

1

Introduction

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The broad picture

The subject of this edited book is the interface between four major trends in the global economy, which have become apparent during the last two decades.

The first of these trends is the large expansion in trade between nations. International trade has been growing since the adoption of the GATT in 1947, but it has significantly accelerated over the last two decades. During the period 1980–2000, global trade grew very significantly. In addition, a number of new nations (e.g. China) have joined the WTO in recent years, thereby expanding the scope of application of WTO trade rules. It is widely believed today that participation in international trade is a key factor in economic development, and that increased global trade contributes to the prosperity of nations.

The second of these trends is the revolution that took place in the telecommunications sector. The first aspect of this revolution relates to market-opening reforms. For much of the twentieth century, telecommunications were organised in many countries around a monopolistic operator. The performance of these operators proved, however, to be disappointing and, in the 1980s, some countries decided to liberalise their telecommunications sector. These countries believed that competition in telecommunications would provide for lower prices, greater innovation, and a greater degree of consumer satisfaction. Such reforms have now extended to a large number of countries. While less than twenty countries had opened the provision of any fixed basic telecommunications services by the mid-1990s, 40 per cent of all countries had done so by the year 2000, including about seventy countries which have allowed competition in basic local services. In addition, a very large number of countries – 80 per cent or more – have allowed competition in the provision of wireless and Internet services.

The second aspect of this revolution relates to technological progress. Until recently, much of the telecommunications traffic was dominated by voice telephony. Technological evolution has, however, stimulated the development of new services, such as wireless telephony and the Internet. In many countries, wireless telephony is now more significant in terms of traffic than wireline telephony and it has become the primary means of communication among individuals. Over the last decade, the growth of the Internet has also been astonishing. It is, for instance, estimated that in 2002 the United States had 186 million Internet users, while the global Internet population amounted to 550 million. The large number of Internet users has stimulated the development of an increasingly large number of applications, which have in turn stimulated the demand for broadband.

The combination of these first two trends was reflected in the adoption of the WTO Agreement on Basic Telecommunications Services. This Agreement is of considerable significance since its sixty-nine contracting parties represent over 90 per cent of the world's basic telecommunications revenues. While several parties had already liberalised their telecommunications market before the adoption of this agreement, there is little doubt that it triggered significant market-opening reforms in many other nations. It is expected that the new Doha Round will seek to push liberalisation further by encouraging Members that are already part of the Agreement on Basic Telecommunications to make further commitments, as well as by inducing Members that are not party to the Agreement to join it and commit themselves to telecommunications liberalisation.

The third trend is the growing tensions between WTO Members in the area of audio-visual services. Unlike in the telecommunications sector, little progress has been made in this area in the context of the WTO. A number of WTO Members have engaged in domestic market-opening reforms in audio-visual services, for instance by allowing the development of new commercial TV channels. The broad wave of reforms that has been witnessed in the area of telecommunications finds, however, no equivalent in audio-visual services as many Members continue to maintain measures designed to protect public broadcasters, as well as locally produced content. In recent years, these measures have led to growing conflicts between Members, such as the United States, which consider that audio-visual products do not differ from other goods and services and should therefore be subject to market access, and other Members, such as the European Union, which argue in favour of a cultural exception. In this context, one of the central objectives of the Doha negotiations

will be to find a common ground between these two positions so as to allow a greater degree of market opening in the sector of audio-visual services while allowing certain Members to ensure the protection of cultural diversity within their frontiers.

The fourth and final trend discussed in this book relates to the process of convergence between the telecommunications and audio-visual sectors. Although these two sectors have generally been treated as separate industries subject to different legal regimes, they increasingly converge into a single communications sector. Convergence first takes place at the network level as, thanks to digitalisation, both telecommunications and cable networks are no longer dedicated to one type of service. Convergence also takes place at the service level as new 'hybrid' services, such as video-on-demand, are placed on the market. Finally, convergence has also a business component as telecommunications companies have entered the audio-visual market, whereas audio-visual companies are now active in the telecommunications market. As will be seen throughout this book, convergence will have significant regulatory implications as current classifications are becoming rapidly outdated and lead to distortions.

Summary of the content of the book

The chapters comprised in this book are grouped into four Parts: Part I (this Introduction) and Parts II, III and IV (the substantive chapters).

Part II analyses the current regulatory framework applicable to telecommunications services in the context of the WTO. The first two chapters of Part II provide a general discussion of the WTO Basic Telecommunications Agreement, as well as other WTO agreements that may be relevant to the telecommunications sector. Chapter 2, by Kelly Cameron, provides an historical overview of the WTO Basic Telecommunications Agreement. The author explains why the negotiations of this Agreement took several years. Contentious issues included foreign investments in telecommunications, licensing and the use of electromagnetic spectrum, and international services. The author also explains why the negotiations of an agreement on audio-visual services in the context of the Doha Round are likely to be difficult. He analyses, however, some factors that could make the achievement of an agreement for market access for audio-visual services possible. Chapter 3, by David Luff, provides a broad discussion of current rules concerning telecommunications services. This includes an explanation of the structure of the GATS, the Annex on Telecommunications and the Reference Paper. Many references are made to these texts

in the subsequent chapters of the book and, without these clarifications, the book may be incomprehensible to those who are not tuned into WTO law.

The next two chapters address one of the most complex issues of international trade in telecommunications services: the issue of accounting rates (i.e. the price for interconnecting calls between countries). In Chapter 4, Peter Cowhey argues that accounting rates create considerable distortions in the market for international telephone services. Despite such distortions, the WTO Basic Agreement on Telecommunications does not require changes to the accounting rates system. In response, the United States took a unilateral regulatory action outside the WTO to cut inflated international accounting rates. In addition, market access commitments made in the context of the WTO Basic Agreement on Telecommunications over international simple resale put additional pressure on international accounting rates. These factors led to a reduction of accounting rates among industrialised countries. The author then analyses the trade issues posed by new services and technologies, such as Internet Protocol (IP) telephony, international access to Internet Traffic Exchange (ITE), and mobile services and international networking. The author concludes that the development of these new services, and the trade issues they generate, may require either the clarification of prior WTO obligations or a consideration of new market access commitments.

In Chapter 5, Boutheina Guermazi analyses accounting rates from a developing country perspective. The author observes that the accounting rates issue has raised a North/South controversy. On the one hand, developed countries suffering from deficit payments are eager to reform the accounting rates regime and align it with cost. On the other hand, developing countries are reluctant to consider any change to the system. The reason for this is that developing countries largely benefit from the current system. Due to traffic imbalances, the total amount of settlement payments received from developed countries is around US\$10 billion per annum. The author admits that the regime as it operates today is unsustainable and that efforts should be made at the international level to bring the system into conformity with the trade principles contained in the WTO. She calls, however, for a differentiation between developed countries and developing countries. While it is not acceptable that the accounting rates system continues to subsidise the telecommunications sector in countries with well-developed infrastructure, it is both necessary and justifiable under the WTO Basic Agreement on Telecommunications that the accounting rates system continues to fund telecommunications

development in developing countries. In this context, accounting rates could be singled out as a prime means for telecommunications development under the liberalised environment for telecommunications services.

In Chapter 6, Damien Geradin and Michel Kerf analyse the mechanisms provided by the WTO to prevent anti-competitive practices in telecommunications. The authors observe that the removal of barriers to entry in the telecommunications markets following the adoption of the WTO Basic Agreement on Telecommunications is a major step forward, but it might not be sufficient to create thriving competition in such markets. This is because the telecommunications sector has certain features that allow the incumbents to retain a substantial degree of market power. Controlling market power in telecommunications is usually achieved through a combination of competition rules and sector-specific rules. The theme of this paper is to analyse whether these instruments can be found in the WTO. The authors observe that WTO Members have so far failed to adopt competition rules. By contrast, the Members that are party to the WTO Basic Agreement on Telecommunications managed to agree on a set of specific regulatory principles designed to ensure that the commitments made by participating countries would not be compromised by anti-competitive practices. These principles, which are comprised in the so-called 'Reference Paper', complement the general principles that are included in the GATS which also apply to the telecommunications sector. Though the Reference Paper is a truly exceptional document, the authors argue that it contains several weaknesses. They also make suggestions as to how the Reference Paper could be improved. The authors also argue that, even if the Reference Paper could be strengthened, two factors suggest there would still be a need for horizontal competition rules. First, competition rules are needed to deal with a range of anti-competitive practices that are not necessarily addressed by sector-specific rules. Secondly, one considerable limitation of the Reference Paper is that it only applies to basic telecommunications services. It does not apply to other services, such as audio-visual services, therefore leaving such services without any form of protection against anti-competitive practices. Finally, the authors offer a proposed model for the elaboration of horizontal competition rules at the WTO level.

Part III discusses and analyses the current regulatory framework applicable to audio-visual services. The first two chapters of Part III provide an analysis of the tension between trade liberalisation and audio-visual policy. In Chapter 7, Christoph Beat Graber provides an overview of the various WTO agreements that are currently relevant to audio-visual

services. He then offers a typology of the governmental measures designed to sustain audio-visual and cultural policy. These measures include subsidies, restrictions on market access and national treatment, special licensing requirements, as well as taxes. As these measures often create barriers to trade, the author analyses their actual or potential points of conflict with the WTO. Furthermore, the author reviews the various provisions of the WTO regime providing for flexibility towards measures of national cultural policy. Finally, he concludes with various observations concerning some open questions.

In Chapter 8, Ivan Bernier focuses on content regulation in the audio-visual sector. The author draws a distinction between ‘content requirement’ (which refers to regulations that usually prescribe a given percentage of local content in film and television programmes or a given percentage of television and radio programmes in one or more national language or languages), ‘content restriction’ (which refers to regulations that exclude certain types of content or allows them subject to certain conditions) and ‘content production’ (which refers to interventions that are intended to stimulate the development of local content). He then examines the compatibility of these various types of content regulation with WTO rules.

In Chapter 9, David Luff focuses on the means used to convey and receive audio-visual products (whether content or services). He examines how current WTO rules enable a certain degree of liberalisation of those means, what the remaining limitations are, and to what extent culture is an issue in this area. He first addresses the current application of WTO rules to the provision of networks. He then discusses the current principles and regulations concerning the allocation of scarce resources, such as frequencies and satellite orbits and the rules applicable to terminal equipment. He also examines the impact of convergence, particularly the rise of broadband networks, which enable the transmission of both telecommunications and audio-visual services, on the application of WTO rules. He highlights the irrelevance of certain classifications in this context and the difficulties that are likely to appear. He concludes by arguing that technological development will inevitably orient the manner in which audio-visual policy will be pursued and that future commitments should be crafted accordingly.

In Chapter 10, Jean-François Bellis analyses whether the GATS contains rules that address the right of Members to take emergency measures to safeguard their interests, as well as the issues of government procurement and subsidies. The presence or absence of such rules has a significant

impact on suppliers of telecommunications and audio-visual services. The author observes that the GATS does not contain rules on these issues. However, the GATS contains mandates inviting Members to enter into negotiations for the adoption of such rules, and negotiations have begun in this regard. These negotiations are at various stages, but none have been concluded yet. The author notes that Members must attach great importance to the negotiations of GATS rules on the above issues. The lack of such rules is partly a cause of the reluctance of Members to make new commitments. These negotiations, however, raise systemic difficulties, and the core issues of the desirability and feasibility of such rules is still being questioned by a number of Members. For all these reasons, it appears very unlikely that the negotiations, which began over six years ago, will soon be concluded.

Part IV comprises chapters analysing convergence under different angles. One chapter explains what convergence means in technical terms. Other chapters review the legal and economic consequences of convergence for trade in telecommunications and audio-visual services.

In Chapter 11, Milton Mueller describes the technological and economic forces that support convergence, and then considers some of the consequences for trade in communication industries. The author observes that convergence means the digitisation of all media forms and the adoption of compatible digital formats by all networks and information appliances. Convergence means an enormous reduction in the cost of interconnecting and interoperating various forms of communication and information technology. The author argues that this cost reduction will have a particularly significant effect in the audio-visual sector. The quantity of audio-visual services supplied will grow enormously as the production costs decline, and as this happens new media forms with market structures and business models quite different from the norms of broadcasting and cinema will evolve. As convergence progresses, broadcasting and cinema will be forced to operate in an entertainment and culture economy in which the Internet and other new distribution channels account for an ever larger share of the relevant markets and play an increasingly prominent role in defining the content choices of the public. As a result, subsidised programming and national origin quotas will affect only a diminishing slice of the average household's content alternatives.

In Chapter 12, Robert Frieden explains how regulatory dichotomies in converging markets may lead to opportunistic behaviour, which may undermine the effectiveness of existing regulation. He first presents what he calls the 'integrated information communications and entertainment

(ICE) market place' in which not only traditional service providers operate, but also new ventures that may escape current regulatory models. He then explains the concept of regulatory opportunism, i.e. where an undertaking organises its activities so as to fall under classifications which entail the least regulatory constraints, in order to acquire competitive advantage. Several examples are provided, illustrating how Internet service providers (ISPs) have proven skilful in both the US markets and internationally to provide services functionally equivalent to those of regulated carriers, while avoiding the duties imposed on the latter. Other examples are drawn from the experience of the US Telecommunications Act of 1996 and from tariff imbalances due to traffic origin or destination. Disparities created by accounting rates and how these have been used by operators to avoid their settlement are discussed in this context. The GATT v. GATS debate is also relevant since in the absence of commitments annexed to the GATS in a specific sector, there might be opposing interests in classifying a delivery as a good or as a service. Robert Frieden also examines regulatory opportunism generated by IP voice telephony. He concludes by warning that regulatory asymmetry in a converged environment, such as that of the ICE, where technological differences are not sufficient to distinguish between functionally equivalent services, may unduly favour the less regulated providers, while jeopardising further technological innovations and regulations such as those promoting universal service or cultural identities. The author therefore stresses the need for a new regulation that would avoid such dichotomies and be technology-neutral, i.e. examining 'the nature of a service without regard to the medium or the mode of delivery'.

In Chapter 13, Paul Nihoul analyses the impact of convergence on the regulatory classifications used in the WTO context. He first provides a detailed review of the definitions given to telecommunications services and audio-visual services, in light mainly of the classification contained in the W/120 list, on the basis of which commitments were made. Since, however, WTO rules do not define these services, definitions are drawn from the UN Provisional Central Product Classification List (CPC), market practice, the views and legislative experience of Members and documents produced by delegations. While distinctions between basic and value-added telecommunications services and definitions of each individual service can easily be grasped, difficulties arise in relation to borderline differences between audio-visual and broadcasting services and between audio-visual and telecommunications services. Not only is there no clear international guidance in this regard, but also pragmatic criteria

traditionally used in practice to justify them are no longer relevant in a converged environment. The author then explains why the new regulatory framework adopted by the European Communities, which abandons old distinctions and focuses on horizontal policy-making, the outline of which is provided, could inspire the evolution of international trade law in this respect.

In Chapter 14, Pierre Larouche recalls that, while convergence is not taking place to the extent expected, it is a reality that challenges the current regulatory framework. He underlines the key issues surrounding the regulation of convergence, i.e. classifications, technological neutrality, the role of competition law, content regulation and institutional issues. He analyses the EC and the US responses for each one of them. From a structural point of view, while the EC created a new framework based on the distinction between content and networks, the US maintained pragmatic divisions based on current industry realities and technological features. Both approaches are criticised: the distinction proposed by the EC may seem artificial in a number of cases and not necessarily in accordance with industry reality, while in the US regulatory imbalances due to technical features may impair the development of a competitive playing field. Both models also seem unsatisfactory from an institutional point of view, as they enable useless duplications. The author then assesses the relevance of these two approaches in the international trade arena. He underlines the inappropriateness of the structure of the GATS, which relies on commitments that are themselves based on classifications that are too constrained. He also argues that technological neutrality is currently not sufficiently reflected in GATS, and examines ways to do so. Finally, he notes that the emergence of common competition principles beyond those of the Reference Paper, as well as a common regulatory framework for universal service and for control on content are unlikely. After examining how these regulations could fit into the current GATS, he concludes that they might become unenforceable without their reorientation and a reclassification of services within the WTO.

Finally, in Chapter 15, Eli Noam argues that convergence will bring many benefits, but that these will not be distributed equally between developed and developing nations. In this context, the author analyses the problem of the 'digital divide', and identifies three kinds of gaps that need to be addressed by developing countries. The first gap is that of telecommunications connectivity. This gap is being closed by investment in infrastructure and by liberalising policy reform. The second gap is that of Internet access. Internet usage is more expensive in developing countries.

Facilitating Internet access is partly dependent on an improvement of the telecommunications infrastructure. The third gap is e-commerce. At present, developing countries account for a very small share of the world's commercial websites and Internet commerce revenues. This may create a large divide between developed nations, which will dominate the field of Internet transactions, and developing countries, which will remain secondary players in this field. Noam therefore urges the governments of developing countries to take measures to stimulate the development of e-commerce. A policy of free entry and investment based on market forces and competition could contribute to this development. Other reforms will, however, be needed, including the development of e-government applications, the reform of the legal system in order to make e-transactions possible, a strengthening of physical delivery infrastructures, and the support of technological education.

The main findings made in the book and an agenda for Doha

The chapters contained in this book, and which are summarised in the preceding section, offer an extremely rich and interdisciplinary analysis of telecommunications and audio-visual services in the WTO context. We may now underline some of the main findings that may be drawn from a reading of these chapters.

Telecommunications services

Current WTO rules concerning telecommunications services are among the most elaborate rules in the international trade in services arena. As we have seen, these rules have proven effective in fostering domestic liberalisation in more than 90 per cent of the markets in telecommunications services.¹ The rules also encourage the development of advanced telecommunications systems and appear to be sufficiently flexible to accommodate non-trade objectives, such as the need to ensure a universal service, the integrity of the public network and the maintenance of essential public services (emergency lines, security, etc.).² Yet, a number of important issues concerning trade in telecommunications services are unresolved, due either to a lack of rules or to their imprecision.

¹ See Kelly Cameron, Chapter 2 below.

² See David Luff, Chapter 3 below.