

Interpreting “Interconnection”: Hermeneutics of the WTO *Mexico-Telecommunications* Case

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Abstract

This paper discusses the hermeneutics of the first GATS panel report, *Mexico-Telecommunications* Case (DS204), with particular reference to its interpretation of the meaning of the word “interconnection” in the Telecommunications Reference Paper.

Having noted that the panel report exposed weakness in persuasion because of the tradition of strict literal interpretation and thus, this paper argues for loosening of the WTO interpretational tradition in order to take into account more comprehensive elements of interpretation in a holistic way.

This paper recommends that the WTO tribunal to develop a structured way to consider the object and purpose of a treaty to a meaningful degree even within the ambit of Article 31 of the Vienna Convention. This paper also recommends that it is time for the tribunal to openly go beyond the interpretation rules of the Vienna Convention to take into account factual contexts at the time of interpretation. This paper goes further to suggest that the WTO tribunal should be prepared to embrace a more purposeful interpretation of the WTO agreements in a dynamic economy which often involves appearance of new gaps in the web of regulation. Finally, it suggests that the WTO develop a structure to carry out some of treaty objectives in cooperation with neighboring institutions, the ITU in this case, and that the WTO tribunal take it into account in balancing the conflicting objectives.

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I. Introduction

A. WTO and Interconnection

It was the Uruguay Round (1986-1994) that first negotiated on telecommunications services. Members made commitments in value-added services¹ and adopted GATS Annex on Telecommunications. The latter deals with access to and use of public telecommunications transport networks and services.² Negotiation continued in the area of basic telecommunications³ for three years after the launch of the WTO. In February 1997, the commitments of 69 governments (contained in 55 schedules) were annexed to the Fourth Protocol of the GATS⁴. The markets of the participants accounted for more than 90 percent of global telecommunications revenues.

Some Members thought market access and national treatment commitments are not enough to open the market for basic telecommunications which had been under government monopoly for a long time. They were afraid that the ingrained preferences for the incumbents and their anti-competitive practices would hamper foreign entrance to the market. Thus, they developed a Reference Paper which covers matters such as competition safeguards, interconnection guarantees, transparent licensing processes, and the independence of regulator. The Reference Paper requires in particular that interconnection be provided in a timely fashion, on conditions and cost-oriented rates that are transparent, reasonable and sufficiently unbundled.⁵

¹ Value-added telecommunication services are telecommunications for which suppliers “add value” to the customer's information by enhancing its form or content or by providing for its storage and retrieval. Examples include on-line data processing, on-line data base storage and retrieval, electronic data interchange, email and voice mail

² The beneficiaries of the disciplines in the Annex are firms that supply any of the services included in a Member's schedule of commitments; not only be value-added and competing basic telecommunications suppliers, but banking or computer services firms, for example, that wish to take advantage of market access commitments made by a WTO Member.

³ Basic telecommunications include all telecommunication services, both public and private that involve end-to-end transmission of customer supplier information. Examples of basic telecommunication services: (a) Voice telephone services, (b) Packet-switched data transmission services (c) Circuit-switched data transmission services (d) Telex services (e) Telegraph services (f) Facsimile services (g) Private leased circuit services (o) Other.

⁴ S/L/20, adopted 30 April 1996; entry into force 5 February 1998.

⁵ Reference Paper 2.2(b).

In relation to interconnection, international accounting rate was the subject of hot debate during the negotiation but without a clear result. A Chair Note of the Group on Basic Telecommunications made on February 15, 1997 shows a temporary compromise:

"7. The Group noted that five countries had taken Article II exemptions in respect of the application of differential accounting rates to services and service suppliers of other Members. In the light of the fact that the accounting rate system established under the International Telecommunications Regulations is the usual method of terminating international traffic and by its nature involves differential rates, and in order to avoid the submission of further such exemptions, it is the understanding of the Group that:

- the application of such accounting rates would not give rise to action by Members under dispute settlement under the WTO; and
- that this understanding will be reviewed not later than the commencement of the further Round of negotiations on Services Commitments due to begin not later than 1 January 2000."⁶

The way in which people reacted and understood the WTO deal on basic telecommunications varied across big bang and little whimper⁷. Its impact on accounting rate system was no less obscure. While some deplored the inaction (or action to defer the issue) with regard to accounting rates⁸, others declared the death of the accounting rate system⁹. The former view saw no normative change in the traditional accounting rate system as there was an understanding on the continuing existence of the accounting rate system among the Negotiating Group on Basic Telecommunications. The latter view noted that the traditional accounting rate system is not compatible with the GATS commitments and thus dead. The first GATS panel report which we discuss deals with this issue.

B. The Case

⁶ Report of the Group on Basic Telecommunications, S/GBT/4.

⁷ William J Drake and Eli M Noam, "WTO deal on basic telecommunications: big bang or little whimper?", *Telecommunications Policy*, Vol. 21, No. 9/10, pp. 799-819, 1997.

⁸ Rob Frieden, "Falling through the cracks: international accounting rate reform at the ITU and WTO", *Telecommunications Policy*, Vol. 22, No. 11, pp. 963-975, 1998.

⁹ Pekka Tarjanne, "Preparing for the next revolution in telecommunications: implementing the WTO agreement", *Telecommunications Policy*, Vol. 23, pp. 51-63, 1999.

The United States have been concerned with the growing deficit in the international telecommunications settlements during the last two decades. Mexico, as one of the largest beneficiary, annually received almost \$1 billion in net settlement payments from the United States in the mid 1990s. Arguing that Mexico's international interconnection measures are in violation of Mexico's GATS telecommunications services obligations, the US brought the issue to the WTO dispute settlement procedure in August 2000.

The WTO panel concluded in its 2004 decision¹⁰, among others, that:

- (a) Mexico has not met its GATS commitments under Section 2.2(b) of its Reference Paper since it fails to ensure that a major supplier provides interconnection at cost-oriented rates to United States suppliers for the cross-border supply, on a facilities basis in Mexico, of the basic telecommunications services at issue;¹¹

Thus, the WTO panel cleared the vagueness by declaring that the traditional uniform settlement regime of international telecommunications is not compatible with the interconnection obligation of the GATS Telecommunications Reference Paper.

It is a perfect victory for telecom operators in the U.S. and some other developed countries. It is also a consolation for proponents of competition policy at the WTO after the dismal setback at the Cancún at the end of 2003. On the other hand, this is dismay for the telecommunications operators in developing countries which have thus far enjoyed the settlement rate surplus. It is also a grave threat to the status and role of the ITU which were regarded as the main forum for the discussion of international accounting arrangement.

¹⁰ WT/DS204/R *Mexico: measures affecting telecommunications services*, 2 April 2004.

¹¹ In addition, the panel concluded that Mexico has not met its competition commitments under Section 1.1 of its Reference Paper; its obligations under Section 5(a) of the GATS Annex on Telecommunications since it fails to ensure access to and use of public telecommunications transport networks and services on reasonable terms; and its obligations under Section 5(b) of the GATS Annex on Telecommunications to ensure that United States commercial agencies have access to and use of private leased circuits within or across the border of Mexico, and are permitted to interconnect these circuits to public telecommunications transport networks and services or with circuits of other service suppliers. On the other hand, the panel saw that Mexico has not made commitment with regard to non-facilities based cross-border supply of telecommunications services.

II. Hermeneutics of the *Mexico-Telecommunications Case*

A. The Approach of the Panel to the GATS Interpretation

The WTO jurisprudence established that the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the Vienna Convention)¹² form part of the ‘customary rules of interpretation of public international law’, which should be followed by a WTO tribunal.¹³ The panel of this case interpreted the GATS commitment of Mexico following the principles of treaty interpretation in the Vienna Convention. Article 31(1) of the Treaty states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Among the three elements in this Article (the terms; context; object and purpose), the WTO tribunals put a special priority on the ordinary meaning of the terms of the treaty.¹⁴

This tradition of literalism is well reflected in the panel’s treatment of the relationship between accounting rate and interconnection. Mexico argued that the Telecommunications Reference Paper does not apply to the issue of international telecommunications interconnection since the Reference Paper governs matters relating to domestic regulation.¹⁵ The panel, however, decides that, following ordinary dictionary and textual meaning of the word, interconnection should be interpreted to include international interconnection. It points out that if the drafters meant to limit the scope they would have inserted the word ‘domestic’.

In support of its argument, Mexico presented that the above quoted Understanding of the Group on Basic Telecommunications which excludes the application of accounting rates from WTO dispute settlement, is an evidence of an intention to

¹² United Nations Treaty Series, vol. 1155, p. 331. See the appendix of this paper for the text.

¹³ WT/DS2/AB/R, *United States – Standards for Reformulated and Conventional Gasoline*, adopted May 20 1996, p. 16; WT/DS8/AB/R, *Japan – Taxes on Alcoholic Beverages*, adopted November 1 1996, p. 10.

¹⁴ Claus-Dieter Ehlermann, “Six Years on the Bench of the ‘World Trade Court’: Some Personal Experiences as Members of the Appellate Body of the World Trade Organization”, *Journal of World Trade* 36(4), 2004, pp. 615-618.

¹⁵ PR, paras 4.3-4.9.

exclude cross-border interconnection from the Reference Paper.¹⁶ The panel, however, reminds a Secretariat note stating that introducing the revised draft of this report, the Chairman of the Group on Basic Telecommunications stressed that this was merely an understanding, which could not and was not intended to have binding legal force. It therefore did not take away from Members the rights they have under the Dispute Settlement Understanding; it was merely intended to give Members who had not taken MFN exemptions on accounting rates some degree of reassurance.¹⁷ The panel states that the Understanding seeks to exempt a very limited category of measures, temporarily, and on a non-binding basis, from dispute settlement, because of possible MFN inconsistencies, and that it does not shield all forms of cross-border interconnection from dispute settlement.¹⁸ It also notes that, at the time of the WTO negotiations on basic telecommunications, ITU recommendations referred in ITR already contained the principle of cost-orientation, transparency and non-discrimination.¹⁹

Subsequent to the discussion of the ordinary meaning, the panel also considers the contextual elements, objects and purposes, and supplementary means for the interpretation of the word, and confirms that the Reference Paper applies to the interconnection of cross-border suppliers. The panel thus seem to have overcome the selective and sequential approach to the elements of interpretation contained in Article 31(1) of the Vienna Convention which characterized the initial jurisprudence of the WTO. This panel at least showed the patience to consider all the elements of interpretation in the Vienna Convention. But, as discussed in the following, what it did to the elements of context and object and purpose seems just ceremonious compared to the great deference it showed to the ordinary meaning.

B. Some Critique of the Panel's Interpretational Approach

¹⁶ PR, para. 4.26.

¹⁷ As reported in a Secretariat note, see PR, para. 7.125. This author could not confirm the Secretariat note for which the panel does not provide reference information.

¹⁸ PR, para. 7.138.

¹⁹ Recommendation D.140 in particular.

1. Expansive Literalism

The panel's interpretation of the word "interconnection" signifies that literal interpretation is not necessarily restrictive interpretation. Quite contrary, an ordinary meaning more often has an extensive coverage when it is detached from its context, object and purpose. Thus, literal approach can be a useful tool to extend the scope of WTO competence. The panel in this case ostensibly follows the method of interpretation shown by the preceding WTO jurisprudence. It seems, however, to have made an error of being neither consistent in literalism nor faithful to the holistic approach.

2. Inconsistency in Literalism: Teleology Concealed?

In discussing a possible special meaning under Article 31(4) of the Vienna Convention for the word 'interconnection', the panel compares the international and domestic interconnection from commercial, contractual, technical and regulatory points of view only to find that there is no significantly different special meaning.²⁰ This author initially does not understand why the panel tries to see the difference in the nature of domestic and international interconnection from commercial, contractual, technical and regulatory perspective. I agree that the difference between domestic and international interconnection from these substantive points of view is diminishing. But, a conceptual boundary of meaning of a word sometimes does not exactly reflect the boundaries of substances of things. Words quite often lag behind the speed of change in the things depicted. Even when the commercial, contractual, technical or regulatory differences have diminished to a minimal, the boundaries of meaning can remain unchanged. As words are used as the tool for legislation, legislators pay their attention not to make a gap between the scopes of the word and the thing depicted. But, in case where there is still difference how minimal it is, regulation depends on the words. That is the expectation of the regulated. Therefore, from a literalist point of view, the panel should have paid more attention to the usage

²⁰ PR, paras 7.112-117

of the words, i.e. ‘interconnection’ and ‘accounting rate’ in the relevant context instead of their commercial, contractual, technical or regulatory character.

The panel does not seriously examine how the words, ‘interconnection’ and ‘accounting rate’ have been used in the international forums where the issue of international accounting rate has been mostly discussed, i.e. ITU, WTO and OECD.²¹ If it did, the panel may have found a special meaning of the interconnection that, in case there is no additional phrase extending its meaning to the international interconnection, it applies for domestic access for public networks in the exclusion of international interconnection or international accounting rates.²² The phrases in the Mexican laws which the panel quoted as an evidence that interconnection includes cross-border interconnection²³ themselves could be a counter evidence that without any additional words to the effect of inclusion of international interconnection, “with foreign networks” in this case, the word ‘interconnection’ normally refers to domestic interconnection. This is the course of reasoning that would predominate if the panel stuck to the approach of literal interpretation.

The panel seemed to have noticed that the pure ordinary meaning rather than any potential special meaning is suitable to deliver a desirable decision to the disputing parties and the trading world in general. The panel may have done so in order that its interpretation best serves the primary purpose of WTO, ‘the expansion of world trade’ or ‘security and predictability’.²⁴ Although it does not state so, the panel may have looked at the development of things behind the words to find out socio-economic (commercial, contractual, technical and regulatory) justifications for its emphasis on the ordinary meaning of interconnection. This, however, is all

²¹ Of course, the burden of proof is actually on Mexico. But the Panel’s questionnaire could be differently composed.

²² This author has not come across any document dealing with the subject of international interconnection whose title includes the word ‘interconnection’ but does not include ‘international’ or ‘accounting rates’. Even FCC documents were distinguishing international settlement rates from international charges. See, e.g. FCC, Report on International Telecommunications Markets 1997-1998, Dec. 1998, pp.5-7.

²³ “[i]nterconnection of public telecommunications networks *with foreign networks* shall be carried out through agreements entered into by the interested parties”; “oversee the efficient interconnection of public telecommunications networks and equipment, *including interconnection with foreign networks*”; “regulate the provision of international long-distance service and establish the terms to be included in agreements for the *interconnection* of public telecommunications networks *with foreign networks*. PR, para. 7.110.

²⁴ See the Preambles of the WTO Agreement and the GATS, and Article 3.2 of the DSU.

speculation. The panel does not even hint on the possibility of the evolution of the term ‘interconnection’²⁵. Its ostensive position is an utter literalism.

3. Context Ignored

The panel’s position regarding the concept of context is not clear. In discussing contextual elements²⁶ the panel included all the elements of Article 31(2), (3), and (4) of the Vienna Convention, despite the fact that the Convention clearly confines context to the elements of Article 31(2). It is unclear whether it is just for the convenience of discussion or the panel has other thoughts. Anyway it has thus effectively prepared the recognition of the concept of factual context in a later case.²⁷

Despite of the broad scope it conferred to the concept of context, the panel was very mean to accept the effect of any contextual elements. In fact, it admitted the relevance of no contextual element which conflicts with the literal meaning.

4. Balking at Object and Purpose

The panel spared just one paragraph to discuss the meaning of interconnection from the view point of object and purpose of the GATS. The paragraph states:²⁸

“... Article I:1 of the GATS provides that the agreement extends to "measures affecting trade in services". Trade in services is defined in Article I:2 to include the cross-border supply of a service "from the territory of one Member into the territory of any other Member". This mode of supply, together with supply through commercial presence, is particularly significant for trade in international telecommunications services. There is no reason to suppose that provisions that ensure interconnection on reasonable terms and conditions for telecommunications services supplied through the commercial presence should not benefit the cross-border supply of the same service, in the absence of clear and specific language to that effect. Since the GATS deals specifically with international trade in services by four modes of supply that are considered comprehensive, it would indeed be unusual for interconnection disciplines

²⁵ The concept of evolution of generic term was invoked by the WTO Appellate Body in the *US-Shrimp* Case, WT/DS58/AB/R, para. 130.

²⁶ PR, 7.108-120.

²⁷ *EC – Chicken Cuts*, WT/DS269 & 286/AB/R, 12 Sept. 2005, para. 176.

²⁸ PR, para. 7.121.

not to extend to an obvious and important mode of international supply of telecommunications services – cross border.”

Does the Use and Disuse Theory apply in treaty interpretation? This author finds the statement unconvincing. First, I do not understand why the panel relies on Article I concerning scope and definition rather than the explicit mention of purposes stated in the preambles or specific provisions of this and other WTO agreements or the generally understood purposes of the Reference Paper.

Second, the panel does not seem to understand the fact that the very existence of different modes of supply testifies different considerations which a country usually takes into account. There are in fact ample reasons for a country to solicit telecommunications services supplied through the commercial presence rather than cross-border supply. To name but a few, a host country can supervise more easily the activities of foreign-affiliated companies which have commercial presence in that country. The level of contribution to the economy of hosting country is higher in the case of commercial presence. There is high possibility of cream skimming by unrestrained cross-border suppliers without serious investment which is helpful to the development of telecommunications infrastructure and service of the host country.

From these considerations, I think that although this case shows a step from sequential literal interpretation towards holistic interpretation, it is very awkward as always is the first step.

5. Limitation of Article 32 of the Vienna Convention

Either one takes the narrow or the broad approach to the meaning of interconnection in this context it leaves the meaning ambiguous or obscure, if not with a manifestly absurd or unreasonable result. In this case, Article 32 of the Vienna Convention states that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. Although the panel does not regard its interpretation of the word “interconnection” under Article 31 of the Vienna Convention as leading to obscurity, it does consider those preparatory works and other circumstances of the Reference paper. It however concludes that the

available records of the negotiations do not contain sufficient material to permit the panel to arrive at the interpretation either that there is no agreements on accounting rates or that accounting rates are exempted from dispute settlement in relation with the Reference Paper.²⁹

Nor the panel finds the fact that the issue of accounting rates is under negotiation in the current Doha Round as a built-in agenda affects its conclusion that the accounting rates are subject to the obligations stated in the Reference Paper.³⁰ Contrastingly, in a Special Session of the Council on the Negotiations, 5-6 Dec. 2000, the Secretariat noted that “currently, accounting rates were negotiated bilaterally outside the WTO. An Understanding between Members existed that no dispute on accounting rates should be taken to the Dispute Settlement Body.”³¹

This reminds this author of the limits of the usefulness of Article 32. Despite some argue that there is no difference of priority between Articles 31 and 32 and the holistic approach equally applies, the text of Article 32 clearly states the element of preparatory work and circumstances of a treaty conclusion as “supplementary” means of interpretation which may be used under certain situation. Therefore one would better to reformulate or complement interpretation rules of Article 31 rather than rely on Article 32 to find a meaningful alternative to literal interpretation.

C. The Method of Treaty Interpretation for a Dynamic Economy

In the case of criminal or civil court, the court mainly decides on the legality of acts which have already been committed. Naturally, the court decides a case by the agreed rule interpreted in the context or circumstances in which the rule was adopted. This is enough for domestic and most of traditional international cases. This may be the background for Articles 31 and 32 of the Vienna Convention. However, what if the court’s main role is to decide on the future not the past behavior of the defendant? What if the rule has the chance to be amended not each month or year but each decade, while there could be a major change in the circumstances where the rule

²⁹ PR, paras. 7.140.

³⁰ *Ibid.*

³¹ http://www.wto.org/english/tratop_e/serv_e/serv_wk_novdec2000_e.htm#negotiations

exists. It is the situation a WTO tribunal faces in quite often cases. In this situation it would not be enough to consider the context or circumstances of the conclusion of a treaty. The court should be able to consider the contemporary circumstances and reinterpret the law.

In the present case, the Understanding on accounting rates was a means to avoid a deadlock of the whole basic telecommunication negotiation. Considering that MFN is basic principle which should be generally applied to all the Members unless there are specific exemptions allowed, it is hard to imagine that those Members who wavered the MFN obligation would have agreed on the more burdensome optional obligations under Specific Commitments. The panel's narrow interpretation of the Understanding is nothing but another example of a literal interpretation in ruling out of contextual elements. It would be proper to infer that the Understanding provided moratorium as to the obligations under the Reference paper as well but also reflects the situation in which the accounting rate deficit countries could tolerate the old system just by January 2000. Accounting rate surplus countries wanted either no change to the system or a slow transition to cost-oriented system with preferential treatment for developing countries. Both sides hoped that the circumstances around the year 2000 might be different from those of 1997 and better to reach on a mutually acceptable solution. However, the circumstances of the time of the ruling have made no noticeable improvement. There seems to be no hope that the deadlock between the deficit and the surplus countries will be solved by formal negotiation in a near future. Meanwhile, the technical and economic changes almost dismantled the old accounting system.

The tribunal remains as the only body either to confirm the old system or to declare that the new rule applies. We might assume that evidences allow the interpretation, as Mexico argues that the word interconnection has a special meaning in this context confining itself to the domestic linking. On the other hand, literal interpretation enables that the word includes both domestic and international interconnection. In this situation, the panel may well take a futuristic position rather than retrospective. This could allegedly be the best way to attain socially more desirable consequences and adequate in the light of the object of the WTO, e.g. to

meet the needs of the world telecommunications community and increase the global welfare through trade³². Otherwise, it would have only prolonged the pain of dying old system. Fortunately a literal interpretation of the GATS commitments concerned justifies the panel's position. But relying only on literalism makes the panel's reasoning to be weak in persuasive power.

Indeed, we are lack of an interpretation theory applying to a situation in which the economic environment of a specific area of trade has experienced such a dynamic change that the interpretation of an agreement according to a general rule of interpretation leads to an undesirable result. The Vienna Convention does not provide guidelines for the court to reinterpret the rule in a changed environment. Apparently, Article 32 of the Vienna Convention which allows recourse the circumstances of treaty conclusion may rather have negative effect on our attempt to reflect contemporary context. Does the consideration of circumstances of the treaty conclusion enable the claim that as circumstances have changed law has to be reinterpreted accordingly? Nye is an easy answer considering the concerns about judicial activism and the limitations of supplementary means under Article 32. However, the practical effect of judicial self-restraint in this case is only to put itself as a barrier to the historical development. And if the tribunal really wants to stick to the judicial self-restraint, the principle of minimal obligations rather than extensive literal interpretation would be a coherent set. That is not the road the panel has taken nor this author would like to recommend.

A treaty is presumed as complete as if there is no intentional gap. To fulfill the presumption, a tribunal fills small holes it finds in the law in a situation where legislative remedy is something which cannot be reasonably anticipated. The methodologies of gap-filling still much depend on the art of judiciary. This art is especially important when the court should play a role in norm development. To reiterate the art in concrete terms:

³² In the specific terms of the preamble of the WTO Agreement, "raising standards of living through the expansion of production and trade."

In cases where the application of general rules of interpretation of Articles 31 and 32 of the Vienna Convention on the Law of Treaties render it unable to obtain the object and purpose of a treaty in a sufficient way because of a major change in the circumstances, the tribunal may interpret the provisions of the treaty in a way the faithful parties would have agreed to obtain the object and purpose of the treaty in the changed circumstances. The tribunal cannot interpret a provision to such a way that it would be an obvious array from the scope of the provision.³³

To take into account new circumstances can be seen as an application of the 'principle of maximum effectiveness,' which interprets treaty language as having the fullest force and effect possible.

Finally, this author regards this type of evolutionary interpretation is a rule of interpretation of public international law, and can be even seen as a customary rule of treaty interpretation in a specific situation of factual turbulence combined with legislative inaction. International Court of Justice stated that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”³⁴ The European Court of Justice stated that “every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”³⁵

Articles 31 and 32 of the Vienna Convention are general principles of interpretation applied to the all areas of international law. This does not exclude the existence of special customary rules of interpretation for a specific area or a specific surrounding. In particular, the practice of interpretation in the application of the EC Treaty has significant values for the interpretation of the WTO agreements, as the EC

³³ To a limited extent, non-violation complaints and situation complaints in paragraphs 1(b) and 1(c) of Article XXIII of GATT 1994 have similar objectives. These additional rooms for maneuvers given to the grieved parties, however, have not proved much effective. Maybe it is partly because of the lack of corresponding flexibility on the part of the tribunal. The suggestions above would increase the effectiveness of these provisions.

³⁴ *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31.

³⁵ Case 283/81 *CILFIT* [1982] ECR 3415, para 20.

Treaty has many similar provisions, even including their ambiguity, with the WTO agreements. In Europe, the ECJ has played a very important role in liberalizing former national monopolies by pushing it forward despite of recalcitrant oppositions from some parts of the Community. The very provision which used to bolster government sovereign right to maintain a telecommunications monopoly was reinterpreted through teleology as a provision to mandate the introduction of competition in this sector.³⁶

In fact, the type of interpretational method which a tribunal needs to adopt largely depends on legal environment. Literal interpretation has helped the WTO dispute settlement system to settle down in the first 10 years since its establishment. The shift toward a holistic application of Article 31 of the Vienna Convention, where context and object and purpose of a treaty have equal footing with the ordinary meaning, is well on the way. This may be the rule of interpretation for the normal state of economy. However, when the economy undergoes a turmoil of change and the Members does not act quickly to elaborate and adapt the existing provisions of the Agreements to the changing world economy³⁷, the panel and appellate body would have to embrace this method of evolutionary interpretation more positively.

III. Reframing the Interpretation

A. Technology and Policy Developments: Factual Context

The *Mexico-Telecommunications* case makes it no longer necessary to wonder whether the WTO basic telecommunications deal is a whimper or a big bang. At least, the WTO deal had scrubbed up the old uniform settlement system and put a formidable pressure for a reform based on the principle of cost-orientation and competition. On the background that the WTO panel could state that the

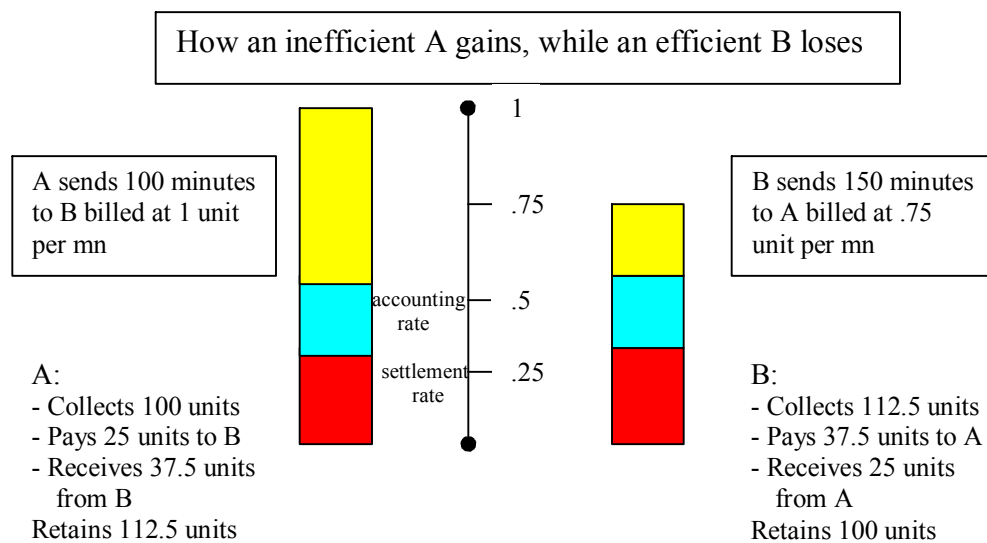
³⁶ See the developments of the ECJ jurisprudence relating to Article 86 (formerly Article 90) of the EC Treaty. The old position as stated in *Sacchi* (Case 155/73, [1974] ECR 409) justifying a grant of monopoly was practically negated in the *BT* (Case 41/83, [1985] ECR 873), *Telecom Equipment Directive* (Case C-202/88, [1991] ECR I-1223) and *Telecom Services Directive* (Cases C-271, 281 & 289/90, [1992] ECR I-5833)

³⁷ There is clear limit to this and even the desirability of frequent revision is doubtful.

commitments on basic communications should be read in a way to prohibit uniform accounting rates lie new developments in the technology and policy of international interconnection.

1. Discontents with the Old Accounting Rate System and Bypassing

Under the accounting rate system, international carriers offset charges against each other and only pay on the imbalance between incoming and outgoing traffic. However, as can be noticed in the *Mexico-Telecommunications* case, the accounting rates cause problems when traffic imbalance becomes big. While an efficient carrier in a competitive market condition would end up with a net traffic deficit, an inefficient monopoly carrier with a net traffic surplus would enjoy a net settlement payment. The high cost monopoly carrier who can charge high price has little incentive to operate more efficiently or to reduce the accounting rate. This, in turn, limits the ability for the efficient carrier to further lower its collection charges.



Source: Direction of Traffic (ITU)

In order to counter the monopolistic power of the other countries carriers in international telecommunications, the U.S. has developed a so-called uniform

settlement policy in the 1930s.³⁸ The FCC formally adopted the uniform settlement policy in 1980³⁹, which was initially applied only to international telegraph and telex services, and extended it to international telephone service in 1986 with its name changed into “International Settlement Policy”.⁴⁰ The FCC’s ISP contains three elements:

- U.S. carriers all must be offered the same effective rate and same effective date (nondiscrimination)
- U.S. carriers are entitled to be a proportionate share of return U.S.–inbound traffic based upon their proportion of U.S.-outbound traffic (proportionate return)
- Settlement rates for U.S. inbound and outbound traffic are symmetrical (symmetrical settlement rates)⁴¹

Without those mechanisms, the FCC was afraid that US carriers might be whipsawed by foreign carriers. Uniform accounting rates and proportionate routing of traffic were the rules of game for a long time.

During the 1990s, pressure for change in accounting rates mounted. Technological development reduced the cost of interconnection. Accounting rates has actually fallen down but reflected only parts of cost reduction.⁴² The effect of technological advances occurred mainly in the developed countries, which cause people in the developed countries to make more outbound international calls. This increased settlement rate deficit in the developed countries, especially the United States⁴³. For the developing countries, it was just a natural development due to the high elasticity of demand for international calls. For the deficit countries it was an unjust result of high pricing for call termination by developing country monopolies.

³⁸ Mackay Radio and Telegraph Co. Inc., 2 Federal Communications Commission Reports 592 (1936), affirmed sub nom, *Mackay v. FCC*, 97 F.2d 641 (D.C. Cir. 1938).

³⁹ *Uniform Settlement Rates on Parallel International Communications Routes*, 84 F.C.C.2d 121 (1980).

⁴⁰ *Common Carrier Services; Implementation and Scope of the Uniform Settlements Policy*, 51 Fed. Reg. 4736 (1986).

⁴¹ *Ibid.*

⁴² Tremendous technological advances have occurred regarding international transport and switching, enabling a sharp reduction of cost for interconnection. A comparable decrease of accounting rates was expected. However, the worldwide accounting rates declined only by 4 per cent per year between 1992 and 1996. Although it declined by 12 percent per year between 1996 and 1998, that was far too small compared to the actual costs decline.

⁴³ The US deficit reached 5 billion\$, almost 5 percent of its trade deficit. Guermazi (2004), p. 84.

ITU adopted Recommendation D.140 on accounting rates principles for the international telephone service in 1992. The main points were:

- cost-orientation of accounting rates and accounting rate shares;
- application of the cost-orientation principles to all relations on a non-discriminatory basis;
- implementation on a scheduled basis of one to five years, if a transitional timeframe is necessary;
- periodical review of accounting rates;
- to survey and publish global accounting rates movement

Recommendation D.140 has been complemented by a series of annexes which deal with the cost elements to be taken into account when determining accounting rates; the provision of information relating to accounting rates; the bilateral negotiation of accounting rates and the reduction of the total accounting rate.

In 1999, ITU-T Recommendation D.150 (new system for accounting in international telephony) introduced three new procedures for remunerating the party that terminates international traffic, i.e. the termination charge procedure, the settlement rate procedure, the commercial arrangement procedure.⁴⁴ Operators will agree bilaterally on the remuneration procedure that is most appropriate to their needs.⁴⁵

ITU Recommendations, however, lack a binding force. This has resulted in a change that is slower than the accounting rate deficit countries desire. The U.S. employed various methods to diminish the volume of accounting rate deficit. Uniform settlement policy which was developed to counter the monopolistic negotiating power of foreign telecom operators has proved not so effective. The FCC stepped up the

⁴⁴ The termination charge procedure allows governments or operators to establish a single charge for terminating traffic in their country, provided the charge meets certain multilaterally agreed criteria. The settlement rate procedure allows them to negotiate cost-oriented and asymmetric settlement rates, better suited to the new market situation. The commercial arrangement procedure allows any other bilateral negotiation which is more suited to the nature of correspondents' relations between countries that have introduced liberalization.

⁴⁵ ITU, "Accounting Rate Reform undertaken by ITU-T Study Group 3", www.itu.int/ITU-T/studygroups/com03/accounting-rate/index.html. An amendment to the D.150 is currently being reviewed.

pressures on domestic and foreign major telecom operators to get the accounting rates down by allowing various business models bypassing the accounting rate system.

International callback is a call processing service that reverses the connection of calls. International callback service is popular in countries that have high tariffs for outgoing international calls.⁴⁶ At the moment, countries in the world are more or less equally divided into the callback allowing group and the prohibiting group. The position of the US as to the callback is that no treaty or general concept of law obligate the US to require that authorization for callback configurations be denied or licenses revoked upon assertion by foreign carriers that callback operators operating in the United States are violating their countries' law. The United States stated, however, that as an international comity, it does not authorize callback operations for service to nations having enacted an express prohibition.⁴⁷ Developing countries however regard that the FCC has encouraged alternative calling procedures for the purpose of exploiting advanced US technologies and that in turn have contributed to the exacerbation of the settlement deficits of US carriers. ITU adopted resolutions on alternative calling procedures on international telecommunication network⁴⁸. In those resolutions, the right of each country to authorize, prohibit or regulate callback service was affirmed. Administrations and operators must take all necessary steps to prevent callback service from being supplied to countries which prohibit the service.⁴⁹

Since late 1990s private leased lines became much more numerous. Private-branch exchanges and other customer-controlled equipment have enabled users to interconnect unmetered international private lines with local PSTNs. The reach of

⁴⁶ The international caller dials a number that provides access to the international callback service. This number may be local in the visited country or be an international number. The international callback gateway receives the call and prompts the caller to enter the number they desire to be connected to and the number they want the callback service to connect to. The international callback center then originates calls to both numbers and connects the two individuals to each other. See Althos on-line telecommunications dictionary.

⁴⁷ Letter from Ambassador Vonya B. McCann, United States Coordinator International Communications and Information Policy, Department of State to Chairman Reed Hundt, Federal Communications Commission (22 March 1995), cited from Rob Frieden, International Telecommunications Handbook, 1997.

⁴⁸ Resolution 21 of the 2002 Plenipotentiary Conference; Resolution 29 of the 2004 World Telecommunications Standardization Assembly.

⁴⁹ As of 2 May 2005, 35, mainly developed, countries permit callback, while 114 countries prohibit it.

leaky private lines has been expanded and packaged for sale to others.⁵⁰ As a concomitant, the decline of accounting rate accelerated to more than 20 percent per year since 1998.⁵¹ Further pressure comes from the technology to add telephony traffic onto Internet and inject Internet voice traffic into the PSTN for the last-mile delivery. VoIP or Internet telephony service providers can exploit the difference between the low cost of providing Internet telephony and the high retail charge for conventional international telephone services.⁵² Although Internet telephony initially lacked the quality, reliability, and security to be considered comparable to conventional telephone services, its potential to migrate substantial traffic volumes from conventional international telephony has now started to be realized in the market.⁵³

2. Response from National Authorities

Despite of every effort to bring international calling rates low, U.S deficit in settlement rates continue to increase in mid 1990s.⁵⁴ In order to curve this trend, the FCC established a benchmarks policy that requires U.S. carriers to negotiate settlement rates at or below benchmark levels set by the FCC.⁵⁵ The Benchmarks Order also condition authorization of the foreign-affiliated carrier⁵⁶ offering U.S. international traffic to set a settlement rate for the affiliated market at or below the relevant benchmark.

Cable & Wireless joined by a group of non-US telecommunications made a petition against the FCC 1997 Benchmark Order on the grounds, among others, that it

⁵⁰ Rob Frieden, *Managing Internet Driven Change in International Telecommunications*, 2001, p.293.

⁵¹ ITU, "Accounting rate Reform undertaken by ITU-T Study Group 3", www.itu.int/ITU-T/studygroups/com03/accounting-rate/index.html

⁵² Frieden (2001), p. 302~311.

⁵³ The number of U.S. residential VoIP subscribers has jumped from 150,000 at the end of 2003 to well over 2 million as of March 2005 and expected to exceed 4.1 million by year end, generating over \$1bn in gross revenues for the year. www.telegeography.com/press/releases/2005-05-31.php

⁵⁴ In 1994 the U.S. deficit totaled \$4.3 billion.

⁵⁵ Benchmarks Order, FCC 97-280, 12 FCC Rcd. 19806 (1997).

⁵⁶ A U.S. carrier is considered to be affiliated with a foreign carrier when a foreign carrier owns a greater than twenty-five percent interest in, or controls, the U.S. carrier. 47 C.F.R. §63.18(h)(1)(i) (1997).

was an extraterritorial and discriminatory exercise of jurisdiction.⁵⁷ The FCC argued that the benchmarks are not extraterritorially applied because they are a constraint only on U.S. carriers, and that they are also compatible with the GATS obligation as well as the U.S. domestic law. The D.C. Circuit Court rejected all arguments of the petitioners.⁵⁸

The FCC a bit appeased the lost foreign carriers in 1999 International Settlement Policy Reform where the FCC lifted the ISP for agreements involving foreign carriers that did not have market power. U.S. carriers could engage in flexible, commercial arrangements with foreign carriers of a WTO member country with market power through International Simple Resale arrangements when carriers have demonstrated that at least 50 percent of the traffic is being settled at or below the relevant benchmark level. The carriers could also have the ISP completely removed from a route by demonstrating that at least 50 percent of the traffic is being settled at least 25% below the relevant benchmark level.⁵⁹

In the expectation of a favorable panel decision in the *Mexico Telecommunications* case, the FCC reformed its rules to further remove the ISP from benchmark-compliant routes in its 2004 ISP Reform Order.⁶⁰

The policy developments in the US show the portion of accounting rates system covered by the ISP has declined sharply through the late 1990s and early 2000s. As of 2005, the old system operates in a small number of countries most of which are non-Members of the WTO.

⁵⁷The complaints are: The FCC, by limiting the settlement rates that foreign carriers may charge U.S. carriers, asserted extraterritorial jurisdiction over foreign carriers and services, thereby exceeding its authority under the relevant U.S. and international law; The Order unlawfully regulates domestic carriers by restricting the prices they may pay to non-FCC-regulated entities; The restriction on foreign-affiliated U.S. carriers is unlawfully discriminatory and inadequately justified; The benchmark settlement rates are arbitrary, capricious, and unsupported by substantial evidence; and, The FCC violated the Administrative Procedure Act by failing to respond to comments urging the Commission to curb allegedly anti-competitive practices of U.S. carriers in Internet-related telecommunications services.

⁵⁸ 166 F.3d 1224 (D.C. Cir. 1999).

⁵⁹ ISP Reform Order, 14 FCC Rcd 7963 (1999)

⁶⁰ International Settlement Policy Reform: International Settlement Rates, IB Docket Nos. 02-324 and 96-21, First Report and Order, FCC 04-53 (rel. March 30, 2004) The US regards that the benchmark policy has contributed to a decline in international settlement rates. As of 2002, more than 94 percent of the approximately 35 billion outbound U.S.-international minutes are being settled at or below the relevant benchmark rate. The average settlement rate declined from \$0.35 in 1997 to \$0.11 per minute in 2002.

In the European Union, the Commission was aware that interconnection was a focal issue in competition since it initiated telecommunications liberalization mid 1980s. As its liberalization deepens from value added telecommunication services⁶¹ to basic telecommunications services, it became more evident that without objective interconnection criteria competition would not render the results promised. From this consideration, the European Parliament and the Council issued Directive 97/33/EC of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP)⁶². A set of specific regulations have also been made to deal with issues such as leased lines⁶³, voice telephony⁶⁴ and the local loop.⁶⁵

The Electronic Communications Regulatory Package of 2000⁶⁶ adapts the existing framework of directives to the convergence of telecommunications, information technology and the media. The Access Directive (2002/19/EC) of the regulatory package contains following principles concerning interconnection.⁶⁷

As a general principle, Member States must ensure that there are no restrictions which prevent undertakings from negotiating between themselves

⁶¹ Its origin may be traced back to Council Directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of open network provision [1990] OJ L192/1 and a parallel liberalization measure, Commission Directive 90/388 on competition in the markets for telecommunications services [1990] OJ L192/10.

⁶² [1997] OJ L 199/32 as amended by Directive 98/61/EC [1998] OJ L268/37.

⁶³ Council Directive 92/44 on the application of open network provision to leased lines [1992] OJ L165/27.

⁶⁴ Directive 98/10/EC of the European parliament and of the Council on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, [1998] OJ L101/24.

⁶⁵ Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (Text with EEA relevance), [2000] OJ L 336/4.

⁶⁶ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L 108/33; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), [2002] OJ L 108/7; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), [2002] OJ L 108/21; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), [2002] OJ L 108/51; and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), [2002] OJ L 201/37.

⁶⁷ As the name of the directive suggests, although the principles discussed only mention interconnection, they apply to access in general *mutatis mutandis*.

agreements on interconnection. The undertaking requesting interconnection does not need to be authorized to operate in the Member State where interconnection is requested, if it is not providing services and does not operate a network in that Member State.⁶⁸ To put it in other way, operators of public communications networks have a right and, when requested by other undertakings so authorized, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services.⁶⁹ Undertakings which acquire information from another undertaking in the process of negotiating interconnection arrangements should use that information solely for the purpose for which it was supplied and should not pass on it to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.⁷⁰

National regulatory authorities (NRA) should be empowered to intervene at their own initiative or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of the Community.⁷¹ The Commission⁷² and the Court of Justice⁷³ stressed that interconnection condition should be primarily a matter for commercial negotiation, but the NRA must still have power to intervene with the flexibility in tailoring remedies to specific market conditions.

Where an operator is identified as having significant power on a specific market, the national regulatory authority will impose the following obligations on that operator: obligations of transparency⁷⁴; non-discrimination⁷⁵; accounting separation⁷⁶; access to, and use of, specific network facilities⁷⁷; price control and cost accounting⁷⁸.

⁶⁸ Article 3, para 1.

⁶⁹ Article 4, para 1.

⁷⁰ Article 4, para 3.

⁷¹ Article 5, para. 4.

⁷² Report on the Implementation of the EU Electronic Communications Regulatory Package, SEC(2003)1342 (November 19, 2003), p. 32.

⁷³ C-221/01 *Commission v Belgium* [2002] ECR I-7835.

⁷⁴ Article 9

⁷⁵ Article 10

⁷⁶ Article 11. For more details on accounting separation and cost accounting, see Commission recommendation 98/322/EC of 8 April 1998 on interconnection in a liberalized telecommunication market, OJ L 141, 13/05/1998, pp. 6-35.

⁷⁷ Article 12

Although neither the ONP Directive nor Access Directive directly mention of traditional accounting rate system, it was intended that the cross-border interconnection would replace accounting rate mechanism⁷⁹. The expectation was fulfilled, at least within the EU.

The EC Commission was very critical of CCITT recommendations in this respect. In the *British Telecommunications* case⁸⁰, the Commission claimed that the CCITT could be no defense for anti-competitive horizontal agreements. Although the European Court of Justice found that CCITT recommendations had different purposes from the anti-competitive practices, the Commission has maintained the view.⁸¹

3. The Meaning of Interconnection in Its Factual Context

The panel briefly noted some of these factual developments as grounds for its rejection of the Mexico's claim that a broad interpretation of interconnection would lead to a result that is "manifestly absurd or unreasonable".⁸² As far as factual development is treated as a supplementary means under Article 32 of the Vienna Convention, it would have little impact on the ordinary meaning. The establishment of jurisprudence that treats factual development as a context under Article 31 of the Vienna Convention is highly recommended. The panel's dicta concerning the difference of domestic and cross-border interconnection from commercial, contractual, technical and regulatory points of view⁸³ should naturally come here. In addition, it is worthwhile to note the relation between regulatory developments at national level and the WTO.

The WTO and national, including European, telecommunication regulatory policies have interacted on each other and evolved in parallel. The EC Green Paper of

⁷⁸ Article 13

⁷⁹ Martin Cave, "Cross-border Interconnection: the Beginning of the End for Settlement Rates?" *International Business Lawyer* (July/August 1997) 303, 308; Pierre Larouche, "Telecommunications", in Damien Geradin (ed.) *The liberalization of state monopolies in the European Union and beyond*, Kluwer Law International, 2000, p. 45.

⁸⁰ Case 41/83 *Italy v Commission* [1985] ECR 873.

⁸¹ See 20th Report on Competition Policy, points 56-57; and Commission Guidelines on the application of EEC competition rules in the telecommunications sector, OJ C 233, 6.09.1991, points 139-144.

⁸² PR, para. 7.142.

⁸³ PR, paras. 7.110-7.117

1987 on the development of the Common Market for telecommunications services and equipment⁸⁴ gave impact to the liberalization of value added telecommunication services in Uruguay Round negotiations. The 1994 Green Paper on the liberalization of telecommunications infrastructure and cable television networks⁸⁵ interacted with the GATS telecommunications annex. The full liberalization directive of 96/19 was adopted with the progress and results of WTO Negotiation on Basic Telecommunications in mind. Negotiating history shows interconnection provision of the Reference Paper was influenced by the language being developed for the EC Interconnection Directive 97/33.⁸⁶ This means that careful WTO negotiators might well have presumed that the regulatory provisions in the Reference Paper would apply to cross-border supply of services as well as supply by commercial presence.

In relation to accounting rate system, the adoption of WTO agreement on basic telecommunication services in 1997 has pushed the reform in various ways. It has introduced competition in domestic and international telephony. In the countries where competition was introduced, the collection and termination rate went down⁸⁷. In particular, the WTO negotiation increased the number of countries which allow international resale of leased lines. If international resale of leased line is allowed at both ends of a route, it enables bypassing accounting rate system but without the side-effect of increasing outbound calls which some callback services cause. All knew that bypassing phenomena would continue as long as the over cost accounting rates exist. All had the expectation that the traditional regime cannot stand for a long time. In this situation, despite that GATS did not pinpointed the accounting rates, the negotiators must have perceived that the cost-oriented rates obligation in Section 2.2(b) of the Reference Paper would equally apply to the accounting rate system sooner or later. They might have thought that it would just be a regulatory confirmation of what have already been obliged by the market.

In this way, factual developments provide reasoning to the recognition of evolution of the concept of the relevant terms, i.e. the extension of the concept of

⁸⁴ COM(87)290.

⁸⁵ COM(94)440 final.

⁸⁶ PR, para. 7.185.

⁸⁷ Accounting rates of US-UK market fell faster than other markets. See ITU, Direction of traffic: trends in international telephone tariffs, 3rd edition, 1999.

interconnection through the 1990s to include international interconnection and the shrink of the range of meaning of accounting rates.

B. In the light of GATS Object and Purpose

1. GATS Object and Purpose

The relevant preamble of GATS reads:

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives; (underlines added)

The first paragraph starting with *Wishing* presents ‘expansion of trade in services’, ‘economic growth’, and ‘development’ as primary objectives of the GATS. It presents ‘transparency’ and ‘progressive liberalization’ as secondary objectives.

While the second paragraph starting with *Desiring* emphasizes progressive liberalization through successive rounds of multilateral negotiations, it would be fair to regard ‘mutual benefit’ and ‘balance of rights and obligations’ as additional objectives in GATS interpretation as well.

The remaining parts of the preamble, not quoted above, are elaborating development aspects of trade in services. The preamble to the WTO Agreement stipulates more or less similar objectives with some additions. The Telecommunications Reference Paper has no separate preamble or provision expressing its object and purpose⁸⁸.

⁸⁸ Its aim is generally regarded as to ensure regulatory environment in which former monopolies does not hamper the value of specific commitments. PR, para. 7.237. But as it is not expressed in specific terms, it would be debatable to rely on the object and purpose of the Reference Paper.

Meanwhile the object of security and predictability contained in Article 3.2 of the DSU will exert certain restraining function on the adoption of teleological interpretation and the recognition of evolution of the concept of a term. However, having noted that this object is of a horizontal character and instrumental to other object and purpose of the GATS⁸⁹, the following elaboration concentrates on the object and purpose contained in the GATS preamble.

2. Expansion of trade in services

Is the accounting rate system appropriate in terms of expansion of trade compared to cost based termination rate? No is the answer. High cost hinders consumers from making international calls. High cost also hinders trade in other goods and services which use telecommunications as an important input. Replacing accounting rate with interconnection rate would promote this object.

3. Economic growth and development

Lowering accounting rates has two sides in this respect. On one hand, low accounting rate and collection charge promote economic growth and development through increase of calls and trade using international call. On the other, developing countries claim that they use accounting rate surplus in rolling out their domestic networks. Whenever developed countries sought for a way to reform the accounting rate system, they had to face this ‘development aspect’ as a major roadblock, and had to offer various ways such as loan guarantees in order to compensate the cash loss of the poor countries which a reform would involve.⁹⁰ Developed countries argue that the link between accounting rate surplus and network development is very weak.

4. Transparency

⁸⁹ Panel Report on *US – Section 301 Trade Act* (WT/DS152/R), para. 7.75.

⁹⁰ Noam (2001) p. 127; Guermazi (2004).

Accounting rates have been negotiated in secret. Besides the United States and the United Kingdom, the agreed rates were not disclosed to the public. This transparency object has been further elaborated in GATS Article III, the Telecommunications Annex, and the Reference Paper. The Reference Paper requires that the interconnection procedures to a major supplier and either its interconnection agreements or a reference interconnection offer should be made publicly available.

At the heart of the debate between developed and developing countries over settlement rates exists the issue of how much the cost of terminating a telephone call varies according to the level of teledensity. While the FCC proposed a relatively narrow range of costs, between 15 and 23 US cents per minute⁹¹, the ITU proposed between 6 and 44 US cents per minute.⁹² Transparent and neutral fact-finding can reduce the gap.

5. Progressive liberalization

The object of progressive liberalization is a two-edged sword. It presses on the reform of accounting rate system but it suggests the change be progressive rather than a sudden collapse. This sheds new lights on the understanding on accounting rates. That is, a bumper for a smooth transition to a cost-oriented termination system. The bumper, however, does not seem to function properly. The deadline for review lapsed without getting an agreement on the future of the understanding or the accounting rates. The panel recognized effect of the understanding only to a very limited scope, treating non cost-oriented and differential accounting rates as being in violation of the Reference Paper.

6. 'Mutual benefit' and 'balance of rights and obligations'

The biggest problem with the panel's decision rests on the question whether the transition to the cost-based interconnection rate regime is mutually beneficial. The

⁹¹ FCC 1997 Benchmark Order.

⁹² ITU-T Recommendation D.140 Annex E.

pain in implementing the cost-oriented reform as described by the decision is huge on the side of developing countries. They lose surpluses in accounting rates. Reduced collection charges may stimulate international calls. The gain from call increase, however, would be far less than the loss.

One may note that the WTO is based on a cross-sector bargaining, single undertaking, where a Member may be compensated a loss in a sector by a gain in other sectors. It should be remembered, however, that the Basic Telecommunications Agreement was negotiated as a separate deal from other areas of trade. That means the balance should be maintained within the sector.

C. Dealing with Conflicting Objectives

We have noted that the panel's interpretation of interconnection promotes most of the objectives of the GATS but conflicts with some other objectives. The decision sounds like having unfairly tilted the balance of rights and obligations against developing countries. This is not a mutually beneficial but a nearly zero-sum game to the benefit of developed countries. It is also a threat to the right to development for the developing countries that are deprived of the resources which were at least partly contributed to the development of their telecommunications infrastructures.

Recognizing the evolution of the concept of interconnection activated by new factual developments as suggested earlier does not lessen the consideration of object and purpose of the GATS. A law based on fact only and not justified by object and purpose has very weak normative force. From this perspective, developing a structured way to deal with conflicting treaty objectives is an imminent condition for the WTO tribunal to apply the rules of treaty interpretation of Article 31(1) in a holistic manner.

This author first thinks that it is necessary to set priority among the treaty objectives. We can classify the objectives into primary and secondary objectives based on the goal and instrument relation; and direct and indirect objectives based on the immediacy of the objectives.

	Primary objective	Secondary objective
Direct objective	Trade expansion, Liberalization	Transparency, Progressiveness
Indirect objective	Growth and development	Mutual benefit Balance of rights

The basic approach should be to find a solution which is harmonious to all these objectives. When the tribunal cannot satisfy all the objectives in the preamble, whatever decisions it makes, it may have to weigh the relative total benefit to the trading community by multiplying the pending significance of each objective. When the tribunal weigh, it may give more weight to primary and direct objectives.

Secondly, it should be admitted that the object and purpose contained in the preamble of GATS cannot be attained by the sole effort of the WTO. It is the conventional wisdom that one institution cannot effectively pursue multiple conflicting objectives. The WTO should focus on the primary and direct objective. Conflicting purposes should be pursued by other instruments. A WTO tribunal should take into account this possibility of division of labor between international organizations. When negative or secondary objectives are pursued by other organizations, a WTO tribunal may consider it when weighing the objectives. When there is no institutional support from other organization, on the other hand, the tribunal should request that all the objectives are satisfied within the system.

From the above consideration I find that a broad interpretation of interconnection and thereby subjecting accounting rates to the rules of the Reference Paper with regard to developing countries can only be justified under the condition that the development deficit is corrected in some way. Otherwise it is a bad law and the creation of such a bad law by judicial lawmaking should be discouraged.

The current architectural design of international institutions involved in international trade and development requires WTO focus on trade. The cure for side-effect of the expansion of trade is more effectively sought in other institutions than the WTO. As a way to remedy this side-effect problem in the trade in telecommunications, this author underlines the complementary role of the ITU. As

the importance of trade in telecommunications grow, the level of cooperation and competition between ITU and WTO increases. In 2000, ITU and WTO entered into a cooperation agreement which provides cooperation between staffs, information sharing, reciprocal invitation as an observer to relevant meetings of each institution.⁹³ The cooperation should be extended to formally interconnect development objective of the WTO and the activities of the ITU for that purpose so that the WTO judiciary can review whether the WTO development objective is observed.

IV. Conclusion

We have seen that the WTO *Mexico-Telecommunications* case practically ended the traditional accounting rates system by replacing it with interconnection rate. It confirmed that now is the era of interconnection rules as contained in the GATS Telecommunications Reference Paper which applies at domestic and international level indiscriminately.

Some WTO telecom negotiators of the developed Members seem to be boosted by the WTO panel decision on *Mexico-Telecommunications*. Attempts are being made to consolidate, elaborate and extend the content of Reference Paper⁹⁴, and to adopt similar reference papers for other areas of trade.⁹⁵ Some developing countries, on the other hand, have become wary about the potential impact of the Reference Paper. Some may regret that they committed on what they are not prepared. Those who have not yet committed are now very cautious about committing to the Reference Paper.

The panel made a right choice between the two possible interpretations in favor of meeting the needs of the changed situation of the international telecommunications, but with an awkward manner due to the constraints of literal interpretation. This paper

⁹³ <http://www.itu.int/itu-news/issue/2001/01/agreements.html>

⁹⁴ See for example, APEC TELWG, "Progress Towards Adopting and Implementing the WTO Reference Paper" 2005/SOM2/CTI/062; Australia's additional (Article XVIII) commitments on telecommunications services in addition to those set out in the Reference Paper on telecommunications, TN/S/O/AUS/Rev.1, May 31, 2005, p. 60; and telecommunications chapters of many FTAs which the U.S. had made.

⁹⁵ A more ambitious next step for the WTO would be to generalize and consolidate the provisions of Telecommunications Reference paper into Article VI (domestic regulation) of GATS to cope with distortion of competition by Members and major suppliers in other areas of trade.

recommends that the WTO tribunal to develop a structured way to consider the object and purpose of the treaty to a meaningful degree even within the ambit of Article 31 of the Vienna Convention. This paper further recommends that it is time for the tribunal to openly go beyond the rules of the Vienna Convention to take into account the factual context at the time of interpretation. The WTO panel in the *Mexico-Telecommunications* case made a judicial confirmation of this factual shift of interconnection practices from cooperative joint provision to competitive provision, and from accounting rates based on revenue sharing to interconnection rates based on actual costs. This paper also suggests that the WTO tribunal should be prepared to embrace a more purposeful interpretation of the WTO agreements in a dynamic economy which often involves appearance of new gaps in the web of regulation.

I am not proposing a liberal or process-oriented interpretation. I am saying that, to have a life, the skeleton of the Vienna Convention rules on interpretation should be complemented by the muscle and flesh of factual developments and the blood of object and purpose. Considering the limited nature of the WTO commitments compared to the aim of ever closer integration of the European Union, the adoption of an ECJ type teleological interpretation or the word of it would not be accepted as a proper method of interpretation in a normal state. The WTO judiciary cannot stray from an obvious text of the WTO legal provisions or push the world trade to a certain direction. However, the tribunal can help smooth operation and progress of the world trading system by clearing unpredicted ambiguities and fine-tuning in the light of object and purpose.

Finally, the GATS Agreement set various objectives which are sometimes difficult to be reconciled within the WTO system. It is suggested that the WTO decision making bodies to develop a structure to carry out some of treaty objectives in cooperation with neighboring institutions, the ITU in this case, and that the WTO tribunal take into account the achievement through the hands of others in balancing the conflicting objectives.

Appendix: Vienna Convention on the Law of Treaties

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.