Paper submitted to the 48th Annual Convention
of the International Studies Association
Chicago, IL, USA
February 28 - March 3, 2007

Exploring the Limits of Legalization in the WTO: The Case of the Basic Telecom Agreement

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Abstract

This paper assesses the legalization in the Agreement on Basic Telecommunications Services of the World Trade Organization (WTO). Besides evaluating the telecom agreement according to obligation, precision, and delegation, as outlined by the concept of legalization, the paper looks at four WTO member states and compares their respective obligations under the agreement. Even though the WTO is characterized by a high degree of legalization, the paper finds the degree of legalization of the telecom agreement to be relatively small. By engaging in positive theorizing on the basis of rationalist international relations approaches and with the support of secondary literature, the interest-group-based explanations are suggested as the most plausible for explaining this outcome.

Keywords: World Trade Organization, General Agreement on Trade in Services, Basic Telecom Agreement, telecommunications regulation, legalization, international organizations, domestic regulation**.**

1. Introduction

Telecommunications are subject to various local, national, regional and international regulatory regimes. The complexity of this multi-level governance of telecommunications poses a challenge to anybody interested in the nature and interactions among these different regimes. The Basic Telecom Agreement of the World Trade Organization (WTO) is one of the pieces in this broader puzzle. It is not just that this is a relatively new international agreement, but that global telecommunication issues have found a second home in the WTO; the traditional venue for such issues has been the International Telecommunications Union (ITU). Furthermore, The WTO is not just any other international organization where "soft" international law prevails. International law and international relations scholars see the WTO as the most legalized international organization.[1] This high degree of legalization implies that the WTO sets concrete obligations for member states, that these rules are precise, and that settlement of disputes regarding application of the rules is delegated to an independent decision-making body. While this general characterization of the WTO institutional framework is accurate, the agreement on telecommunications, as this paper argues, has significantly lower degrees of obligation and precision than most other WTO agreements. Only the degree of delegation in the telecom agreement is equal to other main WTO agreements, such as the General Agreement on Tariffs and Trade (GATT).

This difference between the WTO framework and the telecom agreement begs a question about the effectiveness and impact of the regime on the other regulatory regimes in telecommunications. Investigation of the puzzle is relevant for many scholarly

[1] The European Union is more legalized than the WTO but it is a regional organization. Most importantly, the EU is more than international organization (for instance, see Zielonka 2006).

undertakings. Scholars investigating "digital divide" have found telecom infrastructure and regulations as important variables in explaining outcomes in the Internet diffusion rates (Corrales and Westhoff 2006, Beilock and Dimitrova 2003, Dasgupta et al 2001, Fink et al 2003). The relative influence of the WTO on these domestic regimes provides additional aspects to the analyses of telecom regulation that emphasizes the importance of diffusion of so-called best practices (Heimler 2000, Taylor 2002). More specifically, the literature on regulation still contains significant gaps in the causes and outcomes of regulatory reform (Tenbuecken 2006, 38-40). On a more general level, interactions between the WTO Basic Telecom Agreement and national regulations contribute directly to the literature on regulation and "regulatory state". In addition, this paper is relevant for debates on international law and relations concerning the nature and effectiveness of international institutions. Last but not least, because the telecommunications issue reaches deep into domestic affairs, the research is linked to the debates in international and comparative political economy on the relative role of system-level and domestic politics-based explanations. Particularly "the varieties of capitalism" literature can benefit from the inquiry into how historically evolved domestic approaches to telecom regulation interact with new global regimes.

Bearing this broad context in mind, the reasons for this smaller degree of legalization in the WTO Basic Telecom Agreement will be explored by using positive theorizing on the basis of secondary sources. International relations theories, particularly the neorealist and neoliberal institutionalist approaches, as well as the factor endowment models and interest group theories used by international political economy scholars, offer springboards for suggesting plausible explanations. Of the explanations based on

different theories, the use of analogies from economics is broadened in this paper by incorporating some insights from public choice literature. Evidently, the interest group-based approach emerges as the most compelling in offering suggestions for understanding the observed outcome. Ultimately, the small degree of legalization of the telecom agreement can be explained by the competition and investment-related issues in the telecom agreement. Attempts to increase the degree of legalization of the Basic Telecom Agreement activate a vast variety of actors with competing interests. The heterogeneous nature of interests implies that the result is a more heterogeneous regime than is usually the case with the WTO agreements.

The paper is organized as follows: I will start with the concept of legalization and assess the degree of legalization exhibited by the WTO general framework. Then I will turn to the analysis of the General Agreement on Trade in Services (GATS) and develop metrics for measuring the degree of legalization. As the empirical research focuses on the WTO Basic Telecom Agreement, I will explore the degrees of obligation, precision and delegation of the agreement. The general analysis is complemented by a comparison of the specific commitments of four small Central and Eastern European countries under the WTO Basic Telecom Agreement. This descriptive part of the paper is followed by attempts to explain the degree of legalization of the telecom agreement. The paper concludes by highlighting the findings and discussing some of the implications.

2. The Concept of Legalization

Legalization is "a particular form of institutionalization characterized by three components: obligation, precision, and delegation" (Abbott et al 2000, 401). "Obligation" implies legal rule-boundness of states and other actors in the international

system (Abbott et al 2000, 401). Once a rule and/or a commitment has been made the stipulation must be followed – not ignored and/or changed at will for political or other reasons. Precision refers to the exactness and specificity of the rules to be followed by states and other actors in the international system. Ambiguous rules leave greater room for interpretation, thereby potentially undermining the given obligation; if a commitment is unclear it is harder to point out whether it has been met or whether a violation has occurred. "Delegation" refers to placing the implementation, interpretation and application of rules in the hands of an independent third party arbitrator to decrease the possibilities of unilateral discretions regarding the obligations and defining the meaning of the rules.

The degree of legalization characteristic to an international institution is important because a high degree of legalization constrains the political discretion of participating states. The high degree of legalization is not just politically significant for interstate relations, nor does it only allow international pressure to be applied to a state. Domestic interests can also benefit from legalization. Changes to domestic law can be "locked in" by accepting international commitments and rules with a high degree of legalization. If state actions depart from these rules and commitments, domestic interests can use the international institutions and procedures to correct these failures. Additionally, governments can make use of the fact that they have been locked into international commitments by legalized international institutions when bargaining with domestic interest groups. National laws cannot simply be changed even when there is strong domestic pressure when doing so violates a binding international obligation. Obviously, a higher degree of legalization serves the interests of those who benefit from the

agreements and will be preferred by those who do not want to constantly change domestic laws. These are two distinct groups: The former is likely to be larger and to have more intense views than the latter, as members of the former perceive themselves as having interests at stake in the maintenance of current commitments.

3. Legalization in the WTO

As defined above, legalization refers to the procedures to be followed in an international institution, not to the substance of the rules or to the intended and unintended consequences or negative and positive externalities of following the rules. Therefore, measuring the degree of legalization in particular international institutions cannot be based on consequentialist premises. Legalization must be assessed by determining the levels of obligation, precision, and delegation that exist in a given international institution.

It is widely accepted that the WTO is an organization with a high degree of legalization (Abbott et al 2000, 407-408, Goldstein and Martin 2000, 603-604, Kahler 2000, 661) because the basic WTO institutional framework is characterized by high degrees of obligation, high precision, and high delegation. First, the high degree of obligation is found in the fact that the rules are binding on all states party to the WTO Constitution, the GATT 1994, and the various Side Agreements. The WTO law is certainly a body of "hard" rather than "soft" law (Jackson 1998, 164). In many ways, the WTO legal system is self-enforcing due to the elements of reciprocity built into the rules. Member states have incentive to follow the law because failing to do so allows other WTO members to retaliate by withdrawing equivalent concessions (Abbott et al 2000, 408). Certainly, retaliation is not a perfect enforcement mechanism; there are instances

when retaliation is not incentive-compatible (Das 2003, 62-63).[2] Despite this shortcoming, the WTO system can be rated high on the obligation criterion, as it is based on a requirement that all member states sign all agreements (Jackson 1998, 162).[3] This procedural requirement is crucial for obligation because by encouraging similar rules across a wide array of trade sectors, the binding nature of the entire WTO system is bolstered. In sum, the obligation as criteria for high degree of legalization is fulfilled by the WTO.

Second, the high degree of precision implies that the WTO agreements ask for reduction in tariffs, specific opening of sectors and other relatively concrete actions when compared with many other international agreements. However, there are many exceptions to the general principles of openness, transparency, nondiscrimination, and national treatment at the core of the WTO agreements. A large number of disputes and a considerable amount of "creative lawyering" stem from the ambiguity and competing interpretations of the exception clauses in the WTO agreements. Some examples of exceptions that create ambiguity can be found in the GATT's definition of dumping, as well as in GATT clauses allowing trade restrictions for protecting human health. (Jackson

[2] For example, developing countries "would naturally hesitate to annoy a powerful country which can show its displeasure in several ways" (Das 2003, 62-63). Even if the developing countries win a case in the WTO dispute settlement mechanism against large developed countries, they might not find it beneficial from the point of view of their aggregate welfare to retaliate against a developed country. As indicated by the *EU Bananas* case, "...a trade-restrictive measure such as retaliation can be costly as it limits the choice of the source of supply, which can have an impact on the price and the quality of goods to be purchased" (Das 2003, 62-63). Hence, providing direct compensation to a country able to prove that another has violated GATT obligations in ways that cause it harm could be much more incentive-compatible than permitting cross-retaliation. This would also transfer the burden of actually paying for the punishment from the business sectors whose goods or services were selected for retaliation to the taxpayers generally, altering the domestic dynamics involved in returning to compliance.

[3] Single undertaking in the WTO means that every nations signing up to the GATT/WTO agreements have to accept the entire package or at least 95 percent of the agreements reached (Jackson 1998, 162).

et al 2002b, 45, 174-175).[4] The complexity of rules and many vague exceptions reduce the degree of precision of otherwise specific rules. In addition, WTO agreements can be more ambiguous than many sets of rules in domestic legal systems. Nevertheless, parts of domestic law are still hotbeds for disputes regarding the correct interpretation of a particular law. But the comparison should be carried out with that of the other international agreements – not in relation to the domestic legal system, particularly not the most developed ones.. From this perspective the WTO law is characterized by a higher degree of precision than most other international agreements (Abbott et al 2000, 411).

Third, the degree of delegation is strongly affected by the formation of a formal compulsory and binding third-party dispute settlement mechanism in the WTO, as opposed to the non-binding arbitration that was provided by the old GATT (Abbott et al 2000, 412, Braithwaite 2000, 184). The independence and legal role of the GATT/WTO dispute settlement has increased since 1995. Often it is noted that the establishment of this stronger legal mechanism for the dispute settlement moved the settlement of disputes from "diplomats' jurisprudence" to "lawyers' jurisprudence" (Hudec 1999) by decreasing the role of political bargaining. The independence and legalistic nature of WTO dispute

[4] For example, a country can use GATT article XX (b) to justify protection from foreign competition by arguing that it is "necessary to protect human health" (Jackson et al 2002b, 45). When they do, lawyers must consider the intent of regulations and whether or not these regulations could be proved protectionist by means-end analysis. Of course, this can increase uncertainty and, no matter how precise the rules are, the broadness of the exceptions sometimes undermines precision. Another example is Article 2.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 defines dumping as the sale of a product in another country at less than its normal value. Normal value is determined by comparing the export price of the product with the comparable price of that same product "in the ordinary course of trade" (Jackson et al 2002b, 174). However Article 2.2.1 provides some exception to the general definition of the term "ordinary course of trade" (Jackson et al 2002b, 174-175). The length of marketing campaigns, quantities of products sold and whether the costs of campaigns have been recovered through sales in less than six months or one year would be important for the analysis whether dumping has occurred according to the agreement or not (Jackson et al 2002b, 174-175).

settlement mechanism stands in strong contrast to the system of dispute settlement that existed before 1995. These earlier procedures required consensus of all members at several points (Jackson 1998, 166-167). The first was the decision to establish a panel to handle a particular dispute, which meant any state subject to complaint could delay the process or even bring it to a complete halt (Stone Sweet 1999, 165). However, after 1995 the panels were formed automatically, limiting the room for political manipulations (e.g., constant delay in forming a panel) by the WTO members (Stone-Sweet 1999, 171). The second point of required consensus before 1995 was adoption of a panel report. Since 1995, panel reports have been adopted automatically by the member governments when acting as the dispute settlement body unless one disputant files an appeal (Jackson 1997, 125). In addition, before 1995 consensus was required to authorize retaliation when a member had been found in violation of GATT. After 1995 authorization is automatic for suspensions of concessions once a panel has ruled in a country's favor. This is important because the panel decision authorizes a retaliatory action – a member state cannot just go retaliate on its own. The post-1995 WTO dispute settlement set up the Appellate Body, an organ that can review the decisions of panels and serves as a safeguard against panel error (Stone Sweet 1999, 171). Last but not least, parties could no longer delay by failing to agree on the composition of a panel. Under the current system, the WTO Director General can nominate the panel members when the disputants fail to agree. In sum, the WTO dispute settlement mechanism can be seen as one with a high degree of delegation in procedural terms, particularly when taking into account that many other international organizations lack similar arrangements.

By discussing obligation, precision and delegation it is obvious that the WTO member states are more constrained by the WTO institutional framework in their trade relations than they are in activities occurring within less legalized international institutions. The following parts of the paper will investigate if this general characterization of the legalization will hold up in the context of a specific WTO agreement.

4. The GATS and the Basic Telecom Agreement

Having outlined the characteristics of the WTO institutional framework and having characterized the WTO as having a high degree of legalization, I will explore the extent of legalization in the General Agreement on Trade in Services (GATS). The GATS agreement was a result of the Uruguay Round of negotiations in the WTO (Braithwaite 2000, 338). The GATS can be seen both as an agreement on trade in services and as an agreement on foreign investment (Sherman 1998, 2; Das 2003, 54-55 and 126). The GATS agreement has three major components. The first encompasses general obligations that apply to all WTO members. Members have to provide Most Favored Nation (MFN) treatment to all other members of the WTO regardless of obligations held by individual member countries. This means that if a country opens its service sector for competition, it must open the sector to all WTO members regardless of whether a member has made any commitments under the GATS. The second is the specific schedule of commitments concerning market access, national treatment and other obligations undertaken by each individual WTO member state in the services sectors it chooses to open up. The third is a list of exemptions from these general obligations (Spiwak 1998, 24-25). This means that the obligations of a particular WTO member under the GATS can only be established by

the reference of GATS text and its specific schedule (Sherman 1998, 2). Simultaneously establishing the MFN principle as a general obligation and permitting variation in many specific commitments identified in the schedule creates imbalance in the sectors because it permits some members to avoid providing market access and national treatment. In particular, the positive list approach of the GATS may undermine the principles of obligation in the context of the highly legalized WTO framework (Snape 1998, 286-287). Some member countries are not part of the Basic Telecommunications Agreement and are therefore only committed to vague general obligations under the GATS. Some member countries can postpone their commitments and rely on the ambiguity of the rules that guide their behavior. Furthermore, the working mechanism of the GATS, to be described below, undermines reciprocity, an important *modus operandi* of the WTO (Snape 1998, 286-287). In the parts of the paper that follow I will explore the nature of GATS in a more detailed manner on the basis of the telecommunications sector and WTO Basic Telecom Agreement.

The Agreement on Basic Telecommunications Services is an annex to the Fourth Protocol of GATS. The Agreement provides national treatment and market access in the telecommunications sector. The WTO Basic Telecom Agreement can be seen as an investment treaty that encourages foreign investment, as participating countries should, in principle, treat foreign investors just as they do their domestic investors. However, the participating countries were allowed to negotiate schedules, permitting them to phase in the undertaking of certain commitments over many years.

4.1 Obligation

The first deviation from the general WTO system stems from the general obligation to provide MFN treatment to service providers of other countries regardless of their commitments under the agreement (Snape 1998, 280-290). The GATS rendition of the MFN treatment principle in the context of GATS/Basic Telecom Agreement means that a WTO member opening its telecommunication market is required to open it to all WTO members regardless of whether or not those other members open their markets. In other words, the WTO member cannot maintain reciprocity by selectively opening markets only to those member countries that have opened their telecom markets under the agreement while excluding telecom providers from members who have not done so.

The obligations concerning market access and national treatment also differ from the general WTO framework. The obligations of countries are listed in individual schedules of commitments, and these schedules vary in terms of the time of market opening and the specific areas of telecom services that are being opened to international competition. Furthermore, as not all WTO members have undertaken the Basic Telecom Agreement, many countries have no obligations whatsoever. Fetekuty (2000, 94-95) highlights these architectural shortcomings of GATS by pointing out that the relationship between the commitments across the three levels is "somewhat unclear." The extent to which reservations in national schedules override general provisions or sectoral annexes of GATS is also unclear. Some general or sectoral provisions grant the WTO members' the right to have reservations in their national schedules, yet other provisions remain unclear (Fetekuty 2000, 94-95). Gourmazi (1999, 15) analyses the obligations in the context of accounting rates used in international telecom services. She points out that the

current regime of accounting rates contradicts the general principles of GATS as well as some specific obligations included in the Basic Telecoms Agreement.

The extent of obligation can also be analyzed by looking at the provisions of the general GATS agreement. For example, Article 21 states that a member state "may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article." (World Trade Organization 1994a). Das (2003, 35) also points out the imprecise wording of provisions concerning the developing countries in the general text, and argues that these provisions are not enforceable because the articles do not stipulate how objectives will be achieved. Ultimately, such clauses further reduce the degree of obligation.

Sherman's (1998) data on aggregate commitments made by WTO members under the Basic Telecom Agreement illustrates the high degree of variation in obligations. Altogether 69 countries made commitments to open their markets to foreign competition in some or all basic telecommunication services. Fifty-two of these guaranteed access to their markets for international services and facilities. Five others opened access to selected international services. Fifty-six countries opened markets to international competition in all or some services provided by satellites. Forty-four countries allowed complete foreign ownership of basic telecom service providers. Twelve countries allowed foreign ownership or control of certain basic telecom services. Thirteen countries allowed for a certain degree of foreign ownership in their basic telecom markets. Fifty-three countries agreed to accept as a binding commitment the "Reference Paper", which is basically a set of pro-competition principles for telecom sector regulation.

The commitments deviate from the broader WTO framework. First, less than half of the WTO member states have joined the Basic Telecom Agreement: The WTO had 122 members in 1995; membership had grown to 150 by the end of 2006. This is a huge deviation from the general WTO system of obligations based on membership-wide reciprocity and the principle of single undertaking. Second, the obligations actually undertaken vary considerably from country to country. Phrases such as "certain degree", "some" and "selected" mean that different groups of services and different regulatory restrictions will prevail in different countries. In sum, the evidence leads to the conclusion that the WTO Basic Telecom Agreement has a smaller degree of obligation than the general WTO framework and other agreements.

4.2 Precision

The general GATS agreement is characterized by a lack of precision (Fetekuty 2000, 85-111, Sauvee and Stern 2000, 7). As the GATS three-tier architecture makes the agreement highly complex and obligations under the Basic Telecom Agreement differ greatly, it is difficult to aggregate these obligations and discuss the precision of the rules in a general manner. However, as the key document in the context of this agreement is the Reference Paper, I will use it as the basic indicator of precision.

The Reference Paper is short and general. It lacks precision in many key aspects thereby reducing the degree of legalization. For instance, the Reference Paper defines the term "major supplier" as "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use

of its position in the market" (World Trade Organization 1996). The term "essential facilities" is imprecise and may be read to mean many different things.

Article 2 on interconnection uses terms and sentences like " timely", "sufficiently unbundled", "cost-oriented rates that are… reasonable", "economically feasible" and so on (World Trade Organization 1996). All of these terms are undefined and therefore subject to a wide range of interpretations. Sherman (1998, 8) points out that the negotiators deliberately left terms undefined, leaving the final say up to the WTO dispute settlement mechanism. However, by doing so they introduced a higher degree of uncertainty into the agreement and reduced the degree of precision.

The articles of the Reference Paper on universal service obligations, public availability of licensing criteria, independent regulators and allocation and use of scarce resources are even more ambiguous. A good example of this very general nature is Article 5 on independence of regulators, which states: "The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants" (World Trade Organization 1996). Usually, the degree of independence determines the effectiveness of regulators and thus the article is an extremely important one. Even though the article does state one key principle, this article is nonetheless general and insufficient. The impartiality to the market participants is only one aspect of regulatory independence. The regulatory body should also be independent of government (ideally similar to the role of independent central bank), not just another government department (Broek 2000, 46). The regulatory body should also have enforcement power to impose penalties for violations of regulations (Broek 2000, 46).

4.3 Delegation

Disputes regarding commitments in the Basic Telecom Agreements are solved by the WTO dispute settlement mechanism under the special GATS agreement titled "Decision on certain dispute settlement procedures for the General Agreement on Trade in Services" (World Trade Organization 1994b). This decision elaborates on the general provision for delegation found in the Basic Telecom Agreement. The decision states that a specific roster of individuals eligible to serve on dispute settlement panels must be established. Article 3 stipulates that Panels shall be composed of well-qualified governmental and/or non-governmental individuals who have experience in issues related to the General Agreement on Trade in Services and/or trade in services, including associated regulatory matters. It further specifies, "Panelists shall serve in their individual capacities and not as representatives of any government or organization." (World Trade Organization 1994b). From the perspective of the telecommunications sector, it is important panel members understand telecom issues; Article 4 of the decision refers to this necessity by saying "Panels for disputes regarding sectoral matters shall have the necessary expertise relevant to the specific services sectors which the dispute concerns" (World Trade Organization 1994b). This specification should ensure that there is not only delegation but that those who must make independent decisions understand the issues at stake as well. Hence, the meaningfulness of delegation criteria is further increased. In sum, the degree of delegation in the Basic Telecom Agreement is equivalent to that of the general WTO framework, and there is no deviation present.

4.4 The degree of legalization in the WTO Basic Telecom Agreement

This analysis of the provisions of the WTO Basic Telecom Agreement reveals that the agreement has a lower degree of obligation and precision than the general WTO framework. At the same time, the degree of delegation is equivalent to that of the WTO's other agreements because the dispute settlement mechanism is the same and it is even required that sector-specific experts make sector-specific decisions. The main deviation in obligations of the Basic Telecom Agreement is the result of the positive list approach, a huge variation in obligations and exclusion of the agreement from a single undertaking wherein positive externalities of issue-linkages do not figure. To better understand these differences, I will examine the schedule of specific commitments of four countries under the WTO Basic Telecom Agreement. This empirical evidence allows me to measure the degrees of precision and obligations even further.

5. Commitments of Individual Countries under the Basic Telecom Agreement

I selected the commitments made by four countries in Central and Eastern Europe, Estonia, Latvia, Slovakia, and Slovenia, for closer examination. These four countries are all small and do not have any significant bargaining power in the WTO. These countries are fairly developed middle-income countries and eager to cooperate with international institutions. All of these countries became members of the European Union (EU) in 2004. They all had to undertake the Telecommunications *Acquis* of the EU before their respective accession to the EU.[5] This body of EU law established standards that are much more demanding than those in the WTO Basic Telecom Agreement. This should suggest

that the four countries made homogeneous commitments under the WTO Basic Telecommunications Agreement.

5.1. Estonia

Estonia became a party to the WTO Basic Telecommunications Agreement in 1999, when it joined the WTO. Estonia's schedule of commitments provided unconditional market access with an exception in the cross border supply and commercial presence mode. The exception states that "domestic intercity and international services have to be switched over the public telephone network of the Estonian Telephone Company Ltd. according to the Concession Agreement between the Government of the Republic of Estonia and the Estonian Telephone Company" (World Trade Organization 1999, 11-12). Estonia could not provide immediate market access in fixed line voice telephony, as its concession agreement with strategic shareholders of Estonian Telecom company secured an incumbent monopoly in these services until December 31, 2000. It also meant limiting market access in mobile telephony services as the domestic intercity and international interconnection with another mobile or fixed network had to be switched over the network of the incumbent telecom company until January 1, 2003 (World Trade Organization 1999, 11-12). But in reality, Estonia opened its telecom market for competition two years before this deadline.

Otherwise, Estonia provided unconditional market access and national treatment in the telecom sector. Estonia agreed to undertake additional commitments six months after WTO accession. According to these commitments laid out in the reference paper annexed to the schedule of commitments, Estonia agreed to prevent anti-competitive practices in

[5] The EU Telecom Acquis or the EU Telecom Acquis Communautaire refers to a body of EU law on

telecommunications (cross-subsidization, preventing suppliers from restricting technical and commercial information), to uphold a non-discriminatory nature of interconnection services (principles of transparency, cost-oriented rates and availability of technical information), and to secure existence of independent regulators (World Trade Organization 1999, 23-25).

5.2 Latvia

Latvia set limitations in cross-border and commercial presence supply mode in both market access and national treatment by pointing out that "Lattelekom SIA has exclusive rights for telecommunication infrastructure operating services and for supplying of basic telecommunication services" (World Trade Organization 1999b, 12-13). Furthermore, Latvia specifically stated that the provision of public voice telephony and facilities-based services is reserved for Lattelekom. Provision of enhanced telecom services must be based on facilities of Lattelekom. Call-back and refile services were not allowed. Latvia agreed to end all limitations outlined above and to provide unconditional market access and national treatment in the telecom sector as of January 1, 2003 (World Trade Organisation 1999b,12-13).

In other areas, Latvia provided unconditional market access and national treatment in the telecom sector. The Latvian government made an additional commitment to re-examine and publish rules of regulatory policy "towards the year 2003." In addition, Latvia agreed to undertake additional commitments laid out in the reference paper annexed to the schedule of commitments: Latvia agreed to prevent anti-competitive practices in telecommunications (cross-subsidization, preventing suppliers from not

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telecommunications. More information on the EU Telecom laws and obligations of accession countries is available at http://europa.eu.int/comm/enlargement/negotiations/chapters/chap19/.

making available technical and commercial information), to uphold a non-discriminatory nature of interconnection services (principles of transparency, cost-oriented rates and availability of technical information), and to secure existence of independent regulators (World Trade Organisation 1999b, 27-29).

5.3 Slovakia

In the first schedule of commitments that Slovakia undertook in 1994, Slovakia excluded basically all telecommunication services and indicated that the commitments were to be subject to further discussion (World Trade Organisation 1994, 17). In 1997 Slovakia filed a supplement to the schedule of commitments thereby reserving the exclusive right of Slovak Telecommunications "to provide public telecommunication infrastructure and public voice services" until January 1, 2003 (World Trade Organisation 1997, 2). This provision limited market access in the modes of cross-border supply and commercial presence in the voice telephone services for public.

The schedule indicated that voice telephone services for "non-public networks" are not subject to limitation, except in the case market access supply mode of commercial presence where "closed user groups connection to public network is not allowed" until January 1, 2003 (World Trade Organisation 1997, 2). This stipulation implies that private businesses with their own telephony network cannot connect to the main public network that is run by the incumbent telecom company. In the packet-switched data transmission services the only limitation was set forth in the market access supply mode of commercial presence where "private-leased circuit services connection to the public network was not allowed" until January 1, 2003 (World Trade Organization 1997, 3). In mobile telephony and personal communication services market access was limited in the provision of

international voice services in the cross-border supply and commercial presence supply mode. Otherwise, Slovakia agreed to market access and national treatment without any limitations. Slovakia agreed to additional commitments identical to those of Estonia, described above.

5.4 Slovenia

Slovenia's domestic approach is reflected in its lack of participation in the extended GATS negotiations on basic telecommunications of 1997. Unlike other EU candidates in CEE, Slovenia did not take specific commitments and did not improve its GATS Schedule of 1995, a clear reflection of the state's domestic legislation at the time. Hence, Slovenia's schedule of commitments does not include most telecommunications services, and specifies that "setting up and operation of telecommunication networks infrastructure as well as the provision of voice telephone, packet and circuit switched data services, telegraph, telex, mobile radio telephone, satellite and paging services are excluded (public monopoly)"(World Trade Organization 1995, 16).

In value-added telecom services, Slovenia limited market access and national treatment in the cross-border supply mode until January 1, 1998. Market access in the supply-mode of commercial presence stated that the share of foreign providers of value-added telecom services must not exceed 99 percent of equity, and issuance of licenses depends on whether or not the basic telecommunications network is used for value-added services (World Trade Organization 1995, 16). No other limitations were placed on market access and national treatment in the area of value-added telecom services.

5.5 Comparison of obligations and their precision

Comparisons of the commitments undertaken by these four countries clearly show that Estonia limited the right to national treatment and market access until the agreed date of liberalization, January 1, 2003, to the smallest degree. Both Latvia and Slovakia limited market access and national treatment in the fixed line voice telephony as well as in the development of alternative infrastructure and leased lines as well. Slovenia aimed at preserving the *status quo* by not including any telecom services (except some value-added services) in the list and by giving the exclusive right of providing almost all telecom services to the incumbent telecom company. Slovenia did not provide any dates for when the market would be opened.

This comparison of the four countries shows that obligations under GATS and the Basic Telecoms Agreement can vary considerably even among countries that are fairly similar and have made many telecom sector-related decisions in the shadow of the EU Telecom *Acquis*. The variation in obligations in the case of these four countries, the flexibility, and hence, a small degree of obligation of the WTO Basic Telecommunications Agreement is visible. It seems that countries were, to a great extent, able to consider their domestic preferences in undertaking the commitments.

As far as precision is concerned, the schedule of commitments of these four countries is certainly more precise than the Reference Paper and general GATS articles: the schedule lists fulfillment deadlines for concrete obligations and concrete areas of telecommunications services. However, as the obligations differ greatly even in the case of these four countries that are expected to have similar commitments, the higher degree of precision will not necessarily increase the degree of legalization. The countries are precise about different commitments – but not about the same commitments. In sum, this

brief analysis of commitments undertaken by countries in their GATS schedule confirms the finding of the previous general discussion that the degree of legalization is smaller in the GATS than in the case of most other WTO agreements.

Table 1. The Nature of Commitments undertaken by Estonia, Latvia, Slovakia and Slovenia (1995-2003).

	Estonia	**Latvia**	**Slovakia**	**Slovenia**
Year entered the WTO	1999	1999	1995	1995
Year entered the Basic Telecom Agreement	1999	1999	1997	1995
WTO Commitment to open telecom market	By 2003	By 2003	By 2003	No commitment.
Actual year telecom market opened	2000	2003	2003	2002
National treatment and market access in fixed line telephony	Restricted until 2003 under the treaty. De facto, provided since 2000.	Restricted until 2003. Provided after that.	Restricted until 2003. Provided after that.	No commitment under the WTO treaty.
National treatment and market access in alternative infrastructure and leased lines	Open to competition	Severely restricted until the end of 2002. Open to competition after that.	Moderately restricted until the end of 2002. Provided after that.	Same as above.

6. Explaining the degree of the legalization of the WTO Basic Telecom Agreement

The analysis of causes of the legalization of the Basic Telecom Agreement will use the literature of international relations and international political economy. The debate between realist and liberal institutionalist approaches is of particular interest in explaining the nature of international regimes. Factor endowment and interest group-based theories offer other plausible explanations for the smaller degree of legalization of the telecom agreement than in the other WTO agreements. The positive theorizing offered below falls broadly under rationalist approaches in international relations (see

Katzenstein, Keohane and Krasner 1998, Schmidt 2001, Jervis 1998, Fearon and Wendt 2001). A debate between neorealism and neoliberal institutionalism is a debate within rationalism (see Baldwin 1993), as are factor endowment and interest group-based approaches. Due to the limits of the scope of this paper, constructivist approaches are excluded (Ruggie 1998, Finnemore and Sikkink 1998, Fearon and Wendt 2001, March and Olsen 1998, Wendt 1992). Exclusion of non-rationalist explanations increases consistency of the paper. The concept of legalization, which is used here as a dependent variable is essentially based on rationalist school of though in the international relations.

6.1 Neorealist explanations

Realism in international relations or mercantilism as equivalent in the international political economy recognize states as only relevant actors in the international system (Waltz 1979, 95). Only states possess power, and power is the clue of the system. Private actors and their regime can only be significant if they are representative of or supported by state power (Dunne and Schmidt 2001, 151, Lamy 2001, 196). If such support exists, there is no reason to focus on private actors as a unit of analysis but on states as the masters of these puppets. The states maximize their national interests by engaging in the cooperation of the anarchistic international system. The GATT/WTO Rounds are "best explained by the national interests of powerful trading countries" (Petersmann 1995, 22).

As the United States started the liberalization of its telecom markets as early as the 1970s and has more developed telecommunications markets than the rest of the world, then further liberalization of world telecom markets and creating access to protected markets of developing countries serves the national interests of dominant states in the international system. The neorealists are concerned about both the relative gains

and the cheating of other states (Petersmann 1995, 22, Lamy 2001, 186). The United States, the EU and Japan had the most sophisticated telecom markets. Logically, it follows that the United States, the EU and Japan would increase their relative position in the world telecom markets vis-à-vis other states as a result of the agreement. However, their relative gains are not as clear-cut as it might seem.

Realist emphasis on the balance of power and the importance of hegemon in securing the cooperation is another plausible explanation for explaining the participation of developing and transition economies in the telecom agreement (Dunne and Schmidt 2001, 151). The United States as a hegemon pushed weaker states, including the EU and Japan, into this arrangement.

However, the exclusion of the WTO Basic Telecom Agreement from the single undertaking and the use of the positive list approach in setting up this regime, which has allowed for participants to exercise a high degree of flexibility, highlight the limits of explanation based on pure *realpolitik*. If the United States as the hegemon wanted a telecom agreement that would benefit the US national interest, then why is the result a weak agreement with a significantly smaller degree of legalization than other WTO agreements? Comparison with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is particularly telling. TRIPS serves the interests of United States because the US is the largest net exporter of intellectual property products and services in the world. Most importantly, the US was the main initiator of the TRIPS agreement, and US efforts resulted in a strong and highly legalized agreement. Why wasn't such an outcome achieved in the Basic Telecom Agreement?

Braithwaite and Drahos point out that "many parts of international telecommunications regulations appear to be a case of US hegemony" but "US hegemony is not really a hegemony that can operate far beyond the limits of cooperation with other states" (Braithwaite and Drahos 2000, 358). They point out that the US still needs to reach agreement with other states, as levels of investments required in the international telecommunications markets are far beyond the individual capability of the United States. They argue that the US cannot achieve a better outcome without the cooperation of other key states, and new telecommunication policies have to be developed through the process of "reciprocal adjustment." This is supported by evidence from the TRIPS negotiations. US national interest alone was not sufficient for achieving the TRIPS agreement; EU support for the TRIPS agreement was crucial as well.

This necessity reveals that the US does not have a position of hegemony in WTO negotiations in general or in the telecom agreement in particular. In the WTO negotiations the ability of the US to pursue its national interests depends on its ability to reach agreement with other key states, such as the European Union (which represents all the member countries in the WTO as the EU is common market area) and Japan. However, even if the hegemonic stability theory does not hold water, the lower degree of legalization may still be the result of national interests of the key states. The European Union and Japan should not have worried about the relative gains of the United States that resulted from the more legalized telecom agreement because the EU and Japan are well-positioned in some areas of telecommunications, such as mobile telecommunications. Their quite strong position would imply that they would have also achieved significant relative gains vis-à-vis the United States.

Some assumptions of realism are also inconsistent with the empirical evidence about the economic relations. Certainly, both the EU and Japan would have absolute gains as a result of a more legalized telecom agreement. It is doubtful they would ignore the significant absolute gains due to a somewhat abstract concern regarding relative gains of the United States. Significance of absolute gains would ring even more true were the realist assumption that states are unitary actors to be dismissed and the role of private actors to be considered. Ostry (1990) points out that the multilateral policy process is in the domain of the "government-business "alliance" in the United States" (Ostry 1990, 97). Braithwaite and Drahos (2000) draw attention to the role of private sector actors in telecommunication policy (Braithwaite and Drahos 2000, 341).

6.2 Neoliberal institutionalist explanation

The Neoliberal perspective would recognize private actors and their role in the international system, but the states remain considerably more important (Lamy 2001, 193, Baldwin 1993). The neoliberal institutionalist approach in regime theory focuses on incentives for cooperation by using microeconomic theories as do neorealists to explain the role of international regimes. Instead of emphasizing the relative gains as the realists do, neoliberal institutionalism stresses the importance of absolute gains as a key incentive for state cooperation (Lamy 2001, 191-193, Stein 1993, 41 in Baldwin 1993 eds). International institutions may help overcome problems of collective action, reduce information asymmetries and transaction costs. Both common interests and common aversion may give rise to the cooperation under a particular rule-set.

The telecom agreement can be seen as a win-win situation where all states could enjoy absolute gains, as opposed to a win-lose situation that would fit the realist

paradigm where the gains of one state occur at the expense of another. Certainly, the agreement may deliver relative gains and absolute gains at once. In this case, the difference in the emphasis of neorealists and neoliberal institutionalists helps reveal which gains are considered most important in motivating state behavior.

However, the problem with the absolute gains argument is a low degree of legalization of the telecom agreement. If the absolute gains created incentives for the key states or for the majority of states, then the agreement should have a higher degree of legalization. Of course, this suggestion depends on the assumption that a higher degree of legalization increases absolute gains; it is reasonable assumption to make from the perspective of neoliberal institutionalism. There are certainly absolute gains for all key states (USA, EU and Japan) as their telecom markets are more developed than those in other countries of the world; a higher degree of legalization increases certainty. It would be possible to argue that a more legalized telecom agreement would also deliver absolute gains to developing countries, particularly if the states are analyzed as unitary actors and the effects are considered in aggregate, as opposed to the distributional impact where some interest groups lose and others gain. Hence, the aggregate welfare of developing countries does not necessarily decrease as a result of liberalizing the telecom sector. Indeed, as demonstrated by the econometric study of 86 developing countries by Fink et al (2003), complete liberalization pays off by increasing teledensity by 8 percent and labor productivity by 21 percent (Fink et al 2003, 99). Teledensity refers to the main telephone lines. The data indicate that developing countries with more liberalized telecom markets had more main telephone lines per capita than countries with higher degree of protection of telecom markets. Labor productivity refers to the efficiency that resulted

from the higher degree of diffusion of telecom infrastructure and access to the modern telecommunications networks. But if there are absolute gains to the key states and plausibly to most other states as well, then the low degree of legalization should not be resultant of the telecom agreement.

6.3 Regime failure

The analogy with economics found in neoliberal and neorealist regime theories can be utilized further in finding the explanation. In particular, the concepts of "market failure" and "public goods" might be helpful (Little 2001, 307). International relations theorists apply these concepts to the international system by seeing states as analogues to market actors in microeconomic theory, competing in an environment based on anarchy (Waltz 1979, Eichengreen 1998). Similar to standard economic theory in which governments are treated as exogenous actors to markets, this view argues that international regimes can create global public goods for overcoming the failures of an anarchic international system characterized by state competition (Little 2001, 307). These goods would not be delivered without the cooperation of participants in the international system, because competition among states would lead to suboptimal outcomes. A clear example of market failure can be found in the lack of telecommunications standards 100 years ago (Braithwaite and Drahos 2000, 328). Although the incompatibility of the telecom standards today is more limited than was once the case in telephony or still is in the case of some communication technologies (instant messenger, for example), the inability to agree on a common global standard may be seen as a failure of the international system. A common standard would increase positive network externalities and benefits to the world welfare, and would therefore be a global public good. A common global international standard would

reduce transaction costs, enhance demand and create competition at the level of products rather than systems (Braithwaite and Drahos 2000, 332). Leaving the setting of standards to market competition can make one company or country a source of dominant market power –a premature standard may become dominant and technological advances may be inhibited (Braithwaite and Drahos 2000, 332). Thus, international cooperation is needed to deliver this public good.

However, telecom regulation is radically more complex than technical standard setting. Considering the complexity, actors may not been interested in creating a highly legalized regime. The analogies borrowed from the microeconomic theory by neoliberal institutionalism and neorealism could be expanded further to explain state behavior in the international system. The Weberian assumption that effective and efficient government bureaucracy can deliver public goods to correct market failures can be deconstructed. Such an assumption is not realistic nor is it incentive-compatible. Governments are not necessarily exogenous actors in relation to markets. The concept of "government failure" can be borrowed from public choice economics and applied to the international system (Buchanan and Tullock 1962). Instead of treating international regimes as exogenous variables to the international system, they should be treated as endogenous variables. On these grounds, the necessity of WTO Telecom Agreement could be brought into question. In such a case, the best contribution of the regime is to serve only as "a lock-in mechanism" for preserving the *status quo* of domestic policy environment. In the worst case it has a negative impact by using available resources for unnecessary purposes and increasing reputation costs, e.g., creating the perception in domestic politics that opening the market is an outcome of external pressures, in general, or of pressure by the

hegemonic power, in particular. Hence, by introducing this public choice concept, it is possible to speak of "system failures" and "regime failures." The failure or perceived failure of the international system may lead to the emergence of an international regime. Even so, this new international regime may not necessarily help solve the system failure due to potential regime failure.

The Basic Telecom Agreement with its small degree of legalization is an example of such regime failure. States realized that there is a failure in the international system: no regime to govern basic telecom issues – but their attempts to fix the failure by establishing an international regime was not successful. States were not willing to give up many of their domestic policy preferences. The result is well captured by the prisoners' dilemma game that theorists use for making the case for international cooperation (Little 2001, 308-309, Petersmann 1995, 24, Baldwin 1993). If the analogy is correct, then only a repeated game may create the opportunity to move away from the suboptimal nash equilibrium outcome of the one-shot prisoners' dilemma game. States may realize that more a legalized telecom agreement can reduce transaction cost and risks. The open question asks whether or not states are able to make credible commitments and create institutional framework that would make the optimal outcome possible. The liberal regime theorists suggest that it is precisely compliance with the reciprocal rule that allows international regimes to induce cooperation (Petersmann 2001, 24). However, the lack of single undertaking in the telecom agreement undermines the reciprocity.

Neither neoliberal institutionalism nor neorealism offers a compelling story for why the Basic Telecom Agreement has a lower degree of legalization than other WTO agreements. At the same time, their borrowing from economics led to the idea of

applying contributions from public choice literature and broadening the use analogies from economics in international relations accounts. The introduction of the concept of "regime failure" as an analogy for "government failure" in public choice literature directs us toward the question of the nature of domestic policy preferences of states and factors that shape these preferences. I will explore these preferences below.

6.3 Domestic Interests

The lower degree of legalization may be a result of investment- and competition-related provisions of GATS, which run deep into the issues of domestic politics and regulation. It has been difficult to achieve binding commitments in the competition and investment areas by applying the MFN principle, and many governments still prefer bilateral deal-making in this area (Hart and Spero 2002, 160, Kobrin 1998, 98, Snape 1998, 290-291, Baldwin 1998, 294-295). In this sense, the GATS and the Agreement on Trade Related Investment Measures (TRIMs) of the WTO are in the same boat, especially considering that the current WTO agreement on TRIMs is weak (Brewer and Young 1998, 458). This implies that the degree of legalization is low as well. For instance, TRIMS does not include Most Favored Nation (MFN) provisions (Hart and Spero 2002, 101). Even though developing countries have had significant changes in their regulatory approaches, bilateral agreements on investment issues have increased to thousands with favorable clauses toward FDI; some scholars suggest that broader multilateral agreement on investment is possible (Moran 2000, 238, Guzman 1998, 639). More legalized WTO Basic Telecom still requires dealing with much deeper issues in different regulatory environments. The negotiations on the so-called "built-in" agenda of GATS that started in 2000 have also drawn opposition from a variety of civil society

organizations (Organization for Economic Cooperation and Development 2002, 13). This opposition deems any rapid top-down changes through the WTO framework unfeasible. The opposition to GATS and other agreements concerning investments should not be seen merely as a result of misinformation and lack of understanding, as suggested by the Organization for Economic Cooperation and Development (OECD 2002, 13). Neither should it be seen merely as a difficult issue between developing countries and developed countries. The regulatory regimes of developed countries pose fundamental challenges as well. For instance, the differences between the Japanese system, with its *keiretsu* relationships, and American antitrust policies are extremely difficult to overcome (Vogel 1996, Lawrence 1993, 16-17). Globalization of telecom markets does not lead to the convergence of international regulatory regimes but to different reactions in domestic regulatory regimes (Vogel 1996). Even within the European Union, the member states have a huge variation in their regulatory approaches to the telecom despite the existence of EU Telecom *Acquis* (Tenbuecken 2006). This is not just limited to "old" and/or large members. The new member states of Central Eastern Europe, which had much less flexibility in adopting the EU Telecom *Acquis*, had quite different regulatory responses. Hence, the general terms "liberalization", "regulation", "de-regulation", "re-regulation", and "independent regulator" imply distinct policies in different contexts (Tenbuecken 2006, 156-167 and 200-239).

6.3.1 Factor Endowments

So what explains the nature of these diverse interests towards the Basic Telecom Agreement? Can the opposition to stronger multilateral investment regimes can also be explained by factor endowments? The Heckscher-Ohlin theorem states that international

trade patterns reflect countries' relative endowment of productive factors. Free trade benefits those who possess relatively abundant factors of production but harms those who possess relatively scarce factors (Caves et al 2002, 107). Following in line with this logic, the Stolper-Samuelson theorem points out that "Any interference with trade that drives up the local import price must unambiguously benefit the productive factor used intensively in producing the import-competing good" (Caves et al 2002, 116). If FDI and trade are substitutes for each other, labor in the developing countries benefits from FDI inflows, as these countries produce labor-intensive goods. Capital in developed countries benefits, as these countries have an abundance of capital. FDI inflow into developing countries started prior to attempts to negotiate multilateral agreements on investments. The inflow changed the relative prices thereby giving more economic clout to labor and fostering changes of institutional framework toward more favorable policies concerning FDI. Douglass North argues that fundamental changes in relative prices will lead parties in both political and economic arena to seek alterations in the existing economic and social contract embedded in the current institutional framework (North 2000, 54).

If FDI and movement of other factors of production (people, goods) are substitutes, then labor representing a scarce factor of production in the rich countries will lose as a result of the increased opening of markets and inflow of FDI into developing countries. Labor in the developing countries should benefit but owners of capital will lose as a result of increased competition. This scenario plays out in the context of telecom industry as follows: The liberalization of telecom services in the developing countries leads to increased FDI and competition. Competition lowers prices for international calls

and makes it possible to outsource labor-intensive services from developed countries to developing countries. This trend is exemplified by call-centers in India.

The reason why many developing countries oppose the Basic Telecom Agreement is rooted in the fact that their governments are captured by small groups of capital holders. As capital is a scarce factor in the developing countries, these small groups benefit from protection of the internal market. A similar argument applies in the case of developed countries where small groups of owners of capital, an abundant factor, are influential in formulating policies and positions of the governments. These groups benefit from the investment opportunities created through liberalization. The reason why these relatively small groups are influential is explained by collective action and theory of groups' literature. It is easier to organize small groups, and small groups with focused interests are more effective in political rent-seeking than large groups with diffused interests (Olson 1971). Lobbying for protection rents offers these small groups with concentrated interests higher financial rewards (at relatively low transaction costs, e.g., organization, information and other costs) than lobbying for liberalization of the telecom sector would offer to large, diffused groups, such as labor in developing countries or consumers (Petersmann 1995, 19).

Naturally, it follows that the aggregate welfare of developing countries would increase as a result of a more legalized telecom agreement, and such an agreement would serve the interest of abundant factor of production: labor. At the same time, the labor is a scarce factor of production in the developed countries, and it would lose as a result of global telecom liberalization, which is the perceived consequence of a more legalized Basic Telecom Agreement. All low-skilled jobs in the telecommunications sector would

move to developing countries, while the high-skilled jobs would remain in developing countries.

However, the problems with the factor endowment theory are some of its assumptions, which are the following: First, the model assumes that while the factors of production are mobile within a country, they are not mobile across national boundaries (Hart and Prakash 2000, 184). This may be a relatively accurate assumption about the labor mobility (a very small percentage of developing countries' population is able to move to developed countries), but is not true in the case of capital mobility. Furthermore, labor is not as mobile within the country either; to give up a job as a telecom engineer in order to become a professor of art takes a lot of learning, which in turn takes time. The simple nature of the assumptions of the model points out the most important inconsistency in using its explanatory power. Namely, we should expect to see fairly homogeneous regulatory telecom regimes as a result of the influence of material interests in the countries with similar levels of development, but instead we observe regime diversity as indicated in the discussion above.

The Ricardo-Viner specific-factor model, which assumes that the factors of production are specific to a particular industry and the factors of production cannot move between industries, reveals this shortcoming in the factor endowment model (Alt and Cilligan 2000, 332). Second, the assumption is that the markets are perfectly competitive (Hart and Prakash 2000, 184). This is not the case with the telecom markets, where many national monopolies still exist. Third, the model assumes that there are no transaction costs for technology acquisition, meaning that access to technology cannot be a source of comparative advantage (Hart and Prakash 2000, 184). The telecom industry is

technology-intensive and having the “right” technology may be a major source of a country’s comparative advantage. This is especially so, as the standard-setting by governments may benefit some companies of particular countries at the expense of others (e.g., the EU’s standard-setting in the second generation mobile telephony benefited companies with GSM technology). Furthermore, transaction costs are certainly positive, not zero.

6.3.2 Corporate interests

Incorporation of issues related to the technology transfer and assumption of positive transaction costs allow us to explain the degree of legalization of the telecom agreement on the basis of interests of companies. According to Ronald Coase, firms exists to reduce transaction costs (Coase 1937). Indeed, if the transaction costs were zero, markets would operate perfectly and the non-market structure of firm would not be necessary. It is precisely the imperfections markets (e.g., failures and inefficiencies)– that make it useful to organize some transactions in the non-market environment that firms provide. Lall echoes this point in the case of MNEs by arguing that they "exist because it is economical for a firm to 'internalize' deficient markets in the presence of high transaction costs, especially for intangible assets (e.g. technology, skills, brand names and the like), across national boundaries" (Lall 1993, 124).

Historically, the factor endowment theory may have had a stronger explanatory power because multinationals mainly invested from capital-abundant developed countries into developing countries to exploit their natural resources. Since the beginning of the 1970s, with significant changes in the technology and reduction of transaction costs due to cheapening of communications, the nature of multinationals has changed (Hart and

Spero 2002, 127). Multinationals started to benefit from the Vernon product cycle, where rich countries produce innovative and capital intensive parts of the product (Kogut 1998, 161). Many intermediate labor-intensive products of these final products are produced in the countries with cheaper labor costs. Partially, the production in low income countries is still explained by factor endowments, but technology plays an important role as well. Changes and the need to standardize production have brought leaner and cleaner production methods (technology), and the recognition that FDI by MNEs generally bring net benefits has grown significantly (Moran 2000, 224-226, Stopford 1998-1999, 20, Hart and Spero 2002, 135). One of the key benefits of MNEs for economic development is technology transfer (Lall 1993, 124), but the foreign direct investments by multinational enterprises (MNEs) have a positive effect on the transfer of know-how, but the role of MNEs is less evident in transferring know-why (Lall, 1993, 125-126). The "thin" nature of technology transfer is supported by evidence that indicates high level of centralization; the level and intensity of R&D in host markets differs along national lines of home countries of MNEs (Doremus et al 1998, 7, 86-89, 111-115, 136-137).

The literature on MNEs, FDI, technology transfer and national telecom sector regulation bring out the diversity in rules and the private sector actors involved. It brings out the weakness of assumptions of factor endowment theories that see actors in a homogeneous, if not simplistic, way. This offers an explanation for understanding the level of legalization of the WTO Basic Telecom Agreement. First, firms involved in the telecommunications business have quite varied characteristics: Some are technology-intensive, some have high degrees of labor intensiveness, and some may combine

technology with labor intensity. The national characters are important, as well. Firm-specific features must be also be considered, and the explanatory power of technology-specific features and transaction costs are enhanced further by considering industry-specific features. The current state of legalization of the Basic Telecom Agreement reflects the changing bargaining power of interested groups in domestic politics, not just the power of a few MNEs. In this sense, inclusion of telecom services in the WTO framework should not be seen only as a triumph of MNEs and a result of conditions imposed by international organizations who act in the interests of global MNEs. If this were the case, the telecom agreement would have a higher degree of legalization.

Therefore, the interests of firms and their preferences for regulation should not be seen as unitary and over-generalized. Ultimately, "firms vary in their preferences for regulation" (Murphy 2004, 3). Murphy (2004) points out that firms' preferences may lead to three different types of regulatory regimes: 1) Convergence of standards toward the lowest common denominator, 2) Convergences of standards toward the highest common denominator, and 3) Heterogeneous regulatory regime. According to Murphy (2004), the locus of regulation on the production process or market access explains either laxity or stringency of regulatory developments. The structure of industry explains the degree of change. The asset specificity explains the homogeneity of regulations among states (Murphy 2004, 5, 11-20). Even more importantly, firms with assets specific to a domestic market have a strong preference for heterogeneous international regulations (Murphy 2004, 19). Obviously, a more legalized WTO Basic Telecom Agreement implies more homogeneous treatment of "production process" of telecom services. Structure of industry is dominated by one or a few firms, which makes the change slow. The assets of

telecom companies are highly specific to the domestic market depending greatly on the historical co-evolution of the companies and regulation.

The variance in the commitments of Estonia, Latvia, Slovakia and Slovenia under the telecom agreement can be explained by these insights. The Slovenian telecom market is dominated by one large firm, while the Estonian market has significantly more market players. Latvia and Slovakia fall somewhere in between. The asset specificity of the Slovenian telecom company is greater than that of Estonia's telecom companies. Estonia, which took commitments to the highest degree of legalization of the four countries, has the most heterogeneous telecom market. Forty-nine percent of the incumbent monopoly was privatized to Finnish and Swedish telecom companies in 1992. Twenty-four percent of the incumbent telecom was sold to financial investors and floated in the stock market in 1997. The remaining part is owned by the state (ESIS 99a). In addition, FDI inflow has been high and many small companies operate in many other telecom services (data, Internet) (OECD 2001, 2-3). In addition, Estonian banks have significant stakes in telecom regulations. For instance, they introduced the Internet banking already in 1996. Hence, the diversity of interests made it hard to block the schedule of commitments under the Basic Telecom Agreement. At the same time, the Slovenian incumbent telecom company is owned by the state and workers of the company (ESIS 1999b). Inflow of FDI in the Slovenian telecom sector is non-existent (OECD 2002a, WTO 2002, 11, 26). Naturally, the concentration of ownership in the hands of one actor, the state, creates very concentrated interests that are easy to protect. Slovenian government officials simply did not want to give up the market of the company they consider "strategic." In addition, the workers of the incumbent company are afraid to lose their jobs, and through ownership

and labor unions offer the strong opposition to liberalization commitments of the WTO Basic Telecom Agreement.

On a more general level, the notion that firms' preferences for regulation are heterogeneous is supported by transaction cost theories of firms that were discussed in the beginning of the chapter. Lall (1993) and Coase (1937) see firms as non-market hierarchies that base some parts of their activities on external "free" markets while internalizing other parts of their activities are internalized within their non-market structure. This is crucial for understanding the potential role firms might play in the shaping the telecom policy. Firms do not necessarily see markets as serving to their best advantage. Markets may very well work against the interests of firms. Similarly, the effect of MNEs on the economic development of countries may vary significantly (Lall 1993, 124).

These findings are contrary to the conventional wisdom that assumes firms prefer only the convergence toward the lowest common denominator, a so-called race to the bottom. The WTO Basic Telecom Agreement can be seen as a representative of heterogeneous regulatory regime because a lower degree of legalization than in the case of other WTO agreements. The telecom agreement touches on the business activities of many different firms. On the one hand, there are large incumbent telecom companies which, in addition to utilizing the latest technologies, are also highly labor intensive. On the other hand, there are small firms specializing in specific services and products that are technology-intensive. In addition to the telecom firms, many other firms are interested in the further liberalization of the telecom services. Large MNEs with heavy use of telecommunication services, such as large banks, accounting firms, stock exchanges,

insurance companies and the electronics industry, were all interested in telecommunication liberalization under the WTO Basic Telecom Agreement (Braithwaite and Drahos 2000, 341). Furthermore, the different categories of firms have different characteristics across national borders. The interests of these firms are not always consistent with each other, and government policy on the Telecom Agreement may reflect the heterogeneous nature of business interests. Hence, it is not possible to talk of the telecom business interests – either business interests of developing countries or developed countries – in a general manner in the context of the WTO Basic Telecom Agreement. In comparison, the TRIPS agreement had significantly more homogenous business interests involved (entertainment, pharmaceuticals), which more legalized agreement possible due to the existence of concentrated interests. Furthermore, interests of some telecom firms are also served by the TRIPS (trade in technology intensive telecom products protected by intellectual property rights), which make the highly legalized telecom agreement a less important factor.

The Olsonian logic of collective action worked on different levels in this case. On the global level, there were different MNEs, a group that was not small with concentrated interests; it was a large group with diverse interests. The large group consisted of many small groups with opposing interests. For example, on the one side of the spectrum, a large MNE such as American Express would push for liberalization while a large incumbent telecom giant on the other end would try to block it. Many other firms would be somewhere in between these two opposing sides of the spectrum. On the domestic level, if telecom markets were dominated by homogeneous interests, then these concentrated interests would be able to block new commitments from being made. In the

countries with diverse and heterogeneous interests, the undertaking of commitments was not blocked because of the lack of strong concentrated interests. Hence, the result is not highly legalized, nor is it a complete lack of agreement – but rather a weak agreement.

7. Conclusion

The purpose of the paper was to explore whether or not the degree of legalization is smaller in the Basic Telecom Agreement than in the general WTO framework and to address the reasons for the different degree of legalization. By analyzing the procedures of the Basic Telecom Agreement and the schedule of commitments of four countries under the agreement, I found that the degree of obligation is significantly smaller in the case of the agreement than in the case of other WTO agreements, such as the GATT. Due to the complex nature of the Basic Telecom Agreement, it is more difficult to indicate the difference between the degree of precision in the agreement and the degree of precision of the other agreements. On the one hand, I found that the general rules of the Basic Telecom Agreement are significantly less precise than the most other WTO agreements. On the other hand, I found that specific commitments undertaken by individual countries are quite precise. But as these precise obligations differ greatly on a country-by-country basis, it allows for the conclusion that the degree of precision is smaller in the case of the telecom agreement than in the case of other WTO agreements. By comparing the degree of delegation of the Basic Telecom Agreement with that of the other WTO agreements, I found no difference, as the WTO dispute settlement mechanism is used in both cases. Overall, the degree of legalization of the telecom agreement is smaller than the high degree of legalization of the WTO institutional framework.

In analyzing the factor for the lower degree of legalization of the Basic Telecom Agreement, I used neorealist, neoliberal insitutionalist, factor endowment and interest group approaches. All of these theories revealed some explanatory power that could confirm or dismiss by way of more rigorous examination of empirical evidence. The state-centric theories of international relations had some explanatory power, but many of the assumptions vital to these theories were not consistent with the evidence. Similarly, the factor endowment theory had unrealistic assumptions regarding the transaction costs and technology access. Hence, the interest group-based approach was the most compelling. The telecom agreement with a high degree of legalization would reach deep into domestic regulatory environment concerning investment- and competition-related issues. This potential activates a vast variety of actors with opposing interests. The heterogeneous nature of interests implies that the result is more a heterogeneous regime than is otherwise the case with the WTO agreement.

Certainly, the legalized telecom agreement has strong distributional impacts, and some local vested interests may be worse off as a result of telecom liberalization. Considering the convergence between the different communication and information technologies, the telecom agreement is quite narrow in its scope; for instance, Internet service suppliers are defined as users rather than suppliers of telecommunications (Drake 2004, 10). The proliferation of Internet-based services, such as IP telephony (for example, Vonage and Skype) makes such classification rather archaic. However, these new service providers have quite different interests from those of traditional telecom companies, and may prefer competition instead of harmonization across national borders.

All of this implies that increasing the degree of legalization of the GATS, in general, and the telecom agreement, in particular, may be highly unlikely, as it would take away tools that can be used by politicians to silence interest groups. The current deadlock in the Doha Round of WTO negotiation will make a significant change in the Basic Telecom Agreement and other investment- and competition-related issues even more unlikely because issues in the WTO are interlinked. Even more importantly, without the deadlock and in a perfect world of trade negotiations, increasing the degree of legalization of the WTO Basic Telecom Agreement will pose a fundamental challenge because of the historical path-dependent development of telecom markets. Ultimately, there is no one model toward which telecom markets will develop in a linear fashion – this realization is both a positive conclusion and a normative suggestion to emerge from this research .

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