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Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services

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Abstract: The objective of this paper is to assess the adequacy of multilateral rules dealing with monopolies and state trading enterprises, particularly in the domain of services. This paper argues that since these rules depend largely on the other obligations undertaken by Members, a variety of exemptions and exclusions have weakened the rules considerably. Furthermore, liberalization of services trade, aided by negotiations under the GATS, is leading to changes in market structure and the pattern of ownership. These changes imply that government-mandated monopolies or non-competing oligopolies are disappearing from the infrastructural services for which Article VIII of GATS is most relevant. The behaviour of dominant suppliers that often remain does not fall within the scope of Article VIII and has been addressed by creating other disciplines. The paper assesses how much emphasis needs to be placed on pro-competitive regulation to ensure competitive market conditions and argues that there is a need to strengthen Article VIII and widen its scope to deal with certain generic problems.

Keywords: monopoly, international trade, services, protection, regulation

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Multilalteral trade rules on monopolies and state trading enterprises (STEs) do not create any general obligations to change either the market structure or the pattern of ownership. Nor are these rules primarily designed to prevent anti-competitive behaviour in order to achieve economic efficiency. Rather, their purpose is to prevent monopolies and STEs from behaving in a way that undermines the multilateral market access obligations undertaken by governments. This concern arises because such enterprises may be subject to government control or, in the case of monopolies, because market power creates scope for autonomous behaviour which has the effect of subverting multilateral rules.

The rules that apply to monopolies and STEs, however, are not the same in the domains of goods and services. To an extent, this is not surprising since the problems that can arise in the two domains are different. In the case of goods, concern has been raised primarily by the operation of STEs which are exclusive buyers (sellers) abroad on the behalf of domestic consumers (producers). The perishability of most services largely precludes such intermediation. In services, however, there is much greater concern about monopoly control over essential facilities. This is because, first, such control is more frequently observed in services, such as telecom and transport networks and terminals, than in goods. Secondly, the same perishability of services reduces scope for arbitrage and enables monopolistic discrimination in segmented markets in a way that is seldom possible in goods. There are, however, also similarities in the concerns that arise in goods and services. In both domains, there are examples of exclusive or non-competing final producers, for instance in energy production and distribution, communications, health or education services, who often constitute the only or major source of demand for the producers of certain specialized inputs. The lack of competition in the markets for their output may allow them to deviate from strictly commercial considerations in their input purchases.

The objective of this paper is to assess the adequacy of multilateral rules in addressing these concerns, with an emphasis on the problems arising in the domain of services where such rules are relatively new. The next section undertakes a comparison of GATS Articles VIII dealing with monopolies with GATT Article XVII dealing with STEs, highlighting the difference in the domains and disciplines of these two articles. Section II focuses on the limitations of GATS Article VIII, and Section III shows how it has been necessary to modify and elaborate on its rules to deal with sector-specific issues in telecommunications and

maritime transport. Section IV assesses the scope for addressing anticompetitive practices in services under existing rules, and Section V presents a simple framework to analyze the implications for trade and regulatory policy of alternative technological situations. Section VI concludes the paper.

I. A Comparison of GATS Article VIII with GATT Article XVII

Table 1 juxtaposes certain elements of Article XVII of the GATT 1994, as well as the Uruguay Round Understanding on the Interpretation of Article XVII of GATT 1994, with Article VIII of the GATS.

1. *Scope*

The domain of GATT Article XVII is significantly wider than that of GATS Article VIII both in terms of the entities covered and their activities. GATT Article XVII, which contains the substantive disciplines on STEs, covers all state enterprises, and those private enterprises which have been granted exclusive or special privileges.[1] The Understanding on the Interpretation of Article XVII, which is relevant only for notification purposes, narrows the scope to enterprises, public or private, which have been granted exclusive or special rights or privileges. Thus, state enterprises which are not recipients of privileges or rights need not be notified even though they continue to be subject to GATT Article XVII disciplines.

GATS Article VIII resembles the Understanding in taking a market structure-based view as opposed to an ownership-based view, but is still narrower in scope. Its domain includes only monopolies, i.e. sole suppliers, and those oligopolies which behave virtually like monopolies. Some form of Government involvement is a necessary condition in so far as it is required that the monopoly or non-competing oligopoly be "authorized or established formally or in effect" by a Member (GATS Article XXVIII:h). Natural monopolies and oligopolies which exist without any facilitating government action are outside the scope of GATS Article VIII.[2]

[1] While Article XVII is entitled "State Trading Enterprises", the text refers more widely to "state enterprises".

[2] The words "in effect" could be interpreted to form the basis for a wider view whereby the failure of government to act in preventing the emergence of such market structures would constitute a form of governmental responsibility. But such a view is not convincing in that it would be so wide as to render superfluous the requirement of a Member having "authorized or established" a monopoly, since the existence of most monopolies could then be attributed to government action or inaction. Perhaps the relevant question is whether a monopoly would have existed even if there was no government involvement.

It is notable that Article VIII refers to the supply of the monopoly service "in the relevant market". This concept has received significant attention in competition law, but here it is sufficient to note that a judgement of what constitutes the relevant market may, therefore, be necessary to establish whether or not a "monopoly" exists. Thus, for instance, the government may provide exclusive rights to a private supplier to operate a particular port or a particular highway. If the relevant market is defined narrowly in geographical terms, then the operators would be considered monopolists. However, a wider view, taking into account the competition offered by proximate ports or alternative routes, may suggest that the exclusive rights do not amount to a monopoly.

An important respect in which the scope of GATS Article VIII differs from that of GATT Article XVII, is that obligation in the former relates only to the "supply of the monopoly service" and not to "purchases or sales" as in the latter. The implication is that, under the GATS, a monopoly's behaviour in its input market is not subject to any disciplines.

GATT Article XVII excludes from the scope of its main disciplines "imports of products for immediate or ultimate consumption in governmental use and not otherwise for sale or use in the production of goods for sale".[3] The line dividing government procurement from state trading is not always clear, but the language here implies that any government purchases which are sold either directly or indirectly would be covered by the disciplines of Article XVII.[4] It is also relevant that Ad Article XVII states that the term "goods" is not intended to include the purchase or sale of services. This would seem to suggest that the purchase of goods for use in the production of services is not covered by Article XVII. Hence, taking stock of all the exclusions, we find that neither GATT Article XVII nor GATS Article VII deals with the purchases by covered entities of goods or services to produce services, or the purchase of services to produce goods.

[3]Article XVII:2 states that "with respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment." The procurement of some 22 WTO Members is subject to the disciplines of the Agreement on Government Procurement.

[4]It is notable that the exclusion of government procurement from Article III disciplines refers to "products purchased for governmental purposes and not with a view to *commercial* resale" (emphasis added). The Article XVII exclusion of government procurement differs in omitting the word "commercial" from before "sale".

2. *Disciplines*

In the WTO context, Article XVII of GATT 1994 and Article VIII of GATS have an unusual aspect: they both apply to the behaviour of enterprises, not to government rules of general application. Thus GATT Article XVII requires that any covered enterprises in its purchases or sales acts in a manner consistent with the general principles of non-discriminatory treatment. This obligation has been interpreted in some instances only to imply an MFN obligation, i.e. a prohibition of discrimination between imports on the basis of country of origin, and not a national treatment obligation (see Jackson (1992), p. 284). The reasons for this narrow interpretation are not clear because the "general principles of non-discriminatory treatment prescribed in this Agreement" would seem to include national treatment. It is also specified, in Article XVII:1(b), that such enterprises shall make any "purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford foreign enterprises adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."

Disciplines on STEs in the goods context are also contained in other Articles of GATT 1994. Thus, import monopolies are required not to operate so as to afford protection above the level of tariff bindings (Article II:4) and STEs cannot be used to give effect to import or export restrictions inconsistent with the general rules of the GATT on such measures (Ad Articles XI, XII, XIII, XIV and XVIII).

In some respects, the disciplines in Article VIII of the GATS resemble those in Article XVII of GATT 1994. The basic obligation is that the monopoly supplier of a service should not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with a Members MFN obligation and specific commitments. There are, however, some important differences with the Article XVII obligation. First, consider the requirement that a monopoly service supplier must respect the specific commitments under GATS on both market access and national treatment. Both, however, only apply in scheduled sectors and there too are subject to limitations. The scope of the Article VIII disciplines, therefore, crucially depends on the extent to which Members have made liberalizing specific commitments. Under GATT 1994, this is mirrored to an extent by the requirement that mark-ups on imported goods charged by STEs should not violate tariff bindings, the extent and level of which differs between Members. However, while the rules against quantitative restrictions apply more generally in GATT 1994 than in the GATS (which allows quantitative market access

limitations), the obligation on STEs to provide national treatment apparently does not apply at all in GATT 1994 but does in the GATS to the extent Members have made specific commitments in this respect.

It is, however, the different implications of the MFN obligation that are perhaps most interesting. GATT Article XVII does not prevent a state enterprise from practising price discrimination in its sales. Notably, Paragraph 1 Ad Article XVII states that:

> The charging by a state enterprise of different prices for its sale of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

On the other hand, the charging, for instance, by a monopolist telecom supplier of different prices for termination services to foreign telecommunications suppliers, or a monopolist port operator of different rates to different foreign ships, could in principle be held to be inconsistent with Article VIII:1. Why does this difference arise? One argument could be that in the goods case, price discrimination pertains to behaviour in export markets, whereas in the case of essential intermediate services, price discrimination would lead to discrimination between imports from different foreign sources. The latter presumably raises more serious concerns than the former.[5]

3. *Transparency of existence and behaviour*

It has been recognized that it is difficult to enforce the disciplines on state enterprises since the required monitoring of their *behaviour*, rather than rules of general application, is rarely feasible. The creation of transparency has therefore received emphasis. GATT Article XVII only required a notification of products imported or exported from their territory by covered enterprises. The Understanding created a requirement to notify all enterprises which had been granted exclusive or special rights. In the GATS, a certain degree of transparency is achieved by the requirement to specify measures inconsistent with Article XVI in scheduled sectors with respect to bound modes. Thus, if a Member wishes to maintain a monopoly, or any other restriction on the number of suppliers, then this must be specified in its schedule.

[5]GATT Article I (MFN) is symmetric in its application of the non-discrimination principle to imports and to exports, while the MFN obligation in GATS is only defined in terms of treatment of foreign services and service suppliers, and thus excludes measures affecting exports.

Furthermore, in Article VIII there is a requirement to notify monopoly rights, granted after the entry into force of the WTO Agreement, regarding the supply of a service covered by specific commitments. The gap in information arises, of course, with respect to sectors not included in the schedules, or if the relevant mode of supply (commercial presence) is unbound.

Both Agreements create similar obligations with regard to transparency of operations. Members may, at the request of a Member which has reason to believe that its interests under the Agreement are being adversely affected by the operations of a covered enterprise, request the Member establishing, maintaining or authorizing such an enterprise to supply information concerning relevant operations.

GATT Article XVII goes further in requiring a Member establishing, maintaining or authorizing an import monopoly of a product, which is not subject to a tariff concession, on the request of a Member having a substantial trade in the product, to inform Members of the import mark-up on the product or, when this is not possible, of the resale price. Moreover, the Understanding creates an obligation on each Member to conduct a review of policy to ensure maximum transparency in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises and the effect of their operations on international trade.

4. *The Approach to Eliminating the Restrictive Effect of STEs and Monopolies*

Both the GATT and the GATS allow Members to maintain STEs and monopolies. As noted above, the Agreements themselves create no obligations to change either the pattern of ownership (from public to private) or the market structure.[6] GATT Article XVII:3 does contain a collective recognition that STE's might be operated so as to create serious obstacles to trade, and recognizes the importance of negotiations designed to reduce such obstacles. Such negotiations between Members have usually pertained to aspects of the behaviour of

[6]In fact Article XX(d) contains a general exception for measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT, including those relating to "the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII".

STE's, such as the level of mark-ups on imports, but recent accession negotiations have also been concerned with the elimination of exclusive rights.[7]

However, what is an exception in the goods-context, is the rule in the services-context. GATS defines trade to include the supply of services through establishment of commercial presence which could be through foreign ownership of existing (government-owned) suppliers or through new entry into markets which were previously the subject of monopoly rights. Changes in ownership and market-structure have, therefore, been central to the negotiations. The collective commitment to progressive liberalization contained in the GATS could well be expected to translate into a further reduction in the scope of state-owned entities and state-mandated monopolies.

Privatization and liberalization, however, do not always go hand-in-hand, for in several cases, state-owned monopolies have been replaced, at least temporarily, by private monopolies. For instance, in Pakistan's basic telecommunications schedule, the government has committed to privatizing part of the state provider, but maintained its exclusive rights for a period of seven years. Similarly, an entry for Italy in the GATS schedule of the European Union states that exclusive rights may be granted to, or maintained for, newly-privatized companies. One reason why governments find this pattern tempting is that privatization may be more easily accomplished, or yield greater revenue, if liberalization is delayed.

[7]This shift in emphasis reflects that in many of the new acceding countries, like China and Russia, STEs have a major influence on trade.

II. An Assessment of GATS Article VIII

This Section argues that GATS Article VIII in itself is of limited current relevance. First, what the article covers may well be less important than what it excludes. Government-mandated pure monopolies or non-competing oligopolies are disappearing from the infrastructural services for which Article VIII is most relevant, notably telecommunications. The behaviour of dominant suppliers which often remain does not fall within its scope and must be disciplined through other means - which include the Annex on Telecommunications and the additional commitments undertaken in basic telecommunications and maritime transport discussed in the next Section. Furthermore, the exclusion of purchasing behaviour of non-competing public enterprises may not be innocuous.[8]

Secondly, since the article's disciplines depend exclusively on the other obligations undertaken by Members, a variety of exemptions have weakened Article VIII in key areas. These include the understanding that accounting rates in basic telecommunications would not for some time be an issue for dispute settlement, the suspension of the MFN obligation for the maritime sector along with the limited specific commitments in the sector, and finally, the exclusion of air traffic rights from the scope of the GATS.

1. *Where are the monopolies*?

First, consider the existing domain of Article VIII. Where are the monopolies (or non-competing oligopolies) to be found whose *supply* behaviour merits concern? Most commonly in "locational services" like transport, telecommunications and energy distribution which frequently require specialized distribution networks, such as roads, rails, cables, pipes and satellites (see UNCTAD and World Bank, 1995). There may also be need for specialized equipment for transmitting or receiving the service, such as telephone exchanges, railway stations, airports, and ports. Even though it is usually possible to introduce competition in certain segments of the markets for such services, the high barriers to entry due to the need for large initial investment in other segments may lead to the existence of natural monopolies. Thus, while different airlines may compete with each other on the same route, they are usually obliged to use the same airport, as is the case with

[8]One other area of exclusion from Article VIII relates to monopolies in professional services which exercise control over activities ranging from accountancy, architecture and legal services. Here the issue of monopoly control is related to the issue of professional standards and qualification requirements, which are being addressed in negotiations mandated by Article VI:4 of the GATS.

maritime transport companies and ports. It has also been easier to introduce competition in long-distance telephone calls than in the provision of local calls, where technologies which reduce the optimal scale of operation have only recently emerged. Similarly, while some countries have introduced competition in electricity generation, electricity distribution is still subject to (regional) monopolies. In many of these situations, therefore, monopolistic market structures are a consequence of the state of technology, without the need for supporting government action. However, such action often exists, if only to extend the scope of the monopoly beyond what would be technologically necessary.

What about monopolies in areas where there is no technological reason for their existence? As noted above in the section on transparency, Article XVI obliges Members to indicate in scheduled sectors, with respect to the modes of supply that they choose to bind, if certain restrictions on market access are maintained, including limitations on the number of service suppliers. Table 2 contains the results of an examination of the GATS schedules of commitments for sectors other than basic telecommunications where Members have indicated that a monopoly or exclusive rights are maintained. The sparseness of the table probably reflects absence of commitments by Members in sectors where government-mandated monopolies exist, and the table should be seen as illustrative rather than exhaustive.

Again, the focus, in this section, is on monopolies whose supply behaviour causes concern. Non-discriminatory access to placement and supply services of personnel may be important for locally established foreign firms which are obliged by restrictions on the movement of personnel to hire local personnel. The monopolies in supplying of pharmaceutical good, i.e. pharmacists, tobacco and certain retailing services, reflect, not the existence of a single seller, but the need to fulfil certain conditions in order to qualifier as a supplier of these products. These monopolies may have implications for the non-discriminatory distribution of foreign goods rather than services. The monopolies in financial services mostly pertain to certain mandatory insurance services. Among the most significant instances of monopolies are those in public utilities, which certainly exist in many more Members than have chosen to indicate their existence. The EU schedule notes that services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators. According to the schedule, public utilities exist in sectors such as environmental services, health services, transport services and services auxiliary to all modes of transport.

The basic telecommunications sector merits separate examination. In the recently concluded negotiations on basic telecom under the GATS, sixty-nine governments made multilateral commitments granting, in many cases, significantly liberalized access to their markets to foreign services and service suppliers (Table 3). Taking into account both immediate liberalization (L) and phased-in liberalization (P), 55 governments committed to competition among infrastructure-based operators (defined here as permitting two or more) in public local voice telephony, 52 in domestic long distance, and 56 in international service. Simple resellers will be allowed to offer public voice telephony by 42 governments. It is, of course, true that nearly half the WTO Members did not make any commitments on basic telecommunications, and in many of these markets there is a persistence of monopoly. But in terms of world market share, network competition will be allowed in 80 per cent of the market by the beginning of 1998, and another 6 per cent by the year 2005. On the whole, there is overwhelming evidence that the development of modern telecommunication technologies, characterised by relatively small optimal scales of production, combined with liberalization of access, has overturned conventional wisdom about telecom infrastructure being inevitably monopolised.

Table 2 shows that monopolies in transport services may arise in terminal services, such as cargo handling, and networks such as railroads and highways. It may also useful to consider the commitments which Members have made regarding supporting services for various transport services. These may reveal the extent to which there are policy restrictions on the supply of terminal services for various modes of transport. In maritime transport, only 11 Members have made commitments in the area of port services, of which just 2 (Australia and Gambia) have fully liberalized access to foreign service suppliers. In supporting services for air transport, 33 Members have made commitments, of which only 5 (Bulgaria, Cuba, Gambia, Nicaragua, Sierra Leone) have fully liberalized the right of foreign suppliers to establish commercial presence. Only 5 Members have made commitments with respect to supporting services for road and rail transport, with 4 (Gambia, Guyana, Iceland, Norway) and 2 (Nicaragua, Norway), respectively, imposing no restrictions on the establishment of commercial presence.

To sum up, pure monopolies in the sense of Article VIII, i.e. with facilitating government action, are disappearing from telecommunications - in part, due to the success of GATS negotiations in liberalizing telecom markets. Where they persist, or are replaced by dominant suppliers, it is often due to the nature of the technology. Certain aspects of transport services, relating to terminals, roads and railway tracks, and energy distribution

have similar technological features. However, the lack of GATS commitments in these areas suggest that the government may have a role in the persistence of monopoly beyond areas where it is a technological necessity.

2. *Do the exclusions from GATS Article VIII (and GATT Article XVII) matter*?

As noted above, neither GATT Article XVII not GATS Article VII covers the purchases by covered entities of goods or services to produce services, or the purchase of services to produce goods. Furthermore, firms operating in a competitive environment are excluded from the scope of GATS Article VIII, regardless of whether they are privately or publicly owned. Some of these exclusions are covered by the plurilateral Agreement on Government Procurement, but only 23 WTO Members are signatories to this Agreement and its coverage, particularly of services, is limited in certain respects.

For the purchasing decision of an enterprise to evoke concern, two conditions need to be fulfilled: first, the firm does not operate in a competitive market for its output, and second, its purchases of a particular good or service are large compared to domestic supply.

An enterprise operating in a competitive market is unlikely to be able to afford the luxury of procuring intermediate services inputs from any but the most competitive seller. Thus, non-competitive product markets would seem to be a necessary condition for distorted purchase decisions. The source of the distortion could then be either government influence or anticompetitive practices by a firm enjoying significant market power. Creating disciplines on government action or influence would fall clearly within the domain of the GATS. But it would seem unnecessary to impose disciplines on a public enterprises operating in competitive conditions, and may even lead to inefficiencies.[9] At the same time, there may be a need for disciplines on private enterprises operating in non-competitive environments. Thus, market structure in the final goods market is a more important consideration than the nature of ownership.

Even though operating in a non-competitive product market is a necessary condition for a firm to be able to deviate from strictly commercial considerations in its purchases, it may still not be sufficient to merit concern. Baldwin (1970, 1984) and Baldwin and Richardson

[9] It has been argued that the procedural disciplines of the GPA have imposed excessive costs on public enterprises operating in competitive conditions and adversely affected their ability to compete with private enterprises which are not subject to similar disciplines.

(1972) are among those who have shown, in a perfectly competitive context, that if non-discriminating demand is sufficiently large, and domestic and foreign goods are perfect substitutes, then extending preferential treatment to domestic industry by a particular entity neither reduces imports nor increases domestic price, output and employment. Discriminatory procurement is ineffectual because shifting demand towards domestic products by a particular entity tends to increase their prices and, therefore, generates an equal and opposite shift in the demand of non-discriminating entities toward imports.

This result can be qualified in certain important respects. Perhaps most importantly, *the discriminating entities' demand may be a large part of total domestic demand*.[10] More precisely, if the discriminating entities' demand is larger than the quantity supplied domestically in the non-discriminatory equilibrium, then shifting their demand towards domestic producers can clearly have real effects - i.e. increased domestic output and reduced imports. Thus, a revealing empirical test would involve comparing the magnitude of such entities' demand with the quantity supplied domestically at the notional free trade price to determine when discriminatory purchases are likely to affect trade and output.

Consider the two questions in turn: first, where do enterprises (public or private) continue to operate in non-competitive environments? In the case of goods, inadequate access to the upstream market for goods has evoked significant concern in energy generation and other utilities. In the area of services, large government non-competing enterprises still exist in the health and education sectors, as well as in transport and communications sectors. The question, of course, arises whether the purchases of such enterprises qualify as government procurement, excluded from the scope of the disciplines of both GATT 1994 and GATS. Furthermore, the line between employment and purchases of services, say of doctors and teachers may be blurred. In a splintered world, there is clearly greater scope for competition between suppliers than in a vertically integrated world.

The second question, regarding the importance of purchases of goods and services by non-competing entities relative to domestic supply, is not easy to address. Data on procurement, which is sufficiently disaggregated to make the homogeneity assumption plausible, is difficult to find. At a somewhat aggregated level, Francois et al. (1995) find that in the United States, purchases by state enterprises in total demand tends to be small. Their

[10]Other qualifications of the neutrality result are that domestic and foreign goods and services may not be perfect substitutes that markets are rarely perfectly competitive. The implications of these assumptions in discussed in Mattoo (1996) .

share is largest in maintenance and repair construction, but even there it is less than 10 per cent of aggregate demand. A key variable, in terms of the test identified above, is the share of public enterprise purchases in total domestic production. Again, even aggregate non-defence procurement (including purchases for own use and by enterprises) accounts for a substantial share of domestic output only in construction-related services, and in the ophthalmic and photographic equipment sector.

The finding from the United States of the relative insignificance of purchases by state enterprises is probably not generalizable to other countries. In contrast to many other countries, the United States does not have a telecommunications monopoly, state-owned airlines, or full state ownership of utilities. Thus, Francois, et al. (1995, Table 9) show that public ownership of the type found in certain European Union states would imply significant government presence in the markets for engines, turbines, transportation equipment, communications, pipelines, air transport, rail and motor freight services, communications equipment, computer and data processing services as well as finance and non-medical professional services.

It seems, therefore, that the conditions for discriminatory purchases to adversely affect imports may be fulfilled in certain areas. If a fuller empirical examination confirms this, then he challenge would be to create effective disciplines in the areas where they are needed without creating unnecessarily burdensome regulation in areas where they are not.

3. *The problem of weakened disciplines*

Accommodating accounting rates in telecommunications

As discussed above, monopolies (or non-competing oligopolies), whose supply behaviour merits concern, are to be found most commonly in "locational services" like transport and telecommunications. If one were to identify one central purpose of Article VIII, it would be to prevent national monopolies from undermining the MFN obligation through price-discrimination. Interestingly, the most obvious example of such price-discrimination, the accounting rate system in basic telecommunication, has been virtually exempted from the scope of GATS disciplines. Furthermore, unilateral measures designed to counter the system may themselves fall foul of the MFN obligation.

The accounting rate system was initially to compensate carriers for the costs of providing international telephone calls. It is widely recognized that accounting rates negotiated with carriers located in non-competitive markets are substantially above costs and discriminate between different countries of origin according to "what the market will bear". This discrepancy between costs and rates has widened due to technological development in the telecommunication industry and have meant that costs of international telephone calls have remained higher than they would in competitive conditions.[11] The strongest justification of the system is that it helps generate revenues for developing country telecommunication operators, needed to fund investment in domestic systems, and provides a useful source of hard currency.

The MFN obligation would in any case have prevented price-discrimination, but allowed the charging of a uniform monopoly price. Furthermore, the implications for global welfare of the shift from the former to the latter are ambiguous. A discriminating monopolist sets prices which would be inversely related to the respective elasticities of demand. The move to uniform pricing, which an MFN obligation would necessitate, is bound to make the monopolist worse off, because the uniform price it is now obliged to charge in each segment could at worst also have been charged in segmented markets. Consumers in low elasticity markets are adversely affected by price discrimination and prefer the uniform price; consumers in high elasticity markets prefer price discrimination.[12] Price discrimination causes the marginal rates of substitution to differ among consumers and is therefore socially inferior to uniform prices if aggregate output is unchanged in the two situations. Thus a necessary condition for price discrimination to increase welfare is that it raise total output, i.e. it reduce the distortion caused by monopolistic pricing.[13]

Not surprisingly, five countries (Bangladesh, India, Pakistan, Sri Lanka and Turkey) with telecom monopolies in international services listed MFN exemptions to cover the application of differential accounting rates. In order to prevent a spate of such exemptions being listed,

[11]According to the Financial Times international calls in the United States cost more than six times as much as domestic long-distance calls (88 cents compared to 13 cents per minute). Net outpayments from the US to foreign carriers in 1995 were almost $5 billion corresponding to 5 per cent of the US trade deficit for goods and services.

[12]It may be the case, when prices in different markets are not common knowledge and search is costly, that all risk averse consumers prefer uniform pricing to price discrimination. In these circumstances, a producer may have an incentive to create a reputation for uniform pricing.

[13]If demand were linear, uniform pricing would socially dominate third-degree price discrimination since total output under the two situations would be the same.

an understanding was reached, and reflected in the Report of the Group on Basic Telecommunications, that application of such accounting rates would not give rise to action by Members under dispute settlement in the WTO. This understanding is to be reviewed no later than commencement of the next comprehensive round of services negotiations due to begin no later than the year 2000.

Suspension of key disciplines in maritime and air transport services

Even though the maritime transport sector is an integral part of the GATS, it is for the moment not subject to its full disciplines. First, the application of the MFN obligation to this sector has been temporarily suspended. Secondly, since it has not yet been possible to reach a negotiated agreement on the level of specific commitments that Members are willing to make, the existing market access and national treatment commitments are limited to those which certain Members have been willing to make unilaterally.

The suspension of the MFN obligation was prompted by the difficulty in eliminating MFN-inconsistent measures in the maritime sector.[14] One example of such measures are the bilateral cargo-sharing arrangements - such as those under the United Nations Code of Conduct for Liner Conferences - which favour the trading partner at the expense of third countries. A somewhat different example of an MFN-inconsistent measure are unilateral retaliatory actions taken by a Member against trading partners who, in its perception, resort to restrictive foreign trade practices.

International air transport services are for the most part governed by arrangements negotiated under the Chicago Convention. The Annex on Air Transport Services specifically excludes this complex network of bilateral agreements on air traffic rights from the new services rules. In consequence, the GATS, as far as the air transport sector is concerned applies at present only to aircraft repair and maintenance services, the selling and marketing of air transport services (a function defined as not including the pricing or conditions of transport services), and computer reservation systems.[15] A provision for periodic reviews of

[14]Even though the GATS does permit Members to seek temporary exemptions from the MFN obligations, the dominant view was that the continued suspension of the MFN obligation would avert the need for many countries to take MFN exemptions which may be more difficult to negotiate away once explicitly listed.

[15]The WTO dispute settlement procedures can be invoked only in respect of obligations specifically assumed by members, and even then only after any bilateral or other procedures have been exhausted.

developments in the air transport sector, to be undertaken at least once in every five years, leaves the door open for a possible future extension of GATS commitments in the sector.

In sum, if the MFN principle does not apply to these key service areas, and Members have made no or limited commitments, then Article VIII's function of ensuring that monopoly suppliers do not undermine Member's obligations loses much of its meaning. Of course, it remains possible that in future, if GATS disciplines are extended to these areas, and government mandated monopolies persist, then Article VIII may again assume relevance.

III. Going beyond Article VIII: Developing alternative disciplines

1. *Telecommunications*

The telecommunications sector is the focus of two additional sets of rules: the generally applicable Annex on Telecommunications, and the Reference Paper which has been incorporated into their schedules of commitments by around 60 WTO members.[16] At the risk of some oversimplification, we can see the first as primarily a response to the central role of telecommunications as a medium of transporting services, and the second as a response to the particular difficulties in achieving liberalization in a sector characterized by significant network externalities.

The Annex on Telecommunications: Reinforcing Access Guarantees for Users

This Annex was drafted during the Uruguay Round by negotiators realizing that, despite Article VIII, telecom operators were in a unique position of having the potential to undermine commitments undertaken in schedules -- not only on telecom but any service sector in which telecommunicating was essential to doing business. Three aspects of the Annex make it a much more powerful defender of the rights of users of telecommunications services than Article VIII. First, it is silent about market structure and therefore applies regardless of whether the services in question are supplied by a monopoly or through competition. This reflects the fact that not just monopolies, but dominant operators in a more competitive regime might also engage in unfair practices restricting access and use.

[16]This Section draws upon Tuthill (1997).

Secondly, the Annex carries its own non-discriminatory disciplines on telecom service suppliers and, unlike Article VIII, does not depend on the sector-specific obligations undertaken by Members. The Annex requires governments to ensure that other Member's suppliers are afforded reasonable and nondiscriminatory access to and use of public telecommunications transport networks and services (PTTNS) for the *supply of a service included in its schedule*.[17] The term "non-discriminatory" refers to most-favoured-nation and national treatment as defined in the Agreement, as well as to 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". The suppliers of any service listed in a government's schedule, say financial services, are thus assured of non-discrimination with respect to access and use to telecom services even if a member has not committed to national treatment with respect to that particular service.

Finally, the Annex offers greater specificity in certain areas than Article VIII. For instance, it elaborates further on transparency obligations for the sector. It requires Members to ensure that relevant information on conditions affecting access to and use of public telecom transport networks and services is publicly available. It also lists examples of such measures. These include tariffs and other terms and conditions of service, specifications of technical interfaces with such networks and services, and conditions applying to attachment of terminal or other equipment.

[17] In Annex definitions: "Public telecommunications transport service" means any telecommunications transport service required, explicitly or in effect, to be offered to the public generally and typically involving the real-time transmission of customer-supplied information without any end-to-end change in its form or content. 'Public telecommunications transport network' means the public telecommunications infrastructure permitting telecommunications between and among network termination points.

The Reference Paper: Ensuring Competition in the Supply of Telecom Services

In the basic telecommunications negotiations, there was concern that despite the commitments to liberalize both trade and investment, telecommunications markets would still frequently be characterized by dominant suppliers that controlled bottleneck or essential facilities. This could be because this sector has for a long time been monopolised, and despite efforts to break-up these monopolies, control over key infrastructural facilities will not immediately be diversified. Or it could be that large fixed costs and economies of scale render some markets inherently incontestable, i.e. given the minimum efficient scale of operation, the market was simply not large enough to accommodate more than one or two suppliers. In any case, the concern was that dominant players in the telecom market, left free to make decisions about how to treat other suppliers, would be capable of frustrating the market access and national treatment commitments made by governments in the negotiations.[18]

Furthermore, participants felt that neither Article VIII nor the Telecom Annex would be adequately equipped to deal with potential anti-competitive practices. First, Article VIII did not cover dominant suppliers who may face limited competition. While the Annex was wider in scope, there were some doubts over whether the interconnection guarantees it contained applied to rival telecom suppliers and not just to the users of telecom services. Secondly, there was concern that the disciplines contained in Article VIII and the Annex were too general to guard sufficiently against the possible anti-competitive practices. For example, the Annex contained no clear disciplines, beyond "reasonableness", over the pricing or promptness of access or on bundling practices.

In anticipation of these problems, some 60 governments participating in the basic telecommunication negotiations made additional commitments under Article XVIII of the GATS to apply certain regulatory principles contained in a Reference Paper.[19] The Reference Paper is, first of all, wider in scope than Article VIII and its domain is clearer than

[18]For instance, a major supplier, with control over essential facilities, may allow rivals to enter the local telephone call market but deny them dialling parity. That is, while its own customers had seven digit telephone numbers, those of the rival could be allotted sixteen digit numbers. We can imagine the impact a seemingly innocuous "technical restriction" would have on the relative attractiveness for customers of the two suppliers.

[19]Governments had the flexibility to draw selectively from a common text. Fifty-seven of the 69 participants in the negotiations on basic telecommunications adopted the Reference Paper in full or with fairly minor modifications as additional commitments. However, six more participants scheduled selected elements of it or drafted their own wording. Another six decided not to offer any additional commitments on regulation.

that of the Annex. Its disciplines apply to any "major supplier", defined as one who "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. "Essential facilities" are defined to 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 to provide a service. Notably, the conditions to qualify as a "major supplier", and therefore to be subject to the disciplines in the Reference Paper, do not include government responsibility for its existence, unlike in the case of Article VIII monopolies. The Reference Paper also makes clear that its adherents must ensure that major suppliers will allow linking with *other suppliers* of public telecommunications transport networks or services, an issue on which the Annex was apparently not adequately clear.

The disciplines of the Reference Paper can also be seen as going beyond those contained in Article VIII and the Annex. In the current context , the most interesting relate to *interconnection* and *competition safeguards*.[20] Interconnection must be on non-discriminatory, transparent and reasonable terms, conditions (including technical standards and specifications) and rates; 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; at cost-oriented rates; in a timely fashion; sufficiently unbundled so that a supplier need not pay for network components or facilities it does not require; at any technically feasible point in the network; and upon request, at points in addition to the network termination points offered to most users, albeit allowing for charges that reflect the construction cost of necessary additional facilities. The requirement to offer interconnection at "cost-oriented rates", for instance. goes much further than anything in the Annex or Article VIII.

Competition safeguards oblige Members to prevent a major supplier from abusing control over information, or engaging in anti-competitive cross-subsidization - i.e. to prevent a major supplier from using profits made in one segment of the market to subsidize its *output* sales in another segment and thus drive out rival suppliers. Certain disciplines against

[20]Other Reference Paper provisions provide for greater transparency and require the creation of dispute resolution mechanisms. Governments who have scheduled the Reference Paper must also ensure that a regulator of the sector will be separate from, and not accountable to, any supplier of basic telecommunications services and specifies that the decisions of and the procedures used must be "impartial with respect to all market participants".

cross-subsidization can already be read in Article VIII:2, however there the discipline is curtailed by reference to a Member's territory and commitments.

2. *Maritime Transport Services*

The failed negotiations on maritime transport services also illustrated a recurrent theme in the GATS context: the difference between liberalizing access for foreign service *suppliers* to supply a service, and ensuring that foreign *users* of the service are given non-discriminatory access. This issue is illustrated by a curious switch in the manner of scheduling commitments with regard to port services. Port services were initially treated as a sub-sector - under *supporting services for maritime transport* - in which Members could make specific commitments on market access and national treatment. Thus, if a Member scheduled this sub-sector and did not impose prohibitive restrictions, it would be possible for the suppliers of another Member to provide these services.

Later negotiators developed a "draft schedule" which focused on the three pillars of the maritime transport sector: international shipping, maritime auxiliary services, and access to and use of port facilities. In the draft schedule, while commitments on the first two pillars are scheduled under Article XVI (market access) and Article XVII (national treatment), commitments on the third pillar are scheduled under Article XVIII (additional commitments). However, differences in the way that the additional commitments are phrased may imply significantly differing obligations . Some have simply stated that port services shall be made available to international maritime transport suppliers on reasonable and nondiscriminatory terms, while others have stated that no governmental measure will be taken which prevents the availability of port services on such terms. It would seem that in the former case, a Member has undertaken to ensure that even private suppliers do not discriminate in the provision of these services and thus committed to pro-competitive regulation.

In some respects, therefore, the approach to port services, which can also be seen as "essential facilities" often controlled by "major" or monopoly suppliers, was analogous to the approach to basic telecommunications networks. However, the draft schedule structure does not include the possibility of allowing the service suppliers of another Member to provide port services. In effect, it is concerned only with the rights of consumers of port services, i.e. suppliers of international shipping services, rather than the rights of suppliers

of port services.[21] Thus, while in telecom we have both access guarantees and liberalization of supply itself, in maritime, there is currently scope for providing guarantees on access but not to liberalize foreign entry into the sector.[22]

IV. Anticompetitive Practices, Article IX and the MFN obligation

This paper has focused for the most part on GATS Article VIII, at the expense of the other article which deals with anticompetitive practices, Article IX. The scope of Article IX is wider, dealing as it does with "certain business practices of service suppliers, other than those falling under Article VIII, [which] may restrain competition and thereby restrict trade in services", but its disciplines are much weaker. In effect, the only obligations imposed relate to consultation and information sharing.

Even though it is evident that the GATS itself contains only limited obligations on Members to curtail anti-competitive practices, the question arises whether it leaves Members adequate scope to take action against the anti-competitive practices of the service suppliers of other Members.

An interesting issue arose in the context of the basic telecommunications negotiations pertaining to international services which illustrates this issue. Some Members were reluctant to grant unconditional MFN access to their liberalized markets to operators originating from non-liberalized markets. Apart from the desire to retain negotiating leverage, there were two main concerns. The first was the fear of anti-competitive cross-subsidization and the second was the problem of "one way monopoly by-pass."[23] The first concern is relatively straightforward, and not unlike certain concerns about predatory

[21]This gap in the draft schedule may reflect pessimism about liberalizing commitments on access to port services. However, even if concentrated market structures persist, many countries are in the process of privatizing port facilities and frequently seek to attract foreign investment in these areas.

[22]There is one other issue which the draft schedule approach raises, which is also relevant to basic telecommunications. Article XXVIII (c)(ii) of the GATS states that "'measures by Members affecting trade in services' include measures in respect of the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally." Thus, it could be argued that non-discriminatory access to and use of port services is already assured by the MFN principle in Article II. Why is there any need then for an explicit listing of port services under additional commitments? Such an explicit listing does have an independent value when the national treatment commitments are not comprehensive - in which case the explicit listing would assure suppliers of another Member at least of reasonable and non-discriminatory access to port services, while they remain vulnerable to other protective instruments. It could also be argued that Article XXVIII(c)(ii) only covers access to services inputs and not non-services inputs - such as water and electrical supplies, which are included in the draft schedule list of port services.

[23]This discussion draws upon Gamberale (1997)

pricing that have been raised about the dumping of goods. The concern is that the competitive structure of the liberalized market could be undermined if an operator from a closed home-market were to subsidize its activity in the liberalized market, using revenues generated in the closed home market, including revenue from excessively hight accounting rates. This problem highlighted the limitations of Article VIII:2 since it only requires that a Member shall ensure that a monopoly supplier "does not abuse its monopoly position to act *in its territory* in a manner inconsistent with [a Member's *specific*] *commitments*." (italics added) The behaviour at issue is not taking place in a Member's territory and is not inconsistent with its specific commitments.

The second concern was that the operator from the closed market would be able to by-pass the accounting rate system by establishing commercial presence and its own facilities in the liberalized market and using this to terminate its own calls. Operators of the liberalized market would, meanwhile, still have to depend on the closed-market operator to terminate their calls. The imbalance in payments between the two would worsen, since the liberalized market operators would no longer be able to offset some of their payments for outgoing calls by receipts for incoming calls. Furthermore, foreign carriers from closed-markets operating in the liberalized market would also be able to offer cheaper international calls from the liberalized market to their country of origin, being able to circumvent the high termination charge imposed on other carriers.

Several solutions were considered the problem of achieving MFN-based liberalization while allowing Members the freedom to deal with possible anti-competitive practices by exclusive operators from closed markets. One was taking measures ex ante, consisting in limiting market access for operators capable of engaging in anti-competitive practices because their home-markets were closed. Second, was taking measures ex post, after market access is granted, if there was evidence of actual anti-competitive practices. And finally, the possibility of commitments by non-liberalizing Members to restrain exclusive operators from engaging in anti-competitive practices in international services. The limited time available did not permit a full exploration of the alternatives, and eventually it was the second option which seems to have been adopted by default.[24]

[24]At the end of 1996, the US Federal Communication Commission published a Notice of Proposed Rulemaking dealing with international accounting rates. This notice presents a possible solution to the problem of exclusive operators taking advantage of the combined effect of liberalization and the existing accounting rate system. It sets "benchmarks" based on costs for accounting rates, which countries should respect as a condition for their operators to be licensed in the US market. The FCC makes provision for higher completion costs in poorer countries and proposes benchmarks which differ according to the level of development of countries. The Notice of Proposed Rulemaking was adopted as an Order by the FCC on 7 August 1997 and is

The ability to exercise national competition policy depends on the interpretation of the MFN obligation. Is a long-distance call provided at a low price by a subsidiary of a protected monopolist like a long-distance call provided by any other supplier? And is the subsidiary of a protected monopolist like any other supplier? If the reply to these questions is in the affirmative, then the MFN obligation would preclude any discrimination between these services and service suppliers, including on the basis of competition policy considerations. Alternatively, it could be argued that if competition policy itself is based on non-discriminatory principles, then it would be acceptable for it to impact differentially on particular services or service suppliers in specific instances provided they themselves manifested the characteristics which aroused concern. For instance, if competition policy had general restrictions on cross-subsidization or on the expansion of dominant suppliers, then specific actions which happened to be directed against foreign services or service suppliers which had these attributes would not constitute infringements of MFN. However, any discrimination in treatment, based not on competition policy related-attributes of the service or the service supplier, but on unrelated attributes such as the fact of protection in the home market would seem to violate the MFN obligation.[25]

(..continued)

due to come into force on 1 January 1998. The Order allows for gradual phase-ins conditional on the level of development. In effect, the FCC proposes to enforce the benchmarks, by withdrawing or denying a license if an accounting rate above the benchmark is charged. Though some have expressed doubts over the consistency of the legislation with the MFN obligation, the US has argued that these doubts are not justified since its actions are based on post-entry competition safeguards rather than on ex ante reciprocity.

[25]There would seem to be an acknowledgement of this distinction in the case of maritime transport. This time the concern is that anticompetitive practices in the provision of port services in certain countries have hampered access of foreign maritime transport suppliers to their markets. How far these practices are facilitated by government action (or inaction) is subject to dispute. In this case, the MFN obligation was not a constraint on retaliatory action since the application of the obligation to the sector has been suspended. Indeed, one of the reasons the United States presented for seeking an MFN exemption when the application of the obligation was a possibility, was precisely to preserve its right to retaliate against foreign restrictive practices. Recently, the United States imposed penalties on Japanese ships visiting United States ports because of the perceived persistence of anticompetitive practices in Japanese ports.

V. An Integrated Approach to Policy

The question arises as to where pro-competitive regulation is a necessary complement to trade liberalization (or at least temporarily required to facilitate the advent of market forces), and where the development of genuinely competitive conditions depends not so much on regulation as on complementary liberalization in areas like distribution services. The answer to these questions depends, of course, on the degree of contestability of certain markets. The traditional view that certain basic services are necessarily natural monopolies has changed significantly due to technological advances, but in certain areas the existence of significant economies of scale still precludes the emergence of competitive markets.

An analysis of the impact of monopolies and STEs can be conducted in the framework of multi-stage production, where one of the stages could be the distribution of the product/service. The existence of a monopoly or STE has been cause for international concern when it has exclusive control over supply at any stage of production or over the supply of an essential input. Such exclusive control may be due to rights conferred by the government, or some other form of government facilitating action, or it may be a consequence of large economies of scale in production. In some cases, the situation is more fuzzy, where monopolies were originally government-mandated, but even after the end of the government mandate, more competitive situations are slow to emerge.[26]

It is when the exclusive supplier at any stage of production (of a particular input) chooses to discriminate against or between foreign suppliers at other stages of production that there is cause for international concern.[27] Why might this happen? One possibility is that the exclusive supplier may in some way be vertically linked to producers at another stage of production. This link may be policy induced and based solely on nationality, as, for instance, when an STE restricts purchases from foreign sources to protect national suppliers. Or the link may be deeper, taking the form of vertical integration, as when a telecommunications monopolist charges high interconnection charges to its rivals in order to ensure the profitability of its own downstream operations. Even if there is no national or own production to protect, the exclusive supplier may still choose to behave as a monopolist (pure or discriminating) simply to maximise its own profits.

[26]This may be because it takes time for competitors to create alternative production facilities, such as telecom networks, or for alternative technologies to develop which are not subject to large economies of scale.

[27]Of course, control over essential facilities may give rise to non-discriminating pure monopolist behaviour which has adverse welfare-effects on welfare, but this is as much a concern for national authorities as for foreign suppliers.

Table 4

Nature of technology	Nature of policy	Liberalizing entry into all stages of production (distribution)	Enforcing non-discriminatory access to the use of facilities
Optimal scale of production at some stage of production (distribution) is small relative to demand	No advantage arising from vertical integration	Sufficient	Sufficient
	Advantage arising from vertical integration	Only way of ensuring competitive conditions	Does not ensure fully competitive conditions, and may prevent economically efficient arrangements
Optimal scale of production at some stage of production (distribution) is large relative to demand	No advantage arising from vertical integration	Does not ensure competitive conditions	Only way of ensuring competitive conditions
	Advantage arising from vertical integration	Does not ensure competitive conditions	Creates increased competition but may prevent economically efficient arrangements

Table 4 attempts to relate technological fundamentals to policy prescriptions. The first two columns describe alternative technological possibilities depending on whether there is scope for competition at all stages of production (inclusive of distribution) and whether there is an advantage arising from vertical integration. If economies of scale imply that a particular stage of production or distribution is monopolised, then the mere liberalization of entry is not sufficient, and there is need for regulation to ensure non-discriminatory access to the monopolised facilities. On the other hand, where an advantage arises from vertical integration, as in the distribution of certain consumer durables, liberalization of entry is the only way of ensuring competitive conditions. Enforcing non-discriminatory access for all suppliers is then a sub-optimal instrument of achieving increased competition, since it prevents gains from vertical integration from being realised.

These issues can be illustrated by referring to an area of tension between trade and competition policy which also demonstrates the interplay between liberalization and rules in the domains of goods and services. This involves the perceived denial of market access through vertical foreclosure. It has been argued that vertical linkages between manufacturers and distributors in certain countries make it difficult for foreign goods to reach consumers. In a way, there is a parallel with the issue in the telecom context because

again the problem, if any, arises from discrimination in the provision of a crucial input service - distribution.

The problem of vertical foreclosure in this form is a less extreme version of the concern about STEs, in that the concern is not about state entities and not necessarily about fully monopolised distribution. Some of the considerations raised in Section II.2 are relevant in determining whether the problem genuinely merits concern. Nevertheless, in so far as it does, can it be addressed purely by trade liberalization or is there need for the application of complementary pro-competitive regulation?

First, if the discrimination in distribution can in any way be attributed to government action, then there is scope for challenging this under Article III of GATT 1994 (dealing with national treatment on internal taxation and regulation). Article III:4 states that imports must be "accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, *distribution* or use." (emphasis added) Thus, in a sense Article III:4 is a access provision like those which have been created in telecom and maritime transport services, but it is a guarantee against discrimination through government regulations, not the practice of private and government firms.

If the discrimination is purely a consequence of private arrangements between local manufacturers and distributors, then the obvious question is what prevents foreign suppliers from creating their own distribution networks?[28] Here a country's commitments under GATS are relevant.[29] In principle, liberalization of trade (understood in the wide GATS sense to include establishment of commercial presence) in distribution services could go a long way in addressing most difficulties. Of course, economies of scale may still limit the scope for competition - a small town may not be able to profitably accommodate more

[28]It could also be argued that private anticompetitive practices can be addressed under Article XXIII (dealing with nullification and impairment) of GATT 1994. The argument would be that the failure to enforce national competition law by a Member has led to another Member's benefits under GATT 1994 being nullified. It would, of course, be necessary to demonstrate that non-enforcement of competition law could not have been reasonably expected when certain market access commitments were made. If no specific commitments had been made, if competition law did not exist in a particular country or if the level of enforcement had always been weak, then the non-violation argument would be weakened.

[29]For instance, New Zealand, a country which has numerous market boards operating in agriculture, has excluded from the scope of their commitments on wholesale trade services those which pertain to CPC classes 6221 (wholesale trade services of agricultural raw materials and live animals), 6222 (wholesale trade services of food, beverages and tobacco), and services relating to CPC classes 2613-2615 (wool and animal hair).

than one supermarket, or energy distribution may be necessarily monopolised at the regional level. Drawing an analogy from telecommunications, if economies of scale considerations force foreign sellers to rely on local distributors, then trade liberalization is not enough, and there would seem to be a case for application of pro-competitive regulation to prevent discrimination. What makes this different from the existing WTO approach is that pro-competitive disciplines would be applied in the domain of *services* to protect the integrity of market access commitments, not only in the domain of *services*, as is the focus of Article VIII, but in the domain of *goods*. This may be an example of the type of situation which has prompted calls for an international agreement on competition policy.

A particular problem could arise, most obviously in the case of certain consumer durables, such as automobiles, where the ability of the manufacturer to distribute his own product and provide post-sales service affects the competitiveness of his product, i.e. vertical integration enhances efficiency. If a foreign manufacturer is not allowed to enter the distribution and service industries, and is forced to rely on local agents, he may be put at a competitive disadvantage vis-a-vis local manufacturers. It would be difficult to argue that the obligation under Article III:4 of GATT 1994 implies that a Member is obliged to give access to the distribution sector to manufacturers where such access is necessary to ensure competitiveness. Nor is it clear how pro-competitive regulation would address this problem. Forcing all existing distributors to stock a range of products from different manufacturers may prevent the realization of benefits from efficient vertical arrangements. The only meaningful solution would seem to be the liberalization of entry into the distribution sector.

An analogous problem arose within the domain of services, in the negotiations in maritime transport relating to multimodal transport services, an area of growing importance. This form of transportation apparently can be provided most efficiently by vertically integrated operators, who control both the ocean and the inland means of transport. The willingness of some Members to make additional commitments guaranteeing access and use to the inland mode, but not the right to own or control, were deemed to be inadequate by others who felt that foreign suppliers would be put at a disadvantage relative to vertically integrated national suppliers. Progress in these negotiations will therefore depend heavily on the willingness of countries to liberalize foreign access to trucking and related services.

Perhaps the central point that emerges is that liberalization of trade and investment in both goods and services is frequently necessary to ensure effective competition. However, where

there are intrinsic limitations on the contestability of markets because of scale considerations, pro-competitive regulation may well be required to ensure a competitive outcome in the market.

VI. Conclusions

This paper has argued that GATS Article VIII is of limited relevance today. What the article currently covers may well be less important than what it excludes. Government-mandated pure monopolies or non-competing oligopolies are disappearing from the infrastructural services for which Article VIII is most relevant, notably telecommunications. The behaviour of dominant suppliers which often remain does not fall within its scope. Furthermore, the exclusion of purchasing behaviour of non-competing public enterprises may not be innocuous.

Furthermore, since the article's disciplines depend exclusively on the other obligations undertaken by Members, a variety of exemptions have weakened Article VIII in key areas. These include the understanding that accounting rates in basic telecommunications would not be an issue for dispute settlement, the suspension of the MFN obligation for the maritime sector along with the limited specific commitments in the sector, and finally, the exclusion of air traffic rights from the scope of the GATS.

In telecommunications, one of the first areas under GATS where there were serious liberalizing negotiations, the limitations in the scope and disciplines of Article VIII needed to be addressed. The Annex reinforced the rights of users of telecommunications services, while the Reference paper strengthened guarantees of market access for suppliers of liberalized services. In maritime transport, similar steps were taken in the form of additional commitments ensuring reasonable and non-discriminatory access to port services.

One basic question concerns how much emphasis should be placed on pro-competitive regulation to ensure competitive market conditions in other sectors, rather than simply to continue the process of trade and investment liberalization already underway. The answer, not surprisingly, depends on the technological features of the market. The existence of benefits from vertical integration, as in multimodal transport services or in car manufacture and distribution, makes access obligations, such as those considered in maritime

negotiations or contained in GATT Article III:4, an inferior substitute for liberalization of access to all stages of production and distribution. However, the existence of significant economies of scale at any stage of production or distribution relative to the size of demand, as for instance in telecom and transportation networks, and energy distribution, implies the need for some form of pro-competitive regulation to ensure non-discriminatory access to the relevant good or service.

It may well be that the specific conditions in each services area necessitates the creation of detailed sector-specific regulatory disciplines, and make cross-sectoral rules like those contained in Article VIII inevitably inadequate. Nevertheless, it may be desirable to strengthen Article VIII to deal with certain generic problems rather than to rely on developing regulatory disciplines for each sector. Such an approach would economise on negotiating effort and avoid the need to anticipate all the sector-specific problems that could arise.

How then could GATS Article VIII be strengthened? First, in recognition of the intrinsic limitations on the contestability of certain markets because of scale considerations, it would seem desirable to extend the scope of Article VIII. Thus, its coverage could extend to major suppliers, as defined in the Reference Paper, in terms of control over essential facilities and without requiring some form of government responsibility as a condition for coverage. Secondly, it would be worth examining fully the empirical significance of the exclusion from both GATT Article XVII and GATS Article VIII of the purchases of goods and services by services producers and of services by goods producers. The challenge would be to design disciplines which are sufficiently discerning in order to be effective where these exclusions matter without being unnecessarily burdensome where they do not. Finally, while the MFN obligation is valuable in promoting allocative efficiency, real liberalization depends on the national treatment obligation. The application of the latter to STEs in the domain of goods is doubtful, and the application of both in all areas of services is riddled with holes. Remedying these gaps would automatically strengthen the disciplines under both articles.

One final question concerns how far it is possible to address anticompetitive practices under the GATS. The disciplines here are so weak that the relevant issue is not so much what GATS does as what GATS would allow in the form of unilateral remedies. The scope for national competition policies to address foreign anti-competitive practices is found to depend on the interpretation of the non-discriminatory obligations, especially relating to the notions of like services and service suppliers. It could be argued that if competition policy

itself is based on non-discriminatory principles, then it would be acceptable for it to impact differentially on particular services or service suppliers in specific instances provided that they manifested the relevant anti-competitive characteristics.

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Table 1: A comparison of GATT Article XVII and GATS Article VIII

	GATT Article XVII and the Understanding on the Interpretation of Article XVII	**GATS Article VIII**
Scope	All state enterprises, and any enterprise granted, formally or in effect, exclusive or special privileges. Understanding: Governmental and non-governmental enterprises which have been granted exclusive or special rights or privileges in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.	Any monopoly supplier: any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that services; and exclusive service suppliers: where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.
Disciplines	In its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment. Shall make any purchases or sales solely in accordance with commercial considerations, and shall afford foreign enterprises adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.	In the supply of the monopoly service in the relevant market, act in a manner consistent with that Member's obligations under Article II (MFN) and specific commitments. If the monopoly supplier competes in the supply of a service outside the scope of its monopoly rights and which is subject to specific commitments, the supplier shall not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.
Transparency of existence	Requirement to notify products which are imported or exported by covered enterprises. Understanding: requirement to notify enterprises under new definition. Also provision for counter-notification.	Requirement to notify monopoly rights, granted after the entry into force of the WTO Agreement, regarding the supply of a service covered by specific commitments
Transparency of behaviour	A Member establishing, maintaining or authorizing such an enterprise may be requested to supply information about its operations if a Member has reason to believe that its interests under the Agreement are being adversely affected by such operations. And shall, on the request of a Member having a substantial trade in a product, which is not subject to a tariff concession, inform Members of the import mark-up on the product or, when this is not possible, of the resale price. Understanding: each Member is required to conduct a review of policy to ensure maximum transparency in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises and the effect of their	A Member establishing, maintaining or authorizing such a supplier may be requested to provide specific information concerning the operations of a monopoly supplier if a Member has reason to believe that the monopoly supplier is acting inconsistently with Article VIII: 1 or 2.

	operations on international trade.	

TABLE 2: Monopolies or Exclusive Rights Scheduled as Limitations on Market Access

Sector	Countries
BUSINESS SERVICES	
Supply of pharmaceutical goods to the general public (pharmacists)	Belgium, Denmark, Spain, France, Greece, Italy, Luxembourg, Portugal
Placement and Supply Services of Personnel	Belgium, France, Italy, Spain, Norway
Legal services	Iceland (exclusive rights)
COMMUNICATION SERVICES	
Value Added Telecom Services	Turkey
Computerized airline reservation services	Mexico
CONSTRUCTION SERVICES Construction and maintenance of highways and Rome airport	Italy (exclusive rights)
Maintenance of highways	Portugal (exclusive rights)
DISTRIBUTION SERVICES	
Wholesale Trade Service State monopoly on tobacco	Spain, Italy, Portugal
Retailing Services	Spain, France, Italy
ENVIRONMENTAL SERVICES	
Refuse disposal services Some categories of waste	Norway
Control services of exhaust gas from cars and trucks	Norway, Sweden
RECREATIONAL, CULTURAL AND SPORTING SERVICES	
Gambling and betting services	Senegal

TRANSPORT SERVICES	
Cargo handling	Aruba, Benin, Ghana, Netherlands Antilles
Storage and warehouse services	Benin, Ghana
Container station and depot services	
Supporting services for air transport	Mexico
Rail Transport Services	Turkey
Management of highways	Italy, Portugal (exclusive rights)
Management of Rome airport	Italy (exclusive rights)
Road transport	Iceland (exclusive rights)
FINANCIAL SERVICES	
Motor vehicle insurance	Canada (Quebec, Manitoba, Saskatchewan and British Columbia)
	Australia (in most States and Territories)
Fire and natural damage insurance on buildings	Switzerland (in 19 cantons)
Workers Compensation	Australia (Southern Australia, Queensland, Victoria)
Mandatory or facultative reinsurance	Brazil
Residential property disaster insurance	New Zealand
Management of pension funds of public and para-public institutions	Canada (Quebec)
Registration of securities	Norway
Securities custodial depository services	Singapore
Settlement and clearing services	Turkey, Italy
PUBLIC UTILITIES	
Sector coverage variable	EU Member States, Slovenia, Turkey

Source: Compiled from GATS Schedules

TABLE 3: Results of the basic telecommunications negotiations

Participant		Voice telephony			
	Local	Domestic long distance	International	Resale	Addl. comms. Ref. paper (2) (6)
Antigua & Barbuda			P		+
Argentina	P	P	P	P	+
Australia (3)	L	L	L	L	+
Bangladesh	L	L			
Belize					+
Bolivia	L	P	P	P	
Brazil (3) (5)					
Brunei Darussalam	(6)		L		+
Bulgaria	P	P	P		+
Canada	L	L	P	L	+
Chile		L	L	L	+
Colombia	L	L	L		+
Cote d'Ivoire	P	P	P	P	+
Czech Republic	P	P	P	P	+
Dominica					+
Dominican Republic	L	L	L	L	+
Ecuador					
El Salvador	L	L	L	L	+
European Union (4)	L	L	L	L	+
Ghana	L (6)	L (6)	L (6)		+
Grenada	P	n.a.	P	P	+
Guatemala	L	L	L	L	+
Hong Kong	L	n.a.	L	L	+
Hungary	P	P	P	P	+
Iceland	L	L	L	L	+
India	L	L (6)	(6)		+
Indonesia	L (6)	L (6)	L (6)		+
Israel (5)	(6)	(6)	L (6)		+

Participant		Voice telephony			
	Local	Domestic long distance	International	Resale	Addl. comms. Ref. paper (2) (6)
Jamaica	P	P	P		+
Japan	L	L	L	L	+
Korea	L	L	L	P	+
Malaysia	L	L	L		
Mauritius	P	P	P		
Mexico	L	L	L	L	+
Morocco	P	P	P		
New Zealand	L	L	L	L	+
Norway	L	L	L	L	+
Pakistan	P	P	P	P	+
Papua New Guinea					+
Peru	P	P	P	P	+
Philippines	L	L	L		
Poland	L	P	P	P	+
Romania	P	P	P	P	+
Senegal					+
Singapore	P	n.a.	P		+
Slovak Republic	P	P	P	P	+
South Africa	P (6)	P (6)	P (6)	P	+
Sri Lanka					+
Switzerland (3) (5)					+
Thailand					
Trinidad & Tobago	P	P	P	P	+
Tunisia	P				
Turkey					
United States	L	L	L	L	+
Venezuela	P	P	P		
Total schedules (55)	41	38	42	28	0
Total governments (69)	55	52	56	42	14

Source: WTO

Explanatory Notes for Table 3

(1) **L** indicates that the service will be "liberalized" (i.e. can be supplied by at least two suppliers) as of 1 January 1998. **P** indicates that liberalization will be phased in at a later date.
(2) **+** indicates that the Member incorporated the Reference Paper on regulatory principles with few, if any, modifications.
(3) Commitments made conditional upon the passage of relevant national legislation.
(4) Phase-in of facilities-based voice service applies for Greece, Ireland, and Portugal.
(5) Where no public voice telephone commitments are indicated, voice over closed user groups is nonetheless committed.
(6) Commits to review the possibility of allowing market access for additional suppliers.