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IMPLICATIONS OF THE WTO AGREEMENT ON BASIC TELECOMMUNICATIONS

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Introduction

In the meeting of the Joint Group on Trade and Competition held 28 October 1998, Delegations discussed the Secretariat's Note on the Complementarities Between Trade and Competition Policies [COM/TD/DAFFE/CLP(98)98]. Paragraph 31 of that Note raised a number of questions about the implications of the GATS Agreement on Basic Telecommunications ("ABT") and its associated Reference Paper for further rule making in the trade and competition policy context. Specifically, paragraph 31 queried whether:

> "[i]t might be worth asking whether the model of addressing the trade and competition complementarity in the Reference Paper with respect to anti-competitive practices, interconnection, dispute settlement, and balancing other policy objectives could be generalised in other bilateral, regional or multilateral trade agreements. Alternatively, is this a sector-specific model, or are there other sectors to which it conceivably could be applied? Does this Agreement reflect industry-specific technological developments, and/or a broad cross-country consensus on the need for regulatory reform of this particular sector? What doctrinal or regulatory preconditions, if any, are necessary for this model to be successfully replicated?"

Delegations asked the Secretariat to prepare a new Note that would reflect on some of the issues described above. Accordingly, the Secretariat prepared this Note to help focus the further consideration of these issues by delegations. The Note was considered by Delegations in the Ninth and Tenth Meetings of the Joint Group held on 18 February and 4 May 1999, and was subsequently revised to take into account comments received by Delegations in the course of those meetings.

GATS Basic Telecommunications Agreement: Summary[1]

The negotiations on basic telecommunications were not completed by the time the Uruguay Round drew to a close in December 1993. It had become apparent as the Uruguay Round negotiations on services proceeded that governments saw telecommunications as special because of their importance in the supply of many other services. Without access to telecom services, many other services cannot be delivered, making specific commitments in relation to the latter of dubious value. Thus, paragraph 5(a) of the GATS Annex on Telecommunications states that: "[e]ach Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions for the supply of a service included in its Schedule.[2]

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[1] See generally: Marco C.E.J. Bronkers and Pierre Larouche, "Telecommunications Services and the World Trade Organization" 31 Journal of World Trade 5 (June 1997); and Bernard Hoekman, Patrick Low and Petros Mavroidis, "Regulation, Competition Policy and Market Access Negotiations: Lessons From the Telecommunications Sector" in Einar Hope (ed.), Competition Policies for an Integrated World Economy (Routledge forthcoming)

[2] Non-discrimination in this context comprises both MFN and national treatment.

Suppliers of such services are entitled to access to and use of any public telecommunications transport network or service offered within or across the border, including private leased circuits, the right to purchase or lease and attach terminal or other equipment to the network, and to interconnect private leased or owned circuits with public telecommunications transport networks and services, or with circuits leased or owned by another service supplier. These rights are qualified by the right of the entity owning and/or controlling the network to impose conditions on access and use in order to safeguard public service responsibilities, protect the technical integrity of the networks or services, and to restrict network use where this is not required pursuant to a scheduled commitment. The obligations of the Annex extend not only to service suppliers in other sectors, but also to those in the telecommunications sector who would compete with incumbent network operators.[3]

Thus to a degree, competition policy-related issues concerning interconnection, market conduct safeguards, and transparency had already been touched upon in the GATS and its associated Annex on Telecommunications. However, some negotiators felt that the Annex commitments were too general to guarantee new entrants adequate opportunity to compete.

The obligations of GATS and the Annex on Telecommunications apply only to those telecommunications sectors that the WTO Members incorporated in their Schedules. Mostly, the Schedules contained what is commonly referred to as "enhanced telecommunications services." Enhanced services are those services in which the voice or nonvoice information being transferred from one point to another undergoes an end-to-end restructuring or format change before it reaches the customer. In 1994, the Members' Schedules generally included enhanced services, such as electronic mail, voice mail, on-line information, electronic data interchange, value-added facsimile services, code and protocol conversion, and data processing.

The Members were not ready in 1994 to make commitments on "basic telecommunications services" because, unlike enhanced services, the supply of basic services has been by state-owned operators or state-sanctioned monopolies. Thus, it became increasingly apparent that if negotiations were limited to the traditional trade approach of scheduling commitments on market access and national treatment, there would not be a guarantee that liberalisation commitments would translate into effective access to markets.[4] The removal of regulatory entry barriers is clearly a necessary condition of access, but such action would have little impact in the face of non-governmental barriers based on the ability of regulated incumbent firms to frustrate market entry.

Thus, a significant component of the extended negotiations centred around a quest for a set of acceptable regulatory principles that would be enforceable through WTO dispute settlement procedures. Accordingly, proposals were made to define interconnection rights more specifically. Market conduct safeguards were also sought to ensure that suppliers with market power refrain from a range of anti-competitive practices. Finally, transparency requirements were sought in order to ensure the availability of all information necessary for prompt and trouble-free interconnection.

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[3] It should be noted that Annex commitments only apply in those sectors where governments have accepted specific market access and national treatment commitments. Under the GATS, governments have negotiated these commitments on a sector-by-sector basis, and in sectors that are not covered in this manner, the only obligations that apply relate to most-favoured-nation treatment and transparency.

[4] Patrick Low, "Multilateral Rules on Competition: What Can We Learn From the Telecommunications Sector?," presented at an OECD workshop on Trade Policy for a Globalizing Economy, Santiago, Chile (November 1995).

> The discussion of regulatory principles in the WTO negotiations revealed a preference among governments for a sector-specific approach over a more horizontal approach based on general rules. In part, this choice was due to the limited nature of the general competition law disciplines in the GATS. With respect to sectors covered in a Member's schedule, GATS Article VIII requires the Member to ensure that a monopoly supplier does not "abuse its monopoly position" when it competes in the supply of services outside its monopoly rights. Article IX:1 provides that "Members recognise that certain business practices of service providers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services." Article IX:2 obliges Members to accede to any request for consultation with any other Member concerning such practices "with a view to eliminating" them. It also imposes a duty to co-operate in the provision of non-confidential information of relevance to the matter in question.[5]

During most of the extended negotiations, regulatory principles were discussed exclusively in terms of protecting the interests of new market entrants against possible abuse of dominant position by incumbents. However, towards the end of the negotiations the problem of "one-way bypass" in international telecom services was raised. Concern was expressed that the interests of incumbents needed to be protected against potential predation by foreign entrants with dominant positions in their home markets. Thus, a proposal was made, for a licensing criterion designed to protect the conditions of competition in the domestic ("importing") market.

To summarise, at the conclusion of the negotiations, for each Member that participated in the continued negotiations, the following apply to its basic telecommunications services sectors: the obligations of GATS 1994, the 1994 Annex on Telecommunications; any 1997 limitations to MFN for basic telecommunications that it annexed to its 1994 List of Article II Exemptions; any 1997 commitments or limitations on market access and national treatment for basic telecommunications that it annexed to its 1994 Schedule of Specific Commitments; any additional commitments made in its 1997 Schedule; and the commitments described in the Reference Paper for those countries that adopted it. We turn next to a consideration of the Reference Paper.

Reference Paper

The Reference Paper to the GATS Agreement on Basic Telecommunications Agreement (Reference Paper) represents a prominent example of a framework in a WTO agreement that already involves competition principles. Specifically, the Reference Paper contains a general commitment of Members to maintain appropriate measures to prevent suppliers unilaterally, or collectively, from engaging in or continuing anti-competitive practices. A "major supplier" is defined as one with the power "to materially affect the terms of participation (having regard to price and supply)", either due to control over essential, facilities or its market position.

In addition, the Reference Paper gives several specific examples of anti-competitive practices. These are:

- anti-competitive cross-subsidisation;
- use of information obtained from competitors (with "anti-competitive results"); and
- withholding technical and commercially relevant information.

[5] See Competition Elements In International Trade Agreements: A Post-Uruguay Round Overview Of WTO Agreements [COM/TD/DAFFE/CLP(98)26/FINAL].

The Reference Paper also applies to "interconnection" issues: e.g. the linking with suppliers providing public telecommunications transport networks or services to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier. However, the extent of this obligation is limited to the specific commitments undertaken by a Member in the various schedules of GATS and ABT commitments. Interconnection must be provided:

- under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

- in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

- upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

The Reference Paper also builds on transparency in order to ensure that the Agreement can actually be operationalized. The procedures applicable for interconnection to a major supplier will be made publicly available, and a major supplier must make publicly available either its interconnection agreements or a reference interconnection offer.

With respect to settlement of disputes under the Agreement, the Reference Paper appears to distinguish between disputes about anti-competitive practices and disputes about interconnection. There is no particular form of dispute settlement provided for disputes over anti-competitive practices of major suppliers. However, a Reference Paper Signatory's failure to maintain appropriate measures to address anti-competitive conduct could, itself, be subject of dispute settlement. With respect to interconnection, the Reference Paper indicates that for dispute settlement, recourse is to be made to an independent domestic body. A service supplier requesting interconnection with a major supplier will have recourse, either: "at any time" or "after a reasonable period of time which has been made publicly known" to an independent domestic body, which may be a regulatory body.[6] That body must be given the authority to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously. It is conceivable (and not precluded by the terms of the Reference Paper itself) that, the body might not be a sector-specific regulator, but e.g. a competition authority.

The Reference Paper also reflects a balance between the objectives of both trade liberalisation and competition policy and other social or policy objectives of interest to governments and civil society. The third commitment in the Reference Paper provides that any Member has the right to define the kind of universal service obligation it wishes to maintain, and such obligations will not be regarded as anti-competitive *per se*. However, those requirements must be administered in a transparent, non-discriminatory and competitively neutral manner and cannot be more burdensome than necessary for the kind of universal service defined by the Member. Similarly, any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, must be carried out in an objective, timely, transparent and non-discriminatory manner.

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[6] In the case where this is a "regulatory body" it must be separate from, and not accountable to, any supplier of basic telecommunications services, and the decisions of and the procedures used by regulators must be impartial with respect to all market participants.

When the ABT entered into force in February 1998, 69 of the 130 WTO members committed to some degree of liberalisation of their telecommunication markets. Of these, 44 (representing 99 percent of basic telecommunications revenue among WTO members) permitted entry by foreign carriers. Furthermore, 55 countries agreed to adhere to the Reference Paper.[7]

Implications of the Agreement on Basic Telecommunications

In this section, we discuss the implications of the ABT for future multilateral rule-making with respect to trade and competition policy issues. First, we identify several unique factors that, in part, made possible this sectoral agreement. Second, we discuss possible ways in which the architecture of this agreement may be applied in other sectoral contexts, or to other multilateral rule making. Finally, we conclude with a discussion of several normative caveats, which suggest that this model should be invoked with some caution when it comes to other contexts.

Factors Facilitating the ABT

First, over the last two decades and more there has been a spurt in technological developments in the telecommunications industry globally.[8] These developments on the supply-side have been matched with tremendous growth in demand for traditional and new forms of telecommunication services.

Second, this growth in demand is linked, in part, to the fact that telecommunication services are an important component of, or input into, traded or tradable services. The demand and supply of enhanced services and growth of foreign service suppliers in these areas have also tended to highlight the further gains that could be achieved by liberalisation of basic telecommunications services as well. Furthermore, as barriers between nations decline, and economic interdependence grows so to does the demand for increased links between national telecommunication networks. Consequently, this interdependence highlighted the need for a multilateral as opposed to a network of bilateral approaches. Furthermore, given the prominence of this sector in the modern global economy, certain growth-oriented developing countries may have chosen to signal their commitment to open trade and investment policies by agreeing to liberalisation in this sector.[9]

Third, over the same time period many of the leading markets for the demand and supply of telecommunications services have unilaterally liberalised their regulations of first, enhanced telecommunication services, and then basic telecommunication services. This liberalisation has in some cases also involved significant privatisation of incumbent domestic monopolies. This trend has been accompanied by increasing application of competition principles by telecommunications regulators, or in

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[7] Toshiaki Takigawa, "The Impact of the WTO Telecommunications Agreement on U.S. and Japanese Telecommunications Regulations" 32 Journal of World Trade 33 (December, 1998) at 39-40. C.f. Lawrence J. Spiwak, "From International Competitive Carrier to the WTO: A Survey of the FCC's International Telecommunications Policy Initiatives 1985-1998" 51 Fed. Com. L.J. 111 (December 1998) at 176 noting that certain "of the signatory countries agreed to uphold certain `pro-competitive regulatory principles' yet, at the same time, these signatory countries also condone those signatory countries which refuse to allow any new competitors to enter their market."

[8] See generally OECD Information Technology Outlook 1997 (1997) and OECD Communications Outlook 1997 (1997) at 31.

[9] Patrick Low and Aadityi Mattoo, "Reform in Basic Telecommunications and the WTO Negotiations: The Asian Experience" WTO Staff Working Paper ERAD9801 (February 1998) at 26.

some cases the application of competition policy to these sectors.[10] There was wide agreement among Delegations that this transitional nature of the telecommunications industry from a highly regulated character with public monopolies to a less regulated character with more entrants and service providers was a crucial and unique feature recognition of which helps to explain the competition provisions of the Reference Paper. Once governments had decided to emphasise entry and to open this network industry to international competition, there was a feeling that traditional trade approaches to market access through national treatment and MFN commitments alone would not be sufficient to ensure successful entry by foreign service suppliers without additional competitive safeguards. Hence the Reference Paper builds on both traditional market access concepts as well as competition principles. Some Delegations noted that, in this respect, the Reference Paper could be seen as going beyond the existing approaches to access to "essential facilities" under the competition laws of many countries.

Fourth, the successful negotiation of the ABT may have something to do with the inherent character of trade in services as compared to trade in goods. It may be that trade in services is seen as inherently implicating "behind the border" domestic regulation to a much greater degree than the traditional "at the border" tariff or non-tariff barriers emphasis of the liberalisation of trade in goods. Even where the national treatment commitment applies behind the border to imported "like" products, it is less likely to call into question the existing domestic regulatory scheme and choices as appears to be the case in trade in many services. Accordingly, nations have been more hesitant to apply the broad traditional approach to applying the most-favoured-nation ("MFN") and national treatment principles than has been the case with trade in goods.

Therefore, from a pragmatic viewpoint, a negotiating approach based on a degree of up front liberalisation, and disciplines on domestic regulation may have been important. It may be that, for this reason, trade liberalisation and competition law and policy can act in a particularly focused and complementary fashion to promote pro-competitive reform of existing domestic regulation. While competition authorities will be concerned with promoting competition within the domestic market, trade officials will also be concerned with the relationship between the domestic market regulation, and export and foreign investment opportunities of domestic firms.

These four factors may not be necessary, but rather sufficient conditions, for trade and competition policy to work in a complementary fashion in respect of multilateral rule making. Accordingly, one might suggest that other highly regulated tradable service sectors characterised by network effects (e.g. electricity) may be candidates for the ABT approach to multilateral rule making. We will return to this point below.

Architecture

Although the ABT is a sectoral agreement with respect to trade in services, its architecture might have implications for both trade in goods, and more general multilateral competition rule making. As discussed above, the ABT builds on the GATS commitment of: MFN and national treatment linked to schedules of commitments; transparency; disciplines on the abuse of a monopoly position by a monopoly supplier; and multilateral dispute settlement. In addition the ABT incorporates the Telecommunications Annex to the GATS which addresses issues of access and use of public telecommunications transport networks and services. Similarly, the ABT incorporates the Reference Paper; at least insofar as concerns the 55 countries that have agreed to adhere to it. The Reference Paper also addresses issues of anti-competitive practices and interconnection.

[10] See generally: OECD Competition in Telecommunications OCDE/GD(96)114 and OECD Developments In Telecommunications: An Update Aide Memoire (1997).

It may be worth giving further consideration to this aspect of the Reference Paper. As discussed above, the Reference Paper defines a "major supplier" as a supplier that has a material effect on price or quantity by virtue of controlling an essential facility or using its market position. No further definition is given of the term "essential facility" suggesting that each jurisdiction has, at least, some degree of regulatory flexibility. With respect to the major supplier's abuse of its market position, more guidance is given by a non-exhaustive list of anti-competitive practices – cross-subsidisation; the misuse of competitors' confidential information (presumably obtained from interconnection or through horizontal collusion); and withholding important information relating to an essential facility. In the context of the application of competition policy in most OECD Members, at least as regards telecommunications, this list is probably uncontroversial insofar as it goes. However, what is important here is that Members have agreed to a framework for thinking about anti-competitive practices in the telecommunications area while retaining important degrees of freedom to implement their regulatory policy choices. This point holds true even with respect to interconnection issues discussed in the Reference Paper. Again, if there were a failure to meet this obligation prematurely this would likely be a matter for multilateral dispute settlement.

Thus, the Reference Paper provides a flexible approach to dealing with certain trade and competition concerns. This flexible architecture is also manifested in the dispute settlement provisions of the Reference Paper. Countries have an obligation to maintain "appropriate measures" to prevent major suppliers from engaging or continuing to engage in anti-competitive practices. There is no obligation with respect to the detailed application of those laws. However, the WTO dispute settlement provisions could address the issue of whether a particular measure is "appropriate" without making a judgement about the application of the measure in any particular case. With respect to interconnection issues, countries are required to provide access to an independent "regulator", and such regulator is subject to certain other procedural requirements.

There was general agreement among Delegations that the ABT was facilitated by unique sectoral characteristics of that particular industry in transition. While many suggested that other sectors (e.g. electricity) characterised by network economies might also be candidates for an approach similar to that taken in the ABT, most Delegations cautioned that such an approach would not be a substitute for a horizontal approach to competition law in respect of any future multilateral rule-making. That being said, there was agreement among Delegations that some of the concepts and approaches in the ABT might also have relevance to further thinking about such multilateral rule-making. In that regard, a Delegation noted that in applying the ABT some countries would choose to rely on their domestic telecommunications regulators rather than their competition authorities. That Delegation also noted that in the ongoing discussions around the "built in" GATS negotiating agenda, there appears to be some interest in further exploring the application of competition principles to constrain anti-competitive distortions that may be sometimes facilitated by domestic regulations and regulators. By contrast, the ABT permits countries to rely on the domestic regulators to enforce the competitive safeguards to facilitate entry and market access.

Caveats

Three important caveats about the ABT model of dealing with trade and competition concerns can be identified at this stage. First, it might be argued that if governments agree to create mutual obligations to enforce a given set of regulatory principles, they could be viewed as having tied themselves into an established pattern of regulation. This approach may be appealing from the point of view of opening up market access on a broadly reciprocal basis. However, it also has the potential drawback of locking in a uniform approach in circumstances that might be quite different among countries. In the specific context of the ABT and the Reference Paper, and the more general context of possible future multilateral initiatives that might build upon the flexible architecture described above, this will not necessarily be the case. That is so because the Reference Paper does not set forth a detailed or mechanical "common standard" for regulation of the telecommunications sector. Rather, the Reference Paper provides

an approach to applying principles of competition to the telecommunications sector while leaving significant freedom and flexibility for Members to implement their regulatory policy choices.

This problem, to the extent that it exists, can also be addressed through the design of the regulatory principles that do not apply when a given threshold of diversification in relation to the sources of supply available in a market has been attained. Even so, multilateral uniformity may still in some circumstances lead to a suboptimal degree of regulatory intervention. In other words, the regulatory authorities, or the governments, to whom they are ultimately responsible, could find that multilateral commitments make regulatory forbearance harder in circumstances where it might otherwise seem desirable. Again, for the reasons described above, in the specific context of the ABT and the Reference Paper, and the more general context of possible future multilateral initiatives that might build upon its flexible architecture, there is no *a priori* reason to expect this result to occur.

The third caveat is the risk that regulatory interventions putatively designed to promote competition instead become primarily used to protect competitors, not competition. However, given the flexible architecture of the ABT and the Reference Paper, there does not appear to be any *a priori* reason to expect the problem of rent seeking to be worsened by the multilateral agreement. On the contrary, the embodied emerging consensus among trade and competition officials about telecommunications regulation would seem to strengthen, rather than weaken the hands of those authorities wrestling with these forms of rent seeking behaviour. It must also be recognised that antitrust laws and their enforcement may, in certain jurisdictions – inside and outside the OECD - reflect multiple objectives, including industrial policy considerations. It is also true that antitrust authorities may be subject to the similar problems of capture and political influence as other types of regulators.

Conclusion

This Note has attempted to set forth some of the implications of the ABT for multilateral rule making in respect of trade and competition policy issues, while recognising that there are discrete factors that led to the creation of what one commentator has called "a unique and slightly divergent method for the establishment of international competition."[11] Where similar conditions are present, the ABT might provide a useful model for dealing with these issues in other sectors such as electricity. However, such sectoral approaches are generally not seen as substitutes for a horizontal approach to competition law at either national or multilateral level. Furthermore, there are important caveats that must be considered closely before generalising a sector-specific approached to regulation. Nonetheless, the architecture of the ABT also provides an interesting model that might warrant closer scrutiny to see whether any of the principles, concepts and approaches might also be applicable to further multilateral rule-making in respect of anti-competitive practices that have a significant impact on international trade.

[11] James F. Rill et al, "Institutional Responsibilities Affecting Competition in the Telecommunications Industry: A Practicing Lawyer's Perspective" Working Draft Paper prepared for the European University Institute 1998 EU Competition Workshop at p. 23.