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Express Delivery and the Postal Sector in the Context of Public Sector Anti-Competitive Practices

D. Daniel Sokol*

I. INTRODUCTION

International trade plays an increasingly important role in global economics. One growing part of the international economy has been express delivery services. Because various governments that maintain public sector postal monopolies have erected barriers to entry to impede its growth, express delivery has become an important battleground within the realm of trade. International trade, which initially consisted mainly of the trade of goods, is now increasingly focusing on services. This article focuses on the problem of a particular type of service and the barriers on this service (express delivery) that countries place upon it. Not surprisingly, those countries that are the most competitive and have the fewest barriers to trade and problems of monopolization (i.e., those countries that suffer least from monopolistic behavior in their express delivery market) have the most effective and competitive distribution systems.¹ Section II of this article explains the importance of express delivery to the international economic system. Section III offers examples of how countries erect public sector barriers to entry in this field to limit the ability of private sector entrants to compete. Section IV examines how privatization in conjunction with liberalization will improve opportunities for entrants to provide express delivery services. Section V explains how current legal mechanisms could promote greater competition on the issue of public sector barriers to entry in the express delivery segment of the postal services sector. Section VI concludes by advo-

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cating increased global cooperation for the elimination of entry barriers.

Many countries have placed anticompetitive barriers for entrants in their respective express delivery markets, in many cases to protect such countries' local monopolies. Consumers are the ultimate losers of these policies, because they must pay higher prices for poor service quality. Competition stimulates productive efficiency. Companies that face falling costs in production (due to competition and the corresponding efficiency gains) respond by reducing price and increasing production. With all other things being equal, such gains in efficiency lead to greater consumer welfare. Continuing barriers, therefore, threaten the global economy by reducing efficiency gains and the ability to maintain effective supply chains of the delivery of goods from one country to another.

II. NATURE OF EXPRESS DELIVERY SERVICES

Express delivery is a method of communication and transportation that serves to get items from door to door within a definite period of time. The key element to this service is the time sensitivity of the packages, often next day service. The best known companies in this field are United Parcel Service ("UPS"), Federal Express ("FedEx") and DHL. Given the rapidly globalizing economy that utilizes a just-in-time production schedule, express delivery of parts has become essential to global operations of businesses. Further, express delivery offers faster delivery of business documents, thereby promoting more rapid transactions for services. It also allows small and medium-sized businesses to compete in the global marketplace by giving them access to an international distribution system.

Express delivery requires a robust service system that involves air and ground transport, distribution centers, delivery, and the use of advanced technologies in all facets of its business to track items and provide information. Each of these segments is a potential bottleneck that would slow express delivery services if governments were to erect barriers to competition in order to protect their domestic monopolies, the domestic postal service providers. Such bottlenecks exist when monopoly postal operators cross-subsidize their competitive express delivery services via their monopoly services. Costs and delays associated with cross border parcel delivery, and unequal treatment toward postal incumbents are other methods by

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2 For examples of anticompetitive barriers see infra Section III.

3 Barriers to trade have been found to lower economic growth. See Sebastian Edwards, Openness, Productivity and Growth: What Do We Really Know, 108 ECON. J. 383 (1998); Ann Harrison, Openness and Growth: A Time Series, Cross-Country Analysis for Developing Countries, 48 J. DEV. ECON. 419 (1996).


5 See infra Section III.

6 OECD, INTERNATIONAL PARCEL DELIVERY, OCDE/GD(97)151, 12 (1997).
which governments stymie competition in this sector, as Section III describes.

These anti-competitive barriers keep the price of express delivery and mail services artificially high. Moreover, there is a link between mail service generally and express delivery service. A lack of competition in mail service leads to a decreased mail market, which reduces the size of the express delivery services market as well. Put differently, "the regulatory situation in countries A and B does not only affect domestic parcel rates, but it also exerts an impact on the entire price for international transport and delivery." In any one country, a lack of competition in general mail service has a ripple effect on the competitiveness of that country's express delivery service, which, in turn, has a ripple effect on other countries' mail service (including express delivery services). These pernicious, unequal practices serve to destroy a part of the international free market system and thus to limit global consumer welfare. It is because of this linkage that a global solution to anti-competitive concerns in express delivery is needed—one that also addresses the problem of state owned postal monopolies.

Express delivery service is a growing part of the global economy, in part because express delivery companies have responded to the consequences of public monopolies' increased transaction costs due to inefficiencies in delivering the service and insufficient customer awareness. Express delivery service accounts for twelve percent of the world market in postal services and market share is growing by twenty percent a year. More generally, air cargo (including cargo for express delivery traffic) transports thirty-seven percent of the goods in the world. Once commodities such as oil and agricultural products are excluded from this figure, nearly half of all global trade by value is transported by air express and cargo transportation. The importance of air transport and express delivery will only increase over time. Currently cargo and express traffic is growing at six to seven percent a year while passenger traffic is only increasing at between three and four percent a year. The growth of air cargo will surpass that of air passenger transportation over the next twenty years.

The growth in express delivery is key because as it grows, so does the international economy. Thus, barriers to competitive entry in this sector can have a deleterious effect upon the global economy. As the Organiza-

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7 Id. at 40. This occurs because the price charged might be too high to use the service and/or because the low savings in time in providing the service when there is lack of competition does not encourage an increase in demand.
8 Id. at 43.
10 Id. at 91 (quoting Brian Campbell, president of Campbell-Hill).
11 97 Shapes Up as Year of Rapid Growth, AIR COMMERCE, Jan 27, 1997, at 10.
tion for Economic Co-operation and Development ("OECD") has noted, "Costs and delays associated with cross-border parcel delivery can be a major disincentive for consumers wanting to make purchases from other countries." The high costs are particularly apparent since the rates for international service are significantly higher than domestic rates of a comparable distance. Given the growing cost that these barriers and higher costs create, a fundamental reworking of the entire postal system is needed to ensure that express delivery services thrive.

III. CURRENT PROBLEMS

Basic economic theory teaches that free trade increases consumer welfare. Though trade and liberalization may not directly lead to growth, empirical research shows that there is a positive correlation between per capita income and the share of investment in Gross Domestic Product ("GDP"). Indirectly, therefore, trade stimulates growth through investment. Free trade and the reduction of barriers improve economic performance because they force competition in domestic markets. As Douglas Irwin notes:

This competition diminishes the market power of domestic firms and leads to a more efficient economic outcome. This benefit does not arise because foreign competition changes a domestic firm's costs through changes in the scale of output...rather, it comes through a change in the pricing behavior of imperfectly competitive domestic firms. Firms with market power tend to restrict output and raise prices, thereby harming consumers while increasing their own profits. With international competition, firms cannot get away with such conduct and are forced to behave more competitively.
Trade forces firms to become more efficient in order to deal with competitors. If such firms do not, they will lose out on potential profits and if run very poorly, even fail. Likewise, where there are barriers to trade, interest groups exact rents that lower consumer welfare. Where such barriers exist, the incentive to offer better service is lost.

Often, it is a state entity that holds a key part of the market and uses it to exclude rivals. It is not surprising, therefore, that governments have created a number of barriers for express delivery services. These barriers are manifested in a number of different ways, as described in the following examples.

A. Cross-subsidization of Express Delivery Services by Suppliers Granted Special or Exclusive Rights in the Regulated Postal Sector

The United States Trade Representative ("USTR") has noted continuing problems regarding the European postal sector, stating that "the prevalence of postal monopolies in many European Union countries restricts [express service providers'] market access and subjects them to unequal conditions of competition." The USTR report notes in particular problems in Belgium, where cross-subsidization may be an issue, as well as Germany where Deutsche Post may have engaged in predatory pricing and cross-subsidization. Further the USTR report notes that many observers believe that the German government worked to delay the EU decision on whether Deutsche Post cross-subsidized and used other methods to forestall competition. The Deutsche Post case offers an interesting example of a cross-subsidization problem that express delivery providers face. The E.U. first received complaints regarding Deutsche Post in 1994 regarding anticompetitive cross-subsidization and other practices. However, the European Commission ("EC") waited until July 1999 before it opened a full investigation into the matter. They claimed that Deutsche Post stalled in providing necessary data for the investigation. A Deutsche Post spokesman as much as admitted that there was cross-subsidization but that at the time it occurred (1990-1995), German laws on the subject were ambiguous. Deutsche Post has also been fined $21.6 million for offering loyalty rebates to mail order customers; the European Commission stated that such rebates

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19 UNITED STATES TRADE REPRESENTATIVE, 2002 REPORT ON FOREIGN TRADE BARRIERS 127 [hereinafter USTR REPORT].
20 Id.
21 James Kanter, Deutsche Post May Face Record EUR800 Min-Plus EU Penalty, DOW JONES INT'L NEWS, Jan. 28, 2002.
prevented other companies from entering into that market. The EC also fined Deutsche Post for disrupting international mail bound for Germany. However, the $860 fine was only symbolic, because German courts condoned the practice. Recently, the EC ordered Deutsche Post to repay €572 million for state aid that the German government gave it in violation of E.U. Article 87. The aid was used for cross-subsidization to undercut the prices of rivals in the express delivery market. Deutsche Post also may have used its cash flow from its regulated monopoly in Germany to launch into unregulated competitive business. This is cross-subsidization, under which Deutsche Post built a one stop shopping standard, express delivery service, freight and even a financing arm with its revenues from its monopoly service.

In the Belgian case, the European Commission decided that the Belgian postal operator De Post la Poste ("La Poste") abused its dominant position by making a preferential tariff in the general letter mail service subject to the acceptance of a supplementary contract covering a new business-to-business ("B2B") mail service. This B2B service competed with the "document exchange" B2B service provided in Belgium by Hays, a private undertaking established in the United Kingdom. As La Poste exploited the financial resources of the monopoly it enjoys in general letter mail in order to leverage its dominant position there into the separate and distinct market for B2B services, the Commission has imposed a fine of €2.5 million.

B. Unfair Competition from Post Offices that Limit the Ability of Foreign Firms to Compete

In Canada, the government has the ability to give direct subsidies to its postal arm, Canada Post. The government pays for Canada Post publications for revenue and includes Canada Post’s employees as part of the federal government’s pension plan. By this measure, the federal government subsidizes the labor costs for Canada Post. There is no corresponding payment by the Canadian government of pension plans for private competi-

23 Id.
25 Case COMP/35.141, Deutsche Post AG, 2001 O.J. (L125)
26 Id.
28 This practice is certainly not unique to Deutsche Post. Rather, it is inherent to state-owned monopoly postal services. For example, the Dutch Post Office (KPN) used its monopoly profits to cross-subsidize its acquisition of the express delivery carrier TNT for over $1.5 billion. OECD, supra note 6, at 17.
29 COMP/37.859, De Post-La Poste, 2002 O.J. (L 61).
30 J. Greg Sidak & Daniel F. Spulber, Monopoly and Mandate of Canada Post, 14 YALE J. ON REG. 1, 10 (1997).
tors of Canada Post.

C. Discriminatory Treatment for Foreign Suppliers with Respect to Size and Weight of Packages

Size and weight restrictions prolong postal monopolies so as to shelter incumbents from competition from express delivery and other services. A proposed law by the Chinese government would place weight and rate limitations on packages that could be delivered by foreign express delivery companies.31 Any shipment under 500 grams would be restricted to the Chinese postal monopoly, except when such firms charge more than the China Post.32 Such limitations would narrow the services express delivery companies could offer consumers and would grant an anti-competitive monopoly to the Chinese Post. In a market estimated to be worth $1.8 billion annually and which has grown at a rate of 30 percent in recent years, such a proposed law is significant.33

A similar case of weight restrictions can be found in Mexico. The Mexican post office ("Sepomex") had losses of $200 million in 2000 and $600 million in 2001. Rather than focus on improving the efficiency and quality of Sepomex, the Mexican government is in the process of limiting competition by express delivery service providers. A new proposal sent to the Mexican Chamber of Deputies would require all packages weighing 350 grams or less to be sent exclusively through Sepomex except in cases where a private firm offers extra services such as postal tracking, immediate delivery or digital signatures, or when the price for services is at least double those of Sepomex.34 Currently, over half of Mexico's corporate mail is delivered by private companies.35

D. Unfair Restrictions on Flight Times and Landing Slots

Trade negotiations between the United States and Japan have reduced some of the more onerous barriers to entry for express delivery companies operating in Japan. In January 1998, Japan and the United States reached an aviation agreement that liberalized regulations going forward, and included further provisions to take effect automatically after four years if, by that time, a fully liberalized agreement was not reached. The agreement lifted access restrictions on incumbent carriers for all U.S.-Japan services,

35 Id.
allowing operations from any point in the United States to any point in Japan. Further, the agreement created opportunities for non-incumbent carriers (UPS and Polar Air Cargo) to transport cargo to destinations beyond Japan. Within four years, an additional all cargo carrier will be given entry access to the Japanese market. During this interim period, however, all other foreign express delivery firms have been denied equal landing rights in Japan.

E. Uneven Enforcement of Existing Antitrust Laws or Exemptions to these Laws

The European Commission recently found that the €9 billion subsidy to Poste Italiane by the Italian government was not illegal state aid, since the money was in part a compensation for Poste Italiane’s historically low efficiency. Nevertheless, such behavior is anti-competitive because the government has chosen to bail out its national favorite mail carrier rather than to let the market punish inefficient operators for their low quality service.

F. Mandatory Requirements for Partnerships with Local Firms as a Condition for Establishment

In some cases, mandatory requirements for partnerships means local equity requirements in excess of 49 percent for a joint venture. In some countries, foreign companies may only own as little as 10 percent of a joint venture. This prevents foreign private companies from exercising the control necessary to execute beneficial decisions, and therefore results in discriminatory treatment. For example, China prohibits express delivery companies from operating independently. Instead, they must enter into a joint venture with a Chinese company, in which the entrant cannot own a majority stake until the end of 2006. Foreign express delivery companies doing business in China must also wait one year before establishing branch offices and five years before entering into a second joint venture. These limitations constrain the ability of foreign express delivery companies to develop on a national basis. This is not a surprising policy approach since sometimes countries replace tariffs with non-tariff barriers to impede trade and competition. Moreover, these governments place additional limits on

investing in preexisting domestic enterprises.\(^{40}\)

G. Lack of Transparency of Domestic Laws and Regulations and Fairness of Administration

Since the summer of 2001, the Finnish Competition Authority has been analyzing a case concerning the lack of transparency of tariffs for hybrid mail applied by the Finnish Post Office.\(^{41}\) A lack of transparency in the rules increases the cost of doing business because it raises the cost of uncertainty in the business decision equation.

H. Denial of Access to Government Programs Available to Domestic Service Providers

A current UPS complaint against Canada Post reveals a number of areas in which the Canadian government has offered preferential treatment to Canada Post.\(^{42}\) The government has exempted Canada Post from charging recipients of packages imported through the postal system a 7 percent tax on goods and services on the CDN$5 handling fee. The government has also exempted Canada Post from interest and penalties for the late payment or non-payment of duties.\(^{43}\)

I. Discriminatory Tax Treatment for Foreign Suppliers

Unlike competitors that must pay taxes in the countries in which they operate, state owned monopolies are often exempted from such treatment. For example, until 1994, Canada Post paid no federal income taxes even for years when the company earned positive net income.\(^{44}\) The state postal companies may also gain exemption from Value Added Tax ("VAT"), which can raise the price for express delivery competitors by up to 15 percent.\(^{45}\) In Canada, the postal service is free from many Customs’ Sufferance Warehouse regulations which apply to its express delivery competitors. Customer broker license bonds, temporary importation bonds, air carrier operation bonds, freight forwarder operation bonds, highway car-


\(^{43}\) Id.

\(^{44}\) Sidak & Spulber, *supra* note 30, at 9.

\(^{45}\) OECD, *supra* note 6, at 39.
rier bonds, and sufferance warehouse bonds are among them.\(^4\) By exempting Canada Post from these bonding requirements, the government imposes taxation by regulation on Canada Post’s competitors and raises their cost of business.

J. Denial of Access to Competitors

At present the Finnish Competition Authority is investigating alleged discrimination of access for mail delivery and packages to operators other than Finnish Post. This current investigation follows a complaint filed with the national authority by a competitor of Finnish Post.\(^4\)

K. Lack of Consumer Choice in Selection of Delivery Services/ Reimposition of Monopoly

A proposed bill in Brazil to reorganize the postal service would create a monopoly in the delivery of certain types of mail that are not subject to current regulation, including express delivery packages.\(^4\) A monopoly by the postal service would deny consumers the option to choose their own provider of these services.

L. Restrictions on the Geographic Scope of Operations of an Express Service Provider within a Member's Territory

Entry into the Chinese market has been frustrated in the express delivery sector. China Post’s express mail service has seen its market share decline in the $1.5 billion Chinese market from 97 percent in 1995 to 40 percent in 2001, because of increased competition.\(^4\) In response, the Chinese government on December 24, 2001 moved to implement a policy that would require licensed express delivery companies to file “entrustment” applications with the postal service in each province where the carriers operate. This has the potential to allow the postal authorities, under their broad discretionary powers, to reject or delay applications for its direct competitors.\(^5\)

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\(^4\) UPS v. Canada, supra note 42, at 4-5.
\(^4\) See 2001 Press Pack, supra note 41.
\(^4\) This proposed law would amend Article 9 of Law No. 6.538/78. As DHL spokesman Ricardo Brandi remarks, it is a misguided proposal: “[I]f this is approved, our company will either disappear, or will be reduced dramatically in both revenue and number of employees because we will not be able to ship documents, which is still the bulk of our business.” Larry Luxner, It's Not Letter-Perfect: Small-Package and Courier Services Say Pending Legislation Is Confusing and Would Put Them Out of Business, J. COM., Dec. 3, 2001.
\(^5\) McGregor, supra note 39.
\(^5\) Pruzin, supra note 31.
M. Inability to Expedite Delivery Service through Adoption of Rapid Release Customs Procedures for Express Consignments for which Immediate or Expedited Release is Requested

Brazil refuses the use of electronically produced airway bills. This has the effect of preventing the use of certain types of software for express delivery and slows the customs process for those shipments that are known as "just in time." Unfair and slow customs services also add costs to express delivery providers. Because items are subject to import duties, custom clearance procedures must be applied. This creates time delays for the delivery of a package.52

N. Conflict of Interest between the State as both Regulator and Market Participant

On July 30, 2001, the European Community sent a "reasoned opinion" to the Belgian authorities for incorrectly implementing EC Directive 97/67/EC ("Postal Directive"). Belgium maintains a system where the national postal regulator is not independent. The opinion responds to the fact that Belgium's Minister for Postal Services performs both managerial and regulatory functions, creating a conflict of interest that is against the provisions in the Postal Directive.53

O. Implications

Examples of restraints on competition and trade such as those discussed above have the effect of raising the barriers to entry for private foreign firms. In this context, competition between state-owned and private firms is weak. Thus, the benefits of competition which might have flowed to the consumer are sacrificed and shipment costs remain unnecessarily high. As the OECD notes:

[S]hipping a 3 1/2 KG parcel with the United States Postal System from New York to London is more than two times as expensive as a shipment from New York to Los Angeles, although the distance is similar. In some cases international shipments can be about four times as expensive as domestic delivery over comparable distances. Furthermore, the prices for parcels that private firms charge in general are higher than the prices of public suppliers.54

The OECD breaks down the types of charges that go into the price increases

52 OECD, supra note 6, at 50.
54 OECD, supra note 6, at 11.
built into each step of the process. In one OECD example, a shirt bought in New York that weighs 3 ½ kilograms and has a retail value of $100 is shipped from a point in the United States that lies precisely between Paris and Anchorage Alaska. The OECD explains:

If delivered to Anchorage, Alaska, the UPS transportation costs, including insurance, are $31.50. The rate to Paris, including brokerage fees and insurance, is $77.50 to which are added 13 per cent customs duty, 20 per cent VAT, in addition to the customs duty and VAT charged in transportation costs. The door-to-door shipping cost to the consumer is $93 from New York to Paris, compared with $31.50 from New York to Anchorage. The total cost of this purchase, including transport, is $139.75 in Anchorage, and $227.58 in Paris. The shipping distances are roughly equivalent and Anchorage is less densely populated than Paris. \(^{55}\)

Given that the price difference is approximately $90 between the two destinations, one realizes the enormous cost that trade barriers place on the global economy.

Equally significant is the fact that postal monopolies have entered into the express delivery sector and have financed these acquisitions through their monopoly rents. As the European Commission has noted:

We are faced with a situation where the bottleneck position of the postal incumbents for letter mail protected by a legal monopoly continues for the time being while we face at the same time announced intentions by the same actors to dominate the international mail / parcel / logistics markets. Inevitably, this combination of legal monopoly and strategic expansion implies a high risk for the consumer, as any lack of competition combined with market dominance does. It shows the importance which competition law must take in the current situation. \(^{56}\)

It is because of cross-subsidization by monopoly providers that particular urgency is required to aggressively pursue a solution that will lead to the elimination of barriers to trade and open up competition by eliminating laws and regulations that prevent companies from competing on equal footing.

The U.S. experience in admitting foreign competition to its express delivery markets in the early 1980s illustrates the connection between increased competition and greater consumer welfare in this business sector. American regulators understood that competition in express delivery services would yield greater economic benefits. The Civil Aeronautics Board

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\(^{55}\) Id. at 19.

in its Notice of Proposed Rulemaking noted that, "[c]ompetition, free of government intervention, is usually the best way to optimize consumer benefits. The greater the number of suppliers, the greater the chances that all segments of the public will have their demands satisfied."\(^5\) The notion that greater competition would lead to more efficient outcomes and greater consumer welfare was embodied in the Final Rule. In granting foreign air freight service providers access to the U.S. market, the Final Rule noted that such changes had the ability to "promote competition among indirect air carriers, increase business on U.S. direct carriers, provide consumers with more price/service options, and reaffirm the U.S. commitment to promote competition in the air transport industry."\(^5\)

IV. SOLUTIONS

A. The Problem with Government Regulation and the Need for Regulatory Reform

Traditional government regulation is not an effective way to channel market forces. Government regulators operate in an environment of informational asymmetry. They lack the benefit of data on the operations and expenses of the companies they regulate. The companies have no incentive to offer such information to regulators. In fact, they have an incentive not to turn over such information or, at the very least, an incentive to provide less than fully accurate information. These companies can leverage the information asymmetry to generate greater profits than they would be able to otherwise achieve in a competitive market. The costs of regulation can be substantial. In the United States, one study estimates that the cost of all regulation in 1991 was $542 billion, which translates to 9.5 percent of the GDP.\(^5\) Similarly, the cost savings from deregulation can be significant. According to another study, aggregate gains from deregulation in the United States amounted to between $35 and $46 billion per year.\(^6\) These gains through deregulation are not limited to the United States. Deregulation in the developing world can also lead to savings. Wherever such studies have been performed, savings have amounted to at least a few

\(^6\) Foreign Air Freight Forwarders and Foreign Cooperative Shippers Associations, 47 Fed. Reg. 19683, 19683 (May 7, 1982).
percentage points of the GDP. Not surprisingly, regulatory reform has led to the promotion of greater competition in industry.

B. Privatization

One element of greater deregulation is privatization. Privatization helps to create incentives for more efficient economic behavior. It reduces governmental interference in economic activity, introduces competition to consumers and exposes formerly state-owned industries to competition. Regulators may want to privatize because state-owned industries are not commercially viable. Such companies' financing poses a problem for the governments concerned, specifically the ability to maximize the revenues that governments can extract from the sale of such enterprises. Yet, in some countries, the impulse to pawn off market share in faltering industries on new entrants is tempered by the state's reluctance to surrender control over the outflow of economic benefits for political reasons. The possibility of market distortion through "rent seeking" in an anti-competitive sector may be highest when there is no clear distinction between where the public sector monopolist operates and where the competitive segment should begin.

Privatization has generally brought economic success to countries un-

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63 Such an introduction of competition can only occur when liberalization accompanies a process of privatization. Otherwise, privatization will merely replace a public monopoly with a private monopoly. See William L. Megginson et al., The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis, 49 J. Fin. 403, 407 (1994).

64 See, e.g., Maxim Boycko & Andrei Shleifer, A Theory of Privatisation, 106 Econ. J. 309, 313-17 (1996); James Simms, WALL ST. J., July 8, 2000, available at 2002 WL-WSJ 3399941. TNT Post Group ("TPG") has become the world's first publicly traded postal system and is a provider of express delivery and logistics services. The company's Royal TPG unit is the primary mail delivery service in the Netherlands. TPG's TNT unit is the express service arm.

dergoing broad-scale reorganization. Empirical evidence from the 1980s and 1990s suggests that privatized firms outperform state owned firms and that privatization itself increases the efficiency of the incumbent private domestic firms. Since the privatized firms then depend on the capital markets for funding rather than from their governments, there is greater accountability because markets demand profits. Companies will thus only supply those products and services that they believe will yield profits. The incentives for the government-owned firms are the opposite. As one scholar notes, “Because they do not need to maximize profits, government firms are unconcerned about recouping losses. Indeed, they are happy to hold prices below cost indefinitely, since that increases output, which enhances job security for government managers.”

In the context of postal markets, there is also no incentive for monopoly-holding postal incumbents to improve operations, to simplify their network structures, to automate sorting processes or to improve their efficiency. For example, the U.S. Postal Service had a loss of as much as $2.4 billion, with revenues of $63 billion. Former U.S. Postal Service head William Henderson has advocated privatization in order for it to stay competitive. Thus, in order to create a more responsive competitive system to keep costs down, a market approach is needed for the postal sector, which includes privatization of services.


66 In contrast, a state-owned enterprise and its incentives for decision making are not necessarily responsive to market pressures. As Nellis has noted, it is the “common and deadly ailment of public enterprises: interference by owners who have more than profit on their minds.” John Nellis, Is Privatization Necessary?, WORLD BANK (1994), available at http://www1.worldbank.org/viewpoint/HTMLNotes/7/07nellis.pdf.


70 Neal E. Boudette, Private Courier: When Germans Open Their Mail, They Get Message on Capitalism, WALL ST. J., Nov. 20, 2000. The U.S. Postal Service may be forced to become more competitive as a recent court case has removed antitrust immunity from the postal service. See Flamingo Industries Ltd. v. U.S. Postal Service, 302 F.3d 985 (9th Cir. 2002).


72 One way to create such a system is through the use of an auction process rather than competitive bidding for the procurement of services and for the sale of companies because such an approach is more transparent. However, poor auction design may lead to bad re-
C. Deregulation and Liberalization

Privatization alone will not create a more competitive environment unless the privatization proceeds hand in hand with regulatory liberalization to prevent incumbents from maintaining monopoly power. Economists agree that "perhaps the most important point to emerge from the evidence is the importance of competitive conditions and regulatory policies, as well as ownership, for incentives and efficiency." Liberalization is the process through which heavily regulated sectors begin to be exposed to market forces. As a process, liberalization has met with mixed success. However, when well implemented, liberalization promotes growth. To liberalize, countries must implement rules to prevent monopolies. Monopoly power not only hurts consumers through higher prices but also from poorly executed services. This is not surprising given that weak competition gives monopoly firms little incentive to make efficient investments. Without a well structured and equitable regulatory regime, the incumbent and new entrants will start on different footing, contravening the truism that "market[s] cannot be expected to discover the best competitors unless all companies begin on an equal regulatory footing." Otherwise, special treatment for incumbents will obstruct the greater efficiency that competition would yield.

Certain structural reforms are needed to reap the benefits of efficiencies and cost savings brought about by greater competition. First, transparency in governance is vital. Further, laws must restrict anti-competitive


Guasch & Hahn, supra note 61.


business practices including cross-subsidization, which occurs when a regulated part of a business subsidizes its competitive affiliates by shifting affiliate costs to the regulated portion of the business. When some of the affiliate's costs are paid by the regulated side (and built in to the cost structure for the regulated price for postal services through the use of accounting methods that do not accurately allocate costs), consumers will have subsidized the competitive affiliate giving them a cost advantage relative to their competitors. Cross-subsidization and its cost shifting distorts the express delivery market. Under such a system, the efficient allocation of resources and the development of competitive markets can be stymied. Liberalization increases customers' choices as new entrants enter the sector and compete with established incumbents.

A number of governments are loath to make the necessary changes. Overstaffing is endemic in many monopolistic postal services.\(^1\) Moreover, poor management and planning leads to an over-allocation of funds to the postal sector. As the OECD has noted, reforms to create competitive markets in public utility industries have largely bypassed the postal sector.\(^2\) Sadly, it is not uncommon for postal sectors to require heavy subsidization out of economic necessity.\(^3\) In the United States, the government provides significant aid to the postal service. In Barbados and Jordan, the subsidies are 40 percent of revenue. In India, the subsidy is 100 percent of revenue.\(^4\) Within the E.U., 85 percent of mail services remain controlled by national postal monopolies.\(^5\) Nevertheless, the universal service requirement accounts for only 5 percent of the costs of postal operators total turnover in the E.U.\(^6\) This suggests that the E.U. provides indirect subsidies through the creation of anti-competitive barriers. Similarly, if only governments would contract with private firms, universal service problems could be solved. As Andrei Shleifer notes:

A common argument for government ownership of the postal service is to en-

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\(^2\) OECD, *Promoting Competition in the Postal Sector*, available at http://www.oecd.org/oecd/pages/document/print_template/0,3371,EN-document-591-17-no-14-4440-591--.00.html. OECD argues that where regulators remain concerned over the presence of natural monopoly elements in the postal sector, these concerns should be addressed through an access regime rather than from a push to stop privatization and liberalization of the sector.

\(^3\) According to Final Accounting Period Data, the Postal Service ended FY 2001 with a loss of $1.5 billion. See http://www.postalfacts.com/fmcrisis.htm.

\(^4\) Walsh, *supra* note 81, at 18.


\(^6\) See Ungerer, *supra* note 56.
able the government to force the delivery of mail to sparsely populated areas, where it would be unprofitable to deliver it privately. From a contractual perspective, this argument is weak. The government can always bind private companies that compete for a mail delivery concession to go wherever the government wants, or it can alternatively regulate these companies when entry is free. It cannot be so difficult to write the appropriate contract or regulation; after all, the government now tells the U.S. Postal Service where it wants the mail to be delivered. 87

The argument that there cannot be a full privatization and liberalization of postal services is spurious. Postal sectors are commonly state-controlled and are often major employers, which may render restructuring and liberalization politically difficult. 88 In the E.U., the postal sector generates 1.4 percent of the GDP and employs 1.7 million people. 89 After railway services, postal services are the biggest employer in Europe. 90 Because of the unnecessary overstaffing, and therefore inefficient nature of such postal services, there is all the more reason to liberalize postal services. In countries where the postal incumbent’s service is of a poor quality, entrants can compete by offering better quality services (such as express delivery services that have a guaranteed time of arrival). 91 In such circumstances, the need to keep a state run monopoly has only weak support. 92 Because money is siphoned off to inefficient and anti-competitive postal services, this is money that is

88 Tim Schwarz & David Satola, Telecommunications Legislation in Transitional and Developing Economies (World Bank, Technical Paper No. 489, 2000). Under a private interest theory framework, this process can be understood as one in which competing interest groups attempt to use state power to capture rents for the successful groups at the expense of less organized groups and the interest groups that do not prevail. See Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q. J. ECON. 371 (1983); Sam Peltzman, Toward a More General Theory of Regulation, 19 J.L. & ECON. 211 (1976); George Stigler, The Theory of Economic Regulation, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). This article uses a private interest framework. The alternative framework would be that of public interest theory. Under public interest theory, government regulation serves to maximize social welfare by correcting market failures and protecting consumers from harm. That theory is also known as the positive theory of regulation. See Paul Joskow & Roger Knoll, Regulation in Theory and Practice, An Overview, in STUDIES IN PUBLIC REGULATION (Gary Fromm ed., 1981).
91 This strategy is effective more generally in postal services as well as in less developed countries where the incumbent provider offers poor quality, full-service services. In Argentina, OCA has entered the market as a full-service provider and has a 10 percent market share compared to the incumbent’s (Correo Argentina) 40 percent share. OCA is highly profitable because it can charge a premium of 50 percent for high quality service. See Dietl & Waller, supra note 69, at 6; see also OCA, at http://www.oca.com.ar.
92 Schwarz & Satola, supra note 88.
not available for other needed functions such as spending for health, social services and infrastructural development. Indeed, competition will force incumbents to become more efficient and to reduce costs.\footnote{This may be done by lowering wages, simplifying the delivery network structure and its processes, increasing automation and making redundant workers displaced by such automation, and raising labor productivity. Dietl & Waller, supra note 69, at 7.}

Some argue that imposing a cost separation between the regulated and unregulated markets might be a way to achieve greater sector entry. In principle, cost separation allows auditors to track the costs in both the regulated and unregulated portions of the mail business. However, it seems that cost separation may not be an effective solution and full separation of postal and express delivery services may be needed, as in practice it is difficult to differentiate between joint costs and because of the large costs that would be involved in reflecting accurately accounts that would be so large and voluminous. Thus, cost accounting is limited in its ability to inform regulators as to the treatment of an incumbent with competitors in the liberalized sector.\footnote{This issue is problematic in all regulated industries. See, e.g., Paul L. Joskow & Roger G. Knoll, The Bell Doctrine: Applications in Telecommunications, Electricity and Other Network Industries, 51 STAN. L. REV. 1249, 1267 (1999).}

In spite of some political opposition, a number of countries have privatized and/or liberalized their postal services—Sweden, Finland, New Zealand, and the United Kingdom. The United Kingdom is the most recent example. Postcomm, the British regulator created a three-stage plan for the liberalization of the U.K.’s postal system. In the first phase (January 1, 2003—March 31, 2005), bulk mail above 4000 items (from a single site in a similar format), which constitutes approximately 30 percent of the U.K. letter market by value, together with consolidation services and niche services will be liberalized. In the second phase (April 1, 2005 - March 31, 2007), the bulk mail threshold will be adjusted to open up a total of 60 percent of the postal market by value. In the final stage (beginning April 1, 2007) all restrictions on market entry will be abolished.\footnote{Promoting Effective Competition in UK, Postal Services, A Decision Document (May 2002), available at http://www.psc.gov.uk/Departments/SubSection.asp?ID=29.}

Liberalization has made impressive inroads in terms of quality and price of services, specifically in the postal sector. New Zealand was one of the first countries to liberalize its postal services.\footnote{Only New Zealand, Argentina, Finland and Sweden have opened up fully their postal markets to competition. Dietl & Waller, supra note 69, at 14, at www.unipaderborn.de/bwl5/forschung/MrPostman.pdf. New Zealand also liberalized beyond mere privatization by abolishing the postal monopoly in 1998 under the Postal Services Act. Now, any company may compete in all sectors of the postal market. The Act eliminated all market access and foreign ownership restrictions on postal operations.} In the ten-year period since liberalization, a number of effects have been noted. Productivity
gains have been significant as 40 percent fewer staff since the service's liberalization in 1987 handle 20 percent more business than in the pre-liberalization period. The postal service, responding to market pressures, was forced to become competitive with regard to profitability. A loss of NZ$37.9 million in 1986-87 was transformed into to a NZ$47.7 million after-tax profit in 1996-97. This profitability occurred during a period, 1987-1998, when the basic letter price remained at the same nominal level (NZ$0.40). This steady price, when adjusted for inflation, implies a significant price reduction in real terms. Further, during this period delivery performance of service for a basic letter has improved sharply.

D. Infrastructural Development

Companies that are given opportunities to compete will create well functioning infrastructures. Not surprisingly, the creation of a robust and well functioning infrastructure serves to reduce prices within an economy, promotes competition, and makes business entry and trade more reliable. A well functioning postal structure serves to reduce transaction costs by giving businesses a more cost effective way of completing transactions. It also serves to mitigate local market power by encouraging new entrants and forcing the exit of high cost firms in that market. Smaller businesses gain access to international suppliers and can ship their products abroad rapidly. Such a structure allows smaller businesses opportunities to operate on a global scale. In this regard, a well functioning postal sector and its express delivery component acts as a distribution channel for market functions.

V. LEGAL SOLUTIONS

A. Competition Policy in Trade and Antitrust law

Both economic theory and practice in the antitrust/competition policy arena emphasize the importance of entry conditions as a key aspect to com-

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97 OECD, supra note 82.
98 Id.
100 OECD, supra note 97.
103 Walsh, supra note 81.
petition. Such entry conditions are particularly important when dealing with the transition from a monopolistic to a competitive marketplace. Without actual entry, consumers lack choice for competing prices for services and incumbents have few incentives to improve or widen the services that they offer. Mario Monti, the head of the E.U.’s competition policy, has noted the importance of competition policy and what it means: “[T]he goal of competition policy . . . is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer.”

Competition policy laws have been structured to attempt to achieve this goal and it is through anti-trust/competition policy that public sector anti-competitive constraints must be attacked.

Public sector barriers to entry remain a serious concern. Though some believe that since government-owned firms cannot earn profits, they are uninterested in driving out competitors; government market actors will attempt to undercut their private rivals. As Geddes notes:

“Government firms use the benefits of monopolized business sectors, along with many other advantages of government ownership, to price competitive activities below cost. Antitrust authorities call this ‘predatory pricing’ when done by private firms but ignore the behavior of government firms. The effect, however, is the same: competing private companies don’t enter or are driven from the market.”

Private firms cannot sustain predatory pricing as easily because shareholders are likely to punish firms that price below marginal cost in order to drive out competitors. A government market participant, however, can sustain predatory pricing precisely for the reason that market forces will not act to end such practices.

In this context, the E.U. has set up a system to manage public sector re-

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107 Id. It is difficult to prove predatory pricing in the private antitrust setting. In the United States one needs to produce objective evidence of predatory intent that shows that a defendant priced below the appropriate measure of incremental cost and believed that the company would recoup this cost. See, e.g., Rebel Oil Co. v. Atlantic Richfield Co., 146 F.3d 1088, 1097 (9th Cir. 1998).
restants. Article 3 of the Treaty of Rome ensures that neither private nor state actors could replace one form of competitive barrier (those of the nation-state) with others (those between states).\footnote{Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3, art. 3 (1997) art. 3 [hereinafter E.C. Treaty].} Article 31 of the Treaty prevents continued monopolization in the transition from state-owned enterprises to a privatized firm. Its purpose is to prevent discrimination regarding the conditions under which goods are procured and marketed. Article 86 protects consumers by preventing abuse of market participants with a dominant position. Specifically, market participants are prevented from applying dissimilar conditions to equivalent transactions with other trading parties, which place them at a competitive disadvantage.\footnote{Id. at art. 86(2).} Article 86(2) is a strict threshold that requires an objective justification for the provision of services. It states:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.\footnote{Id. at art. 87.}

Article 87 lays out the rules regarding state aid. When such aid distorts or threatens to distort competition by favoring certain undertakings, such aid is found to be incompatible with the E.U.\footnote{Id. at art. 81(3).} However, under Article 81, exceptions are made to the competition laws such that under certain circumstances state aid is permitted. Specifically under 81(3), there is a carve-out for agreements or decisions which contribute to improving the production or distribution of goods or to promoting technical or economic progress but that does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or (b) afford such undertakings the possibility of eliminating competition with respect to a substantial part of the products in question.\footnote{Id. at art. 87(2).} Further exceptions are made for Member States to grant state aid under a carve-out under Article 87(2) which is: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or other exceptional occurrences; (c) aid granted...
to the economy of certain areas of the Federal Republic of Germany affected by the division of. If rigorously enforced, these provisions could serve as an effective model for public sector restraints on trade.

The European Commission's Green Paper, The Development of a Single Market for Postal Services gave the initial steam to postal sector liberalization. The Green Paper examined the interplay between competition and universal service. The E.U. established its new regulatory framework in the Postal Services Directive of 1997. It laid out a clear maximum scope for the reserved area (350 grams if less than 5 times 1st class tariff) but only to the extent necessary to maintain universal service. A new E.U. Postal Directive purports to liberalize the sector by introducing new areas of competition. Member States must begin opening other aspects of the market to competition in 2003 and further reforms will arrive in 2006. From 2003, these include delivery of letters weighing more than 100 grams (or costing more than three times the price of a standard letter) and all outgoing cross-border mail. From 2006, liberalization will impact delivery of letters weighing more than 50 grams or costing more than two and a half times the price of a standard letter. The Postal Directive also requires the EC to complete a study of each Member State that would assess the impact of an internal market for postal services in 2009 and to make recommendations based on the study.

Unlike the E.U., U.S. antitrust laws deal with private but not public restraints of trade. Indeed, under the Parker Doctrine of state action immunity, state legislative and regulatory policies are immune from the reach of the Sherman Act on grounds of state sovereignty and federalism. State action has been more narrowly tailored in this context than in 14th amendment cases. In the antitrust setting, state action refers "only to government policies that are articulated with sufficient clarity that it can be said that these are in fact the state's policies." Judge Diane Wood notes that the result of the Parker Doctrine in its present form is that it prevents the crea-

113 Id. at art. 87(2).
117 However, the limitation to the latter of these two liberalizations that would allow Member States which need the revenue from this market segment to continue to provide their universal service to reserve such service from their competition. See New Postal Directive, The European Commission, at http://www.europa.eu.int/comm/internalmarket/post/newdiretive_en.htm.
118 Id.
120 A.D. Bedell Wholesale Co. v. Phillip Morris, 263 F.3d 239, 254 (3d Cir. 2001) (citing AREEDA & HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 221 (2d ed. 2001)).
tion of uniform federal competition policy. Taking Judge Wood's analysis one step further, it would follow that the effect of a global state action exemption presents the problem of a lack of a global competition policy because each country could create a Parker exemption for its state actions.

B. WTO Solution

A key part of the WTO is the General Agreement on Trade in Services ("GATS"), which forms part of Annex I to the WTO Agreement. The purpose of GATS is to create favored nation status by reducing barriers to trade. Renato Ruggiero, the former Director General of the WTO, notes that the purpose of GATS has been the right of establishment and the obligation to treat foreign services suppliers equitably and objectively in relevant areas of domestic regulation. As a part of the WTO agreement, GATS is binding upon all of the signatories to the WTO.

The market access provision of GATS prohibits six different types of anticompetitive practices from being applied to foreign services or suppliers in scheduled sectors. Under Article XVII, countries must not offer more favorable treatment to domestic providers. Known as the national treatment article, Article XVII provides that any foreign service or foreign service supplier be given treatment that is not less favorable than that given to domestic counterparts.

The current definitions to the GATS do not include express services. However, a reading of the GATS might include such services with regard to the competition in services provisions. Under the definitions to the GATS, trade in services is the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; and (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. Article I is also important in that it establishes that government measures need not restrict trade in services but merely affect such trade in services. Measures by Members are defined as measures taken by: (i) cen-

121 Diane Wood, United States Antitrust Law in the Global Market, 1 IND. J. GLOBAL LEGAL STUD. 409, 422 (1994).
124 GATS, supra note 122, at art. XVI.
125 Id. at art. XVII.
126 Id. at art. 1:2.
tral, regional or local governments and authorities; and (ii) non-
governmental bodies in the exercise of powers delegated by central, re-
gional or local governments or authorities.  

Measure is further defined as any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form. Under Article XXVIII, a Measure by a Member affecting trade in services includes measures in respect of (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; and (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member. Such measures, therefore, might include situations involving express delivery services.

Under Article II of the GATS, each Member must accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country. Only for certain exemptions can a member have measures inconsistent with the GATS. The GATS covers all services except those “supplied in the exercise of governmental authority.” But GATS Article I:3c defines such excluded services very narrowly as “any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.” GATS Article VIII requires that a monopoly supplier of a service must not be allowed to act inconsistently with a member government’s MFN obligations or any specific commitments, nor to abuse its monopoly position. Since many governments use their postal services as monopoly suppliers, it is possible that express delivery might fall into this category where a postal monopoly abuses its monopoly position to cross-subsidize its non-monopoly business.

While there is no specific GATS treatment of express delivery services, some public sector restraints on trade are covered under the GATS. While GATS does not cover services “supplied in the exercise of governmental authority,” it limits this reading under Article I:3c to “any service which is supplied neither on a commercial basis nor in competition with one or more suppliers.” Since by their nature express delivery providers are in competition both with each other and with domestic postal services, one could make the case that GATS should apply. Thus, under GATS the applicability of express delivery and other postal services remains un-

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127 Id. at art. I:3.
128 Id. at art. XXVIII:(a).
129 Id. at art. XXVIII:(c).
130 Id. at art. II.
131 Id. at art. I:3c.
clear. To address the issue that express delivery is not included among the WTO classification list of goods, the United States has proposed a definition under which express delivery services would be included under the WTO classification for communications services. The proposed definition is:

Express delivery services are time-sensitive, utilize advanced technologies for communication, and are integrated or controlled from end-to-end. Express delivery services consist of the expedited collection, transport, and delivery of documents, printed matter, parcels, and/or other goods, while tracking the location of, and maintaining control over, such items throughout the supply of the service. Services provided in connection with express delivery services include, but are not limited to, customs facilitation and logistics management. Customs facilitation consists of practices and procedures used to avoid delay of customs processing or to obtain rapid release of shipments, while satisfying customs requirements. Logistics is the process of planning, implementing, managing, and controlling the flow and storage of goods, services, and related information from the point of origin to the point of consumption. Express delivery services may include one or more value added elements, such as collection from an address designated by the sender; release upon signature; guarantee of delivery within a specified time; electronic and/or other advanced technologies; and ability of the sender to confirm delivery.

Such a definition would give a more definitive tool for pro-competitive forces to open up the express delivery markets worldwide. The GATS enforcement mechanism is found under GATS Article VI, which calls on the Council for Trade in Services to develop any “necessary disciplines” to ensure that “measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade.” The acceptance of this definition would make it easier for parties to bring a suit regarding barriers to trade.

C. NAFTA

For those cases that arise among the United States, Mexico and Canada, NAFTA has a number of provisions with which to combat anti-competitive public sector monopoly practices. Under the investment chapter (Chapter 11), NAFTA Article 1102 requires each NAFTA party to accord to investors of another party treatment no less favorable than that it

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accords, in like circumstances, to its own investors with respect to the estab-
ishment, acquisition, expansion, management, conduct, operation, and
sale or other disposition of investments. This means that a national post
provider cannot be granted privileges that such a provider could use for the
purposes of cross-subsidies to its non-monopoly segment unless such privi-
leges are granted to the postal provider’s competitors. NAFTA also has
specific provisions for “Competition Policy, Monopolies and State Enter-
pri ses” under Chapter 15 of the Agreement. Specifically under NAFTA Ar-
ticle 1502(3)(a) a state monopoly company cannot provide discriminatory
treatment to use its monopoly position to engage in anti-competitive prac-
tices in a non-monopolized market in its territory that adversely affects an
investment of an investor of another Party, including through the discrimi-
natory provision of the monopoly good or service, cross-subsidization or
predatory conduct. Article 1503 mandates that any established state en-
terprise accord non-discriminatory treatment in the sale of its services.
Currently in a Chapter 11 hearing before arbitration is the UPS suit against
the Canada Post in which UPS alleges that Canada Post has used its mo-
nopoly in letter mail services to cross-subsidize against express delivery
providers such as UPS. UPS is requesting at least $160 million in damages,
plus costs and tax consequences.

VI. CONCLUSION

The elimination of anti-competitive barriers to trade in the express de-
livery sector in the postal services sector would serve to improve global
consumer welfare by reducing costs. In order to achieve this goal, countries
must push for a system that deals with private and public anti-competitive
behavior. A system is needed that incorporates both antitrust and trade law
into a more comprehensive competition policy. Competition should be en-
couraged by placing entrants on a competitive footing rather than offering
advantages to national favorites. Where the state is immunized from com-
petition policy, there is the potential for the Parker Doctrine at the global
level one that would allow for the prosecution of private anti-competitive
practices but would immunize state owned corporations from antitrust li-
ability and competitive concerns.

A quick series of examples show how competition within the express
delivery sector has created greater consumer welfare because it has led to
greater efficiencies and innovations. For example, in Europe, UPS has in-

135 NAFTA, art. 1102(1).
136 NAFTA, art. 1502(3)(c)-(d).
137 NAFTA, art. 1503.
vested in new technology to improve the quality of its signature tracking, proof of delivery, and internet-based shipping and tracking services. UPS claims that these improvements serve to improve supply chain efficiency because they provide visibility, multiple language capability and after sales service. Likewise, Federal Express has increased the coverage area of its noontime delivery commitment because of enhancements of its line haul operations in Spain and Portugal. Competition also leads to mergers as competitors look to increase their scope and scale to better compete in the more integrated marketplace. One function of the increase in mergers is that it has led to greater transparency in pricing via standardization of pricing and services. It may also lead to greater efficiencies.

A vigorous use of existing laws and the addition of an explicit express delivery services section to the GATS would help to combat barriers to trade. Further, a more global antitrust system, if based on the principal of increasing global consumer welfare, may prove advantageous as a tool to open the express delivery sector to greater competition. If current laws are not applied liberally to promote greater efficiency, then a new global system of competition policy may be required. Countries are working toward agreed upon general principles in some areas of antitrust law under the auspices of the International Competition Network and have created a group that studies sector specific issues. The process toward a global antitrust system may indeed be inevitable. Global standards may deal with the problem that a significant number of states lack such laws at all. For example, only 13 of the 34 states in the Western Hemisphere that are participating in negotiations for the Free Trade Area of the Americas have competition laws. On a global level, only 80 of the WTO members have adopted competition laws. In order to promote benefits for consumers around the world, implementation of a robust competition policy is needed. One area where a global antitrust/competition policy would be

139 Express Services Unite Europe, LOGISTICS MGMT. & DISTRIBUTION REP. (Sept. 1, 2001).
140 Id.
141 Id.
142 “The purpose of this subgroup is to compile studies on competition advocacy in specific regulated sectors: telecommunications, energy, air transportation, and the legal profession.” See http://www.internationalcompetitionnetwork.org/sectoralstudies.html (n.d.).
146 Some scholars are more skeptical about the creation of antitrust laws. Paul E. Godek, A Chicago-School Approach to Antitrust in Developing Economies, 43 ANTITRUST BULL.
particularly beneficial would be in the area of public sector barriers to trade and particularly barriers that involve express delivery service. With the political will to use such laws, new opportunities should emerge that will open up markets to great opportunities for competition and therefore lower prices.

261 (1998); Robert D. Cooter, The Theory of Market Modernization of Law, 16 INT'L REV. L. & ECON. 141 (1996). Note, however, that these scholars state that even if an antitrust authority is unnecessary, such authority is unwarranted precisely because free trade can accomplish many goals of antitrust policy. Cooter, at 162.