

USA *versus* Mexico

World Trade Organisation

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Introduction

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World Trade Organisation WTO

- Where global rules for trade amongst nations are agreed
- Created in 1994 at the conclusion of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT)
- The provisional secretariat had administered the GATT rules for much of the world's merchandise trade since 1948
- The General Agreement of Trade in Services (GATS) came into force at the conclusion of the Uruguay Round. It consists of the Articles of Agreement and its Annexes, and the schedules of specific commitments (and lists of exemptions from Most Favoured Nation treatment, MFN) submitted by member governments
- The schedules and exemption lists are integral parts of the GATS
- The schedule identifies the service sectors to which a country will apply the market access and national treatment obligations and any limitations
- These are specified for each of four modes of supply:
 1. cross-border supply
 2. consumption abroad
 3. commercial presence
 4. temporary presence of natural persons

IT Agreement

- Singapore Ministerial (1996) adopted of a Declaration on Trade in Information Technology Products (ITA)
- Multi-lateral initiative among WTO Members to eliminate tariffs on information technology products
- Applied on an MFN basis
- There is no definition of information technology, products are defined by their inclusion in Attachment A or Attachment B of the Declaration
- There are no exceptions to product coverage, all products must be bound at zero
- There is staging of concessions over time
- There 63 Participants (including the European Union), accounting for ~97 % of trade in IT products around 12% of world trade

GATS fundamentals

- Non-discrimination:
Most Favoured Nation (MFN) & national treatment
- Transparency:
public availability of measures affecting trade
- Regulation:
reasonable, objective, impartial, transparent and
no more burdensome than necessary
- Competition safeguards:
aimed at the realisation of obligations and
commitments

Telecommunications Annex

- This Annex to the GATS requires member governments to ensure that their telecommunications suppliers give access to and use of public telecommunications, on reasonable terms and conditions, to service suppliers from other countries supplying any services included in the member country's schedule of commitments
- The Annex also ensures the freedom of movement of information within and across borders for purposes of providing scheduled services. And it limits the restrictions that can be placed on access and use of public telecommunications to those needed to safeguard public service and the technical integrity of the networks, as well as to prevent the supply of telecommunications services by other countries other than as provided for in the host country's schedule of commitments.
- The GATS provides for the resolution of disputes between member countries with respect to compliance with obligations under the GATS, including annexes and specific and additional country commitments. A WTO Dispute Settlement Understanding establishes the procedure to be followed.

Reference Paper

- After the Uruguay Round, WTO members set up a Negotiating Group on Basic Telecommunications (NGBT)
- It was to agree on specific commitments to liberalise the telecommunications markets within the framework of the GATS
- Participants also negotiated a common text, called the *Reference Paper*, that would serve as a template for scheduling additional commitments on regulatory principles for the sector

Reference paper commitments

- Establish a regulatory authority that is independent of all suppliers of telecommunications services and networks
- Maintain measures that prevent and safeguard against anti-competitive practices by major suppliers
- Require major suppliers to interconnect other suppliers at any technically feasible point on a non-discriminatory, cost-oriented basis following transparent procedures and subject to dispute settlement by an independent body
- Administer universal service programs in a transparent, non-discriminatory and competitively neutral manner
- Allocate and assign use of scarce resources, including the radio spectrum, numbering blocks, and rights of way, in an objective, timely, transparent, and non-discriminatory manner

A major supplier is defined as a supplier that, through control of essential facilities or use of market position, can materially affect the price and supply on the relevant market.

Schedule of commitments

- The key objective is “progressive” liberalization of markets
- Commitments are different – no one schedule is exactly like another
- Many, but not all schedules, have the Reference Paper attached
- In implementation, governments:
 - may well go beyond their commitments
 - are free to find their own solutions

Reasonableness

- Transparent
- Non-discriminatory
- Objective
- Impartial
- Timely
- Least burdensome
- Necessary
- Least (trade) restrictive

Non-discrimination

- Most Favoured Nation (MFN) treatment is critical in making the WTO truly multilateral
- MFN applies whether or not a telecommunications commitment has been made on the schedule
- MFN is particularly important in privatization, licensing or tendering

“... each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country”

National treatment

- Each Member shall accord to foreign services and services suppliers treatment no less favorable than that it accords to its own like services and service suppliers
- No discrimination against foreign services or service providers
- It applies to any degree of discrimination in all types of measures
- No discrimination whether *de jure* or *de facto*
- In Schedules, “limitations” can allow preferences to domestic services or suppliers
- Departures from national treatment are uncommon in telecommunications

Non-discrimination

- Interconnection with a major supplier will be ensured ...
- under non-discriminatory terms, conditions ...
- and at 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;...
- Universal service obligations will not be regarded as anti-competitive *per se*,
- Always provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary
- Procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner

Dispute resolution

- A service supplier ... will have recourse, either at any time or after a reasonable period of time ...
- to an independent domestic body... to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time ...

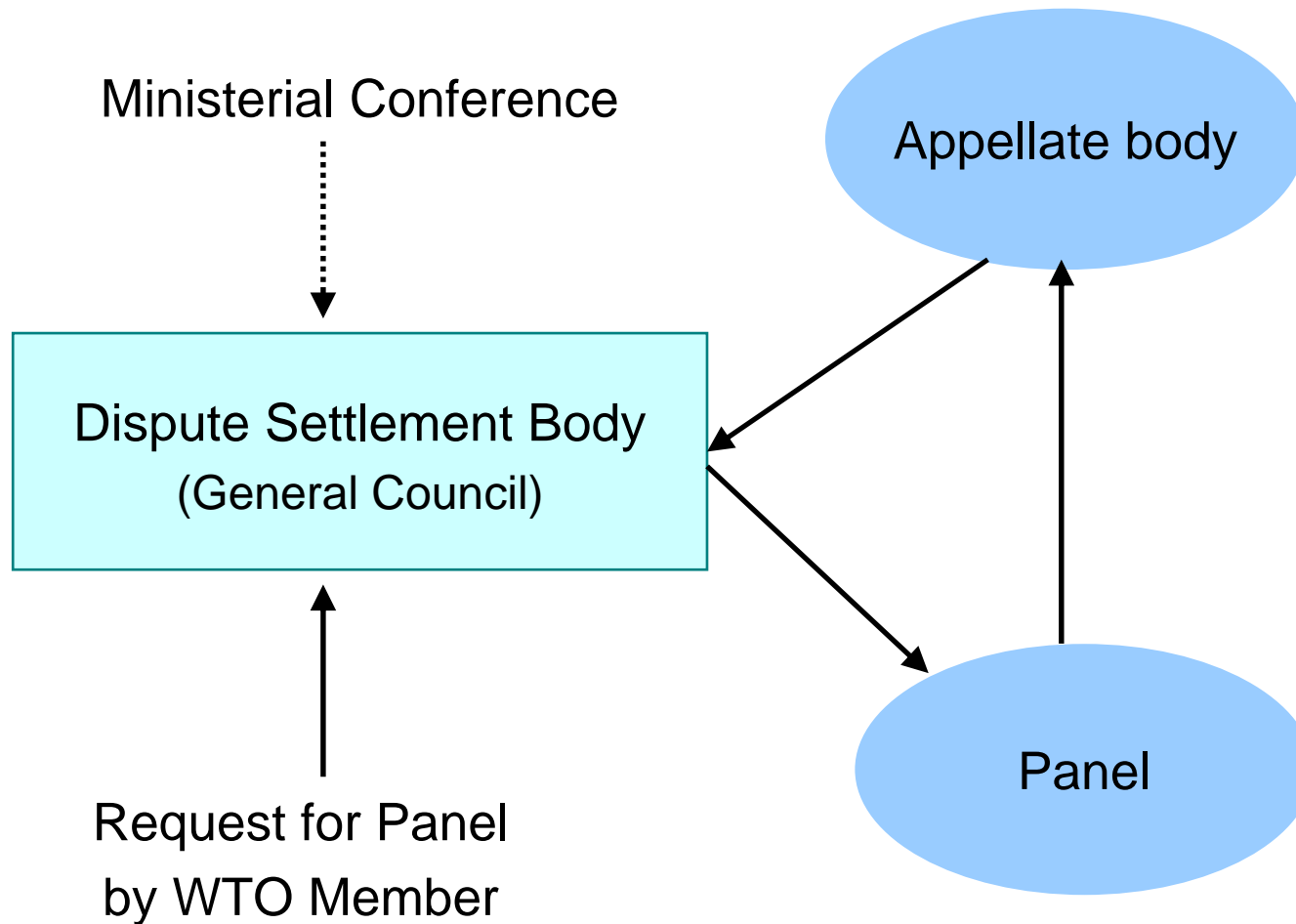
Reasonableness

- Ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner
- Reasonable being:
 - not extreme or excessive
 - having a rational ground or motive
 - logical, sensible, sound
 - appropriate or suitable to the circumstances or purpose
- Flexibility and balance are also part of the notion of "reasonable"

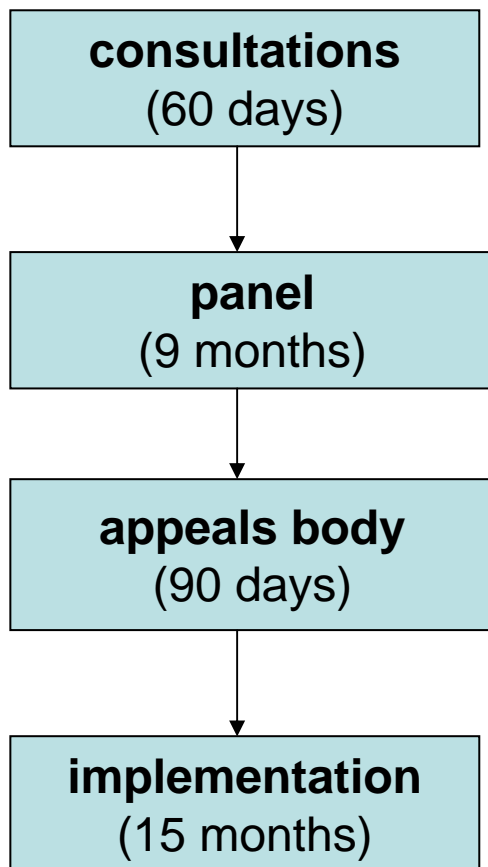
Independent regulator

- The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services
- Decisions are left to individual governments
- The areas of concern must be:
 - independence
 - clear and adequate authority and powers
 - selection and appointment mechanisms for senior staff
 - funding mechanisms
 - legal mechanisms

Dispute settlement process



Process and timing



- Member state indicates the reasons, identifies the measures and the legal basis for the complaint
- Consultations between member states to seek agreement, others with a substantial trade interest can join the process
- If consultations fail within 60 days a panel can be requested
- A panel of 3 independent experts to make an objective assessment of the facts, the applicability of and conformity with the relevant agreements
- Third parties allowed with a substantial trade interest
- Appeals are limited to the parties in dispute and only on issues of law and their interpretation by the panel
- Appellate Body (of 7) with recognized expertise in international trade law and unaffiliated with any government
- Member must bring the measures into conformity with its obligations and inform WTO of the timetable
- If no agreements on the timetable, then binding arbitration
- If the measures are not brought into conformity within a reasonable period of time there can be compensation or retaliatory measures

USA versus Mexico

- The first (and so far only) case of WTO dispute resolution on telecommunications services and in services generally
- It was brought in 2000 by the USA
- The case alleged a failure by Mexico to meet its obligations on basic and value-added service
- There were successive rounds of consultations that failed to resolve the issues
- In February 2002 the USA formally requested the establishment of a Panel for a revised claim (based only on basic but not value-added services)
- The Panel issued its final report to the parties in March 2004
- Although neither parties claimed to be fully satisfied the decision was not taken to the WTO Appellate Body
- The WTO's Dispute Settlement Body adopted the Panel report in June 2004
- Mexico and the USA agreed a plan to redress the underlying problems by July 2005

The commitments

- The services were:
 - public voice telephony
 - circuit-switched data transmission
 - facsimile services
- Provided both on a facilities and non-facilities basis
- Mexico had scheduled telecommunications commitments under the GATS
 - Articles XVI (market access)
 - XVII (national treatment)
 - XVIII (additional commitments, i.e., Reference Paper)

The complaint against Mexico

- Failed to ensure that TELMEX, the largest operator, interconnected with U.S. cross-border suppliers of services on cost-oriented, reasonable rates, terms and conditions
(Inconsistent with Sections 2.1 and 2.2 of its Reference Paper)
- Failed to prevent anti-competitive behavior, as regulations empowered TELMEX to fix rates for international interconnection on behalf of all suppliers in the market, resulting in a cartel
(Inconsistent with Section 1.1 of its Reference Paper)
- Failed to ensure access by suppliers from the USA to public telecommunications networks in Mexico, thus preventing them from providing non-facilities based services within Mexico (through commercial agencies or 'comercializadoras') and international simple resale (through cross-border leased circuits)
(inconsistent with Articles 5a and 5b of the GATS Annex)
- The significance:
 - In 2000, Mexico accounted for 16 percent of total outgoing international telephone traffic from the USA
 - Net international settlements from operators in the USA to foreign correspondents reached a record high \$3.9 billion in 2002, of which about 19 percent was paid to Mexican operators

Findings

- “Interconnection” includes linking of a network in one country with the network of another country at the border so the Reference Paper obligations relating to interconnection apply to termination of international traffic at the border. Existence of the accounting rate system does not eliminate application of the interconnection obligations in the Reference Paper.
- “Mode 1” (cross-border supply of services) does NOT require a supplier to operate, or to be present in some way, on both sides of the border.
- The “relevant market” for purposes of determining whether a supplier is a “major supplier” for purposes of the Reference Paper is defined by application of a “demand substitution” test.
- “Cost-oriented” means pricing based on the costs incurred in supplying the service, in this case the interconnection service. “Cost-oriented” does not equate exactly to cost, but should be founded on cost. Costs associated with the general state of the telecom industry or the coverage and quality of the network CANNOT be included in calculating interconnection costs.
- Prices for termination at the border that are 75% higher than costs for domestic termination are not “cost-oriented.” The fact that the international termination rates are consistent with benchmarks set by the ITU is not relevant to the analysis.
- “Reasonable” means “something of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose.”

Findings (2)

- Prices for access to and use of the public telecommunications network must be reasonable. Prices that are "reasonable" for purposes of the Telecom Annex may be higher than rates that are cost-oriented in terms of the Reference Paper.
- Rates that exceed cost-based rates "by a substantial margin" and whose uniform nature exclude price competition do not provide "access to and use of "the public telecommunications network and services on "reasonable" terms.
- "Anti-competitive" practices include any action that lessens rivalry or competition in the market. The list in paragraph 1.2 of the Reference Paper is not exhaustive and other practices, such as price fixing and formation of cartels are covered by paragraph 1.2.
- The obligation to ensure access to and use of the public telecommunications network under the Annex on Telecommunications applies to foreign suppliers of any basic telecommunications services included in a WTO Member's Schedule of Specific Commitments.
- Regulations required to make market access commitments effective should be in place at the time the commitments become effective or soon thereafter and at a minimum, the effort to draft and adopt such rules should be commenced by the time the commitment comes into force.
- Use of the phrase "facilities-based" in Mexico's Schedule of Specific Commitments means that Mexico has NOT agreed to permit provision of service through resale.

Academic criticism

Perhaps the U.S. government believes that U.S. consumers benefit when Mexican consumers lose. That reasoning would be fallacious, however, because it ignores the network effects in telecommunications. U.S. consumers benefit from a more ubiquitous network in Mexico. Consequently, the U.S. government's success at the WTO will hurt its own consumers, contrary to stated U.S. policy. The sole beneficiaries of the U.S. policy appear to be U.S. long-distance carriers, which in all likelihood will widen their margins on calls from the U.S. to Mexico.

Gregory Sidak & Hal Singer *FCLJ* vol. **57**

<http://www.law.indiana.edu/fclj/pubs/v57/no1/Sidak.pdf>

Conclusions

- Commitments under GATS to liberalize markets and follow the Reference Paper provide leverage to keep domestic telecommunications reforms on track and resist the inevitable pressures brought to bear by incumbents to slow down or reverse the process
- However, these commitments should not be undertaken without serious consideration of the capacity and political will to implement them
- Governments will also need to make an informed decision on applying the GATS and Reference Paper principles to the settlement of international traffic

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