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Trade and Competition Interlinkages: The Case of Telecom

by

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I. INTRODUCTION

The most remarkable feature of the WTO Telecommunications Agreement, concluded in February 1997, is undoubtedly that almost all participating countries (but for Ecuador and Tunisia) agreed to enter into additional commitments concerning regulatory principles to be applied in the telecommunications sector. These principles are derived from a brief Reference Paper (hereinafter RP),[1] which was prepared by a group of countries in the run-up to the April 1996 deadline. Some countries (Bolivia, India, Malaysia, Morocco, Pakistan, the Philippines, Turkey and Venezuela) did not adopt the whole of the Reference Paper, while others (Bangladesh, Brazil, Mauritius and Thailand) indicated they would adopt it at a later point in time.

The purpose of the RP is twofold: to provide the requisite safeguards in domestic law for the market access and foreign investment commitments to be truly effective, and to anchor these safeguards in the WTO system and hence make their inadequate implementation challengeable through the WTO Dispute Settlement system.

The telecommunications sector in most countries in the world has until recently operated under a legal monopoly regime, whereby one or a few operators held the exclusive right to provide telecommunications services. Whenever liberalization occurs, the former monopoly operator is by definition almost always the dominant player on the market. It is in many ways advantaged, if only because its network is

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[1] The Reference Paper was circulated by the WTO together with the results of the GBT. It attached as an annex to this contribution. Like many other documents, it can be found on the WTO Internet site at http://www.wto.org.

already in place and it has a strong customer base. Usually, it also wields more political clout than any entrant, although this often means that it will be burdened with certain obligations which it would not otherwise have incurred on the basis of free market principles (whether they are called universal service obligations, open network provision requirements or otherwise).

The RP contains a core of principles designed to ensure that the advantages of the former monopoly operator are not used to the detriment of new entrants on the telecommunications markets. These principles constitute a special type of competition law: they address market behaviour in one market only, and they are written for a particular market situation, where new entrants are considered to need help pro-actively to unseat powerful incumbents with often close links to the government.

II. AN ANALYSIS OF THE 'REFERENCE PAPER' INCLUDED IN THE WTO TELECOMS AGREEMENT

Scope

According to the heading "Scope" at the very beginning, the RP applies to basic telecommunications services. It makes almost no practical difference that the *obligational* content of the RP is imposed only on suppliers of basic services, since in all likelihood no supplier of value-added or enhanced services gives rise to the type of concerns behind the RP (the markets for value-added services are usually competitive). On the other hand, there is no reason why providers of all types of telecommunications services should not have benefited from the *rights* that will be granted to suppliers when the RP is implemented by WTO members.

The RP is divided into six headings: the first two (competitive safeguards, interconnection) apply to the regulation of "major suppliers", while the last four (universal service, licensing, independence of the regulator, allocation of resources) deal with general regulatory issues.

The regulation of "major suppliers"

The first two headings of the RP concern "major suppliers" of telecommunications services within a given country. The RP defines a "major supplier" as one:
(i) with a power "materially [to] affect the terms of participation (having regard to price and supply)";
(ii) flowing from one of two alternative situations, namely control over essential facilities *or* the position on the market
(iii) in the relevant market for basic telecommunications services.

Each of these elements is hereafter commented in turn.

(i) The precise nature of the power to affect the terms of participation in the market is not clear. At first sight, it seems that it should not be simply equated with market power or a dominant position, *i.e.* the ability to behave independently of the market.[2] The phrase "affecting the terms of participation"

[2] The ECJ in *Michelin* v. *Commission*, Case 322/81, [1983] ECR 3461 defined a dominant position as the possibility "to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers."

on its face would appear to mean quite a radical influence on the market, namely the power to exclude or control the participation of market actors. The RP is therefore concerned with suppliers which have a particularly strong dominant position on the market, a kind of discipline power. That power can be exercised through means such as cutting off the supply of "building blocks" needed to make up the relevant product or squeezing off market actors by offering these building blocks at prices where actors on the market cannot hope to realize a sustainable margin on their own market prices. In concrete terms, if a given TO holds the public telecommunications network and therefore the main source of leased line capacity (presumably), it can very well discipline players on the data communications market, for instance, by refusing to supply leased lines or by pricing them so high that it becomes impossible to operate on that market. It would seem that only this type of strong market power is envisaged by the wording of the Reference Paper.

(ii) In order for a supplier to qualify as a major supplier, the power to discipline discussed under (i) must come from control over essential facilities *or* the position on the market.

The introduction of "essential facilities" as an alternative criterion is noteworthy. So far, the so-called "doctrine of essential facilities" has generally been presented as a special case of a dominant or monopoly position.[3] The RP, however, avoids complicated market analysis while still allowing to characterize a supplier as a Αmajor supplier≅ on the basis that it controls an essential facility.[4]

The RP defines essential facilities as the parts of a public telecommunications transport network or service (a) which are exclusively or predominantly provided by one or a few suppliers *and* (b) for which there is no economically or technically feasible substitute. While condition (b) echoes the widespread view that an especially high level of non-substitutability must be shown to establish that a facility is essential,[5] condition (a) is worded somewhat loosely, in that a facility could be deemed essential even if it was provided on a competitive basis by a few suppliers (the RP does not require that there these suppliers would exercise joint dominance, i.e. constitute an oligopoly) .

(iii) It should be noted that the wording of the RP does not require that the major supplier itself be active on the relevant market; it can very well exert the power

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3 See the presentation of the doctrine in the main jurisdictions where it has been used in Van Siclen, *Background Note* in OECD, *The Essential Facilities Concept*, Competition Policy Roundtables No. 5, OCDE/GD(96)113 at 7-10. See also Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 Fordham Int'l L.J. 437 (1994).

4 The European Commission appears to follow the traditional approach in its *Communication on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector,* OJ 1998 C 265/2.

5 For a recent, strict interpretation of the concept 'essential facilities' see the ECJ in *Oscar Bronner v. Mediaprint*, Case C-7/97, judgment of 26 November 1998, not yet reported. The Court followed the Opinion of Advocate General Jacobs of 28 May 1998. The case concerned the distribution of newspapers.

in question from an upstream, downstream or neighbouring market.[6] It may seem in theory that a major supplier would have no incentive to use such a discipline power were it not itself active on the relevant market or intent on doing so, and that accordingly there should be no competition or regulatory concern if the major supplier is not active on the relevant market. In practice, given the difficulties which have surrounded market definition in the telecommunications sector so far, at least in Europe,[7] it is certainly more convenient not to burden the inquiry further by requiring that the major supplier be also present on the relevant market.

However, the scope of the obligations of a major supplier in the RP arguably is restricted by the reference to a relevant market for *basic* telecommunications services. Such a restriction appears arbitrary. Thus, a TO which is offering value-added services (e.g., a value-added virtual private network) may not be able to rely on the RP in relation to an incumbent who controls the public telecommunications infrastructure -- unless, perhaps, this TO is only asking the incumbent to provide him with certain basic telecommunications services (such as leased lines) as 'building blocks' in the offer of his value-added services.

The definition of major supplier in the RP is framed in "competition law" terms, *i.e.* generally, by reference to relatively indeterminate notions. It remains to be seen whether such notions are enforceable in WTO dispute settlement proceedings. In other words, the use of such a general definition for a central element of the RP casts some doubt on the ability of the RP to fulfil its objective (creation of enforceable safeguards against anti-competitive behaviour).

In contrast, it is interesting to see that neither the USA nor the EC use such a general definition in their telecommunications *regulatory* framework, relying instead on more clear-cut criteria. In the USA, the new Telecommunications Act of 1996 uses the regulatory classification of service providers as local exchange carriers,[8] incumbent local exchange carriers[9] and Bell operating companies[10] to impose certain obligations going beyond those resting on telecommunications carriers in general.[11] The EC definition is more general than the US one, but still more concrete than in the RP: the new ONP regulatory framework uses the concept of telecommunications organizations "having significant market power" to justify the imposition of the kind of obligations foreseen in the RP, whereby a share of 25% in a given market will be indicative of significant market power. Factors to be examined to deviate from the result of the market share test include the ability to influence market conditions, the turnover relative to market size, control of access to customers, financial resources

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[6] Giving rise to the same type of situation as was considered by the ECJ in *Tetra Pak* v. *Commission*, Case C-333/94, Judgment of 14 November 1996, [1996] ECR I-5951.

[7] See van Duijvenvoorde, *Informatietechnologie en Europees mededingingsrecht* (Kluwer, Deventer, 1996) at 211-23.

[8] 47 U.S.C. § 251(b).

[9] 47 U.S.C. § 251(c).

[10] 47 U.S.C. § 271 and ff

[11] 47 U.S.C. § 251(a).

and experience in the market.[12] It may have been impossible to reach agreement at such a level of specificity within the more heterogeneous group of WTO countries.

Competitive safeguards

As a general principle, the RP contains a commitment to enact appropriate measures to prevent anti-competitive practices by major suppliers.[13] In the specific case of telecommunications operators holding a monopoly or exclusive/special rights, the obligations of the RP complement those of the GATS.[14] To the extent that anti-competitive practices are not defined but for the specific examples given in the RP, it would appear that WTO members could meet this commitment either through the application of general competition law or in the absence thereof, through a specific regulatory provision for the telecommunications sector whereby a set of defined practices would be forbidden.

The RP lists three examples of anti-competitive practices, namely (i) cross-subsidization, (ii) use of information obtained from competitors and (iii) withholding technical and commercial information.[15]

(i) Cross-subsidization is not defined, but for the qualification "anti-competitive". Generally, cross-subsidization consists in the use of profits derived from one area of operations in order to finance another area (presumably loss-making). That is a common business practice. Yet it can become anti-competitive when the operations in the profit-making area are conducted pursuant to exclusive or special rights or when the major supplier in question holds a dominant position in the profit-making area. As experience in the EU shows, however, it can be quite difficult to translate a complaint about unfair or >cross-subsidized= prices for liberalized services into violations of general competition law.[16] If cross-subsidization is to be prevented, an appropriate regulatory framework must be developed. In order to be able to monitor whether any cross-subsidization occurs, one of the first regulatory elements required is that the major supplier in question implement an appropriate accounting system, with regular reporting and disclosure requirements.[17] Given the size and service portfolios of large

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12 *Directive 97/33/EC on interconnection in telecommunications with regard to ensuring universal services and interoperability through application of the principles of open network provision (ONP)*, OJ 1997, L 199/32, Art. 4(2) and (3), 8(2); *Directive 97/51/EC amending Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications*, OJ 1997, L 295/23, Art. 2(3); *Directive 98/10/EC on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment replacing Directive 95/62/EC*, OJ 1998, L 101/24, Art. 2(2).

13 Par. 1.1 RP.

14 Article VIII GATS.

15 Par. 1.2 RP.

16 See Hancher & Buendia Sierra, *Cross-Subsidization and EC Law,* 35 Common Market Law Review 901 (1998); Bronckers, *Cross-Subsidization in EC Competition Law,* in State Entrepreneurship, National Monopolies and European Community Law 103-112 (Stuyck & Vossestein eds., Kluwer, Deventer, 1993).

17 See the requirements imposed pursuant to *Directive 97/33/EC*, *supra*, note 12 at Art. 7(5) and Annex V. The European Commission has drawn up a *Recommendation on*

telecommunications companies, it is otherwise almost impossible to prove that cross-subsidization has occurred. Yet the RP is silent on this issue, which leads one to doubt the effectiveness of a general commitment to prevent cross-subsidization without more.

(ii) TOs typically operate at many levels in the telecommunications sector. They will for instance both supply leased lines to data communications providers in order to enable them to complete their network and at the same time offer data communications in competition with those providers. In that example, in the course of supplying leased lines to its data communications competitor, a TO would likely obtain information from the competitor which is often precise enough to identify the customers of the competitor or to guess the intentions of a competitor. If that information is relayed to the data communications division of the TO, it can be used for anti-competitive purposes (although the RP does not specify what "anti-competitive purposes" could mean).[18] Here as well, structural measures such as the legal separation of business divisions operating in different markets can be needed, although the RP does not mention this.

(iii) This anti-competitive practice is defined in absolute terms and not in non-discrimination terms, which means that on the face of the RP a major supplier could be forced to disclose technical and commercial information to third parties which want to provide a certain service even if neither the major supplier itself nor any other party is already providing that service. These far-reaching consequences, if they were intended, can only be explained through the high degree of market power held by the major suppliers falling within the RP definition (see above).

Interconnection

The provisions on interconnection form the core of the RP. In large part, they also seek to prevent anti-competitive behaviour by a major supplier, and they accordingly are closely linked to the provisions discussed above. Interconnection is defined as the "linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier".[19]

This definition closely resembles the standard US and EC definitions. In the USA, interconnection is defined as the "physical linking of two networks for the mutual

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interconnection pricing in a liberalised telecommunications market, Part 2 - Accounting separation and cost accounting, OJ 1998, L 141/6. For examples in concrete cases, see the conditions and obligations imposed by the European Commission in *Atlas* (Case IV/35.337, Decision of 17 July 1996, O.J. 1996, L 239/23), *Phoenix/GlobalOne* (Case IV/35.617, Decision of 17 July 1996, O.J. 1996, L 239/57) and *Unisource/Telefónica* (Case IV/35.830, Notice of 12 February 1997, O.J. 1997, C 44/15).

[18] The risks for competition associated with the movement of confidential information amongst divisions and subsidiaries was a major concern of the US Department of Justice in *US* v. *MCI*, Civil Action 94.1317, Consent Decree filed on 15 June 1994, and *US* v. *Sprint Corporation*, Civil Action 95.1304, Consent Decree filed on 13 July 1995. In these two cases, stringent requirements were imposed in this respect.

[19] Par. 2.1 RP.

exchange of traffic",[20] while in the EC, it is the "physical and logical linking of telecommunications networks used by the same or a different organization in order to allow the users of one organization to communicate with users of the same of another organization, or to access services provided by another organization".[21] In contrast to customer access, interconnection is granted between telecommunication service operators. It occurs not at network termination points, but rather at more central points of the network,[22] and it offers a quite different and more extensive range of possibilities (such as calls between users of both networks, etc.).

The RP enumerates the parameters of the obligation to ensure interconnection, namely:[23]

- interconnection must be made at any technically feasible point;
- the terms, conditions and rates must be Anon-discriminatory≅, and the quality of interconnection, "no less favourable" than that provided to subsidiaries, affiliates or third parties. This leaves open the question of whether subsidiaries or affiliates can be interconnected according to proprietary protocols, as long as others are offered an equivalent interconnection according to an established standard.[24] In business terms, allowing proprietary protocols fosters the efforts of affiliated entities to develop competitive advantages through innovative seamless services;
- it must be provided in a timely fashion;
- the rates must be cost-oriented (and not necessarily cost-based);
- the terms, conditions and rates must be transparent and reasonable, having regard to economic feasibility;
- there must be "sufficient" unbundling, so that there is no need to "pay for network components or facilities" that are not required. Similar provisions are found in the new US *Telecommunications Act of 1996*[25] and the EC interconnection directive.[26] Such provisions are difficult to apply unless the regulatory authority intervenes to provide a classification of network components in order to make the obligation more concrete.[27] The RP does not contain any provisions on this;

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20 Interpretation given by the FCC to the interconnection obligation of the local exchange carriers (LEC) pursuant to the new Telecommunications Act of 1996, 47 U.S.C. § 251(c)(2), in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, 61 Fed. Reg. 45476 (8 August 1996) at 47.

21 Article 2(1)(a) of *Directive 97/33*, *supra*, note 12.

22 For instance directly to a local switch.

23 Par. 2.2 RP.

24 This has been allowed in the *Atlas* and *Phoenix* cases by the US Department of Justice (*US* v. *Sprint Corporation*, *supra* note 18 at item III.I) and the European Commission (Case IV/35.337, *supra*, note 18 at p. 54).

25 47 U.S.C. § 251(c)(3).

26 *Supra*, note 12 at Art. 7(4).

27 In the USA, this has been done by the FCC in the *Local Competition Order*, *supra*, note 99 at 97-409. There is no indication that the European Commission will do the same

- interconnection must also be provided upon request at points other than those provided to the majority of users, subject to charges for additional facilities.

Unless otherwise noted above, the parameters contained in the RP broadly follow the most recent legislative efforts in the USA and the EC, although the RP, as can be expected, does not go in much detail. For instance, in the EC the Commission has published a recommendation on the pricing formula for interconnection,[28] and regularly publishes 'best practice' rates.[29]

The RP contains provisions on transparency.[30] It can be noted that, even though the RP imposes a general duty of non-discrimination and the public availability of interconnection agreements or standard offers,[31] some negotiation would still be needed for newcomers to obtain interconnection agreements (with prolonged discussions as to what terms and conditions are non-discriminatory). The RP does not go as far as the US *Telecommunications Act of 1996*, which forces local exchange carriers to offer to other telecommunications carriers the same terms and conditions as those offered under existing interconnection agreements.[32]

The RP stipulates that Parties must make available dispute settlement mechanisms to telecommunications service providers in case of disagreement with a major supplier on the terms, conditions and rates for interconnection.[33] No indication is given as to what is meant by "resolving" the dispute, *i.e.* whether an agreement can be imposed on the parties or not. Telecommunications regulators in the EC, for instance, have the power to intervene and impose interconnection terms on parties who fail to agree.[34]

Cross-border interconnection

Interconnection is normally of interest to telecommunications operators who want to compete with the incumbent on the latter's domestic market. However, interconnection can also become of interest to foreign operators who seek alternative means to terminate their international traffic in a particular country (an example of such 'cross-border interconnection' would be a US telecommunications company seeking to terminate its outgoing traffic to a European country). The reason is that international telephone traffic is frequently still processed according to a pricey

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in the EC; the task would then be left to Member States, with the inherent risk of divergences and incompatibilities.

28 *Commission Communication on interconnection pricing in a liberalised telecommunications market*, OJ 1998, C 84/3.

29 *Commission Recommendation on interconnection pricing in a liberalised telecommunications market, Part 1 - Interconnection pricing*, OJ 1998, L 73/42, as modified by OJ 1998, L 228/30.

30 Par. 2.3 and 2.4 RP.

31 Par. 2.2 and 2.4 RP respectively.

32 45 U.S.C. § 252(I). Such an obligation can work as a disincentive to negotiate.

33 Par. 2.5 RP.

34 *Directive 97/33*, Art. 9(3).

correspondent system, which was developed earlier this century when almost all countries were served by monopoly TOs, often State-owned.

In the correspondent system the TO of the originating country co-operates with the TO of the terminating country to complete telephone calls or other services. They have construed special circuitry for the physical handling of these calls, often involving third countries as well through which international calls may be routed. The TO of the originating country alone collects a fee from the caller (collection rate). As between the originating and terminating TOs an 'accounting rate' is agreed. For each minute of international traffic, the TO of the originating country will then owe a fraction of the accounting rate (usually up to half, called the 'settlement rate') to the TO of the terminating country, in order to compensate the latter for the completion of the international call (third countries, through which international calls are routed, will also receive a fraction).

A central weakness of the current system is that the often high accounting rates bear no relationship to customer prices or the underlying costs of the international traffic. Efforts have been underway for some time to renegotiate the accounting rate system, and generally bring these rates down. Resistance to change is strong, however, as the sums of money involved are very considerable, and as a number of (notably developing) countries use the income for accounting rates for the upkeep and development of their telecommunications infrastructure in general.

While these international negotiations are continuing, the accounting rates have come under pressure from other sources. For instance, the EC Commission has recently opened investigations under general competition law into the highest accounting rates charged by seven incumbent TOs for international traffic within the EC. According to the EC these high rates may constitute abuses of a dominant position.[35]

A different approach is for a foreign telecommunications provider to establish its own presence (e.g., a point of interconnection) in the countries to where most of its international calls are destined, and to claim interconnection rates from the incumbent TO for the last leg of its international calls. In this way the originating TO bypasses the special circuitry dedicated for international calls altogether,[36] therefore does not need to pay accounting rates, and can claim interconnection rates. Even if cross-border interconnection involves some additional costs for the incumbent compared to the interconnection of purely local calls, cross-border interconnection rates will generally be much lower than the accounting rates. As indicated above, the RP stipulates that interconnection rates must be 'cost oriented'; no exception is made for cross-border interconnection.

This approach certainly has its attractions, but is not without drawbacks. The originating TOs will have to invest in local points of interconnection in a number of countries.[37] Particularly for smaller TOs these investments may add up to a

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35 Commission press release, IP/98/763 of 13 August 1998.

36 This is also of interest to originating TOs in a liberalized market. New entrants in this market will have no dedicated international circuitry of their own, and will normally depend on the cooperation of the local incumbent (or of other incumbents with such circuitry) to terminate their outgoing international traffic).

37 Note that, according to the EC Commission, telecommunications operators within the EC may not require such local investments in points of interconnections as a condition

significant expense. In any event, these investments would be unnecessary, if cost-oriented accounting rates would be charged for the use of existing circuitry dedicated to international traffic. A drawback for the terminating TO notably occurs in the event it is faced with demands for cross-border interconnection from TOs who, in turn, refuse or make it difficult to request such low rates when terminating the international traffic of others (e.g., a telecommunications company from a developing country requests cross-border interconnection rates to terminate its outgoing traffic to the Netherlands from a Dutch operator, but this Dutch operator is unable -or only able after considerable expense or under certain limiting conditions- to obtain cross-border interconnection rates for the termination of its outgoing international traffic to the developing country).

Against this background, cross-border interconnection raises some interesting commercial and legal questions. Will cross-border interconnection schemes replace the traditional correspondent system for handling international traffic, or will they merely add pressure to reduce the accounting rates? Can a TO subject its offer of cross-border interconnection rates to the condition that it is able itself to obtain such low rates in the country where the international call originates?

Universal service

The RP does not provide any definition or parameters for universal service, expressly leaving it to each WTO member. Parties to the Telecommunications Agreement are, however, expected to commit that their rules on universal service will be transparent, non-discriminatory, competitively neutral and not unduly burdensome.

Licensing

The RP contains commitments on the public availability of licensing criteria, time periods required to decide on a license application and terms and conditions of individual licenses.[38] Furthermore, reasons are to be given when licenses are denied.

The content of the RP on licensing is limited, and some major issues are not addressed:

- The RP does not attempt to define the situations in which a license can be required, nor does it outline the terms and conditions which should or should not be found in a license. Licensing can become a substantial barrier to cross-border trade, since a service provider can be subject to fairly different (and sometimes incompatible) licensing conditions from one country to the other, even if each country applies an even-handed licensing process. Moreover, when the scope of activities for which a license is required is defined broadly and the time period for issue is relatively long, new market entrants are penalized by having to wait while the incumbent catches up. In the EC, one of the central elements of the new regulatory framework is a Directive on a common framework for licensing.[39] The RP does not address

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to grant each other cross-border interconnection rates. See the Commission's Communication on interconnection pricing, *supra* note 28, at para. 5.1.2.

[38] Par. 4 RP.

[39] *Directive 97/13/EC on a common framework for general authorizations and individual licences in the field of telecommunications services*, OJ 1997, L 117/15.

these issues. The GATS general proportionality rule,[40] however, could be used to keep disproportionate licensing requirements in check.

- There is no provision for the mutual recognition of licenses in the RP. The GATS otherwise contains a mere encouragement to mutual recognition of licenses and a non-discrimination obligation.[41] In the telecommunications sector in particular, it is very important to be able to operate globally, i.e. at both the international and domestic levels. A regional operator wanting to serve the Mercosur area, for instance, would likely have to obtain licenses from each and every country. It is however understandable that the RP does not touch upon this issue, since even within the EU, agreement on the mutual recognition of telecommunications licenses has proven elusive. [42]

- On the other hand, one must also recognize the limitations of the RP in particular, and of the GATS in general, to limit or regulate licensing conditions in the telecommunications sector. Governments will want to retain discretion to impose licensing conditions for public policy reasons. Given the theme of this conference, it is noteworthy that one area of public policy which may justify licensing conditions is competition law. Thus, market access of foreign TOs who are found to violate notions of competition law in a country may be denied or restricted. For example, recalling the discussion above regarding cross-border interconnection, it is conceivable that a country might hold that the denial of cross-border interconnection rates to its TOs in a foreign country X could result in unfair competition (e.g., low, cross-subsidized rates) on its domestic market. On this ground that country might deny a license to TOs from country X to establish a local point of interconnection with which they could terminate their international traffic.[43]

It is unfortunate that the RP contains an obligation to provide reasons only in cases where a license is denied, and not in cases where a license would be granted with conditions which the applicant may not have desired.

Independence of the regulatory authority

Pursuant to the RP, signatories to the Telecommunications Agreement are bound to guarantee the separation of the regulatory authority from any supplier of basic telecommunications services, as well as its impartiality.[44] There is however no

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[40] Art. VI GATS, discussed below.

[41] Art. VII GATS.

[42] The Licensing Directive, *Directive 97/13/EC*, *supra*, note 39, contains no substantive provisions on the mutual recognition of licenses. At Article 13, the Commission is simply given the mandate to develop a one-stop-shopping procedure, which would not ensure mutual recognition but rather the simultaneous and coordinated issue of licenses through the EC. The previous proposal of the Commission on this point provided for some recognition of foreign licenses, but it had to be withdrawn in the face of opposition from the Member States (see OJ 1994, C 108/11).

[43] This example is not entirely theoretical. The United States has employed a Equal Competitive Opportunities (ECO) test when considering license applications from foreign telecommunications providers.

[44] Par. 5 RP.

provision in the RP which compares to the requirement in EC law that, when the TO is state-owned or -controlled, the regulatory authority should also be structurally separated from the government departments in charge of exercising the ownership and control functions over the TO.[45] Indeed, when the local TO is State-owned but autonomous, two sometimes distinct sets of interests can potentially conflict with the regulatory authority: the interests of the TO itself as a business and the interests of the government as the owner of the TO. Even if the regulatory authority is independent from the TO as a business, it can still conflict with the government as owner, for instance when privatization is taking place.

The RP is silent on some other important issues as well, such as the circumstances in which a recourse to an independent authority will be open (except in the case of interconnection disputes) or the standing requirements for foreign entities before that independent authority.

Allocation and use of scarce resources

The RP includes commitments to allocate and use frequencies, numbers, rights of way and other scarce resources in an objective, timely, transparent and non-discriminatory manner, with a reservation for the national security interests in the secrecy of certain frequency spectrum allocation.

Concluding assessment

As a document concerned with telecommunications regulation, the RP constitutes a solid basis, but as demonstrated above, it still leaves many issues open. In general, the RP avoids the "heavier" regulatory issues that are no less essential to ensure a level playing field: transformation of TOs into private law companies (including privatization), cross-subsidization, accounting standards for TOs, the definition of the network and service components to be unbundled, universal service, services for which individual licenses may be required or not, terms and conditions attached to licenses or the recognition of foreign licenses, the independence and powers of the regulator.

III. COMPETITION OR REGULATION?

At this point, it is appropriate to draw certain conclusions as to the significance of the Telecommunications Agreement for the WTO as a whole, notably as far as the inclusion of competition law in the WTO is concerned. That is a topical issue of broader interest as well, now that a working group has been established to study the interaction between trade and competition policy, following the Ministerial meeting in Singapore.[46]

It will be recalled that pursuant to the GATS, members have agreed to enter into consultations with each other, and to provide each other with information whenever one of them has concerns about anti-competitive practices generally of a service

[45] Art. 5(a)(2), second dash, of Directive 90/387, as it is amended by *Directive 97/51/EC*, *supra*, note 12.

[46] See WTO/MW(96)/DEC/W (13 December 1996) at par. 20.

supplier.[47] For the time being, this consultation and information procedure is quite modest, and it adds little to the general consultation provision of the GATS.[48] Moreover, there are no obligations regarding the content and the enforcement of competition rules. Accordingly, it is doubtful that service providers with pressing complaints about the anti-competitive practices of their competitors will find any comfort in this provision.

Nonetheless, it is notable that the GATS touches upon competition law, given the reluctance of WTO members to include competition law as an item for negotiations in WTO. There are other provisions already in the WTO that deal with competition law.[49] The most elaborate framework now is the RP.[50] This marks a departure from the original decision that the GATT ought not to deal with restrictive business practices of private parties.[51] In fact, one sometimes has the impression that the WTO membership has not yet fully realized the consequences of including references to competition law issues in several of the new WTO agreements. This suggests that some form of general agreement on competition will have to be included in the WTO to give a solid base in international trade law to all these references to competition law.

Yet various reasons have been advanced against a WTO agreement on competition law. Firstly, such an agreement will be difficult to negotiate. Secondly, much progress in creating market access can still be achieved through the reduction of governmental trade barriers. Thirdly, a number of competition law problems could perhaps already be tackled through existing the WTO dispute settlement process.[52] Even if one agrees with these points, there are still important reasons in favour of a WTO agreement, or at least a WTO framework for discussing general competition law problems.

Without a common understanding of the goals and methods of competition law, it is difficult to see how WTO members to begin with, and WTO dispute settlers later on, can interpret some of the specific commitments on the prevention of anti-competitive practices. The RP, for instance, includes terms such as "anti-competitive cross-

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[47] Art. IX GATS.

[48] Art. XXII GATS.

[49] For instance, see Art. 8, 31(c) and (k) and 40(2) TRIPS. These provisions are discussed in Bronckers, *The Impact of TRIPS: Intellectual Property Protection in Developing Countries,* 31 Common Market Law Review 1245, 1269-1272 (1994). See also Art. 9 TRIMS.

[50] Holmes, Kempton & McGowan, *International Competition Policy and Telecommunications Lessons from the EU and Prospects for the WTO* 20 Telecommunications Policy 755, 756 (1996).

[51] It will be recalled that one of the reasons why the predecessor of the WTO, the International Trade Organization, failed to materialize in the early 1950s was the resistance to its proposed jurisdiction over private restrictive business practices in Chapter V of the 1948 Havana Charter. This, as well as the cautious follow-up to deal with the issue later on in GATT, is discussed in Hoekman & Mavroidis, *Competition, Competition Policy and the GATT,* 17 World Economy 121, 137-139 (1994).

[52] See *e.g.* Hindley, *Competition Law and the WTO: Alternative Structures for Agreement* in Bhagwati & Hudec eds., *Fair Trade and Harmonization*, Volume 2 (MIT Press, Cambridge Mass., 1996), 333-348; Hoekman & Mavroidis, *id*.

subsidization", "anti-competitive results", "non-discrimination". As pointed out above, these terms are not further defined in the RP. What do these terms mean for the individual WTO members? Without a reference to common principles, and without the benefit of experience in other sectors of the economy, there is a risk of sub-optimal interpretation. It will also be difficult to adjudicate disputes in WTO about the correct interpretation of these critical, but generally worded principles. [53]

Furthermore, while general competition policy is concerned with the overall competitive conditions in a market, sectoral regulation of the kind discussed here focuses primarily on market access for foreign suppliers. At best, the difference in emphasis does nothing to change the pro-competitive outcome that is the putative objective of both competition law and market-opening efforts. At worst, the narrower focus on market access could lead to results that are undesirable for global economic welfare.[54] The EC experience, where even general competition law principles have occasionally been subordinated to (and become tool for) the political goal of market integration, illustrates the problem.[55]

It is conceivable that at least for an initial period of time, market access can be considered a political priority. Accordingly, emphasis is put on sector-specific regulation that is necessary to open up a market, like telecommunications, which previously was heavily regulated. The same political choice has also been made in the EC. Even then, it is recognized that after some time, such sector-specific regulation ought to be replaced again by general competition law.[56] This process appears to be underway in the USA.[57] However, as long as there is no WTO agreement on competition in general, sector-specific regulation will be more difficult to abandon. Accordingly, even from a perspective which prefers sector-specific regulation of competition for an initial period in order to achieve market access, it

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[53] See Low & Mattoo, *Reform in Basic Telecommunications and the WTO Negotiations: the Asian Experience,* WTO Working Paper ERAD 9801, mimeo at p. 25 (1998).

[54] See Hoekman, Low & Mavroidis, *Regulation, Competition Policy and Market Access Negotiations: Lessons from the Telecommunications Sector,* in Competition and Trade Policies: Coherence or Conflict 115-139 (Hope & Maleng eds., Routledge, London and New York 1998).

[55] An example is the current debate on the EC Commission's traditional opposition to restrictions in so-called vertical agreements, like distribution agreements, in order to further economic integration in the EU. See generally Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 CMLRev 973-989 (1995).

[56] See Lasserre, *L'autorité de régulation des télécommunications*, AJDA 224 (1997) The same argument is made in *The great telephone paradox,* The Economist 74 (23 March 1996).

[57] With respect to the long-distance and international markets, for instance, the main operator, AT&T, has been relieved of special regulatory burdens which attached to its dominant position, so that it is now subject to the same general regulatory supervision as other carriers and to competition law: *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, FCC 95-427 (12 October 1995), *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, FCC 96-209 (9 May 1996). In contrast, the Bell operating companies, which still hold a dominant position on the recently opened local market, are subject to heavy regulatory burdens in the transition phase towards competitive local markets: 47 U.S.C. § 271 and ff.

would be advisable as well to start negotiations on a WTO competition law agreement or framework soon.[58]

Furthermore, general competition law may very well co-exist with, and actually reinforce, sector-specific regulation in opening up markets and ensuring fair and effective competition. The case law and guidelines issued by the EC Commission in the telecommunications sector amply illustrate this.[59] Yet as long as there is no WTO competition law agreement, there is no multilateral framework to encourage and check this mix between regulation and competition law rules in the telecommunications sector.[60]

In other words, the RP are a step towards a competition law regime in WTO. Yet the RP can by no means be identified with general competition law. The underlying concern of the RP (redressing competitive distortions caused by government interference) very much resembles that of traditional trade law. In view of the theme of this conference, the RP could perhaps be characterized as a (provisional) bridgehead between trade and competition law.

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58 Apart from ensuring an optimal interpretation of the additional regulatory commitments in the telecom sector, as well as their temporary existence, there are other arguments favouring a multilateral agreement or framework on substantive issues of competition law. See Campbell, Rowley & Trebilcock, *The Role of Monopoly Laws in the International Trading System,* 1 International Trade Law & Regulation 167-180 (1995); Fox & Ordover, *The Harmonization of Competition and Trade Law*, 19 World Competition 5-34 (No. 2, 1995); Petersmann, *Proposals for Negotiating International Competition Rules in the GATT-WTO World Trade and Legal System,* 49 Aussenwirtschaft 231-277 (1994). See also the Report of the Group of Experts, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, COM(95)359 final (12 July 1995).

59 See, e.g., the Commission’s Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ 1998 C265/2.

60 This distinction between the current approach in WTO and in the EC towards the liberalization of the telecommunications sector was rightly emphasized by Mavroidis & Neven, *The WTO Agreement on Telecommunications: It s Never Too Late,* paper presented at a conference organized by the University of Liège on Competition, Liberalization and State Monopolies (5-6 November 1998).