedules.

Reference Paper on Regulatory Principles

The Principles include the following:

- (a) providing nondiscriminatory, transparent system interconnection rights in a timely fashion with cost-oriented rates and at network termination points other than those offered to the majority of users subject to charges that reflect construction costs. This requires the incumbent carrier to unbundle its network services, which give alternative carriers the right to connect their networks to the incumbent's network at particular points of presence;

- (b) providing a dispute settlement mechanism;
- (c) having anti-competitive safeguards that prevent:
- cross-subsidization by the incumbent telecoms operator of competitive services using revenues from monopoly services;
 - the use of information by the incumbent telecoms operator that is obtained from competitors with anti-competitive results; and
 - the non-dissemination of technical information by the incumbent telecoms provider to other service providers on a timely basis;
- (d) having a regulatory body independent from any supplier of basic telecommunications services;
- (e) maintaining the right to define universal service obligations;
- (f) making licensing criteria publicly available; and
- (g) ensuring that the allocation and use of scarce resources, such as frequencies, numbers and rights of way will be carried out in an objective, timely, transparent and non-discriminatory manner.

In examining the above Principles, it is apparent that they reflect the principles that already exist in Canada's telecommunications environment and which have already been incorporated into the NAFTA Telecommunications Chapter, in some instances in considerably greater detail.

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For instance, the Canadian Radio-Television and Telecommunications Commission (the "CRTC") is an independent agency that oversees the regulation of the Canadian telecommunications and broadcasting industries. Through its decisions, the CRTC has already put in place the anti-competitive safeguards that are envisaged by the Principles. As an example, CRTC Decision 94-19 has provided for the interconnection to the public switched telephone network on transparent and non-discriminatory terms.

In addition, the CRTC has encouraged the use of informal dispute resolution methods, including the use of Inquiry Officers and non-binding staff mediation. In this regard, an Inquiry Officer can rule on confidentiality matters and hold *in camera* hearings.

Another example is the licensing criteria which are available publicly through the publication of the *Telecommunications Act* and related regulations. Furthermore, the licensing process includes public hearings that provide applicants with the opportunity to be heard by CRTC decision makers.

With respect to spectrum allocation, for which Industry Canada is responsible, the process is also conducted in an open manner.⁸

North American Free Trade Agreement

As noted, the Principles echo the basic commitments Canada has already agreed to in Chapter 13 of NAFTA. NAFTA requires Canada to implement the following, among other provisions:

(a) non-discriminatory, transparent system interconnection rights;

- (b) telecommunications services pricing that reflects economic costs;
- (c) public utility discriminatory regulation that can be applied only to:
- safeguard public service responsibilities;
 - protect public network technical integrity; or
 - prevent anti-competitive conduct; and
- (d) the opening of the market for enhanced or value added services.⁹

Canada's Commitments

In addition to committing itself to the above WTO Principles, Canada made the following additional commitments:¹⁰

- (a) *Teleglobe Canada's monopoly on overseas telephone traffic will end on October 1, 1998* (at present, Teleglobe Canada is the telecommunications carrier solely responsible for long distance telephone traffic between Canada and other nations, excluding the United States and Mexico);
- (b) *Teleglobe's special ownership restrictions will be removed on October 1, 1998* (at present, foreign ownership is not permitted in Teleglobe and the Stentor group¹¹ cannot hold over 40 percent of Teleglobe's voting shares. Once the Agreement is implemented, Canada has agreed to allow 20 percent direct and 33 1/3 percent indirect investment in Teleglobe by foreign telecommunications carriers and to remove the

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40 percent voting share limit on the Stentor group of companies);

- (c) *up to 100 percent foreign ownership and control in the resale sector¹² will be permitted as of January 1, 1998;*
- (d) *up to 100 percent foreign ownership and control of international submarine cable landings in Canada after October 1, 1998 (presently, Canada does not allow any foreign ownership of international submarine cables that land in Canada);*
- (e) *restrictions on the use of foreign-owned and controlled global mobile satellite services¹³ will be removed after October 1, 1998;* (presently, Canada requires Canadians to hold an equity share in the entity that owns the satellites and operates the mobile satellite system, which is proportional to the Canadian usage of that system);
- (f) *Telesat Canada's monopoly on fixed satellite services¹⁴ will end on March 1, 2000, instead of on March 1, 2002;*
- (g) *traffic routing rules for all international services will be removed as of December 31, 1999 except Canada/US fixed satellite services which will be unrestricted after March 1, 2000 (at present, the CRTC permits resale and sharing arrangements between Canada and another nation only to the extent that such arrangements are allowed in both countries.¹⁵ Secondly, the CRTC currently prohibits the routing of joint-use private line voice traffic originating or terminating in Canada (through a third country (i.e. the United States)).¹⁶ Finally, the CRTC presently prohibits*

Canadian carriers from routing their overseas telecommunications traffic through a reseller of Teleglobe's private lines.¹⁷ It should be noted, however, that Canada's offer ensures that the routing of basic telecommunications services between points within Canada and between Canada and points outside of Canada will continue to be regulated in order to promote the use of Canadian transmission facilities); and

- (h) *Canada will maintain its open, competitive marketplace and existing transparent regulatory regime (this provision merely confirms Canada's present commitment to maintaining a competitive marketplace and regulatory regime).*

The most significant aspect of Canada's offer is that Canada did not change its present foreign ownership rules from 46.7 percent, which is based on a 20 percent direct and 33 1/3 percent indirect investment.

The American Position

Because the United States generates nearly 30 percent of the world telecommunications revenue, its role at the negotiations cannot be over-emphasized.¹⁸ Had the negotiations failed for a second time, the United States would have determined whether to allow foreign carrier entry in the United States on a case-by-case basis.

In its decision-making process, the U.S. would have applied the Effective Competitive Opportunities (the "ECO") test that the Federal Communications Commission (the "FCC") adopted at the end of 1995.

The FCC held that effective competition could not occur if foreign carriers that held market power in

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their home markets were allowed unlimited access to the U.S. market. The FCC stated that "full facilities-based competition on the foreign end of a U.S. international route is ... the most potent safeguard against anti-competitive effects from the entry of a foreign carrier in the U.S. international services market."¹⁹

The ECO test is thus a reciprocity test which allows the FCC to determine whether a liberalized and competitive telecommunications environment, similar to that of the U.S., exists in the country where the foreign telecommunications carrier is based. The ECO test can therefore be considered to be a tool that would have been used to pry open closed foreign telecommunications markets to U.S. carriers and competition.

By becoming a signatory to this Agreement, the United States will no longer apply the ECO test to other signatory WTO nations that have committed in their Schedules to liberalizing local and long distance markets and to establishing a fair and open regulatory regime.

Impact on Canada

The changes brought about by this Agreement do not dramatically change Canada's regulatory environment in that many of the safeguards envisaged by the Principles are already in existence.

The commitment to remove foreign ownership restrictions on telecommunication resellers merely restates what is *now possible*. Pure telecommunication services resellers are not *presently* subject to any foreign ownership restrictions. The difficulty has been with defining the types of "hybrid" carriers which are not pure resellers (i.e. which only own or operate switches but not transmission facilities) which are or are not subject to Canada's foreign

ownership restrictions. This has proven to be a difficult, but largely manageable, legal issue over the last several years as competition has been confined to long distance, or "interexchange services" and the concept of "reseller" is fairly easy to define for this industry segment. New problems and complexities are likely to emerge in defining the telecom businesses subject to foreign ownership as the CRTC moves to implement measures this year to provide local telecommunication competition where most new entrants are likely to own or control a mix of high and low capacity transmission facilities.

The Teleglobe "monopoly" concession would likely have occurred in any event by 2000 as a result of an Industry Canada review of Teleglobe's existing protection from competition, protection which Teleglobe itself has stated publicly was *not* sustainable.

The loss of Telesat's monopoly over Canada-Canada satellite communication services was also expected. Telesat's privatization policy made it clear that this protection from competition was assured for five years and in any event did not apply to DBS satellites.

Foreign ownership restrictions for "facilities-based" suppliers of "basic" (non-valued added) switched and unswitched telecommunication services has been a central tenet of Canadian telecommunication policy for many years. This policy was crystallized in July 1987 by announcements of the Minister of Communications designed to ensure that these discriminations against foreign *investors* could be grandfathered upon completion of the Canada-USA Free Trade Agreement in late 1987.

The substantive policy basis for such investment restrictions has never been well-articulated,

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particularly as these businesses have been exposed to detailed CRTC regulation designed to ensure that they operate in the public interest, and because Canada's second-largest telecom services company, BCTel, has been American controlled for many decades.

The United States has had similar foreign ownership restrictions on much of its telecom services sector for some time, and even the 1996 legislative revision to the federal *Communications Act* did little to reduce their force or breadth.

In both countries, the advent of more local telecom competition is likely to cause more serious questioning of these investment restrictions.

Conclusion

The importance of the Agreement lies in the opening of other regions of the world to competition in telecommunications. While developing nations may not have a significant share of total global telecommunications revenue, they are experiencing greater growth in the telecommunications sector than in advanced industrialized nations.²⁰

This Agreement gives advanced nations, such as Canada, the opportunity to invest and compete in overseas markets with the knowledge that there will be the open and fair application of common rules. However, it is expected that legislative and regulatory changes could take years to resolve and may result in missed commitment dates. It thus appears that the benefits of the Agreement will occur over a period of time as changes are phased in and countries adjust to the demands imposed by the new competitive environment.

Notes

¹ Basic telecommunications are defined to be "telecommunications transport networks and services".

² See WTO background document entitled "The WTO Negotiations on Basic Telecommunications" dated February 17, 1997.

³ Value-added services are defined to be services for which suppliers "add value" to the customer's information by enhancing its form or content or by providing for its storage and retrieval. See the WTO press release dated February 17, 1997 entitled "Ruggiero Congratulates Governments on Landmark Telecommunications Agreement."

⁴ Article II of the GATS deals with the Most-Favoured Nation concept and states:

[w]ith respect to any measure covered by this Agreement, each Member 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.

The "Most-Favoured Nation" concept ensures that a country will provide another country the lowest tariff rates that it applies to any third country. This is a fundamental aspect of multilateral trade.

⁵ For instance, the United States has claimed an exemption relating to Direct Broadcast Satellites.

⁶ This is based on information supplied by Industry Canada.

⁷ <http://www.wto.org/>

⁸ It should be noted that Canada does not auction frequencies as has been the case in the United States with respect to Personal Communications Service.

⁹ "Enhanced or value added services" are defined in the NAFTA as "those telecommunications services employing computer processing applications that:

- (a) act on the format, content, code, protocol or similar aspects of a customer's transmitted information;
- (b) provide a customer with additional, different or restructured information; or
- (c) involve customer interaction with stored information."

¹⁰ Canada's Schedule of Specific Commitments on Basic Telecommunications, Final Offer, February 14, 1997.

¹¹ The Stentor group is a consortium of Canada's incumbent telephone carriers. These include Bell Canada, TELUS Communications Inc., BC TEL, Island Tel, Maritime Tel & Tel, Manitoba Telecom Services Inc., NBTel, NewTel Communications, NorthwestTel, Québec-Téléphone, and SaskTel.

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¹² "Resale" is defined by the CRTC as "the subsequent sale or lease on a commercial basis, with or without adding value, of telecommunications services leased from a telecommunications carrier". See CRTC Telecommunications Decision 92-12.

¹³ The term "mobile satellite service" ("MSS") is defined in Industry Canada's Notice, "Policy Framework for the Provision of Mobile Satellite Services via Regional and Global Satellite Systems in the Canadian Market" (Notice No. DGTP-001-94) as:

a radiocommunication service between mobile earth stations and one or more space stations, irrespective of whether the spectrum being used therefor has been allocated for mobile or fixed satellite services.

¹⁴ A "fixed satellite service" can be defined as a radiocommunication service between fixed earth stations and one or more space stations.

¹⁵ See CRTC Telecommunications Decision 91-21.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ By way of comparison, the fifteen nations comprising the European Community have 28.27 percent of the world telecommunications revenue, while Canada only has 1.78 percent of the world telecommunications revenue. Total global revenues were estimated to be \$601.9 billion (U.S.) in 1995. See WTO informal background document, "Data on Telecommunications Markets covered by the WTO Negotiations on Basic Telecommunications" (February 17, 1997) [hereinafter, "WTO Data Sheet"].

¹⁹ "Market Entry and Regulation of Foreign-affiliated Entities", FCC Report and Order 95-475, IB Docket 95-22 at 8.

²⁰ For instance, in the installation of telephone lines, industrialized countries experienced an average growth rate of 3.5 percent between 1990 and 1995. Developing countries, on the other hand, averaged over 13.8 percent growth in the same time period. Similarly, whereas industrialized countries averaged annual revenue growth of 4.2 percent between 1990 and 1995, developing nations averaged 9.7 percent annual revenue growth. See WTO Data Sheet, *supra*, note 18.
