Telecommunications and investment in the great supranational regulatory game

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Significant change is occurring in the international structure of telecommunications. With the progressive movement of liberalization philosophies across the world, old monopoly structures protecting national telecommunications markets have been breaking down and giving way to a new, more open 'market access' telecommunications regime which is supported by an increasing emphasis on supranational regulation. This changed situation is creating new opportunities for some states but has the potential to place many at a competitive disadvantage. While the benefits of the evolving 'market access' model are well espoused by organizations such as the World Bank, there are many important issues which are being simplified or ignored. One such issue is the link between supranational regulatory reform and investment in telecommunications.

This paper is structured in the following way: the first section offers a brief description of the changes in international telecommunications; the second section analyses the supranational regulatory system, the players in it and the strategies they use as those relate to telecommunications; the third examines the mechanisms which mediate the strategies. The remaining two sections examine the connections between telecommunications and investment. Within the emerging supranational regime, telecommunications policy is being shaped by very powerful interests and states. Some policy conclusions relating to telecommunications and investments are drawn, especially as they relate to less powerful states.

The changing scene

The regulation of telecommunications activities can be divided into three layers: national, regional (eg the North American Free Trade Association – NAFTA) and supranational. Historically, the most im-
important of these has been the national level. It is states that gave birth to the international level of regulation through the creation of the International Telegraph Union in 1865. The details of telecommunications regulation between states have, hardly surprisingly, varied enormously. But at a macro level we can say that national systems of regulation have been characterized by what might be termed a protectionist model of regulation. This model contains legal, economic and cultural assumptions. Legally, states are assumed to be sovereign actors with responsibilities for the cultural and economic life of their citizens. Economically, telecommunications is thought to be an example of a natural monopoly that requires regulation in order to avoid the worst evil – the unregulated monopoly. Finally, state control over telecommunications is thought to be an important means to the goal of preserving a national cultural heritage.

Primarily, because of this model, international telecommunications were treated as an extension of national telecommunications. The result was a heavily regulated international monopoly. International telecommunications trade was commonly based on bilateral agreements with national monopolists operating to serve each national market. Often the national monopolists were state-owned. This international regime was managed by the International Telecommunication Union (ITU). Within this environment limited opportunity existed for firms to exploit new growth in international markets. Typically, exports of telecommunications services were limited by the bilateral agreements which made it difficult for firms or governments to compete for traffic. Additionally, direct foreign investment (DFI) was prevented because national carriers were often immune from takeovers as monopoly or ownership rights existed.

This international regime is now undergoing rapid change. It is being slowly integrated into an emerging supranational regulatory system. Furthermore this supranational system is itself helping to replace the protectionist model of telecommunications regulation with a market access model. The dominant assumption of this model is that the provision of telecommunications services and of facilities represent areas of trade which non-state actors ought to be allowed to enter. Related to this model are beliefs that access to the market should be non-discriminatory, that there should be a 'level playing field' and that cross-subsidization should not be practised. The market access model can have different configurations. For example, the services sector could have different types of market access models ranging from unrestricted market access to all kinds of services (roughly the situation in the USA) to a monopoly on basic services and competition on value-added services like voice mail, videotext and online database services. We have deliberately characterized the market access model in broad generic terms since our interest is in the role that the supranational regulatory system will play in the evolution of this model.

Broadly speaking, the key features of the new international telecommunications regime are competition between firms and countries in the area of international telecommunications services. There is also a much increased level of international activity in terms of direct foreign investment, strategic alliances and cooperative ventures between companies together with an opening up of competition within countries through privatization, corporatization and the entry of new firms. At
the national level the market access model has included features such as: privatization of the operator followed by introduction of competition; partial sale of the operator to the public, partial sale to foreign public telecommunications operators (PTOs); and other measures to increase private sector participation such as management contracts and joint ventures. 6

The supranational regulatory system: players and principles

By supranational regulatory system we mean an international system in which there are supranational institutions that articulate principles and standards of regulation for states. The effect of this system is to make most states from the point of view of their national regulatory system law takers rather than law makers. So, for example, the Final Act of the Uruguay Round (General Agreement on Tariffs and Trade – GATT Agreement) contains principles and standards of regulation in areas as diverse as food standards, services and intellectual property. 7 Countries that have signed it, in many cases, need to make significant changes to their national regulatory systems. Detailed regulatory rules and models are generally not provided by supranational regulatory institutions. The dominant feature of the supranational regulatory order is that it is primarily concerned with principles, standards and the articulation of global policy. Detailed regulatory models are provided by technical handmaidens such as international consultancy firms, specialist organizations or other states.

The supranational system is characterized by the presence of a hierarchy of players. 8 Roughly this hierarchy consists of supranational organizations like the World Trade Organization (the successor organization to the GATT), states of the core (USA, Europe, Japan), states of the semi-periphery and periphery, international and national industry associations, transnational and national corporations, international and national social movements. Each player in the hierarchy can have a significant impact on other players within the system despite relative power imbalances. This is so because the supranational order is both based on and expresses itself in terms of the rule of law (ie law in the widest sense). What matters is not just sheer coercive power (although this is important), but rather strategy and an organizational capacity to navigate through rule-based complexities. So, for example, an organization like Greenpeace can have a major impact on the regulation of biotechnology through lobbying institutions like the European Parliament, despite the fact that it does not have the economic power of those transnational companies interested in a liberal patenting regime for life forms.

The players within the supranational regulatory game vary depending on subject matter and issues. In the case of telecommunications the core states are the USA, Europe (with the UK being important in that grouping) and Japan. In a more extended analysis we would have to disaggregate the state into its executive and organizational components. The Office of the United States Trade Representative (USTR) would feature in such an approach. The international organizations which are important include the European Commission (EC), the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), the World Bank, the International Monetary Fund (IMF) and the International Telecommunication Union (ITU).

7The GATT Agreement is an informal way of describing the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations concluded at Marrakesh, 15 April 1994.
8The hierarchy of players is part of a theory of the emerging international regulatory order being developed by Braithwaite and Drahos in a study of international business regulation.
The major private players include the US multinationals which are
made up of providers of telecommunications services (eg AT&T, MCI
and the regional Bell holding companies), users of such services (eg
American Express, IBM) and manufacturers of telecommunications
equipment, plus their national (eg the International Communications
Association, Coalition of Service Industries, the US Council for Inter-
national Business) and international organizational representatives (eg
International Chamber of Commerce, International Telecommunica-
tions Users Group – INTUG).

These players aim to establish certain kinds of linkages between
principles and standards. The following paragraphs explain what this
means.

The emerging supranational regulatory system is characterized by the
presence of four foundational principles: the principle of reciprocity, the
most favoured nation (MFN) principle, the principle of national
treatment and the principle of transparency. There are several crucial
things to understand about these principles. First, they are not exclu-
sively trade principles. The principle of reciprocity, for instance, is the
basis of many kinds of bilateral treaties, and the principle of national
treatment is to be found in intellectual property and tax conventions as
well as trade law. It is true to say, however, that the application of these
principles to national regulatory systems is being driven through inter-
national trade policy.

The supranational regulatory game is not a struggle over the recogni-
tion of the principles themselves. These are largely recognized and
accepted by states. Rather the struggle which takes place is over the
kinds of standards to which the principles are linked. The principles are,
in the abstract, directionless in terms of economic gains or losses. It is
only when they are tied to determinate standards that they begin to
operate with an economic specificity. Take, for example, the principle
of national treatment. This principle requires State A to grant to the
nationals of State B the same legal rights and advantages that it grants to
its own nationals. The principle requires the equal treatment of nation-
als and non-nationals by a state. This principle can have very different
economic consequences depending on the standard to which it is linked.
Imagine that country A does not recognize biotechnology patents but
country B does. The effect of national treatment is that the nationals of
country B are unable to patent their biotechnological inventions in
country A. If country B is an exporter of those kinds of patents it faces a
freeriding problem from country A. While both country A and country
B may accept the national treatment principle, each is going to argue for
very different standards of protection for biotechnological patents. It is
those standards that determine whether the relevant country is going to
be a winner or a loser from the application of the national treatment
principle. In the case of telecommunications those players interested in
a market access model will, at the supranational regulatory level, support
the principles of national treatment and most favoured nation.
Those players interested in retaining some kind of protectionist model
of telecommunications will also support the principles but seek to
qualify their operation through some standard of differential application
(eg on the basis of developing versus developed country status).

To sum up so far, at the supranational regulatory level players vie to
link standards and principles in a way that produces economic or other
kinds of gains for them. Our next question relates to the strategies they

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9 In abstract this principle obliges a state to extend to any other states which can claim the benefit of the principle the advantages or benefits it gives to one state.

10 In abstract this requires states to make public information about measures and restrictions that affect the operation of an agreement between states.
employ to make the relevant linkages. We shall restrict our focus to the principal strategy which will be employed at supranational level to accelerate the replacement of the protectionist model by the market access model. Strong supporters of this model are the USA and US multinationals.

The most significant development in telecommunications policy at the global level has undoubtedly been the signing of the GATT Agreement in 1994. The GATT Agreement contains a General Agreement on Trade in Services (GATS) and this in turn contains an Annex on Telecommunications and an Annex on Negotiations on Basic Telecommunications. The GATS agreement has profound implications for states at the national regulatory level. This is so because of the nature of services. Services are constituted by law at the national level in a way that goods are not. Many services such as financial and banking services, communications services, legal and accounting services derive their identity and the nature of their operation from law. Once states agreed to include services in the GATT they opened up the possibility that MFN and national treatment principles would apply to areas like telecommunications. These principles will in the long term require states to engage in an intimate reworking of their national regulatory systems in order to make the international trade in services a meaningful possibility.

Since trade in services has such dramatic implications for national regulatory systems, the structure of GATS is designed to allow states to modulate the speed and scale of their entry into the international trade in services. The interests of developing countries in particular are recognized. GATS requires all states to recognize certain fundamental principles like MFN and transparency as well as the special needs of developing countries. Parts 3 and 4 of the agreement then allow states to make choices as to those service sectors they will open to other states. States under GATS can, in what are termed Schedules of Specific Commitments, list those sectors to which they are granting market access and the conditions under which they are doing so. The idea is that, over time, through a series of negotiated specific commitments between states, the trade in services sector will undergo a substantial liberalization. Formally, at least, individual states remain the drivers of this process.

How does the Annex on Telecommunications fit into this general structure? The Annex is based on the assumption that telecommunications is the basis of the delivery of services like, for example, banking and financial services as well as being a distinct part of the services sector itself. The purpose in essence is to ensure that when states open up certain service sectors they also grant access to the public telecommunications network needed for the provision of the service. The Annex does not independently require the liberalization of telecommunications. Rather it cuts in when states have already made commitments on telecommunications or telecommunications-related services.

In many respects GATS and the Annex on Telecommunications represent the status quo. States may maintain a protectionist model of telecommunications if they wish to do so. GATS does, however, set up a process in which the expectation is that telecommunications will over time be liberalized and subject to competition. States like the USA and the UK which have been frontrunners in switching to a market access model of telecommunications may experience some frustration with the
speed at which other states make the transition to that model. Similarly
business users of telecommunications will also want states to move
sooner rather than later on the liberalization of their telecommunications
sector. INTUG, for instance, has consistently advocated that users
of telecommunications should be free to choose from a variety of
transmission services and value-added services. In short, leader states
on telecommunications deregulation, large business users of telecom-
munications and large providers of telecommunications services and
equipment will not view positively the protections that GATS offers
individual states and developing countries in particular.

To speed up the conversion to the market access model the following
strategy is likely to be played out over the next few years. The strategy
has interlocking parts. One part is multilateral and the other bilateral.
Clearly states like the USA will continue to use the GATS process to
push for the liberalization of telecommunications. States have to enter
into successive rounds of negotiations on services. In the closing stages
of the Uruguay Round a Negotiating Group on Basic Telecommunica-
tions (NGBT) was set up. The idea was to continue discussions on
basic telecommunications services in the hope of arriving at a negotiated
multilateral settlement. Participation in the NGBT is voluntary. While
the key players in the forum are the USA, EU and Japan, there are
many countries that are only observers or not participants at all. Clearly
the USA will continue in these discussions to push for a market access
model. The USTR and private sector industry association players began
in 1994 to develop a set of negotiating objectives in NGBT discussions.

There are other ways in which the new WTO forum has the potential
to create pressures for the deregulation of telecommunications. Under
the Council for Trade in Services, sectoral committees may be created.
These have the responsibility among other things of keeping a weather
eye on the way in which GATS is working in particular sectors. Under
the previous GATT arrangement there was a trade policy review
mechanism, and this is continued in the WTO in the form of a Trade
Policy Review Body. Under the process the economies of member
states will be subject to an extensive review. The review process cannot
culminate in new obligations being imposed on states. But it will force
states to give an account of their progress or lack of it in important areas
like telecommunications. More importantly, the review process will
take place in a formal way in an international forum in which free trade
principles are legitimating principles. The onus will be on states to
explain any deviation from those principles. While the effect of the
review process will be to bring only normative pressure to bear on
states, this effect should not be discounted. No one likes getting a bad
report card. Finally, it should be noted that Article 23 of the Dispute
Resolution Agreement seems to allow for the possibility that a state
might bring an action against another state for impeding the attainment
of an objective of GATS. The USA might, in time, use the dispute
settlement mechanism to pressure states which in its view are being
laggards on trade in telecommunications.

The multilateral strategy has an important bilateral complement.
GATS is a multilateral agreement and binding on all members. Under
the agreement states can come to bilateral arrangements concerning
market access to various service sectors. GATS also permits its member
states to enter into agreements of a regional or bilateral kind to
liberalize trade. Thus one move for the USA to make is to push at a
bilateral and regional level for favourable market access arrangements in the telecommunications sector.\textsuperscript{21} This is a simple but highly effective technique, which the USA used with great success in the case of intellectual property.\textsuperscript{22} The US corporate sector in particular is sceptical of what can be achieved in a multilateral forum, since it can potentially lead to a lowest common denominator outcome.\textsuperscript{23} Furthermore, since many states are not participating in the NGBT discussions, they, in a sense, invite US bilateral initiatives. From the US perspective once a sufficient number of bilateral agreements are in place that favour the market access model in telecommunications it becomes very difficult for states to avoid following suit in the multilateral forum. The bilateral and regional arrangements provide the necessary precedents for the multilateral forum to press on with the implementation of the market access model. It is, as it were, a bootstrap regulatory strategy.

A quick review of the argument so far is this. The supranational regulatory system is a contest over principles – not their recognition, but rather their linkage to particular standards. One way in which powerful hegemonic states like the USA or powerful private actors such as multinationals secure the favourable application of the principles is through the multilateral/bilateral strategy we have just described. This strategy has to be implemented, and in the following few paragraphs we suggest some mechanisms that are central in the process of implementation. Before doing so, however, we need to broaden our depiction of the players involved in the supranational regulatory game. Our focus has been on the WTO because it has probably become the single most important international organization in this area. But there are other international organizations that will continue to exercise an important influence on the evolution of telecommunications regulation at the supranational level.

The IMF and the World Bank are two important examples of such organizations. Of these two the World Bank has had more specific input into the telecommunications sector. The IMF is more concerned with broad macroeconomic issues rather than sectoral issues. The World Bank group has become involved in the telecommunications sector through its support for privatization. Beginning in the early 1980s and mainly in developing countries, the World Bank’s lending operations have supported the privatization of many state-owned enterprises, telecommunications being among the most important.\textsuperscript{24} As the privatization wave has continued to grow, particularly in former socialist economies, the World Bank has through its advisory and lending capacities helped to institutionalize regulatory policies in countries which either have seen market access models of telecommunications being adopted or will see such models develop in the longer run. In Argentina, for example, the Bank helped to identify Argentina’s telephone company (Entel) as suitable for privatization and helped to bring it about with structural adjustment loans and specific assistance loans.\textsuperscript{25}

There are several reasons to think that the World Bank will continue to act in a uniform way when it comes to the telecommunications sector. First, the Bank is hardly likely to do anything to discourage the process of liberalization which GATS has set up in relation to the telecommunications sector. Second, while most Bank officials would deny that they have a universal set of solutions in their toolkit, it would be fair to say that many would view the market access model of telecommunica-
Mechanisms of implementation

There are three kinds of mechanisms that are likely to be important in implementing the bilateral/multilateral strategy in telecommunications. The first is coercion. One of the reasons that the USA was successful in negotiating a high-standard intellectual property agreement in the last GATT round was because at a bilateral level it brought trade coercion under its Trade Act of 1974 to bear on those states that refused to enact and enforce intellectual property laws.

Will trade coercion play a role in opening the telecommunications sector? This is a difficult question to answer, for much depends on the legal effect that the present GATT Agreement has on the use of 301 by the USA. The dispute resolution mechanism which has been created makes it clear in Article 23 that members are obliged to use the mechanism to solve their trade disputes. The potential illegality of 301 actions under present arrangements may not be enough to deter the USA from using it. It is clear that at least some, if not most, of the 301
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actions used by the USA were GATT inconsistent under the old GATT arrangements. The 301 process needs to be understood against a US cultural background and tradition of self-help and pragmatism. It is a way of 'getting things done'. Importantly, the 301 process has a great deal of support from those powerful lobbying organizations in Washington like the Motion Picture Association of America which made extensive use of it in their intellectual property campaign. These organizations are also centrally interested in the services sector. So while the 301 process may be allowed to 'cool off' it remains one tool that may be used to implement the bilateral part of the strategy on telecommunications. It should also be said that 301 can be used against states that are not members of the WTO.

The bilateral/multilateral strategy will also be helped by rational actor and modelling mechanisms. Many states will accept that the adoption of a market access model of telecommunications is a rational choice to make, given their economic goals. Their beliefs about the appropriate institutional arrangements needed to get to their goals will be influenced by a process of modelling. The idea behind modelling is that the emergence of institutional arrangements can be explained through a process of copying or imitation rather than through the exercise of power by interest groups. Modelling occurs between states because it is easier to borrow an institutional solution rather than invent new ones; it seems smart to imitate the methods that have brought powerful actors success, it helps to bring certainty and it forges links of identity with the powerful. A modelling explanation is perhaps the best explanation for the rapid diffusion of the National Information Infrastructure initiative from the USA to other states around the world. Telecommunications policy is an area in which the modelling mechanism is likely to feature strongly. Many states will liberalize their telecommunications sectors because they see in the US model a story of success. Led by the ideas of the information superhighway and the information society and worried by the uncertainties of an increasingly interdependent world, many states will copy the market access model of telecommunications in the hope that the promises of economic success that are made on its behalf are true. Modelling provides a useful explanatory frame for the beginnings of a competitive telecommunications sector in Europe. Telecommunications deregulation in Europe has since the late 1980s been led by the European Commission. Prior to that, at the beginning of the 1980s the UK had been the sole serious reformer in this area. In the UK, business users pushed for telecommunications reforms through associations like the Telecommunications Managers Association. The UK banking and financial sector was particularly active because it depended on a strong telecommunications sector in order to be able to innovate and compete against the US financial sector. It is clear from the Commission's 1987 Green Paper that the Commission began its initiatives in this area because it believed that the regulatory models of member states would, if left unchanged, leave Europe disadvantaged in terms of its international competitiveness. In coming to that conclusion the Commission had the UK experience with the market access model to draw on.

The third and final mechanism which we see as being important in the telecommunications story is that of epistemic communities. Epistemic communities are networks of 'professionals with recognized expertise and competence in a particular domain and an authoritative claim to

34See, for example 'The indispensable trade weapon: 301/Special 301', testimony of Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America, before the Senate Finance Committee, Washington, DC, 6 March 1992.
35For the theory of modelling, see Braithwaite, J 'A sociology of modelling and the politics of empowerment' British Journal of Sociology, 1994 45 445-479.
36Dutch, R Privatizing the Economy: Telecommunications Policy in Comparative Perspective University of Michigan Press, Ann Arbor, MI (1991) 236
policy-relevant knowledge within that domain or issue-area'. Epistemic communities flourish because of complexity and uncertainty. Physical and social systems interact at higher and higher levels of complexity, in turn producing yet more complexity. This produces a demand for information by policy makers, a demand which epistemic communities can provide by virtue of their networked specialist knowledge. Epistemic communities purport to provide policy makers with cognitive maps of the phenomenon that confronts them. At the same time as they depict a cognitive reality, epistemic communities push a normative agenda. It is their value-laden mission which makes them a distinctive community and distinguishes them from merely being members of a profession. A transnational epistemic community provides states or other actors in the international system with knowledge and analysis, not in the abstract but in terms of the impacts and effects on the relevant actor's interests in the context of the international system. Epistemic community approaches have been used with great plausibility to explain why states cooperate in potentially controversial areas like pollution regulation. Here one might expect that scientific, ethical and economic controversies of all kinds would make the prospect of cooperation between states more a wish than a reality. Yet cooperation has emerged, it seems, in part because of the role played by epistemic communities.

Telecommunications is fertile ground for epistemic communities for it is a field of interlocking complexity in which law, economics and technologies all meet. The exact shape and nature of a transnational telecommunications epistemic community are matters for further study. Here we have merely suggested that it might be one important factor in the future evolution of telecommunications policy. Like other epistemic communities, the telecommunications community would have a strong commitment to a joint policy enterprise - in this case the entrenchment of the market access model of telecommunications. One strand of evidence suggesting the presence of an epistemic community is the heavy reliance by governments on a network of outside specialists. In the case of telecommunications this specialist expertise seems to come from the private sector and in particular from US companies like IBM, AT&T and regional Bell operating companies which have a great deal of experience in the regulatory game. These established companies provide the people to do the time-consuming policy work on important private sector committees like the Committee of the International Chamber of Commerce on Telecommunications and Computing or the Telecommunications Committee of the United States Council for International Business. The latter committee, for instance, advised the Office of the USTR on the GATS Telecommunications Annex. It reviewed drafts of the agreement and provided opinions on it. Private companies provide governments with telecommunications expertise in other ways. In the words of one OECD official, 'They even write the papers sometimes. That is, the papers relating to the preparation of bilateral agreements are written by private firms.'

Investment and telecommunications

The speed at which the market access model takes over in telecommunications regulation will be profoundly affected by what happens at the supranational level to investment. Trade in telecommunications

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38 Haas, P 'Introduction: epistemic communities and international policy coordination' International Organization 1992 46 1–36
39 Haas, P 'Banning chlorofluorocarbons: epistemic community effort to protect stratospheric ozone' International Organization 1992 46 187
40 Interview (by P Drahos) with Program Director of Telecommunications, IBM, 26 April 1994
41 Interview (by John Braithwaite) with OECD official, 1993
services and trade in services generally can be reconceptualized as an investment issue. One might argue that the aspiration to create a liberal trading order depends on liberalizing opportunities for investment. At base this was the position of the USA in the last GATT round. The Advisory Committee on Trade Negotiations (ACTN), the committee which advised the USTR on the last GATT round, took the view in its discussions that investment and trade ought to be linked in a multilateral way because investment more than any other category of economic activity could increase world trading opportunities. One of the aspirations of the USA in the last GATT round was a multilateral agreement on investment which would lower barriers to foreign investment. This aspiration took the form of negotiations on trade-related investment measures. The Agreement on Trade-Related Investment Measures (TRIMS) which eventually resulted was, from the perspective of the USA and the US business community, a modest outcome. TRIMS is far from being a multilateral investment treaty. It is an agreement which prohibits certain restrictions on investment to the extent that such restrictions affect trade in goods alone. It does not, for instance, provide foreign investors with strong rights of entry and establishment. Because it does not do so the principles of MFN and national treatment cannot, at least in the trade context, be tied to such rights. In the words of one business observer, ‘TRIMS is a beginning.’

Basically TRIMS allows states to continue to regulate direct foreign investment (DFI) in much the same way that states always have. While states have sought to attract foreign capital using incentives of various kinds like tax holidays, guarantees on the repatriation of profits, allowances and so on, they have remained wary of domination by foreign capital. Capital-importing states have carefully regulated foreign investment. Typically, foreign investors have been kept out of many sectors, such as telecommunications, which investors often saw as the most lucrative. When it has come to investment states have remained mercantilist and protectionist, essentially because they have believed that unregulated foreign investment could lead to an erosion of ownership of their resources and production. It is probably for this kind of reason that multilateral approaches to investment have not met with any great success. The story of investment has been a story of bilateral treaties and state sovereignty.

All this is set to change. In many ways the investment aspects of GATT (TRIMS and GATS) are portents of a much greater sea change for the international regulation of investment and state power over such regulation. The reason has to do with the transformative effects of DFI on the economics of many states. DFI stocks worldwide have grown at an average of 11% per annum to reach a staggering US$1650 billion in 1993. Investment has become the driving force of the international economy, surpassing trade. Furthermore, many states have, because of a switch to market principles of development, become investment hungry. Under these conditions the opportunity now exists for those actors in the supranational regulatory game which have been supporters of investment liberalization to institutionalize a single liberal multilateral investment regime to replace the existing predominantly bilateral patchwork of investment treaties.

The USA will continue to push for investment provisions that favour international business in the WTO. An opportunity to increase the role of WTO in global investment will present itself since under Article 9 of

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42Information provided by M Hodin, Vice President – Public Affairs, Pfizer (interviewed by P Drahos, New York, 27 April 1994) and Abraham Katz, President, United States Council for International Business (interviewed by P Drahos, New York, 27 April 1994)
43See Article 2.
46Proposed draft conventions like the ICC’s 1949 draft code to protect foreign capital and the OECD Draft Convention on the Protection of Foreign Property did not gain wide acceptance in the international community. The OECD did some early work on investment in the form of Codes of Liberalization in 1961 (on Current Invisible Transactions and Capital Movements) and a National Treatment Instrument in 1976. Investment has started to feature prominently in regional free trade agreements like NAFTA and APEC. For a description of the ICC’s early initiatives, see Haight, G W ‘Activities of the International Chamber of Commerce and other business groups’ American Society of International Law Proceedings 1960 54 203; for a survey of early international initiatives on investment, see Fatouros, A A ‘An international code to protect private investment: proposals and perspectives’ University of Toronto Law Journal 1961–62 14 77–102.
47More than 600 bilateral investment treaties exist. See Commission of the European Communities A Level Playing Field for Direct Investment World-Wide Com(95)42 Final Brussels (1 March 1995) 5.
48Ibid Annex 1
49Hirst, P and Thompson, G ‘Globalization, foreign direct investment and international economic governance’ Organization 1994 1 (2) 277–303
TRIMS the Council for Trade in Services is obliged to consider whether TRIMS needs to be supplemented by provisions on investment. Before that review, however, an OECD multilateral investment treaty will almost certainly be in place. The OECD’s work on investment shifted towards the production of such a treaty in 1994. In the words of one member of an international business organization participating in the OECD process, it is a ‘seller’s market’ when it comes to investment. This means that it will be possible for the OECD to draft the best possible investment instrument from the perspective of business. 

Even more importantly, the USA has the support of Europe on the need for a multilateral liberal approach to investment. The European Commission has proposed in a recent report on investment that the Council of Ministers launch a campaign for multilateral rules on DFI. Among other things the Commission has proposed that Europe support the OECD initiative and that the WTO be encouraged to make an early start on investment negotiations. As one senior US trade official we interviewed observed, if the USA and the European Community (as it then was) agree on an issue it is only a matter of time before the rest of the world comes along.

The likely consequences of these moves on investment is an OECD instrument, the provisions of which will find their way into the WTO. Once this happens states will find that their capacity to control investment will be regulated by the application of MFN and national treatment principles. Crucially, though, these principles will be applied to a set of liberal standards that will apply to states in an undifferentiated way. The effects of this on the telecommunications sector will be dramatic.

Direct foreign investment and telecommunications

While DFI has been a matter of concern for national governments in areas such as manufacturing, broadcasting and defence industries, it is relatively new to the telecommunications services sector. To an increasing extent, the telecommunications policies of nation states cannot any longer remain focused on purely national concerns such as protecting the national carrier or ensuring a viable local equipment industry. National telecommunications policies have to deal with, among other things, the operation of the supranational regulatory system, DFI and the changing nature of competition in the industry. The framing of national telecommunications policies will depend critically on perceptions of how the market is changing. For example, the ITU has suggested three alternative scenarios for the future evolution of the telecommunications services industry. The first envisages that a handful of global telecommunications service companies come to dominate the industry. Market position is gained through mergers and acquisitions and alliances with secondary smaller players. The second scenario points to a continuing status quo, with national carriers dominant in their home markets. In this scenario, national sovereignty is a major factor preventing widespread levels of foreign ownership. The third scenario involves high levels of market entry in all aspects of telecommunications. The result is multiple and diverse players entering a fragmented telecommunications market. The reality of course may be a mixture of the above scenarios, but individual country responses will have to deal with DFI in their own specific way. A country’s perception
of the most likely international scenario will influence its stance towards telecommunications policy.

The inevitable liberalization of restrictions on DFI would at first glance suggest a considerable reduction of complexity within telecommunications policy. Proponents of the market access approach see deregulation and liberalization as the appropriate policy response. In this approach, the nationality or ownership of a firm has little significance because the most cost-effective provision of telecommunications services can provide a competitive boost to the national economy since it is a vital input to most, if not all, economic activity. Countries are seen to benefit directly from the influx of foreign capital to provide new technology and network modernization. Restrictions on DFI are seen as a strategy to preserve domestic monopoly, and this is no longer a defensible position since an increasing number of countries are freeing up their telecommunications markets. Opponents of the market access approach revert to the status quo situation of protecting national economies since they believe that any wider liberalization will shift the balance of power further towards the developed countries.

Our position in this paper is that neither a market access nor a protectionist approach to DFI in telecommunications seems appropriate. While it may be in the interest of some countries (eg the USA) to push for global deregulation, we argue here that a middle course of action is more appropriate. Countries need to be aware of both the costs and benefits of DFI in telecommunications. Sticking to old policy formulations appropriate for a 'stable' international regime is just as inappropriate as accepting DFI without any regard to broader development issues. A cautious approach is advocated, and various arguments are put forward to support this view.

In advocating a cautious approach towards DFI in telecommunications we wish to stress both the costs and benefits of DFI. In the following discussion, the emphasis is on the perspective of the host country even though the investing country needs to be aware of possible problems arising from DFI. On the one hand, developing countries are often short of capital for network modernization, and new technology is difficult and expensive to develop. By inviting in foreign capital it is possible for countries to develop their telecommunications systems fairly readily. Other benefits include increased options for users in the host country and incentives for the management of the incumbent public telecommunications operator (PTO). From the point of view of the investing country (eg the USA) there may be domestic concerns about the export of jobs and the siphoning of scarce resources away from network upgrading at home. However, the primary motivating factor for investing countries is the trade benefits which are believed to accrue from the long-term investment.

While the benefits of hosting DFI in telecommunications may be obvious, the consequences of freely accepting DFI without adequate controls are less so. Perhaps even more dangerous is the uncritical acceptance of an international regime which does not place any restrictions on DFI. There are a number of concerns in this area.

First, investment has become the driving force of the international economy, surpassing trade. Hirst and Thompson point out that at the beginning of the 1990s some 75% of total accumulated stock and 60% of the flow of DFI were located between the major three players (or Triad) of North America, the European Economic Area and Japan. While

54 Globerman op cit Ref 2
56 Hirst and Thompson op cit Ref 49
57 Ibid 290
DFI linkages within the Triad are dense, linkages between individual Triad members and more marginalized countries exhibit features of geographical and regional specificity. This lack of integration suggests a less than level playing field in DFI. This concern can be taken further if it is recognized that between 57% and 72% of the world population is in receipt of only 8.5% of global DFI. As Hirst and Thompson note, ‘nearly two-thirds of the world is virtually written off the map as far as any benefits from this form of investment are concerned’. This massive inequality does not augur well for those who hope that a more liberal regime will enhance economic welfare. Of course, trends showing increasing activity of DFI in Asian economies run counter to this emphasis on the Triad but are not sufficiently large to threaten the existing dominance of the Triad.

Within these overall patterns of DFI flow, telecommunications is playing an ever-increasing role. For example, the ‘average share of international telecommunications revenue for the large telecommunications carriers is in the order of 15 per cent of total revenue and in some cases, such as Dutch PTT or Swiss PTT, is already much more significant’. This focus on international revenue is reflected in the multinational growth of telecommunications carriers themselves in recent years. For example, ‘the main acquisitions of foreign telecommunications companies, as calculated by the UN Programme on Transnational Corporations, has increased twenty-fold from 399 million US dollars [in 1985] to 16 539 million US dollars in 1990’.

Likewise, the privatization of national telecommunications carriers has provided a major boost for DFI, especially by telecommunications carriers themselves. During the 1980s four of the largest private sales of all companies in all sectors were those of telecommunications operators. The multinationalization of the telecommunications services industry has taken place ‘within a strategy of international product differentiation and horizontal integration as opposed to the previous wave characterized by international vertical integration’. There is every indication that this growth in international investment in telecommunications is further enhancing the global investment inequalities which exist at the more general level.

Second, the global inequalities in DFI mentioned above are also reflected in telecommunications itself. The ITU reported in 1994 that more than two-thirds of all households worldwide still have no telephone and that the telecommunications development gap between high- and low-income countries is still very much in evidence. It would appear likely that a liberalized regime for DFI would do little to redress existing global inequalities in telecommunications.

Third, negotiations about DFI in GATS have always been closely linked to free trade, but it is not obvious that this link is sustainable. Hirst and Thompson point out that trade issues have in the past been amenable to multilateral agreements but this may not be as true for investment issues. DFI is less integrated than trade in the global economy and more dependent on regional and locational factors. It is also less tractable to multilateral manipulation than trade because of its long-term and ‘sunk-cost’ features together with the fact that the major instruments of DFI are multinational companies (MNCs). In short, WTO negotiations focusing on a trade perspective (which emphasizes the removal of impediments to free trade) could well be missing the point about DFI.
The picture we are painting, then, is one of entrenched inequality in general, and within this telecommunications is a central sector. Telecommunications is not only important because of its central role in the functioning of the international economy but because the telecommunications services sector itself is spearheading the reshaping of regulatory and economic structures internationally. However, our arguments above highlight that DFI matters need to be treated with some caution. The enthusiasm for liberalized DFI regimes could in our opinion be seriously flawed, at least from the perspective of countries which are economically marginalized from the key economic players.

If we look more closely at the relationship between DFI and telecommunications, there are also other compelling reasons for caution. First, DFI forms part of the global strategies of carriers and as such forms part of trends towards multidomestic activity of carriers and truly global networks to cater for the needs of MNCs. There is an intricate balance of cooperation and competition between telecommunications carriers. However, the competitive strategies of carriers should not be overlooked by nation states. For example, oligopolists have ‘first mover’ advantages where they can use standards and technological advantages to lock in customers’ networks and exclude others. With an advantage like this the prospect is that a foreign-owned PTO with a near monopoly in one or several host economies could engage in subsidized competition in either international or domestic markets. In this way a competitive regime could be abused. It needs to be remembered that there is no international competition authority so national governments would have to try to deal with these kinds of practices. The capacity of states operating unilaterally or bilaterally to protect their economies from internationally based anticompetitive strategies varies dramatically. A related point is that in the past countries have imposed conditions on DFI as part of a preventive strategy aimed at controlling restrictive business practices by multinationals. Local content requirements, for instance, are one way in which states can address various collusive practices. States need to understand the impact of the supranational order on telecommunications in a cross-regulatory way. Under conditions where there is a liberal DFI regime and a GATS, but no international competition authority (or likely to be one), states may find that the market access model of telecommunications does not lead to competition, at least not in all cases. The connection between market access and competition is contingent rather than logical.

Second, there are important national differences affecting the attractiveness of DFI, especially in telecommunications. Lamberton points to factors such as organizational capital (the complex mix of cultural traditions, information resources, capital, workforce and other social capabilities of a nation), the historical tradition of a nation and technology as being critical to comparative advantage and not very amenable to level playing field considerations. In the same way, national systems of innovation which can be quite distinctive and affect the way countries go about innovation can influence the contribution of telecommunication networks to economic growth. The point is that MNCs operating in a country have to adapt and be integrated into the national system of innovation of a host economy. There is clearly a role for government in emphasizing the link between DFI, industry policy and innovation here. Governments can influence locational decisions of companies by providing adequate infrastructure and in doing so govern-
ments themselves can become players in an internationally competitive regime supporting their own nationally based MNCs. This undermines those who support the level playing field approach as the point of demarcation between state and market becomes less obvious and even blurred.

Third, the extent to which the global telecommunications market evolves into one inhabited by a few multinational carriers will depend on the degree to which the existing international accounting rate charges based on bilateral agreements can be reduced. At the present time developed countries, like the USA and the UK, are claiming that they are disadvantaged and are pushing for a reduction in international access charges. The developing countries are the major beneficiaries of these bilateral agreements but also benefiting are the monopolies in continental Europe. If reasonable reductions were to be achieved so that the international regime continued to a large extent in a revised format, a future alternative industry structure may lend itself to regionalization as opposed to globalization. In this scenario, national concerns with DFI in telecommunications do not recede in the background but take on a character that is peculiar to regionalization and which is different to what would have existed in the former ‘stable’ regime and in the fully liberalized regime.

Fourth, the issue of national sovereignty has traditionally been central to restrictions on DFI in telecommunications. In a liberalized environment DFI restrictions in telecommunications are seen to be irrelevant or at least an inappropriate way for governments to achieve policy objectives relating to national security and sovereignty. Hills has made the point that neither competition nor privatization in telecommunications is necessarily associated with democracy. In a free market situation the concept of consumer replaces the concept of citizen. While a citizen has certain rights, consumers are classified into buyers of goods and services with curtailed rights compared to citizens. In this way ‘consumerism is antithetical to democracy’. Likewise, privatization can have the effect of handing monopoly power from state agencies to private agencies. Privately owned PTOs may focus their attention on the most profitable areas of the market or neglect rural areas. Without adequate safeguards, poorer countries will be powerless to enforce regulations and always be limited to what they can do since information is now held by the private operator. In short, ‘the very process of liberalization can be seen as part of that process by which the State denies rights to all its citizens in the interests of the property rights of a certain section of business’. The convergence of telecommunications with broadcasting and computing further exacerbates these concerns. Telecommunications can no longer be considered only as ‘carriage’. Information industry restructuring in the developed countries is now seeing ‘content’ becoming more important to telecommunications carriers as they press into new information and entertainment markets. Concerns that countries have traditionally had with DFI in broadcasting and the possible erosion of national sovereignty and culture, which were prevalent in the 1960s and 1970s in the United Nations, seem to be applicable to telecommunications today. It seems, then, that a liberalized telecommunications market in many countries will not automatically sweep away the need for restrictions on DFI in telecommunications based on national interest concerns. The rationale for such restrictions may be different due to changing circumstances, but the need for state

[References]

Kurisaki, Y. 'Globalization or regionalization? An observation of current PTO activities' Telecommunications Policy 1993 17 (9) 699–706
Globerman op cit Ref 2
Hills, J. 'Telecommunications and democracy: the international experience' Telecommunication Journal 1993 60 (1) 21–29
Ibid
23
intervention of some sort has not diminished.

Conclusions

The future evolution of telecommunications will be profoundly affected by the emerging supranational regulatory order. This order is characterized by the presence of a hierarchy of players who vie to link principles like MFN and national treatment to certain standards in ways that produce economic gains for them. The strong sovereign control by states of telecommunications is a thing of the past. Within this system those players which support a market access model of telecommunications will use a multilateral/bilateral strategy to campaign for the adoption of the model. Three mechanisms will be important to the operation of this strategy: coercion, modelling and the work of epistemic communities. Importantly, the integration of telecommunications into the supranational system means that the evolution of telecommunications policy must be understood in a cross-regulatory fashion. The liberalization of investment rules, in particular, will shape that evolution in a global way. Our argument has focused on the need for a degree of caution with respect to the relaxation of DFI restrictions in telecommunications. Optimism towards globalization seems to be misplaced, just as a reversion to protectionist nationalist policies in telecommunications is now no longer possible or appropriate. For less economically powerful states, staying out of multilateral negotiations on telecommunications is probably a poor strategy. They may be integrated through bilateral means into the supranational regulatory system on conditions less favourable than if they had become active participants in the multilateral process. For all states the challenge is to understand the systemic effects of the supranational regulatory order on telecommunications. Only then can they aspire to cooperate in the development of coherent economic policies that genuinely benefit their citizens.