

ARTICLES

TELECOMMUNICATIONS TRADE: REACH OUT AND TOUCH SOMEONE?

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1. INTRODUCTION

When we speak of linkages, the topic of trade policy frequently comes to mind. This is because trade policy is purposefully (and often aggressively) being utilized, particularly by the United States, and to a lesser extent the European Union ("EU"), to influence the domestic policies of other states. This linkage between trade policy and foreign policy goals has become increasingly common, in part owing to the growing importance of international trade.

Trade policy linkages can be classified in terms of the subject or area targeted. At least three types of trade policy linkages exist. They are (1) social policy linkages, (2) national security (foreign) policy linkages, and (3) sectoral policy linkages. Each is described below.

A "social policy linkage" exists when trade policy is used to influence a social policy issue. Trade policy has been applied to social issues such as human rights, the environment, labor standards, and public health concerns. When "trade and the environment" are grouped together, this is a social policy linkage. Social policy linkages can be applied unilaterally or multilaterally. They are most controversial when unilateral in nature, as has been the case in many of the well-known trade-related environmental policy disputes. Social policy linkages can have implica-

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tions both for national security and for particular industrial sectors.¹

When trade policy is linked with national security policy objectives, this linkage can be termed a "national security" or "foreign policy linkage." This type of linkage is the subject of another conference paper, so it will not be discussed here, but it should be noted that national security linkages have not escaped criticism, particularly when partisan political objectives masquerade as national security issues. This appears to be the case in certain recent trade disputes, such as that surrounding Helms-Burton. National security linkages may not be effective if allies do not cooperate. One need only consider the Dresser Industries conflict of twenty years ago to appreciate this point. The economic, as opposed to the symbolic (political) effect of national security linkages is dependent on supply and demand considerations, in addition to the political will of one's allies and trading partners. Without downgrading the importance of such linkages, particularly when legitimate security goals, such as the prevention of terrorism are at stake, one should be aware that those living outside the U.S. have a greater tendency to view national security linkages with skepticism.

The third category of linkages can be termed "sectoral policy linkages." In the case of sectoral policy linkages, trade policy is not linked with a particular social policy domain, but instead is linked with a particular business sector. In such linkages, trade policy negotiations are most frequently used as a means of opening a specific business sector to greater international competition, thereby bringing about its integration into the international trade regime, or to use a popular word, its globalization. Sectoral policy linkages, like social policy linkages, exist unilaterally or multilaterally, though recent interest has focused on multilateral approaches. When we speak of telecommunications trade, we are making a sectoral policy linkage. The February 15, 1997 WTO Agreement on Telecommunications Services,² which is designed to liberalize the trade in basic telecommunications services, is a

¹ Environmental damage can have national security implications. Labor standards can affect competitiveness in various industrial sectors and therefore have sectoral policy implications.

² WTO Agreement on Telecommunications Services, Feb. 15, 1997, 36 I.L.M. 354. This Agreement is often referred to as the Fourth Protocol to the General Agreement on Trade in Services.

multilateral sectoral trade policy linkage. It will be discussed later in this Article.

The recent history of international trade negotiations demonstrates a strong preference for sectoral over social policy linkages. Efforts to integrate environmental, labor, and human rights concerns into the multilateral trade regime met with considerable resistance from many contracting parties to the General Agreement on Tariffs and Trade ("GATT"),³ and continue to meet with resistance among the Members of the World Trade Organization ("WTO").⁴ In addition, the unilateral application of trade policy measures to further environmental and other social policy objectives has met with widespread criticism, particularly among developing nations in Asia and the Middle East.

This Article compares social policy linkages with sectoral policy linkages. It examines the preference for sectoral over social policy linkages, contrasting the recent negotiating success of the WTO Members in the telecommunications sector with the failure of the WTO Members to make significant progress on pending environmental and other social policy concerns. Furthermore, this Article explores the basis for the dichotomy between social and sectoral trade linkages and questions whether the recent Agreement on Telecommunications Services ("Fourth Protocol") may also have certain social policy implications. This Article concludes by suggesting that the application of liberal trade rules to service sectors, in particular telecommunications, may have profound social policy implications, and that the distinction between social and sectoral policy trade linkages may eventually become less significant.

2. TRADE LINKAGES

From the perspective of international relations there is little new or extraordinary about the topic of linkages. It is a well-studied concept. Political, economic, and military policies have long been used as a means to influence the policies of other peo-

³ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 5 (1994) [hereinafter THE RESULTS OF THE URUGUAY ROUND].

ple, and more recently states. In particular the use of force, or the threat of force, has long had a powerful influence on international relations, and has often been linked with changes in the policies of people and political entities. More recently, the application of military pressure has given way to the utilization of economic pressure as a means of achieving policy objectives. The use of legal instruments to preserve the results achieved has also become common and accepted.

From the legal perspective, the concept of linkages is also not new. Over 100 years ago, Karl Marx (the son of a lawyer) linked the application of law with the maintenance of the political and economic status quo. Now, when we speak of trade policy linkages, we no longer speak just of the maintenance of the status quo, but rather the advancement of economic, and more recently social policy goals deemed desirable by the democratic governments that are the locomotives leading trade policy reform.

Within the legal community, particularly among academics and policy makers, there is a growing awareness and appreciation of trade linkages. We see this awareness among our colleagues involved in the environmental field and also among those involved more specifically in trade policy matters. Much of this heightened interest is due to an increased understanding of science and economics by the actors involved. This increased interest in trade linkages may also be due to the growing tendency to enact binding international economic instruments that integrate, and thereby linking, legal and economic concerns, such as the agreements that have created international and regional trade arrangements, including the WTO, EU, and the North American Free Trade Agreement ("NAFTA").

From the environmental perspective, the interest in linkages is readily understandable. Recent evidence strongly suggests that environmental factors can be scientifically linked with health problems, as well as such phenomena as global warming, ozone depletion, and species extinction. From the perspective of international trade relations, the interest in linkages is also understandable, particularly if one is familiar with the economic aspects of international trade theory, and the operation of the international trade regime. In a nutshell, trade liberalization has been firmly linked with international economic growth.⁵ This is not a new

⁵ See generally PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* (14th ed. 1992).

concept. The idea of gains from trade goes back to Ricardo. What is of interest is the fact that the rules of the GATT/WTO regime have provided the framework and stability necessary both for the growth in trade and for concomitant economic growth. The rules of GATT/WTO have been credited by many for providing the foundation for a fifty year period of economic prosperity and relative peace, almost unrivaled, in modern history. The success of the international trade regime has also been credited with facilitating the spread of the free-market system to many corners of the world. Of course, there have also arguably been negative social consequences.

3. SOCIAL POLICY TRADE LINKAGES

To paraphrase a well-known comment, the rules of the international trade regime are not hostile to social concerns, just "agnostic."⁶ In general, these rules do not necessarily have direct negative social consequences. In other words, it is difficult to establish a firm link between the rules of the international trade regime and human rights abuses, environmental degradation, or the insufficient protection of workers.⁷ Nor do these rules necessarily have positive social implications. It is usually up to national governments to establish their own social policies, distinct from international trade policies. Of course domestic efforts to protect the environment, human rights, and workers may have indirect implications for international trade, and apparently neutral or agnostic trade policy rules may also have implications for social policy concerns. Trade linkages can be either direct or indirect, and the difference is always a matter of degree. To a large extent the trade-related linkage debate concerns how far to travel down what some regard as a very slippery slope.

Because of the economic and political success of the international trade regime, which can be expected to grow due to this regime's strengthened dispute settlement system, there has been a concerted attempt to co-opt its rules for social policy purposes,

⁶ See Daniel C. Esty, *GATTing the Greens: Not Just Greening the GATT*, 72 FOREIGN AFF., Nov./Dec. 1993, at 32, 35 ("In truth, the GATT is not hostile to the environment but agnostic.").

⁷ Admittedly, if the liberal trade regime leads to economic development, certain forms of environmental degradation would increase. However, few would argue that abject poverty should be preserved in certain countries in order to protect the environment.

i.e., to incorporate social policy norms into the international trade regime, or to graft changes onto the international trade regime so that trade rules can be more easily used to provide leverage for social policy reforms. Such a linkage would have the effect of expanding the reach of the trade regime into social policy areas, most probably human rights, labor practices, and environmental norms.

The history of the GATT Agreement demonstrates that social policy linkages need not be a part of the international trade regime for the regime to be economically successful. In fact, the presence of social policy linkages may work to undermine the regime if economic protectionism is the result. Nevertheless, social policy linkages are actively promoted by people in many countries not only for underlying moral and philosophical grounds associated with the applicable social policy, but also for sensible political and even economic reasons.

Almost without exception there has been strong resistance in Geneva to linking trade and certain social policies, in particular environmental and labor concerns. Resistance to these social policy linkages appears, at times, almost institutional within portions of the WTO Secretariat, among Geneva-based trade negotiators, and more broadly at the political level, particularly among developing country governments. GATT and WTO panel reports have struck down trade measures purportedly designed to protect or conserve herring,⁸ salmon,⁹ tuna,¹⁰ oil resources,¹¹ and clean air.¹² The debate is still ongoing with respect to sea turtles, and animals caught in leg-hold traps, although many scholars doubt that a significantly different result will be achieved with respect to these issues. Trade negotiators in many countries have shown little enthusiasm for expanding the protection in the WTO Agree-

⁸ See Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 98 (1989).

⁹ See *id.*

¹⁰ See GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna, June 1994, 33 I.L.M. 839; GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594.

¹¹ See GATT Dispute Panel Report on U.S. Taxes on Automobiles, Oct. 11, 1994, 33 I.L.M. 1397.

¹² See WTO Report of the Appellate Body on U.S. Standards for Reformulated and Conventional Gasoline, May 20, 1996, 35 I.L.M. 603; WTO Dispute Panel Report on U.S. Standards for Reformulated and Conventional Gasoline, Jan. 29, 1996, 35 I.L.M. 274.

ment to social areas such as the environment. The suggestion mooted by France and the U.S. to link labor rights and the WTO Agreement has also not been warmly received. Lastly, even the U.S. has retreated somewhat from linking human rights and most-favored-nation ("MFN") treatment.

The moral and philosophical grounds for linking social policy concerns and trade policy will be apparent to most readers. However, the economic and political implications that lead some to oppose social policy linkages may be less clear. Linking social policies with trade policies inevitably favors those that have, using the term in a slightly unusual sense, a "comparative advantage" with respect to these policies, in particular, states that already have higher degrees of protection for human rights, labor, and the environment. Such linkages may prove economically disadvantageous for states that lack the technology, resources, or political will to implement a progressive social policy agenda. Those states will be inclined to view, rightly or for rhetorical purposes, these social policy linkages as a form of disguised protectionism. Without entering into this debate, it suffices to say that there are legitimate concerns on both sides. For purposes of this Article, it is the underlying linkages that are of interest.

At a superficial level of analysis, the link between trade policy and certain social policy concerns may be viewed by some as "artificial," an unnecessary add-on to the international trade regime. As already noted, social policy concerns need not be reflected in trade policy for trade policy to be effective. In fact, when the final product is examined, it is seldom discernible whether goods are produced by child labor, by prison labor,¹³ or at great environmental cost. At a deeper level of analysis, however, there may be sound economic reasons for supporting certain trade policy linkages. For example, if the failure to internalize environmental externalities explains the prevalence of a particular form of environmental degradation, linking trade policy and environmental standards may provide a means of promoting internalization, and thereby reducing environmental degradation. If

¹³ GATT Article XX(e) provides an exception from GATT discipline "relating to the products of prison labour." This exception is arguably limited by the terms of Article XX's chapeau. See Arthur E. Appleton, *GATT Article XX's Chapeau: A Disguised 'Necessary' Test?: The WTO Appellate Body's Ruling in United States--Standards for Reformulated and Conventional Gasoline*, 6 REV. EUR. COMMUNITY & INT'L ENVTL. L. 131 (1997).

job opportunities in a highly competitive sweatshop “manned” by children reduce the likelihood that these children will receive an education, and further result in unemployment in the North, many will see sound economic reasons for discriminating against goods produced under such an arrangement.

Both examples relate to the “PPM problem.” PPMs, or the “processes and production methods” used to produce a particular product, are often undetectable in the final product (“non-product-related” or “NPR-PPMs”). For example, merely by examining a given pair of tennis shoes, it is usually impossible to discern whether it is made by child labor, slave labor, or at great environmental cost. Some assert that the general failure to differentiate between products based on NPR-PPMs is arbitrary, while others believe it is necessary for the preservation of the international trade regime. Whichever side of the debate one is on, it will probably be realized that the expression “NPR-PPMs” is a misnomer. Labor, environmental, and human rights issues can indeed be “related” to a product. When the phrase NPR-PPM is used in the WTO-sense, the distinction being made is whether a particular production-related activity is physically detectable in the final product.¹⁴

Any criticism of the PPM distinction implicitly constitutes an attack on the definition of an Article III “like product” that has been emerging in GATT/WTO panel reports.¹⁵ The NPR-PPM issue has become a divisive North-South issue that also divides development advocates and environmentalists. Lurking behind this issue are more difficult economic questions concerning comparative advantage and internalization of externalities, as well as historical arguments concerning the path to industrialization followed by the North.

A question remains: is actively linking trade policy and social policy concerns the most efficient way of implementing a social

¹⁴ There are trade policy linkages that are even more remote than that suggested by the NPR-PPM debate, though the phrase “even more non-product related” will never gain popularity. For example, a decision to raise tariffs on products from a particular non-WTO Member across the board in retaliation for its human rights abuses severs the link entirely between trade policy and the social policies related to a particular product’s manufacture.

¹⁵ *But see* Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) at 116 (1988) (noting “manufacturing processes of products” as being among the criteria to be examined in the determination of likeness).

policy agenda? The answer would appear to be no. The theory of optimum policy intervention suggests that the best solution to many problems, in particular environmental problems, is to be found as close to their source as possible.¹⁶ This often implies a municipal law solution. However, from a practical perspective, because many states lack the political will to make difficult economic and social policy decisions, such linkages offer opportunities for advancing social policies. This point, the benefits that may be attributable to unilateralism, is one that Steve Charnovitz has made in several of his articles.¹⁷

Admittedly, there is no reason why rules governing human rights, the environment, or labor practices could not be incorporated into the rules of the international trade regime. However, there is not much support for such a linkage outside the developed world, and less than universal support for such a linkage within the developed world. This is not to say that the future is bleak for those who would want to see a more socially enlightened international trade regime, rather this enlightenment will probably not be achieved in the desired time-frame or manner. It is difficult to believe that social criteria will never be grafted onto what has proven to be a very flexible international trade regime, either in a subsequent round of trade talks, or through separate multilateral agreements. It is also difficult to believe that there will be significant support for such changes from the developing world until those countries achieve greater development.

4. SECTORAL POLICY TRADE LINKAGES

Social policy linkages, by their very nature, involve the application of trade policy to achieve a desired social policy result. A principal economic goal of trade policy, gains from trade through market opening and trade liberalization, is not necessarily furthered, and in some cases may even be placed at risk by social pol-

¹⁶ See GATT Secretariat, *Multilateral Transparency of National Environmental Regulations Likely to Have Trade Effects*, Note by the Secretariat, GATT Doc. No. TRE/W/4 (Nov. 16, 1992), at 6; Ernst-Ulrich Petersmann, *Trade Policy, Environmental Policy and the GATT: Why Trade Rules and Environmental Rules Should Be Mutually Consistent*, 46 *AUSSENWIRTSCHAFT* 197, 201-02 (1991).

¹⁷ See, e.g., Steve Charnovitz, *Environmentalism Confronts GATT Rules: Recent Developments and New Opportunities*, *J. WORLD TRADE*, Apr. 1993, at 37, 45 n.48; Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 *CORNELL INT'L L.J.* 459, 493-98 (1994).

icy trade linkages.¹⁸ This is because, as explained above, social policy linkages favor products and/or states that meet the applicable social criteria. As a result, products from developed countries are favored.

When we speak of sectoral policy linkages, the situation is often much different. Economic policies applicable to specific business sectors, as opposed to purely social policies, are likely to be the central subject of debate.¹⁹ Unlike social policy linkages, however, with sectoral policy linkages, trade policy is not necessarily applied to produce a desired policy change. Instead, the economic goals of trade policy are acknowledged, and through a negotiation process in which economic incentives and limited political pressure are often applied, a commercial activity not fully integrated into the international trade regime becomes more closely linked with this regime's principles and rules. Incentives and pressure may open the sector, but trade rules assure that the sector remains open. Sectoral policy linkages are thus intertwined with the goals of trade policy itself, in particular market opening and trade liberalization. These linkages come not from the aggressive application of trade policy, but from the acceptance of trade rules and the application of these rules and disciplines to a particular commercial sector. The process is by definition somewhat more consensual.

When the Annexes of the WTO Agreement are examined, one finds that with the exception of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS")²⁰ and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"),²¹ many of these instruments can be linked with sectoral as opposed to social policies. For example, sectoral multilateral and plurilateral agreements were made concerning textiles, agriculture, including dairy products and beef, services, civil aircraft, and government procurement. Admittedly, the Agreement on Technical Barriers to Trade ("TBT")²² and the 1947 General

¹⁸ Other social policy trade linkages, in particular those for health reasons, may actually help to further international trade.

¹⁹ The distinction may not always be clear. Certain economic policies may be hard to differentiate from social policies.

²⁰ See THE RESULTS OF THE URUGUAY ROUND, *supra* note 4, at 69.

²¹ See *id.* at 365.

²² See *id.* at 138.

Agreement on Tariffs and Trade (“GATT 1947”)²³ provide certain social policy exceptions, but these exceptions are narrow and their invocation will be rare. Even the SPS and TRIPS Agreements, which involve important social policies, have predominately sectoral implications.²⁴ They serve to facilitate trade and protect the integrity of the international trade regime. In contrast, the negotiating history of the Decision on Trade and Environment, subsequent action with respect to this Decision in the WTO’s Committee on Trade and Environment (“CTE”), as well as certain of the aforementioned panel reports,²⁵ demonstrate considerable suspicion with respect to sectoral linkages, in particular environmental linkages.

There may be many explanations for the preference for sectoral over social policy linkages, but in accord with Occam’s razor, the simplest explanation may be the best. Trade policy is generally identified with reaping the gains from trade—developing a business climate, creating jobs, making money, and thereby increasing national material well-being. By expanding international trade, sectoral policy linkages, i.e., the application of trade liberalizing rules to new sectors, have the potential to create profits, and, as a result, economic and political opportunities. It is therefore of interest to more of the government actors in international trade negotiations, and more of the political and economic interests that stand behind these actors. Admittedly, this is a practitioner’s perspective. This view is neither meant to suggest that social policy linkages are necessarily incompatible with the international trade regime, nor to downgrade the importance of such linkages with respect to certain specific social policy issues, just to note that they are, rightly or wrongly, viewed with suspicion in certain quarters.

Sectoral policy linkages offer greater potential for compatibility with the principles of the international trade regime. Nevertheless, sectoral policy linkages, arguably shorthand for the con-

²³ It should be noted that GATT 1947 is distinct from GATT 1994.

²⁴ The SPS Agreement serves the social function of protecting plant and animal life (including mankind) from disease and contamination, and the sectoral function of facilitating trade in agricultural products. The TRIPS Agreement serves the social function of strengthening the protection of creative rights, and the sectoral function of establishing more predictable trade rules when intellectual property rights are at issue, thereby affecting sectors such as publishing, the recording industry and the computer chip industry.

²⁵ See *supra* notes 8-12 and accompanying text.

sensual application of WTO rules to sectors once beyond WTO discipline, do have social implications. In recent years, the social implications associated with market liberalization have become increasingly apparent and have received considerable attention in the trade policy debate. This is well illustrated by the social debate concerning the liberalization of market access rules for beef and rice in Japan and Korea. The debate concerning globalization provides a second, and better known, example.

4.1. *The Case of Telecommunications Trade: Links Within Links*

Having explored the dichotomy between social and sectoral trade policy linkages, one important sectoral policy linkage will be examined, and its social policy implications discussed. The Agreement on Telecommunications Services, concluded in February 1997 among certain Members of the WTO, provides a good example of a plurilateral sectoral policy linkage designed to facilitate trade and to satisfy international business expectations. It also provides an excellent example of a sectoral policy trade agreement with a multitude of cross-sectoral links and, perhaps surprisingly, some unexpected social policy implications. Now is an opportune moment to discuss this agreement given that its protocol and annexes are scheduled to enter into force on January 1, 1998.²⁶

The Agreement on Telecommunications Services is remarkable, first for its scope, covering over ninety percent of world telecommunications revenue; second for its depth—approximately seventy governments from both the developed and the developing world are signatories;²⁷ and third for its breadth—as noted above, cross-sectoral linkages abound. Not only are market access opportunities for the trade in telecommunications services covered, within the service sector it also includes, to name a few, foreign investment opportunities, competition provisions, and satellite and cellular communications.

²⁶ See Fourth Protocol to the General Agreement on Trade in Services, Apr. 30, 1996, 36 I.L.M. 366.

²⁷ See *Ruggiero Congratulates Governments on Landmark Telecommunications Agreement* (Feb. 17, 1997) (last modified Feb. 27, 1997) <<http://www.to.org/press/press67.htm>> [hereinafter *Ruggiero*]; *Statement, Ambassador Barshefsky, Basic Telecom Negotiations* (Feb. 15, 1997) (last modified Feb. 18, 1997) <<http://www.ustr.gov/agreements/telecom/barshefsky.html>> [hereinafter *Barshefsky*].

From an economic perspective, the significance of this agreement should not be underestimated. Though figures vary, telecommunications as a whole (the goods and services sector together) is now reported to be more than a \$600 billion a year industry and this figure may double or even triple in the next decade.²⁸ This could mean global income gains of approximately one trillion dollars in ten years, which translates to approximately four percent of present world gross domestic product ("GDP").²⁹ Yet, despite this growth, or maybe as a result of it, some predict that international phone bills in the U.S. will fall eighty percent during this period.³⁰ If, as suggested, the preference for sectoral policy linkages is in large part based on business interests, this is one sector with profound business importance, and the ten years it took to reach this agreement may have been worthwhile.

From a legal perspective, the Fourth Protocol is in line with the development of the international trade system in the Uruguay Round from a regime oriented towards trade in goods, to a regime also applicable to trade in services. Yet, with respect to telecommunications, this development is not as simple as it sounds. The telecommunications service sector is not only a "distinct sector of economic activity [but] the underlying transport means for other economic activities."³¹ In addition, the Fourth Protocol also establishes links between the telecommunications sector and other "new" or emerging areas, including competition law and investment rules—the former being a business issue with social, as well as economic policy implications. These "new" links will be briefly discussed, not only because they are exciting, but also because they may have some predictive value. But before doing so, a few technical words must be said about the Fourth Protocol so that the linkages contained therein will be understood in their proper context.

²⁸ The public telecommunications sector is supposed to have generated revenue of more than \$600 billion in 1995. See Pekka Tarjanne, *Telecommunications and Trade*, Feb. 5, 1997 (visited Mar. 4, 1998) <<http://www.itu.int/ti/papers/moscow97/moscow97.htm>>; Barshefsky, *supra* note 27.

²⁹ See Ruggiero, *supra* note 27.

³⁰ See Barshefsky, *supra* note 27.

³¹ General Agreement on Trade in Services, Annex on Telecommunications, para. 1, reprinted in *THE RESULTS OF THE URUGUAY ROUND*, *supra* note 4, at 359 [hereinafter Annex on Telecommunications].

In the General Agreement on Trade in Services ("GATS"),³² a distinction well known to U.S. telecommunications attorneys was made between "basic"³³ and "value added"³⁴ telecommunications services.³⁵ Specific commitments were made with respect to value added services, but an agreement was not reached on basic services. The result was that while business use of basic telecommunications services was generally guaranteed,³⁶ participation in the actual provision of these basic services, for example, voice telephony (including mobile phones), telex, fax, leased lines, and packet and circuit switched data, whether by satellite, wire, cable, or radio, was not guaranteed.

The Fourth Protocol brought these telecommunications services into the GATS framework, thus ensuring MFN treatment, transparency, and a variant of national treatment suitable to this service sector. Like other service sector negotiations, market access commitments were based on modes of supply.³⁷ These com-

³² See *id.* at 327.

³³ Basic telecommunications can be thought of as "telecommunications transport networks and services." Decision on Negotiations on Basic Telecommunications, para. 1, *reprinted in id.* at 461. Paragraph 1 of a note that was not intended to be legally binding also provides what may be viewed as a definition, or example, of basic telecommunications services. See WTO Doc. S/GBT/W/2/Rev.1 (Jan. 16, 1997) 36 I.L.M. 371.

³⁴ Value-added telecommunications services can be thought of as services that add value to a customer's information by "enhancing its form or content or by providing for its storage and retrieval." *Ruggiero, supra* note 27. They include e-mail, voice mail, on-line data processing, on-line data retrieval, and electronic data interchange. In conjunction with the Uruguay Round, 44 schedules (representing 55 governments) were submitted and are now in force. See *id.*

³⁵ See generally Marco C.E.J. Bronckers & Pierre Larouche, *Telecommunications Services and the World Trade Organization*, J. WORLD TRADE, June 1997, at 5, 16-18. The authors provide a sample schedule differentiating between basic and value added telecommunications services. See *id.* at 48.

³⁶ See Annex on Telecommunications, *supra* note 31, at 359.

³⁷ The modes of supply of services are set forth in Article I(2) of the GATS Agreement. They are:

- (a) from the territory of one Member into the territory of any other Member [cross-border supply];
- (b) in the territory of one Member to the service consumer of any other Member [consumption abroad];
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member [commercial presence];
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member [presence of natural persons].

Id. art. I, para. 2, at 328.

mitments are important for the provision of services, including telecommunications services. In addition to market access commitments, the agreement contains regulatory commitments that are presented in a short but important Reference Paper ("RP").³⁸ Some of the linkages contained in the RP are mentioned below.

The RP embodies the spirit of the Fourth Protocol. Applicable only to basic telecommunications services, it is designed to protect new entrants into the telecommunications market from the commercial power and influence of "major suppliers,"³⁹ including monopoly providers and former monopoly providers that remain the primary basic telecommunications service providers in many nations.⁴⁰ In other words, the RP links competition law with the provision of telecommunications services, perhaps a necessity given the historical dominance of monopoly providers in the telecommunications industry. Members are required to prevent major telecommunications service suppliers from engaging in or continuing anti-competitive practices, which are defined in paragraph 1.2 to include cross-subsidization, the anti-competitive use of information obtained from competitors, and the failure to make necessary technical and commercial information available to other service suppliers on a timely basis. In addition, the agreement seeks to ensure timely access (interconnection with major service suppliers), transparency, the prevention of discrimination against other basic service suppliers, and impartial dispute resolution.

The link between the provision of services and competition law is significant. For some time there has been talk about incorporating competition law into the GATT/WTO framework. Now this talk is becoming a reality. Admittedly, the historical power of monopoly service providers in this industry may have made this linkage inevitable, but it is not improbable that a similar linkage may begin to crop up in other sectors, just as competition law first became a part of certain national legal systems and is now being developed at the regional level.⁴¹

³⁸ See Reference Paper, 36 I.L.M. 367 (1997).

³⁹ A major supplier is defined in the RP 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." *Id.*

⁴⁰ See generally Bronckers & Larouche, *supra* note 35, at 23.

⁴¹ See, e.g., TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, *opened for signature* Mar. 25, 1957, art. 86, 298 U.N.T.S. 11.

A second interesting link made in the Fourth Protocol is that concerning investment decisions applicable to the basic telecommunications service sector. By bringing basic telecommunications services into the GATS framework, parties to the Fourth Protocol (unless otherwise specified in their schedules), have agreed not to maintain or adopt limitations on the participation of foreign capital in their telecommunications sectors.⁴² This liberalization of investment, in what has traditionally been a sector not particularly open to foreign investment, is in accord with the general philosophy underlying the TRIMS Agreement (which is only applicable to trade in goods),⁴³ as well as general efforts underway to liberalize trade in financial services.

Is it significant that an agreement liberalizing trade in the telecommunications sector also links together competition considerations and investment practices? The answer is probably yes. As noted above, there would appear to be predictive value in analyzing the linkages present in trade agreements. This is one reason why the concept of linkages is of academic importance. The linkages present in the Fourth Protocol may provide clues to the evolution of the international trade regime. If this is correct, we can expect to see the inclusion of competition and investment provisions in future trade agreements.

It is conceivable that the successful liberalization of the trade in goods made the liberalization of the trade in services not only possible, but desirable and inevitable,⁴⁴ and that the successful liberalization of the trade in services, in particular trade in communications services, will lead to further linkages between trade and certain social policy sectors. In the last fifty years, we have seen the systematic growth in the rules, scope, and objectives of the international trade regime, as well as the systematic expansion of global international trade. This is no accident. The economic success of the GATT/WTO regime has raised the expectations of trade negotiators and the business community alike. It has also led to an understanding that trade in goods and services are linked, and that subjects such as competition law, the protection of intellectual property, and rules governing investment measures

⁴² See Annex on Telecommunications, art. XVI(2)(f), *supra* note 31, at 359.

⁴³ See Agreement on Trade-Related Investment Measures, *reprinted in THE RESULTS OF THE URUGUAY ROUND*, *supra* note 4, at 163.

⁴⁴ For example, once trade in goods was liberalized, there was considerable pressure to open the service sector applicable to the transport of these goods.

are also linked to the continued liberalization of trade in goods and services. Might social linkages also have implications for the development of the international trade regime? This is the subject of the concluding Section of this Article.

4.2. *Telecommunications Trade: Blurring Social and Sectoral Linkages*

Few would take issue with the argument that the liberalization of the trade in goods has led to greater opportunities for economic development. Some would even go a step further and say that economic development has resulted in greater political stability, higher levels of education, and made the expansion of democracy possible in countries such as Japan, the Republic of Korea, and more recently in Eastern Europe and South America. Can a similar path be charted for trade in services, and more particularly telecommunications services? The liberalization of trade in telecommunications services can be expected to provide economic developmental opportunities, but it also seems likely that it will have social ramifications. To what extent will the liberalization of the telecommunications service sector eventually be linked to social changes? It is suggested here that the Fourth Protocol (applicable to telecommunications services), coupled with the ongoing liberalization in the trade in telecommunications goods that occurred as a result of the GATS negotiations, will indeed have important social implications.

It is estimated that more than one-half of the world's population have never made a phone call.⁴⁵ With the liberalization of the telecommunications sector, and anticipated cost reductions and savings in this sector of perhaps \$200 billion expected by the year 2010,⁴⁶ prospects are excellent that there will be a steady rise in telephone use throughout the world. International calls are already increasing in countries that permit competition in the provision of international telecommunications services.⁴⁷ With increased international communication, there will be increased knowledge about social conditions in other countries. In particular, information concerning human rights standards and abuses

⁴⁵ See Barshefsky, *supra* note 27, at 3.

⁴⁶ See Philippe Wintrebert, WTO Negotiations – Success in the World of Telecom Regulations (IBM Global Services) (visited Mar. 3, 1998) <<http://www.ibm.com/Services/articles/geneva.html>>.

⁴⁷ See Tarjanne, *supra* note 28, at 4-5.

will travel more speedily around the globe. Couple this with the possibility that value added telecommunications services, such as those associated with the Internet, may also further the transmittal of social norms, and it is just possible that the liberalization of the telecommunications sector will have a profound social influence among states open to such change. In other words, just as an increase in the trade in goods resulted in an increase in national wealth, an increase in the availability of affordable telecommunications services should result in improved social conditions: Affordable telecommunications may work to lessen political repression throughout the world by mobilizing "voices" in open countries, and by casting more light from the outside world on closed countries.

Similar arguments can be made for labor and environmental concerns. Increased access to basic telecommunications services, coupled with more affordable value-added services, should mean increased knowledge about international labor practices and environmental norms. Provided that telecommunications rates fall sufficiently and that government and business leaders adopt an enlightened view, the potential exists for telephone access, even by those in remote and poor regions. With this access should come a new vision of how life might one day be. Furthermore, the ongoing integration of various media into the Internet can only expand this vision.

Improved telecommunications services also offer the potential for easier access to political leaders. No longer are diplomats and other government officials capable of isolating themselves from their constituencies. As anyone involved in politics knows, political representatives are now only a phone call away from those who wish to contact them. Mobile telephone numbers are now as jealously guarded as home phone numbers. The potential to reach out and touch political leaders and government officials has seldom been greater. With the progressive liberalization of the telecommunications sector, this potential can be expected to grow and to be felt increasingly in cities like Geneva where important trade policy agreements are negotiated.

In conclusion, while WTO Members may be reticent to incorporate social policy measures into the WTO Agreement, or to sanction the application of certain controversial social policy measures, such as trade-related environmental measures, time is on the side of those who advocate an enlightened international trade regime. This does not mean that these advocates should re-

lax, just that they should be aware that the sectoral expansion of the international trade regime may eventually work more in their favor.

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