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

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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, this paper argues for loosening of the WTO interpretative tradition in order to take into account more elements of interpretation in a holistic way.

This paper recommends that it is time for the tribunal to enrich the interpretation rules of the Vienna Convention by taking into account factual contexts at the time of interpretation. This paper also 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 further 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. Finally, it suggests that the WTO develop mechanisms 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. Interconnection, Accounting Rates and the WTO

International interconnection was the most important issue from the beginning of international telecommunications. Interconnection within a state was not an issue when the whole country was serviced by a monopoly. As the telecommunications market underwent liberalization, interconnection became a key issue at the national level as well. Interconnection also has been one of the most important issues in the accommodation of new telecommunication technologies such as wireless and IP telephony.

Traditionally, however, the telecommunications community did not frequently use the term, 'international interconnection'. Instead, it used terms indicating the constituting elements of international interconnection: international network, international telecommunication services, and accounting rates. Under the traditional model of international telecommunications managed by the International Telecommunication Union (ITU), the provision and operation of international telecommunication services have been pursuant to mutual agreement between administrations¹. The cost and revenue for the international telecommunications were shared with the same spirit between the administrations involved.² Accounting rate is an internal price agreed between telecommunication carriers for a jointly-provided service. It typically includes both international half circuits and both domestic tail circuits to and from an international gateway. Settlement rate is how the accounting rate amount will be divided between correspondents, usually 50/50 when two carriers participate. The accounting and settlement rates negotiated by major telecom operators were applied uniformly to other small carriers.

It was the Uruguay Round (1986-1994) that first negotiated on trade in telecommunications services. Members made commitments in value-added services³ and adopted GATS Annex on Telecommunications. The latter deals with access to and use of public telecommunications

¹ See Article 1.5 of the International Telecommunications Regulations (ITR). The term 'administrations' in ITR includes recognized private operating agency(ies), reflecting the situation before telecom liberalization.

² Article 6 of the ITR.

³ 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

transport networks and services.⁴ Negotiation continued in the area of basic telecommunications⁵ 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 GATS⁶. 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 has been included in each Member's schedule of commitments in full or in part.⁷ It requires in particular in Section 2.2(b) that interconnection be provided in a timely fashion, on conditions and at cost-oriented rates that are transparent, reasonable and sufficiently unbundled.

In relation to interconnection, the 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

⁴ 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.

⁵ 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.

⁶ S/L/20, adopted 30 April 1996; entry into force 5 February 1998.

⁷ The standard Reference Paper can be found at www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

- 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."⁸

The way in which people reacted and understood the WTO deal on basic telecommunications varied from “big bang” to “little whimper”⁹. Its impact on accounting rate system was even more obscure. While some deplored the inaction (or action to defer the issue) with regard to accounting rates¹⁰, others declared the death of the accounting rate system¹¹. 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 was not compatible with the GATS commitments and thus dead. The answer largely depends on the interpretation of the word “interconnection” in the Reference Paper and its relations to accounting rates. The first GATS panel report dealt with this issue.

B. The Case

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 measures¹² incorporating traditional accounting rates system in which Telemex had the sole power to negotiate accounting rates were in violation of Mexico’s GATS telecommunications services obligations, the US brought the issue to the WTO dispute settlement procedure in August 2000.¹³

⁸ Report of the Group on Basic Telecommunications, S/GBT/4.

⁹ 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.

¹⁰ 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.

¹¹ Pekka Tarjanne, “Preparing for the next revolution in telecommunications: implementing the WTO agreement”, *Telecommunications Policy*, Vol. 23, pp. 51-63, 1999.

¹² The Mexican government measures at issue were the Federal Telecommunications Law (FTL), the Rules for Long Distance Service, the International Long Distance Rules (ILD Rules) and the Agreement of the Secretariat of Communications and Transportation establishing the procedure to obtain concessions for the installation, operation or exploitation of interstate public telecommunications networks, pursuant to the FTL.

¹³ WT/DS204/1 (S/L/88), 29 August 2000.

The WTO panel concluded in its 2004 decision¹⁴ 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;¹⁵

Thus, the WTO panel cleared the vagueness by declaring that cross-border interconnection is within the meaning of interconnection of the GATS Telecommunications Reference Paper and that the traditional uniform accounting rate regime of international telecommunications is not compatible with the interconnection obligation of the Reference Paper.

The result was a perfect victory for telecom operators in the U.S. and some other developed countries. It was 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, the decision dismayed telecommunications operators in developing countries which had thus far enjoyed a settlement rate surplus. It was also a grave threat to the role and status of the ITU which was traditionally regarded as the main forum for the discussion of international telecommunications accounting arrangements.

II. Hermeneutics of the *Mexico-Telecommunications Case*

A. The Approach of the Panel to the GATS Interpretation

¹⁴ WT/DS204/R *Mexico: measures affecting telecommunications services*, 2 April 2004. Although it disagreed with the panel's finding, Mexico chose not to appeal the case and actually complied with the panel's recommendation. See WT/DS204/9/Add.8, 19 August 2005.

¹⁵ As to other counts, 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.

WTO jurisprudence has established that the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the Vienna Convention)¹⁶ form part of the ‘customary rules of interpretation of public international law’, which should be followed by a WTO tribunal in interpreting provisions of the WTO treaties.¹⁷ The panel in 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 ordinary meaning”, “context” and “object and purpose”), the WTO tribunals put a special priority on the ordinary meaning of those terms.¹⁸

This tradition of literalism is well reflected in the panel’s treatment of the relationship between accounting rate and interconnection. The relevant part of the Reference Paper in the Mexico’s GATS commitments states:

- "2. Interconnection
- 2.1 This section applies, on the basis of the specific commitments undertaken, to 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.
- 2.2 Interconnection to be ensured
- Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided
- ...
- (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; ... ”¹⁹

Mexico argued that this passage does not apply to the issue of international telecommunications interconnection since the Telecommunications Reference Paper governs

¹⁶ United Nations Treaty Series, vol. 1155, p. 331. See the appendix of this paper for the text.

¹⁷ 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.

¹⁸ 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.

¹⁹ English translation from the authentic Spanish version. As it is identical to the standard Reference Paper, this paper hereinafter simply put it “the Reference Paper” without distinguishing the two.

matters relating to domestic regulation.²⁰ The panel, however, decided that, following ordinary dictionary and textual meaning of the word, neither “linking” in Section 2.1 nor “interconnection” in Section 2.2 indicates any distinction with regard to the location of the suppliers being linked.²¹ Pointing out that if the drafters meant to limit the scope they would have inserted the word “domestic”, the panel recognized that the scope of interconnection under Section 2 include “international interconnection”.²²

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 “interconnection”. However, as the strict literal approach was prescribed by the Appellate Body, the panel was very reluctant to rely on other elements of interpretation to qualify the ordinary meaning. The panel used other elements only to confirm the interpretation according to the ordinary meaning that the Reference Paper applies to the interconnection of cross-border suppliers.

For instance, in support of its argument, Mexico presented the previously quoted Understanding of the Group on Basic Telecommunications which excluded the application of accounting rates from WTO dispute settlement as evidence of an intention to exclude cross-border interconnection from the Reference Paper.²³ The panel, however, recalled 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 (DSU); it was merely intended to give Members who had not taken MFN exemptions on accounting rates some degree of reassurance.²⁴ The panel stated that the Understanding sought 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 did not shield all forms of cross-border interconnection from dispute settlement.²⁵ It also noted that, at the time of the WTO negotiations on basic

²⁰ PR, paras 4.3-4.9.

²¹ PR, paras. 7.102-109.

²² PR, para. 7.107.

²³ PR, para. 4.26.

²⁴ 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.

²⁵ PR, para. 7.138.

telecommunications, ITU recommendations referred in ITR already contained the principle of cost-orientation, transparency and non-discrimination.²⁶

The panel thus seems to have overcome the sequential approach to the elements of interpretation contained in Article 31(1) of the Vienna Convention. The panel at least showed the patience to consider all the elements of interpretation in the Vienna Convention. But, as I discuss below, what it did to considerations of ‘context’ and ‘object and purpose’ seems superficial in comparison with the deference it showed to the ‘ordinary meaning’.

B. Some Critique of the Panel’s Interpretative Approach

1. Extensive 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 generally accepted holistic approach.²⁷

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 compared 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.²⁸ This author initially does not understand why the panel tries to see the difference in the nature of domestic and international interconnection from

²⁶ Recommendation D.140 in particular.

²⁷ “the elements referred to in Article 31 ... are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order” *US - Section 301 Trade Act* (WT/DS152/R), para. 7.22. The International Law Commission also emphasized that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule (Yearbook of the ILC, 1966, Vol. II, pp. 219-220).

²⁸ PR, paras 7.112-117

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 substantive boundaries 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 extent, the boundaries of meaning can remain unchanged. When words are used as the tool for legislation, legislators pay attention not to make a gap between the scope of the words and the things depicted. But, in case where there is still difference how minimal it is, regulation depends on the words. That is the expectation of the regulator and the regulated. Therefore, from a literal point of view, the panel should have paid more attention to the usage of the words, i.e. ‘interconnection’ and ‘accounting rate’ in the relevant context of the discourse instead of their commercial, contractual, technical or regulatory nature.

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, and which have often been attended by the same persons.²⁹ 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 to *domestic* access for public networks to the exclusion of international interconnection or international accounting rates.³⁰ The phrases in the Mexican laws which the panel quoted as evidence that interconnection includes cross-border interconnection³¹ themselves could be an indication of counter evidence that without any additional words to the effect of inclusion of international interconnection, “with foreign networks” as 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.

²⁹ Of course, the burden of proof is on Mexico. But the Panel’s questionnaire could be composed differently.

³⁰ 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.

³¹ “[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.

The panel seemed to have noticed that the pure ordinary meaning rather than any potential special meaning was 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 the WTO, ‘the expansion of world trade’ or ‘security and predictability’.³² Although it does not say 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 of the ordinary meaning of interconnection. This, however, is all speculation. The panel does not even hint at the possibility of an evolution in the term ‘interconnection’³³. Its ostensive position is utterly literalist.

3. Context Ignored

The panel’s position regarding the concept of context is not clear. In discussing contextual elements³⁴ 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 was just for the convenience of discussion or the panel had other thoughts. Anyway it has thus effectively prepared the recognition of the concept of factual context in a later case.³⁵

Despite the broad scope it conferred to the concept of context, the panel was very reluctant to accept any effect of contextual elements. In fact, it admitted the relevance of no contextual element which conflicts with the literal meaning. When we fix our view point to the timing of the negotiation and conclusion of the Basic Telecommunications Agreement, we may find the Mexican arguments persuasive that the Section 2.2 requirement to ensure interconnection at any technically feasible point in the network and the subsequent practice of most, if not all, Members who subscribed to the Reference Paper maintained the traditional accounting rate regime suggests that international interconnection was excluded from the coverage of the Reference Paper. The grounds for the panel’s rejection of these arguments are weak and defensive.³⁶ It is

³² See the Preambles of the WTO Agreement and the GATS, and Article 3.2 of the DSU.

³³ 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.

³⁴ PR, 7.108-120.

³⁵ *EC – Chicken Cuts*, WT/DS269 & 286/AB/R, 12 Sept. 2005, para. 176.

³⁶ PR, paras. 7.118-120.

submitted that the Mexican arguments may be only validly overcome by the evolutionary interpretation as suggested below.

4. Balking at Object and Purpose

The panel employed just one paragraph to discuss the meaning of interconnection from the view point of the object and purpose of the GATS. The paragraph states:³⁷

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

This author finds the statement unconvincing. First, I do not understand why the panel relied 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.

Secondly, the panel did not seem to appreciate the fact that the very existence of different modes of supply testifies to 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 the hosting country is higher in the case of commercial presence. There is greater possibility of cream skimming by unrestrained cross-border suppliers without serious investment, which is detrimental to the development of telecommunications infrastructure and service in the host country.

³⁷ PR, para. 7.121.

From the above, it is possible to conclude that the *Mexico-Telecommunications* case shows lingering signs of awkwardness in a shift from sequential literal interpretation to holistic interpretation of the text.

5. Limitation of Article 32 of the Vienna Convention

Although the panel in the *Mexico-Telecommunications* case did not regard its interpretation of the word “interconnection” under Article 31 of the Vienna Convention as leading to obscurity, it did consider the preparatory works and other circumstances of the Reference Paper in the light of Article 32 of the Vienna Convention. However, it concluded that the available records of the negotiations did 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 to the Reference Paper.³⁸

Nor did the panel find the fact that the issue of accounting rates was under negotiation in the Doha Round as a built-in agenda as capable of affecting its conclusion that the accounting rates are subject to the obligations stated in the Reference Paper.³⁹ 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.”⁴⁰

This reminds this author of the limits of the usefulness of Article 32. Despite some arguments that there is no difference of priority between Articles 31 and 32 and the importance of a holistic approach⁴¹, the text of Article 32 clearly states the elements of preparatory work and circumstances of a treaty conclusion as “supplementary” means of interpretation which may be used under certain limited situation. In the later *US-Gambling* case⁴², the Appellate Body somewhat elevated the role of the supplementary means by relying on Article 32 in determining the meaning of a US commitment after it found that the examination under Article 31 still

³⁸ PR, paras. 7.140.

³⁹ *Ibid.*

⁴⁰ http://www.wto.org/english/tratop_e/serv_e/serv_wk_novdec2000_e.htm#negotiations

⁴¹ S. Schwebel, “May Preparatory Work be Used to Correct Rather than Confirm the ‘Clear’ Meaning of a Treaty Provision?” in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century*, (1996), pp. 541-7.

⁴² WT/DS285/AB/R, 7 April 2005.

rendered the meaning obscure. On the other hand, the Appellate Body in *EC-Chicken Cuts*⁴³ confirmed that the circumstances of the conclusion should be ascertained over a period of time ending on the date of the conclusion of the agreement, thus blocking attempts to embrace new circumstances since its conclusion.

Therefore, one would better to reformulate or complement interpretative 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 civil or criminal cases, a 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 in which the rule exists and operates. This is the situation a WTO tribunal faces quite often. 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 a basic principle which should be generally applied to all the Members unless there is specific exemption 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 by January 2000 only. 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

⁴³ *Supra* note 35, para. 293.

the circumstances around the year 2000 might be different from those of 1997 and so allow for a mutually acceptable solution. However, the circumstances of the time of the ruling 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 have almost dismantled the old accounting rates system.

The WTO panel remained the only body either to confirm the old system or to declare that the new rule applies. We might assume that evidences allow such an interpretation as Mexico argued that the word interconnection has a special meaning in this context confining it to the domestic setting. On the other hand, literal interpretation suggests that the word includes both domestic and international interconnection. In this situation, the panel may well take a futuristic position rather than a retrospective one. This could allegedly be the best way to attain socially more desirable consequences and adequacy 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 trade⁴⁴. Otherwise, it would have only prolonged the pain of adjustment under the 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 weak and unpersuasive.

Indeed, we are lacking an interpretative theory which applies to a situation in which the economic environment of a specific field 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 permits recourse to the circumstances of treaty conclusion, may have negative effect on our attempt to reflect contemporary context.

Concerns about judicial activism also have chilling effect. However, the practical consequence 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.

⁴⁴ In the specific terms of the preamble of the WTO Agreement, "raising standards of living through the expansion of production and trade."

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 plays a role in norm development. To reiterate the art in concrete terms:

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.⁴⁵

Taking into account of new circumstances would increase the effectiveness of a treaty and give treaty languages a life, although it is always subject to the collective will of the signatories.

Finally, if there is any feasibility of the revision of the Vienna Convention, this author would submit the languages above for consideration as Article 32*bis*. Regardless of the feasibility of the revision, this author regards this type of evolutionary interpretation can be even treated as a customary rule of treaty interpretation in a specific situation of factual turbulence combined with legislative deadlock and prospective nature of a ruling. The 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.”⁴⁶ The European Court of Justice (ECJ) has 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

⁴⁵ To a limited extent, non-violation complaints and situation complaints in paragraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and Article XXIII:3 of GATS 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.

⁴⁶ *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31.

objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”⁴⁷

Articles 31 and 32 of the Vienna Convention are general principles of interpretation applied to all areas of international law. This does not exclude the existence of special customary rules of interpretation for a specific area or a specific set of surroundings. 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 Treaty has many similar provisions, even including their ambiguity, to 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 governments’ sovereign right to maintain a telecommunications monopoly was reinterpreted through teleology as a provision to mandate the introduction of competition in this sector.⁴⁸

In fact, the type of interpretative method which a tribunal needs to adopt largely depends on the particular legal environment. Literal interpretation has helped the WTO dispute settlement system to establish itself in the first 10 years since it was created. 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 ordinary course of cases in the normal state of economy. However, when the covered economy undergoes a transformation and the Members do not act quickly to elaborate and adapt the existing provisions of the Agreements to a changing world economy⁴⁹, the panel and Appellate Body would have to embrace this method of evolutionary interpretation more fully.⁵⁰

III. Reframing the Interpretation

⁴⁷ Case 283/81 *CILFIT* [1982] ECR 3415, para 20.

⁴⁸ 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)

⁴⁹ There is clear limit to this and even the desirability of frequent revision is doubtful.

⁵⁰ Interestingly, the panel of this case also hinted on this evolution of interpretative methods by stating that “Just as the interpretation and application of GATT provisions have dynamically evolved in response to the several hundred GATT dispute settlement proceedings since 1948, so the interpretation and clarification of GATS provisions is likely to evolve over time.” PR, para. 7.2. For other arguments in support of evolutionary interpretation of the WTO treaty, see Joost Pauwelyn, “The Nature of WTO Obligations”, Jean Monnet Working Paper 1/02, www.jeanmonnetprogram.org/papers/02/020101-02.html.

The interpretative technique that I suggested above, i.e. Article 32*bis* or a customary subset rule of interpretation, is a rather cautious approach. I submitted it from the consideration that it makes smaller change to the existing structure of the relevant provisions of the Vienna Convention and thus would not raise the age old controversy over judicial law-making. The Appellate Body, however, allows a bolder approach to recognize the evolutionary interpretation within the ambit Article 31 of the Vienna Convention. The Appellate Body implicitly and explicitly broadened the concept of ‘context’ in Article 31 to include factual context.⁵¹ Given the persistent perception of sequential order among the elements of interpretation⁵², this latter approach, indeed, could be a more practical and effective one to reflect new developments in the legal environment. A WTO tribunal should, however, build up concrete contextual elements in order to support and foster reasoning for the recognition of an evolution.

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 done away with the old uniform settlement system and put a formidable pressure for a reform based on the principle of cost-orientation and competition. New developments in the technology and policy of international interconnection lie in the background of the WTO panel’s conclusion that the commitments on basic communications should be read in a way to prohibit uniform accounting rates.

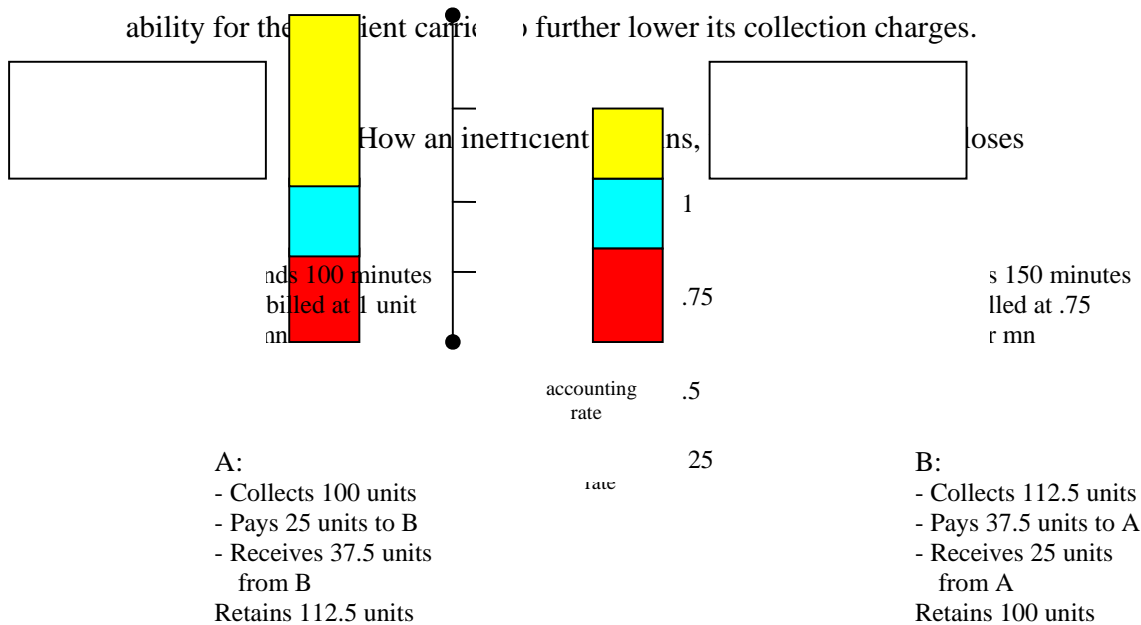
1. Discontent with the Old Accounting Rate System and Bypassing

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 noted from the *Mexico-Telecommunications* case, the accounting rate causes problems when traffic imbalance becomes big. While an efficient carrier in a competitive market condition would end

⁵¹ See *US-Shrimp*, *supra* note 33; and *EC-Chicken Cuts*, *supra* note 35.

⁵² See *US-Shrimp*, *op. cit.*, paras. 114-122.

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 lower its 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. developed a so-called uniform settlement policy in the 1930s.⁵³ The FCC formally adopted the uniform settlement policy in 1980⁵⁴, which was initially applied only to international telegraph and telex services, and extended it to international telephone service in 1986 in the form of the “International Settlement Policy” (ISP).⁵⁵ 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 carry proportionate share of return U.S.–inbound traffic based upon their proportion of U.S.–outbound traffic (proportionate return)

⁵³ 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).

⁵⁴ *Uniform Settlement Rates on Parallel International Communications Routes*, 84 F.C.C.2d 121 (1980).

⁵⁵ *Common Carrier Services; Implementation and Scope of the Uniform Settlements Policy*, 51 Fed. Reg. 4736 (1986).

- Settlement rates for U.S. inbound and outbound traffic must be symmetrical (symmetrical settlement rates)⁵⁶

Without such 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 fallen down but reflected only parts of cost reduction.⁵⁷ The effect of technological advances occurred mainly in developed countries, which caused people in the developed countries to make more outbound international calls. This increased settlement rate deficit in the developed countries, especially in the United States⁵⁸. For developing countries, the deficit was 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.

In response to this situation, the ITU adopted Recommendation D.140 on accounting rates principles for international telephone service in 1992. The main points of the Recommendation 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;
- survey and publication of global accounting rate movement

⁵⁶ *Ibid.*

⁵⁷ 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.

⁵⁸ The US deficit reached 5 billion\$, almost 5 percent of its trade deficit. Boutheina Guermazi, "Reforming international accounting rates: a developing country perspective" in Damien Geradin and David Luff (ed.), *The WTO and Global Convergence in Telecommunications and Audio-Visual Services*, (Cambridge University Press, 2004), p. 84.

Recommendation D.140 was 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; bilateral negotiation of accounting rates; and principles in developing and using a cost model.

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, and the commercial arrangement procedure.⁵⁹ Operators became able to agree bilaterally on the remuneration procedure that was most appropriate to their needs.⁶⁰

In spite of these developments, ITU Recommendations lack 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 pressure on domestic and foreign major telecom operators to get the accounting rates down by allowing various business models bypassing the accounting rate system. These may be outlined as follows.

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.⁶¹ At the moment, countries in the world are more or less equally divided into the callback allowing group and the prohibiting group.⁶² The position of the US as to 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

⁵⁹ 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.

⁶⁰ 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.

⁶¹ 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.

⁶² ITU, TSB Circular 30, COM 3/ST, 2 May 2005.

stated, however, that as a matter of international comity, it does not authorize callback operations for service to nations having enacted an express prohibition of the practice.⁶³ However, developing countries regard the FCC as having encouraged alternative calling procedures for the purpose of exploiting advanced US technologies and, in turn, having contributed to the exacerbation of the settlement deficits of US carriers. ITU also adopted resolutions on alternative calling procedures on international telecommunication network⁶⁴. 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.⁶⁵

Since late 1990s private leased lines have also become 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 “leaky” private lines has been expanded and packaged for sale to others.⁶⁶ As a concomitant development, the decline of international accounting rates accelerated to more than 20 percent per year since 1998.⁶⁷ 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.⁶⁸ Although Internet telephony initially lacked the quality, reliability, and security necessary to be considered comparable to conventional telephone services, its potential to migrate substantial traffic volumes from conventional international telephony to VoIP has now started to be realized in the market.⁶⁹

⁶³ 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).

⁶⁴ Resolution 21 of the 2002 Plenipotentiary Conference; Resolution 29 of the 2004 World Telecommunications Standardization Assembly.

⁶⁵ As of 2 May 2005, 35, mainly developed, countries permit callback, while 114 countries prohibit it.

⁶⁶ Rob Frieden, *Managing Internet Driven Change in International Telecommunications*, 2001, p.293.

⁶⁷ ITU, “Accounting rate Reform undertaken by ITU-T Study Group 3”, www.itu.int/ITU-T/studygroups/com03/accounting-rate/index.html

⁶⁸ Frieden (2001), *supra* note 66, p. 302~311.

⁶⁹ 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

In this situation we can note that interconnection provisions in the Reference Paper are quite adequate and reasonable norms in the current markets for international telecommunication services. “Any technically feasible point in the network” is, and should be, no longer limited to a point located at the border. Subsequent practice of interconnection is gradually alienating itself from the customary accounting rate system. The principle of neutrality which is included in the Chairman’s Note for Scheduling Basic Telecoms Services Commitments⁷⁰ enforces the view that the terms in the Reference Paper are supposed to evolve to reflect new economic and technological developments. It is thus justified to conclude that new contextual developments have caused the evolution of the concept of interconnection in the Reference Paper to include cross-border interconnection.⁷¹

2. The Response from National Authorities

Despite of every effort to bring down international calling rates, the U.S deficit in settlement rates continue to increase in mid 1990s.⁷² In order to curb 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.⁷³ The Benchmarks Order also conditioned authorization of the foreign-affiliated carrier⁷⁴ 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 that, among others, it was an extraterritorial and discriminatory exercise of jurisdiction.⁷⁵ The FCC argued that the benchmarks were not

⁷⁰ S/GBT/W/2/Rev.1, 16 January 1997. Relevant parts read:

1. Unless otherwise noted in the sector column, any basic telecom service listed in the sector column:
 - (a) encompasses local, long distance and international services for public and non-public use;
 - (b) may be provided on a facilities-basis or by resale; and
 - (c) may be provided through any means of technology.

⁷¹ Compare this with the panel’s finding in paras. 7.118-7.120.

⁷² In 1994 the U.S. deficit totaled \$4.3 billion.

⁷³ Benchmarks Order, FCC 97-280, 12 FCC Rcd. 19806 (1997).

⁷⁴ 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).

⁷⁵ The 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

extraterritorially applied because they were a constraint only on U.S. carriers, and that they were compatible with the GATS obligation as well as the U.S. domestic law. The D.C. Circuit Court rejected all arguments of the petitioners.⁷⁶

The FCC appealed the lost foreign carriers to some extent in the 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 demonstrated that at least 50 percent of the telecom traffic was 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 was being settled at least 25% below the relevant benchmark level.⁷⁷

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.⁷⁸

Policy developments in the US show the portion of accounting rates system covered by the ISP 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.

In the European Union, the Commission was aware that interconnection was a focal issue in competition since it initiated telecommunications liberalization in the mid 1980s. As its liberalization deepens from value added telecommunication services⁷⁹ to basic telecommunications services, it became more evident that without objective interconnection criteria competition would not render the results promised. In light of this consideration, the

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.

⁷⁶ 166 F.3d 1224 (D.C. Cir. 1999).

⁷⁷ ISP Reform Order, 14 FCC Rcd 7963 (1999)

⁷⁸ 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.

⁷⁹ 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.

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)⁸⁰. A set of specific regulations have also been made to deal with issues such as leased lines⁸¹, voice telephony⁸² and the local loop.⁸³

The Electronic Communications Regulatory Package of 2000⁸⁴ adapted the existing framework of EC directives to the convergence of telecommunications, information technology and the media. The Access Directive (2002/19/EC) of the regulatory package contains the following principles concerning interconnection.⁸⁵

As a general principle, Member States must ensure that there are no restrictions which prevent undertakings from negotiating agreements on interconnection between themselves. 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.⁸⁶ To put it in another 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.⁸⁷ Undertakings which acquire information from another undertaking in the process of negotiating interconnection arrangements should use that

⁸⁰ [1997] OJ L 199/32 as amended by Directive 98/61/EC [1998] OJ L268/37.

⁸¹ Council Directive 92/44 on the application of open network provision to leased lines [1992] OJ L165/27.

⁸² 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.

⁸³ 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.

⁸⁴ 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.

⁸⁵ As the name of the directive suggests, although the principles discussed only mention interconnection, they apply to access in general *mutatis mutandis*.

⁸⁶ Article 3, para 1.

⁸⁷ Article 4, para 1.

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.⁸⁸

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.⁸⁹ The Commission⁹⁰ and the Court of Justice⁹¹ stressed that interconnection condition should be primarily a matter for commercial negotiation, but the NRA must still have power to intervene with flexibility in tailoring remedies to specific market conditions.

Where an operator is identified as having significant power in a specific market, the national regulatory authority will impose the following obligations on that operator: obligations of transparency⁹²; non-discrimination⁹³; accounting separation⁹⁴; access to, and use of, specific network facilities⁹⁵; price control and cost accounting⁹⁶.

Although neither the ONP Directive nor Access Directive directly mentions the traditional accounting rate system, it was intended that cross-border interconnection would replace accounting rate mechanism⁹⁷. The expectation was fulfilled, at least within the EU.

In this respect, the EC Commission was very critical of CCITT recommendations which prohibited telegraph refile being practiced with a view to evading the full charge for the complete route.⁹⁸ In the *British Telecommunications* case⁹⁹, the Commission claimed that the CCITT recommendations could be no defense of anti-competitive horizontal agreements. Although the European Court of Justice found that CCITT recommendations had different

⁸⁸ Article 4, para 3.

⁸⁹ Article 5, para. 4.

⁹⁰ Report on the Implementation of the EU Electronic Communications Regulatory Package, SEC(2003)1342 (November 19, 2003), p. 32.

⁹¹ C-221/01 *Commission v Belgium* [2002] ECR I-7835.

⁹² Article 9

⁹³ Article 10

⁹⁴ 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.

⁹⁵ Article 12

⁹⁶ Article 13

⁹⁷ 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.

⁹⁸ See Recommendation F.60, (adopted in October 1976, Section 3.5.3.

⁹⁹ Case 41/83 *Italy v Commission* [1985] ECR 873.

purposes from vindicating anti-competitive practices, the Commission has maintained the view.¹⁰⁰

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".¹⁰¹ It is controversial whether these factual developments can be treated as a supplementary means under Article 32 of the Vienna Convention in that the factual developments do not form the *circumstances of the conclusion* of the Basic Telecommunications Agreement. The establishment of jurisprudence that treats factual development as a context under Article 31 of the Vienna Convention, which the Appellate Body has already implied, is highly recommended. The panel's finding concerning the difference between domestic and cross-border interconnection from commercial, contractual, technical and regulatory points of view¹⁰² should naturally be applied here. In addition, it is worthwhile noting the relation between regulatory developments at national level and the WTO.

The WTO and national, including the European, telecommunication regulatory policies have interacted on each other and evolved in parallel. The EC Green Paper of 1987 on the development of the Common Market for telecommunications services and equipment¹⁰³ 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 networks¹⁰⁴ 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 97/33.¹⁰⁵ 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

¹⁰⁰ 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.

¹⁰¹ PR, para. 7.142.

¹⁰² PR, paras. 7.110-7.117

¹⁰³ COM(87)290.

¹⁰⁴ COM(94)440 final.

¹⁰⁵ PR, para. 7.185.

well as supply by commercial presence. Thus, they opened the possibility of evolution of the concept of interconnection in advance.

In relation to the accounting rate system, the adoption of the WTO Agreement on Basic Telecommunication Services in 1997 promoted reform in various ways. It introduced competition in domestic and international telephony. In the countries where competition was introduced, the collection and termination rate went down¹⁰⁶. 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 the bypassing of the 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 existing accounting rate regime continued. All had the expectation that the traditional regime could not remain for a long time. In this situation, despite the fact that GATS did not pinpoint 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 had 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 interconnection through the 1990s to include international interconnection and decrease 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

¹⁰⁶ Accounting rates of US-UK market fell faster than other markets. See ITU, Direction of traffic: trends in international telephone tariffs, 3rd edition, 1999.

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 positive objectives of the GATS. It presents ‘transparency’ and ‘progressive liberalization’ as negative 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 a few additions.¹⁰⁷ The Telecommunications Reference Paper has no separate preamble or provision expressing its object and purpose¹⁰⁸.

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 the evolution of a term. However, having noted that this object is of a horizontal character and instrumental to other object and purpose of the GATS¹⁰⁹, 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. High costs hinder consumers from making international calls. High costs also hinder trade in other goods and services which use telecommunications as an important input. Replacing the accounting rate with interconnection rate would promote this object.

¹⁰⁷ E.g. protection of environment and full employment.

¹⁰⁸ 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.

¹⁰⁹ Panel Report on *US – Section 301 Trade Act* (WT/DS152/R), para. 7.75.

3. Economic growth and development

Lowering accounting rates has two aspects in this regard. 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 subsidizing the development of 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 who would be impacted by the reform.¹¹⁰ Developed countries also maintained that the link between accounting rate surplus and network development is very weak.

4. Transparency

Accounting rates have been negotiated in secret. Apart from 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 minute¹¹¹, the ITU proposed between 6 and 44 US cents per minute.¹¹² Transparent and neutral fact-finding can reduce the gap.

5. Progressive liberalization

¹¹⁰ Eli Noam, *Interconnecting the Network of Networks*, (The MIT Press, 2001), p. 127; Guermazi (2004), *supra* note 58, pp. 83-128.

¹¹¹ FCC 1997 Benchmark Order.

¹¹² ITU-T Recommendation D.140 Annex E.

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 sudden. This sheds new lights on the Understanding on accounting rates. The thrust is 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 WTO panel recognized the 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 pain in implementing the cost-oriented reform as described by the decision is large 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 and is, in effect, a single undertaking, where a Member may be compensated for 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 look at characteristics of the treaty objectives. We can classify the objectives into substantive and procedural objectives based on the nature of the objectives; and direct and indirect objectives based on the immediacy of the objectives.

	Substantive objective	Procedural 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 weighs its results, it may give more weight to 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 a 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 the possibility of division of labor between international organizations. When indirect objectives are pursued by other organizations, a WTO tribunal should consider this in assessing the compatibility of a specific interpretation with the objectives.

When there is no institutional support from other organizations, on the other hand, the tribunal should request that all the objectives are satisfied within the system.

From the above observations 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 an unjust law and the creation of such an unjust law by judicial lawmaking should be discouraged. Even in the case in which this consideration of indirect objectives would not affect the holding of the decision, as might be in the present case, it is submitted that a tribunal should mention the necessity to correct development deficit and maintain balance of rights at the dictum.

The current architecture of international institutions involved in international trade and development requires the WTO to 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 grows, the level of cooperation and competition between ITU and WTO has increased. In 2000, ITU and WTO entered into a cooperation agreement which provides cooperation between staffs, information sharing, and reciprocal invitation as an observer to relevant meetings of each institution.¹¹³ 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 being 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 apply 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,

¹¹³ <http://www.itu.int/itu-news/issue/2001/01/agreements.html>

elaborate and extend the content of Reference Paper¹¹⁴, and to adopt similar reference papers for other areas of trade.¹¹⁵ 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 reasoning due to the constraints of literal interpretation. This paper recommends that it is time for the tribunal to enrich the interpretation rules of the Vienna Convention by taking 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 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 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

¹¹⁴ 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.

¹¹⁵ 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.

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 mechanisms 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.