WTO – Trade in Services

Edited by

Rüdiger Wolfrum
Peter-Tobias Stoll
Clemens Feinäugle

Max Planck Institute for
Comparative Public Law and International Law

MARTINUS NIJHOFF PUBLISHERS
LEIDEN • BOSTON
2008

CONTENTS

Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), WTO—*Trade in Services.*
 pp. 205–219

Article VIII GATS
Monopolies and Exclusive Service Suppliers

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.
2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.
3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.
4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.
5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, a) authorizes or establishes a small number of service suppliers and b) substantially prevents competition among those suppliers in its territory.

Bibliography

D. Reiffen & A. N. Kleit, Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?, J.L. & Econ. 33 (1990), 419–438; *WTO*, Trade and Competition Policy, in: Annual Report, Vol. I, 1997, 30–91; *A. Mattoo*, Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services, in: *T. Cottier & P. C. Mavroidis* (eds), State Trading in the Twenty-First Century, 1998, 37–70; *A. B. Lipsky & J. G. Sidak*, Essential Facilities, Stan. L. Rev. 51 (1999), 1187–1248.

Case Law

GATT Panel Report, *EEC—Imports of Beef*, BISD 28S/92; GATT Panel Report, *Japan—Semi-Conductors*, BISD 35S/116; GATT Panel Report, *Japan—Agricultural Products I*, BISD 35S/163; Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R; Panel Report, *EC—Bananas III*, WT/DS27/R/USA; Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R; Panel Report *Japan—Film* WT/DS44/R; Panel Report, *Mexico—Telecoms*, WT/DS204/R.

Documents

Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995; Fourth Protocol to the General Agreement on Trade in Services, S/L/20, 30 April 1996; Working Group on the Interaction Between Trade and Competition Policy, Submission by the European Community and its Member States, WT/WGTCP/W/45, 24 November 1997.

Cross References

Art. 82 ECT.

BIGDELI & RECHSTEINER

TABLE OF CONTENTS

A. Introduction

1 Whenever monopoly suppliers of a service or exclusive services suppliers abuse their dominant position in their relevant market this poses a considerable threat to market access opportunities and non-discriminatory treatment of their competitors. Therefore, while Art. VIII does not prohibit monopolies and exclusive service suppliers *per se* it tries to control such privileged suppliers in the interest of trade liberalization.

B. Definitions, Scope and Disciplines of Art. VIII:1

I. Definition of "Monopoly Supplier of a Service" and Scope of Art. VIII:1

1. "Monopoly Supplier of a Service"

2 Art. XXVIII lit. h **defines** "monopoly supplier of a service" as "any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service".

Art. XXVIII lit. g defines "service supplier" as "any person that supplies a service" and in Art. XXVIII lit. j, a person is defined as "either a natural person or a juridical person".[1] In situations where an entity carries out a range of **different activities** involving trade in **goods and services, determining whether** a person is a **service supplier may not be straightforward**.[2] Art. XXVIII lit. b states that "supply of a service" includes the production, distribution, marketing, sale and delivery of a service. In *EC—Bananas III*,[3] the Appellate Body stated in its report that "[E]ven if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, to the extent it is also engaged in providing 'wholesale trade services' [...] that company is a service supplier within the scope of the GATS".[4] *3*

It should be noted that the scope of the **definition** of the **"monopoly service supplier"** is primarily **determined by** the **structure of the market** and **not** by the **ownership** pattern of the undertakings.[5] Whether an entity is publicly or privately owned is not relevant to its qualification as a monopoly service supplier under the above definition. What is required is that the supplier is the sole supplier in a relevant market. However, not every monopoly or sole supplier falls within the ambit of Art. VIII:1. Only so-called **legal monopolies** that are "authorized or established formally or in effect" (see Art. XXVIII lit. h) by a Member are covered by Art. VIII:1. Monopolies which exist for economic or technological reasons (such as **natural monopolies**),[6] but without any government facilitation, fall outside the scope of the "monopoly supplier of a service" for the purpose of the provisions of Art. VIII.[7] *4*

2. "Authorized or Established"

In order to define the notion of "authorized or established" (Art. XXVIII lit. h), Art. VIII:1 should be interpreted in line with other paras of Art. VIII: Art. VIII:2 mentions "monopoly rights", Art. VIII:3 refers to a "Member establishing, maintaining or authorizing" a monopoly supplier and Art. VIII:4 refers to a Member granting monopoly rights. In the light of this wording, *5*

---

[1] Art. XXVIII lit. m defines "juridical person" as "any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or government-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association".

[2] *Zdouc*, JIEL 2 (1999), 295, 327.

[3] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R.

[4] *Ibid.*, para. 227.

[5] See *Mattoo*, in: *Cottier & Mavroidis* (eds), 37, 38.

[6] Natural monopolies can be found in sectors where considerable infrastructure is needed, auch as the telecommunication sector or railways.

[7] See *Adlung*, JIEL 9 (2006), 455, 473; *Mattoo*, in: *Cottier & Mavroidis* (eds), 37, 39.

it could be argued that mere "tolerance" of a monopoly by a government (inaction), in the absence of any government facilitation (action), does not necessarily make such a monopoly a "monopoly services supplier" for the purpose of Art. VIII. Therefore, a **governmental "action"** somehow is **needed** for a monopoly service supplier to be "authorized or established" and thus fall within the scope of Art. VIII:1.

6 The **question** arises **whether any governmental action suffices**. For instance the **creation of a disincentive** for potential competitors **to enter a market** in which a monopoly service supplier is operating **could amount to** an act of **authorization or establishment**. In addressing this question it may be helpful to draw analogies from the GATT case law on the attributability of actions to the government: when does a governmental action such as guidance or a non-mandatory request amount to a governmental measure? The Panel in *Japan—Semi-Conductors* stated that for non-mandatory requests to be regarded as measures within the meaning of Art. XI:1 GATT 1947, it has to be demonstrated first that "there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention".[8] Furthermore, the Panel in *Japan—Agricultural Products I*, noted that "the practice of 'administrative guidance' played an important role. Considering that this practice is a traditional tool of Japanese Government policy based on consensus and peer pressure, the Panel decided to base its judgments on the effectiveness of the measures in spite of the initial lack of transparency".[9] Finally, the Panel in *Japan—Film* considered that the ordinary meaning of measure is broader than laws and regulations and includes government actions short of legally enforceable enactments.[10] At the same time the Panel stated that "not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government".[11]

7 In the context of GATS, *Zdouc* opines that **"the scope of measures attributable to a government could be broader under the GATS than under the GATT"**.[12] It is also worth noting that Art. XXVIII lit. a defines "measure" in a broad sense.[13] However, there is as yet no specific

[8] GATT Panel Report, *Japan—Semi-Conductors*, BISD 35S/116, para. 109.
[9] GATT Panel Report, *Japan—Agricultural Products I*, BISD 35S/163, para. 5.4.1.4.
[10] Panel Report, *Japan—Film*, WT/DS44/R, para. 10.43.
[11] *Ibid.*
[12] *Zdouc*, JIEL 2 (1999), 295, 305.
[13] Art. XXVIII lit. a defines a measure as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".

case law on this issue in the GATS context. Overall, the GATT case law can be seen as indicating for the GATS context that whether a concrete governmental action "authorizes or establishes" a person as the sole supplier of a services in the sense of Art. XXVIII lit. h has to be decided on a **case-by-case basis**.

3. "Monopoly Supplier of a Service" *Versus* "Governmental Service Suppliers"

It is important to note that "services supplied in the exercise of governmental authority" are excluded from the scope of GATS in general by virtue of Art. I:3 lit. b. Art. I:3 lit. c says that "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers. Thus, so-called **public monopolies** that provide education, health, and similar services to the public and do not function on a commercial basis **are outside the scope of GATS** in general and Art. VIII in particular. It is generally believed that the scope of governmental services is narrower than that of public services.[14] That means that a provider of a public service such as transportation services may operate on a commercial basis or be in competition with other service suppliers. In this case, such public service would be covered by GATS. In this line of argument, it could be concluded that activities of public monopolies which basically operate on a commercial basis[15] should fall within the scope of GATS in general and (under conditions explained above) its Art. VIII in particular.[16] *8*

[14] For more see *Adlung*, JIEL 9 (2006), 455 *et seq.*; *Krajewski*, JIEL 6 (2003), 341, 350.

[15] *Marchetti* and *Mavroidis* opine that to determine whether an entity operates on a commercial basis for the purpose of Art. I:3 "one has to assess the profit seeking nature of the activity itself regardless of the suppliers' own nature". (*Marchetti & Mavroidis*, EBOR 5 (2004), 511, 530). However, *Van Duzer*, 71 considers that reference to the exercise of governmental authority in Art. I:3 implies that direct participation of a governmental agency might be necessary as a hidden criterion for governmental services. Therefore, in their opinion, a link should be established between the government's role and the commercial nature of a service. *Krajewski*, JIEL 6 (2003), 341, 353 opines that although the wording of the provision lacks any reference to government, an interpretation in light of the context, object and purpose of the provision implies that services without any governmental connection or public function would be excluded from the notion of governmental authority.

[16] However, there is one exception to this rule. In the view of *Marchetti* and *Mavroidis*, by virtue of para. 1 lit. b and c of the Annex on Financial Services "activities forming part of a statutory system of social security or public retirement plans" are considered services supplied under the governmental authority and, therefore fall outside the scope of GATS, if they are not conducted "in competition of a public entity or a financial service supplier" regardless of whether or not they are operated on a commercial basis. See *Marchetti & Mavroidis* EBOR 5 (2004), 511, 534. Also see *Adlung*, JIEL 9 (2006), 455, 467; *Van Duzer*, 83 *et seq.*

4. "In the Supply of the Monopoly Service"[17]

9 In accordance with the wording of Art. VIII:1, **the scope of the provision is limited** to the behaviour of legal monopolies **"in the supply of the monopoly service"**. **"Supply of a service"** includes "the production, distribution, marketing, sale and delivery of a service" according to the definition in Art. XXVIII lit. b. In order to qualify as a **"monopoly service"** such service must fall into the field of services in which the supplier has a monopoly. However, the purchase or sale activities of such monopolies (either of goods or services) in their input market or for their own consumption remain undisciplined under Art. VIII.[18]

10 Art. VIII **differs in scope from its equivalent in Art. XVII GATT 1994** which includes purchases or sales involving either imports or exports by the so-called state trading enterprises.[19] Also in the context of GATT, *Mattoo* opines that purchases by state trading enterprises of services to produce goods are not covered.[20]

11 The fact that the respective purchase or sales behaviour of "monopoly services suppliers" in their input market or for their own consumption is beyond the ambit of Art. VIII:1 may imply that **such entities are legally free to discriminate in their procurement activities** in favour of, for example, domestic producers or service suppliers even in sectors subject to specific commitments,[21] unless prohibited under other provisions of GATS such as Art. XIII on government procurement. It should be noted, however, that the scope of Art. XIII is limited to "procurement by governmental agencies of services purchased for governmental purposes".[22] As stressed above, a "monopoly service supplier" under Art. VIII:1 could be a fully private entity established or authorized by a Member. In that case, the procurement activities of such private monopolies fall outside the scope of Art. XIII.

---

[17] The definition of the relevant market is also decisive in setting the scope of Art. VIII:1. For more on this see commentaries on Art. VIII:2, paras 23 *et seq.*

[18] *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 39; *Adlung*, JIEL 9 (2006), 455, 474.

[19] Art. XVII:1 lit. a GATT 1994 states: "Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports and exports by private traders".

[20] *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 39.

[21] This point is confirmed by *Adlung*, JIEL 9 (2006), 455, 474.

[22] Art. XIII:1.

5. "In its Territory"

Art. VIII:1 regulates the behaviour of "monopoly service suppliers" within the territory of the Member establishing or authorizing such monopolies.[23] Therefore, **Art. VIII does not cover extraterritorial anti-competitive behaviour** of "monopoly services suppliers" in export markets.[24] *12*

II. Disciplines of Art. VIII:1

According to Art. VIII:1 Members shall **ensure** that monopoly service suppliers, as defined above, do not act in a manner inconsistent with that Member's obligations under Art. II and specific commitments. This language implies that the government is responsible for actions of monopoly service suppliers because, as defined earlier, they are authorized or established by the government. The provision addresses the Members and not the monopoly service suppliers *per se*. *13*

1. Compliance with the Most-Favoured-Nation Obligation

The Appellate Body in *EC—Bananas III* decided that "treatment no less favourable" in Art. II includes *de facto* as well as *de jure* discrimination.[25] Therefore, in accordance with Art. VIII:1 as a general obligation within Part II of the GATS, monopoly suppliers are banned from discriminating, *de jure* or *de facto*, among service suppliers of other Members (in the supply of the monopoly service in the relevant market) **regardless of whether the sector in question is scheduled or not**. That is, of course, without prejudice to the sectors which Members have listed in their MFN exemption lists.[26] The following behaviour would constitute a violation of Art. VIII:1: a monopoly postal service provider gives priority to the delivery of the letters of a particular foreign company over those of other foreign companies doing business in its country.[27] *14*

---

[23] This is also the case with Art. VIII:2.

[24] The case is different for Art. XVII:1 GATT 1994 which includes both imports and exports in its scope. Particularly Ad Art. XVII:1 GATT 1994 states that "The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article provided that such different prices are charged for commercial reasons to meet conditions of supply and demand in export markets".

[25] *EC—Bananas III*, WT/DS27/AB/R, paras 233–234.

[26] Except for the sectors listed on the MFN exemption lists, Art. II on MFN treatment is generally applicable to all service sectors whether or not Members have listed them in their Schedules of specific commitments (see *Zdouc*, JIEL 2 (1999), 295, 342). For more on MFN and related exemptions see *Wolfrum*, Article II GATS.

[27] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 403.

2. Compliance with Specific Commitments[28]

15 "The scope of Art. VIII disciplines, [...], crucially depends on the extent to which members have made liberalizing specific commitments"[29] including market access commitments subject to Art. XVI and national treatment commitments subject to Art. XVII.[30] Members are committed to providing market access and national treatment to all Members **to the extent that they have made specific commitments** in that respect. In the context of the GATT, however, some scholars consider that the non-discrimination obligations of state trading enterprises do not include national treatment.[31]

C. Definitions, Scope and Disciplines of Art. VIII:2

16 Art. VIII:2 differs in scope from Art. VIII:1 in the sense that the first addresses the behaviour of monopoly service suppliers "in the supply of the monopoly service **in** the relevant market" and the second addresses the behaviour of the monopoly service supplier **"outside the scope of its monopoly rights"**. The aim of Art. VIII:2 is to avoid that the monopoly position the supplier has in one field of services is abused for the services trade in another. Art. VIII:2 concerns the situation that a Member's monopoly supplier competes, directly or through an affiliated company, in the service supply outside the scope of its monopoly rights and in a field where specific commitments are undertaken by the Member.

I. Definitions and Scope of Art. VIII:2

1. "Affiliated Company"

17 Art. XXVIII lit. n helps with the definition of the notion **"affiliated company"** and reads: "a juridical person is: [...] 'affiliated' with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person". This sets out the general criterion of **"control"** (*e.g.* holding a certain percentage

---

[28] The way the language of the treaty text is drafted seems to imply that its discipline applies to the behaviour of "monopoly service suppliers" *per se* and not to government rules of general application. But the discipline addresses the Members, see above, para. 13. A similar situation exists in Art. XVII GATT 1994. For more see *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 39.

[29] *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 40.

[30] Unlike Art. III GATT 1994 on national treatment, which is a generally applicable rule, national treatment provided in Art. XVII GATS is subject to scheduling in each Member's Schedule. For more see *Krajewski & Engelke*, Article XVII GATS, para. 1.

[31] See *Jackson*, World Trading System, 326 for state trading enterprises and *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 40 for comparison.

of shares to maintain voting power) for a juridical person to be "affiliated" with another without setting any numerical benchmark.

2. "Scope of Monopoly Rights" and Market Definition

a) "Scope of Monopoly Rights"

Art. XXVIII lit. h implies that **monopoly rights** consist of a government's authorization or establishment to be the sole supplier in a relevant market. Therefore the question of the scope of monopoly rights is **linked with the definition of a "relevant market"**. In other words, it is crucial to know how a relevant market is to be defined in order to assess the existence of monopoly rights. For example, if the transmission and distribution of electricity is defined as the relevant market, a Member establishing a single company to operate the grid would constitute a monopoly service supplier. In this case, the grid operator's behaviour outside the monopoly rights, *e.g.* in the production and supply markets, would be subject to the disciplines of Art. VIII:2. *18*

b) The Relevant Product Market

The definition of a relevant market varies in different national competition laws. In WTO law, however, the question of relevant market is traceable in the GATT non-discrimination disputes concerning the definition of "like product" and "directly competitive or substitutable", in the Agreement of Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), in the Agreement on Safeguards and in the Agreement on Subsidies and Countervailing Measures. For instance, the Appellate Body in *Japan—Alcoholic Beverages II* stated that "it does not seem inappropriate to look at **competition in the relevant markets** as one among a number of means of identifying the broader category of products that might be described as 'directly competitive or substitutable.'"[32] *19*

The WTO Appellate Body has not yet directly applied the relevant market definition in GATT national treatment (like-product) cases.[33] However, the Panel in *Mexico—Telecoms* addressing the issue of relevant market in the context of the Reference Paper on Basic Telecommunications confirmed that "the notion of demand substitution—simply put, **whether a consumer would consider two products as 'substitutable'**—is central to the process of market definition as it is used by competition authorities".[34] *20*

---

[32] Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para. 25. Emphasis added.

[33] Whereas the ECJ has stated that "similar products" belong to the same market. See ECJ, Case 168/78, *Commission v. France*, [1980] E.C.R. 347.

[34] Panel Report, *Mexico—Telecoms*, WT/DS204/R, para. 7.152. Emphasis added.

21 WTO adjudicating bodies may apply their own view on the interpretation of Art. VIII and to the definition of the relevant market based on **the existing WTO case law which may not necessarily be consistent with the view of national competition authorities**. In this regard, the findings of the Panel in *EC—Bananas III*[35] in referring to the United Nations Central Product Classification (UN CPC)[36] as a benchmark for defining like services may eventually find relevance in defining a relevant services market in a future case.

c) The Relevant Geographical Market

22 **In order for a market to qualify as monopolistic, the relevant geographical market needs to be defined.** For example, consider that a government grants exclusive rights to a company to operate a certain port or a highway in a particular region. If the market is defined narrowly in geographical terms by national competition authorities, such a company may be considered to have a monopoly in that region. The situation may change however, if competition authorities perceive a certain level of competition from alternative ports or highways and therefore define the market as including these competitors due to substitutability of their services.[37] These questions, if raised in the WTO, can only be addressed on a case-by-case basis.

II. Abuse of a Monopoly Position (Disciplines of Art. VIII:2)

1. Introduction

23 Art. VIII:2 refers to **"abuse" of** a legal **"monopoly position"**, a term which is **narrower** in scope **than the term "dominant position", as used in competition law. Abuse of a dominant position in**

---

[35] Panel Report, *EC-Bananas III*, WT/DS27/R/USA, para. 7.322: "the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers".

[36] The UN CPC which was the basis for the GATT secretariat's classification has been replaced by the 2002 version, which contains different subcategories and classification numbers from the Provisional CPC. The current version is Central Product Classification Version 1.1, ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, see also <unstats.un.org/unsd/cr/family2.asp?Cl=16> (last visited 1 October 2007).

[37] See *Mattoo*, in: *Cottier & Mavroidis* (eds), 37, 39.

competition law[38] means the practice of an undertaking to maintain, enhance or exploit its monopoly power. Abuse of a dominant position includes "exclusive dealing, market foreclosure through vertical integration, tied selling, the control of scarce facilities and vital inputs or distribution channels, price and non-price predation, price discrimination, exclusionary contractual arrangements and, in some jurisdictions, even the simple charging of higher than competitive prices, or the imposition of other 'exploitative' forms of abuse".[39] In the context of international trade there is particular concern over those forms of abuse which have an "exclusionary effect or otherwise limit effective competition from foreign firms".[40]

24 Para. 1.2 of the Reference Paper on Basic Telecommunications provides a non-exhaustive list of **types of abuse of a dominant position**, which could be of relevance to all "network" industries such as gas, electricity, water and railways: anti-competitive cross-subsidization, use of competitors' information with anti-competitive results and not making available information about essential facilities necessary to provide services.

25 Recognizing that the scope of this Reference Paper is limited to the basic telecommunication services, it is briefly examined here **to what extent**, if any, the general language of **Art. VIII:2 could be interpreted to prohibit abuse of a monopoly position** through the refusal of non-discriminatory access **to essential facilities, anti-competitive cross-subsidization** and **prohibition of misuse of information**.

2. The Essential Facilities Doctrine and Art. VIII:2

26 One of the critical issues regarding the abuse of a monopoly position by a monopoly service provider relates to the doctrine of "essential facilities". This legal principle which originates in US Antitrust law[41] basically states that a monopolist in control of a facility essential to other competitors must provide non-discriminatory access to that facility if it is feasible to do so.[42] The **essential facility** must be essential to enter an adjacent market and it must not be feasible for a competitor to duplicate the facility. In such cases non-discriminatory access to the essential facility is necessary to enable competition in adjacent markets.

---

[38] In European competition law, for example, Art. 82 ECT speaks of the prohibition of such an abuse.

[39] *WTO*, Competition Policy, 30, 42.

[40] Working Group on the Interaction Between Trade and Competition Policy, Submission by the European Community and its Member States, WT/WGTCP/W/45, 24 November 1997, 7.

[41] See US Supreme Court, *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912). For more on on this case, see *Reiffen & Kleit*, J.L. & Econ. 33 (1990), 419–438.

[42] See *Lipsky & Sidak*, Stan. L. Rev. 51 (1999), 1187, 1190–1191.

27 It should be noted that the issue here is not obtaining access to the monopoly market *per se*, since foreign producers may not seek to provide services which are subject to a monopoly. The scope of Art. VIII:2 is clearly limited to **adjacent markets in which the monopoly service supplier competes with competitors**. This is also because there is no obligation in the GATS for Members to dismantle their monopolies: the determination of their market structure is up to the individual Members and is reflected in their Schedules of commitments.

28 However, what is at stake here is **access to essential facilities, controlled by a monopolist**, which are **necessary to provide services in adjacent markets which are liberalized** and indicated in the Members' Schedules. Without access to the essential facilities, such as roads, ports, pipelines, *etc.*, the concessions on market access could not be realized particularly in services markets adjacent to monopolized markets.

29 It is crucial to note that even if the concept of third-party access to essential facilities received impetus in the WTO judiciary, its scope would not go beyond the legal monopolies as defined above. That means that **a natural monopoly** that is not backed by legal monopoly rights **does not fall within the scope of this Article**.

30 The question whether the language of Art. VIII:2 provides for mandatory access to essential facilities under certain circumstances may be controversial and the conventional path of nullification or impairment claims may be deemed more appropriate.[43] However, the uncertainty as to the applicability of the essential facilities doctrine to Art. VIII:2 is not to be extended to MFN (Art. II). That means that according to Art. II:1, the Member shall ensure that the **monopoly service supplier provides MFN treatment to the service suppliers of other Members if access to its essential facilities is granted**.

31 Finally, some may argue that the fact that Art. VIII:2 "could" amount to a mandatory provision of access to essential facilities is of no practical significance due to **lack of detailed disciplines such as those incorporated in the Reference Paper on Basic Telecommunications**, *e.g.* rules regarding transparency such as providing terms of access, establishment of an independent domestic body for dispute settlement, *etc.* However, this view should not be seen as undermining the potential of Art. VIII and its second paragraph, should Members make further liberalizing commitments in pertinent service sectors in the future.

[43] See Art. XXIII:3 and Grote, Article XXIII GATS, paras 16 *et seq.*

3. "Anti-Competitive Cross-Subsidization" and "Misuse of Information" in the Light of Art. VIII:2

32 A service supplier which has been granted monopoly rights in the sense of Art. VIII, may use its monopoly rent to cross-subsidize its activities in the downstream market in which it competes with foreign service suppliers.[44] It may also misuse information it obtains from competitors as a result of its control over essential facilities to the detriment of such competitors.[45] **All such anti-competitive activities** of a monopoly service supplier **can be seen as** included in the meaning of **abuse of a monopoly position** and therefore banned by Art. VIII:2.

D. Provision of Relevant Information (Art. VIII:3)

33 Art. VIII:3 contains provisions regarding information-sharing with respect to Art. VIII: the Member which believes that a monopoly service supplier of any other Member is acting in a manner inconsistent with Art. VIII:1 or 2 provides its reasons to the Council for Trade in Services (CTS).[46] The CTS, which acts at the request of that Member, "may" request the Member establishing, maintaining or authorizing the supplier to provide specific information concerning the relevant operations of the monopoly service supplier. Taking into account the soft language of Art. VIII:3, it **offers scarcely any "hard law" provision**[47] which could be subject to dispute settlement.

E. Notification Requirements (Art. VIII:4)

34 Art. VIII:4 contains a notification requirement if a Member grants monopoly rights regarding the supply of a service covered by its specific commitments. The notification should be made to the CTS no later than three months before the intended implementation of the grant of monopoly rights. This provision only applies to the granting of the monopoly rights that takes place after the entry into force of the WTO Agreement.

---

[44] For an example of a violation of Art. VIII:2 see *Michaelis*, in: *Hilf & Oeter* (eds), 375, 403.

[45] See *WTO*, Competition Policy, 30, 61.

[46] On the Council for Trade in Services see *Röben* Article XXIV GATS.

[47] For the distinction between hard law and soft law provisions and the role of the principle of good faith see *Bigdeli & Nenova*, Article IX GATS, paras 27, 32 *et seq.*

I. Notification Formats

35 The Guidelines for Notifications under the General Agreement on Trade in Services adopted by the Council for Trade in Services on 1 March 1995[48] first identify the provisions of the GATS that contain notification requirements and the elements to be included in such notifications, and then propose **a common format to be used by Members for such notifications**. The elements to be included in such notifications are, *inter alia*, the name of the notifying Member,[49] the Article under which the notification is being made, the date of entry into force and the duration of the measure, the agency responsible for enforcement of the measure, the complete description of the measure, Members specifically affected, if any, and other points aiming at making relevant information available to interested Members.

II. Conditions for Creating New Monopoly Rights

36 Under Art. XX:3, Schedules of specific commitments are annexed to the GATS and shall form "an integral part thereof". Also according to Arts XVI:1 and XVII:1 all WTO Members are bound by the conditions, qualifications and limitations provided in their Schedules. Therefore **any derogation from the commitments thereof must be channelled through Art. XXI**, which basically allows a Member to modify or withdraw any commitments in its Schedules as long as the Members acts in accordance with the preconditions in Art XXI.[50]

37 Art. VIII:4 is simply an affirmation of the above general provisions: since the introduction of new monopolies would bring about restrictions that violated existing commitments, any Member who wishes to do so is required to follow the procedures and comply with the provisions of Art. XXI:2–4. The **core obligation** of such a Member would be to **negotiate compensatory adjustments** on an MFN basis, with "affected Members".

---

[48] Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995.

[49] If the subcentral government or authority or non-governmental bodies are involved they should be specified.

[50] See on Art. XXI, *Nartova*, Article XXI GATS.

F. Exclusive Service Suppliers (Art. VIII:5)

In accordance with Art VIII:5, all the provisions of Art. VIII that apply to monopoly service suppliers are **equally applicable** to the so-called "exclusive service suppliers". *38*

The first condition for a service supplier to qualify as an "exclusive service supplier" is that such a service supplier must be **authorized or established, formally or in effect**, by a Member as one of the "few" suppliers in that Member's territory. It is not obvious, however, what exactly constitutes, in terms of quantity, a **"small number of service suppliers"** for the provisions of Art. VIII to apply. But it can be presumed that to meet the object and purpose of Art. VIII, *i.e.* to prevent the abuse of market power in the interest of trade in services, the number of suppliers must be so small that each of them has a dominant position that could be abused. *39*

The second condition for service suppliers to qualify as "exclusive service suppliers" is that the Member establishing or authorizing such suppliers **substantially prevents competition among those suppliers in its territory**. Art. VIII:5 does not provide any details of what constitutes a suitable measure for these terms. The conventional interpretation would lead to the meaning of regional monopolies, *i.e.* suppliers who have been granted exclusive rights to supply a specific region. Another way of examining the issue could be to look at the extent to which the price of a service is driven by market forces. In this line of argument, not every action taken by governments to set down conditions for service suppliers, *e.g.* public service obligations, would amount to "substantially" preventing competition. However, if a Member directly sets prices in a certain market and removes other incentives for competition among exclusive service suppliers, such action may qualify as meeting the second condition stipulated in Art. VIII:5. *40*