



Tom Wheeler
Chairman
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

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Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28

Chairman Wheeler,

Instances of anti-competitive use of differentiated online services and bandwidth are still relatively rare compared to other online trade barriers. But given the increasing competition between internet services providers (ISPs) that provide access and over-the-top (OTT) players who deliver services through them, the mere possibility that operators could engage in anti-competitive behavior by inappropriately limiting access to online services under the guise of network management has sufficed to highlight its importance.

Net neutrality is, however, not the scope of this analysis: this analysis contests the claim that the United States would be in violation of WTO law or other trade commitments unless net neutrality is explicitly legislated in domestic law. Whereas the objective to maintain competition neutrality between OTTs and ISPs has its clear merits, but the question for international trade law is how this objective is actually achieved. WTO rules are designed to impose limits on government interference, and a vast majority of countries have chosen a different route than the one currently proposed to come to terms with the problem.

International law and limits to domestic regulation

In the debate concerning how net neutrality should be achieved in the United States, there is some confusion in regards to what these multilateral commitments entail. The note by two George Washington University professors makes a rather remarkable statement that American WTO obligations would be ‘violated by a US failure to

adopt strong net neutrality rules'.¹ According to the authors, it would also 'operate as an impermissible restriction on freedom of expression' in violation of inter alia UN International Covenant on Civil and Political Rights.

As a product of diplomatic negotiations, international trade law is often ambiguous and subject to numerous exceptions. While there is justified criticism against trade agreements, the growing skepticism in the current public debate is often founded on misinterpretation by the general public, and sometimes even by legal scholars of national laws. International trade is a discipline of its own, with its own vocabulary and dynamic jurisprudence, often distinct from other disciplines of law. As a result, the key instrument for securing rule of law in an ever-increasingly protectionist and unilateral economic order, namely the international trade rules, that also provides market access and growth for the US economy, is often undermined on false grounds.

Therefore, it is of paramount importance for practitioners in international trade to clarify in which circumstances the WTO rules could put limits on domestic regulation on net neutrality. Moreover, the means by which net neutrality is codified into law could have some unintended effects on trade negotiations that are possibly contrary to US interests.

Net neutrality under the WTO system

The authors conclude that the '2014 Proposed Rules for Promoting and Protecting an Open Internet' would violate the WTO rules as 'Any FCC rule that does not meaningfully protect net neutrality would run afoul of these legal obligations',² and argue that any rules that do not forbid paid prioritization would violate WTO rules. This is demonstrably incorrect on several levels.

The argument of the authors is that a WTO member is required to provide interconnection in telecommunication services on nondiscriminatory terms according to their commitments in 'Basic Agreement on Trade in Telecommunication Services', or 'BATS'. Although no such agreement actually exists, one assumes that they refer to an amalgam of two entirely separate agreements: the Annex on Telecommunications, (commonly referred to as GATS Annex),³ and the Reference Paper on Basic Telecommunication.⁴ The authors repeatedly reference the GATS Annex and the Reference Paper as if they were same entities, but they are not: the Reference Paper contains provisions on interconnection (art 2.2) that apply only to telecommunication operators and cannot be extended to all OTTs. In fact, its coverage beyond mere voice traffic is disputed.⁵

In contrast, the GATS Annex on Telecommunications was specifically drafted for the cases when a WTO member agreed to open up its services markets (say, for

¹ Carillo, A.J., Nunziato, D.C., 'Re: Promoting and Protecting an Open Internet, GN Docket No. 14-28', George Washington University, 10 December, 2014

² *ibid.*

³ WTO, General Agreement on Trade in Services (GATS), Annex on Telecommunications, 1994

⁴ WTO Negotiation Group on Basic Telecommunications, Reference Paper, April 24, 1996

⁵ Roseman, D., 'Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects under the GATS' in 'Domestic Regulations and Service Trade Liberalization', World Bank, 2003

engineering services) and those services may need to make use of data or telecom networks to deliver their services to their overseas clients where telecom markets may still not be liberalized. Even in the pre-internet days, trade negotiators understood that market access in most service sectors could be frustrated by the lack of liberalization of the international telecom markets. The GATS Annex stipulates therefore that access to public telecommunications networks and services must be offered on ‘reasonable and non-discriminatory terms and conditions’, and set forth a number of associated rights (as well as exceptions) on interconnection, use of equipment and private networks.

But whether this right to access public telecommunications transport networks and services applies to an OTT service depends on whether that particular service sector is covered by the terms of the Annex and the scope of a party’s commitments in the first place. For example, the US has exempted a large portion of its financial services from foreign participation, and the GATS Annex also explicitly excludes ‘cable or broadcast distribution of radio or television programming’, and many OTT services may fail to qualify. In contrast, China’s discriminatory practices of slowing down or blocking foreign search engines (as they falling under ‘online processing services’)⁶ are a violation of China’s GATS commitments.⁷ Moreover, the applicability of the Annex also depends on whether a party has defined Internet access services as ‘public telecommunications’, which the US has not.

In conclusion, it is disputed whether GATS Annex applies to US based ISPs – and even if it does, it only does so for the cases where the US has committed to the services that is being transmitted from overseas.

Reasonable and non-discriminatory charges

Moreover, even in the case when GATS commitments provide access, it does not preclude that a ‘reasonable’ cost is charged. Obviously, the WTO system looked at the typical case of interconnection between two operators, or service provision over a leased network. It could not foresee the complex case of a charge by a national ISP to foreign OTTs for paid prioritization.

What type of charges GATS Annex and Basic Reference Paper permits was an issue at the heart of a WTO dispute in 2004 regarding the charges that the Mexican former monopolist Telmex applied for interconnection fees for US basic telecom suppliers.⁸ Such charges are to be cost-oriented (not necessarily cost-based), which is to say ‘not free of charge’; they could be at profit, while not overcharging to cross-subsidize for other parts of an operators business. The Panel looked to the domestic rates for comparable service for a Mexican operator,⁹ for ‘like circumstances’, echoing the

⁶ WTO, MTN/GNS/W/120, 10 July 1991

⁷ Hindley, B., Lee-Makiyama, H., ‘Protectionism Online: Internet Censorship and International Trade Law’, ECIPE Working Paper No. 12/2009

⁸ DS204, Mexico—Measures Affecting Telecommunications Services, 2004

⁹ *ibid.* Para. 7.211–216. Telmex applied a system of so-called ‘proportionate returns’ amongst Mexican operators

principle of national treatment (i.e. equal treatment to a domestic operator) and most favored nation (non-discrimination vis-à-vis another WTO member).¹⁰

In sum, the ruling properly leaves open the scenario where paid prioritization would be permitted even if the United States were bound to supply access under GATS as long as it is reasonable considering the bandwidth consumed, and as long as similar charges are applied to domestic OTTs – given GATS Annex applies in the first place.

The consequence of re-classifying ISPs as telecommunications

Unlike the authors stated, the absence of safeguards against net neutrality is not a violation by the United States or the vast majority of WTO members and EU countries who have not legislated against paid prioritization. WTO rules are principally designed to deregulate, rather than to force their members to regulate. To understand this logic, one needs to look at circumstances and rationale behind the creation of the GATS: its negotiations immediately followed the breakup of the AT&T's Bell system, when European, Asian and Latin American countries were yet to privatize their telecommunications market and engaged in state interference and bans on foreign investments in the telecom sector. The purpose of GATS rules was to declassify telecommunication services as public utilities that become prone to protectionist measures and government mandates. GATS rules on telecommunications (and in particular the Reference Paper) draw heavily on the elements of the 1996 Telecommunications Act.¹¹

Besides discriminatory pricing, another implicating factor in the case of Telmex was government involvement granted by Mexican law to Telmex through *de jure* monopoly power. The proposal to move ISPs under Title II is a government intervention that prohibits market decisions of an ISP (small and large), and would raise the same *prima facie* assumption of a non-WTO consistent market distortion like in the Telmex case,¹² even if considerable amount of forbearing was undertaken.

Classifications play a central role in the international trading system as a determinant of whether a country is bound by its commitment to open up a sector for foreign competition. Seeing the United States reclassify Internet services into the Title II “common carrier” category group will justify attempts of other countries to take similar action. As most countries still apply heavy restrictions on their telecom sectors, they will use this justification to reclassify various services as telecoms to restrict US competition on their markets – similarly to a Title II reclassification, China has sought to reclassify the entire internet as a ‘value-added telecommunication service’ to make its draconian censorship compliant with its WTO commitments, and has also imposed a mandatory licensing requirement on all web sites available to the Chinese. To come to terms with the US dominated cloud industry, others countries will follow similar regimes of ‘license to operate’. As a consequence, reclassification justifies a rollback of services market access that the United States has already achieved abroad, including

¹⁰ Footnote 15 to the GATS Annex art 5 explicitly references the MFN principle in GATT art II and national treatment GATS art XVII

¹¹ Hoekman, B., *The Political Economy of the World Trading System*, 2001

¹² Note 11. 7.217

in China and the EU. Half of US services exports depend on digital delivery, which is approximately \$300 billion per year – a volume five times larger than US car exports.

Means of addressing anti-competitive conduct

In considering ways to address possible anti-competitive conduct, it is important to note that there are many different ways of maintaining net neutrality. The structure of the competition between different service providers on different infrastructures varies depending on the countries, and sometimes even within them. Different market institutions govern against different causes of market failures. Therefore, any parallels to other economies should be done with caution. Yet the net neutrality debate in the US has highlighted how some jurisdictions have chosen to legislate against differentiated bandwidth.

Notably, the Netherlands chose to legislate net neutrality through hard law in its Telecommunications Act after the largest local operator ISP attempted to block voice-over-IP (VoIP) services.¹³ However, even amongst the relatively coherent legal systems within the European Union (EU), no single legislative approach is the same: In Slovenia, for example, net neutrality is implemented through e-commerce legislation,¹⁴ with an expectation that competitive pressure of the ISPs – in other words, consumer choice – was a sufficient safeguard to keep the networks open,¹⁵ while not precluding enforcement through their competition laws. Unlike the arguments by George Washington University professors, the diverging views amongst the EU Member States on how net neutrality should be achieved have been difficult to overcome. In any case, neither the approach of hard law nor laissez-faire consumer choice has to date been contested as incompatible with their commitments in the World Trade Organization (WTO), United Nations (UN) or the EU Single Market rules.

The EU sought to introduce centrally set price caps on unbundled local loops, which paradoxically would have improved the market situation for most incumbents who only need to invest in new infrastructure where they face competition from cable operators.¹⁶ The coverage of fiber-based (FTTC or FTTH) networks is approximately the same rate as in China, despite a GDP per capita that is more than three times larger.¹⁷ The Netherlands is a mid-tier country amongst the EU countries, signaling that net neutrality, government controls, and investments are actually three entirely unrelated concepts: None of them are actually necessary to achieve the other two. The unique institutional set-up in the United States just happens to artificially link net neutrality and government regulation through Title II.

¹³ Wet van 10 mei 2012 tot wijziging van de Telecommunicatiewet, 2012

¹⁴ Zakon O Elektronskih Komunikacijah, 003-02-10/2012-32

¹⁵ The European Commission states 96% of EU citizens not covered by net neutrality code

¹⁶ Brandt, L., Lee-Makiyama, H., 'A Fibre-Rich Diet for Europe', ECIPE Policy Brief, 02/2013

¹⁷ *ibid.*

Final remarks

The fact that WTO rules fail to address anti-competitive behavior against OTTs globally signals a weakness of the multilateral system in addressing contemporary trade issues. In that view, the conclusions by the George Washington professors are not only factually wrong but also irresponsible – a comprehensive analysis within the framework of trade law requires a clear understanding of its provisions, jurisprudence and case law. Trade rules must be invoked fully understanding its context, where some WTO members seek justifications for their protectionist measures against OTTs – one needs to carefully weigh the value of one’s own arguments against the risk that they may be used against the interests that the arguments were to protect in the first place.

Moreover, their statement that the United States would be in violation of Universal Declaration of Human Right and the article 19.2 of the International Covenant on Civil and Political Rights, and the ‘freedom to seek, receive and impart information and ideas of all kinds’, is an exaggeration verging on absurdity: the Covenant clearly applies in case of political or commercial online censorship, but is not a universal right to consume any form of media free of charge, nor is it a human right to view streaming video in HD quality. Such arguments only serve to undermine support for the multilateral system, promote protectionism and perpetuate the myth that international law infringes on national sovereignty.

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