Dispute Settlement and the GATS

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Overview of services disputes

Trade in Services Division, WTO
Dispute settlement
Cornerstone of the WTO system

- Accessible only to *governments*, not individuals or corporations
- WTO dispute bodies have:
  - *exclusive* jurisdiction over WTO obligations
  - *no* jurisdiction over non-WTO obligations?
- *Fully-binding* in international law
- Strong judicial elements
  - right to a hearing, detailed procedures, automaticity, deadlines, appeals
WTO dispute settlement
The main steps ...

- Consultations: 60 days
- Panel: 9 months
- Appellate Body: 90 days
- Implementation: 15 months
## WTO dispute settlement
Total number of procedures since 1995

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultations</td>
<td>481</td>
</tr>
<tr>
<td>Agreed solutions</td>
<td>105</td>
</tr>
<tr>
<td>Panel reports</td>
<td>151</td>
</tr>
<tr>
<td>Appellate Body reports</td>
<td>93</td>
</tr>
<tr>
<td>Compliance reports</td>
<td>27</td>
</tr>
<tr>
<td>Arbitrations on retaliation</td>
<td>19</td>
</tr>
</tbody>
</table>

Note: ‘Reports’ refer to number of adopted reports. Figures as at June 2014
WTO dispute settlement
Disputes, panels and appeals since 1995

as of 18 March 2014
WTO dispute settlement
Consultations by Agreement
## WTO dispute settlement

### Most frequent complainants/defendants

<table>
<thead>
<tr>
<th>Member</th>
<th>No of cases initiated</th>
<th>Member</th>
<th>No of cases defended</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>106</td>
<td>US</td>
<td>121</td>
</tr>
<tr>
<td>EC / EU</td>
<td>90</td>
<td>EC / EU</td>
<td>92</td>
</tr>
<tr>
<td>Canada</td>
<td>33</td>
<td>China</td>
<td>31</td>
</tr>
<tr>
<td>Brazil</td>
<td>26</td>
<td>India</td>
<td>22</td>
</tr>
<tr>
<td>Mexico</td>
<td>23</td>
<td>Argentina</td>
<td>22</td>
</tr>
<tr>
<td>India</td>
<td>21</td>
<td>Canada</td>
<td>17</td>
</tr>
<tr>
<td>Argentina</td>
<td>20</td>
<td>Japan</td>
<td>15</td>
</tr>
<tr>
<td>Japan</td>
<td>19</td>
<td>Brazil</td>
<td>15</td>
</tr>
<tr>
<td>Korea</td>
<td>16</td>
<td>Mexico</td>
<td>14</td>
</tr>
<tr>
<td>Thailand</td>
<td>13</td>
<td>Korea</td>
<td>14</td>
</tr>
</tbody>
</table>

Note: Developing countries indicated in **red**. Data from 1995 to March 2014.
Mexico – Telecom

Facts

- By 2003, Mexico had opened its telecom market to competition
- However, foreign telecoms were prohibited from terminating their own calls into Mexico
  - instead, had to interconnect (at high cost) with Mexican telecom operator
- Telmex was dominant Mexican telecom operator, and
  - had legal right in Mexican law to fix international interconnection rates for itself and all other Mexican operators
  - in fact, set an international interconnection rate for itself and others amounting to 70% above actual cost
Mexico – Telecom

Result

- Mexico’s measures were inconsistent with its ‘Reference Paper’ additional commitments
  - to interconnect calls at “cost-oriented rates”;
  - to maintain measures to ensure that major suppliers do not engage in “anti-competitive acts”.

- Mexico’s measures were inconsistent with its Annex on Telecommunication Services obligation
  - to provide “access to and use of” public telecom networks on “reasonable” terms and conditions.
<table>
<thead>
<tr>
<th>Sector</th>
<th>Limitations on Market Access</th>
<th>Limitations on National Treatment</th>
<th>Additional Commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Telecommunications Services</td>
<td>Telecommunications services supplied by a facilities based public telecommunications network (wire-based and radioelectric) through any existing technological medium, included below: (a) Voice telephone services, …etc.</td>
<td>1) None, except the following: International traffic must be routed through the facilities of an enterprise that has a concession granted by the Ministry of Communications and Transport</td>
<td>1) None</td>
</tr>
</tbody>
</table>
Key findings (1)

- Cross-border supply is not narrowly defined
  - does not require the presence of the supplier on both sides of the border
- “anti-competitive practices” of a major supplier
  - can include those practices that are legally required in domestic law, including a requirement to fix prices.
Mexico – Telecom

Key findings (2)

- “Access to and use of” public telecom networks under the Telecom Annex:
  - covers access sought by any supplier of a committed service, including a basic telecom supplier
  - is not in accord with ‘reasonable terms and conditions’ if the access price is 70% above cost-based pricing
Mexico – Telecom

Key findings (3)

- A commitment takes effect at the same time as the Schedule containing it, unless a clear time-frame is indicated
  - it is not enough to indicate generally that a commitment enters into force “when regulations will be issued”
US – Gambling

Facts

- United States refused to allow Antigua-based online gambling firms to supply their services cross-border into the United States
- US domestic laws appeared to prohibit online betting
  - 3 US federal laws prohibited certain interstate and international activities involving betting
  - certain state laws prohibited online betting
- US had taken full GATS commitments on “other recreational services (except sporting)”.
Online gambling services were covered by the US Schedule.

The US measures inconsistent with its Market Access obligations
  - since they were zero quotas inconsistent with Article XVI:2 (a) and (c).

Although US measures were found “necessary” to “protect public morals” under Art. XIV(a), they could not be justified overall since
  - the *Interstate Horseracing Act* continued to allow remote supply by domestic but not foreign operators.
# US – Gambling

## US Schedule

<table>
<thead>
<tr>
<th>Sector or subsector</th>
<th>Limitations on market access</th>
<th>Limitations on national treatment</th>
<th>Add. comm.</th>
</tr>
</thead>
<tbody>
<tr>
<td>10. RECREATIONAL CULTURAL &amp; SPORTING SERVICES</td>
<td>1) None</td>
<td>1) None</td>
<td></td>
</tr>
<tr>
<td>D. Other recreational services (except sporting)</td>
<td>2) None</td>
<td>2) None</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3) The number of concessions available for commercial operations in federal, state and local facilities is limited.</td>
<td>3) None</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4) Unbound, except as ...</td>
<td>4) None</td>
<td></td>
</tr>
</tbody>
</table>
US – Gambling

US Schedule: W/120 and CPC

- W/120
  - Section 10. Recreational services
    - D. Sporting and other recreational services, CPC 964

- CPC
  - 964 - Sporting and other recreational services
    - 9641 – Sporting services
    - 9649 – Other recreational services
      - 96491 – Recreation park and beach services
      - 96492 – Gambling and betting services
      - 96499 – Other recreational services n.e.c.
US – Gambling
Key findings (1)

Schedules:
- W/120 and the 1993 Scheduling Guidelines are relevant documents in interpreting GATS Schedules
  - not “context”, but “supplementary means of interpretation” under the Vienna Convention
  - “unless otherwise indicated in the Schedule, Members were assumed to have relied” on W/120 and the corresponding references
- The “common intention” of the negotiators is of primary importance:
  - Schedules represent a common agreement among all Members.
  - The US Schedule showed no intention to deviate from the CPC classification
US – Gambling

Key findings (2)

Market Access (I):

- A market access commitment under Article XVI implies the right to supply by all means of delivery, unless otherwise specified in the Member’s schedule.
  - “in the form of numerical limitations” in Article XVI:2(a) should not be read too rigidly, covers “limitations which, even if not in themselves a number, have the characteristics of a number”,
  - a zero quota is covered
  - principle of technological neutrality is agreed by most Members.
US – Gambling

Key findings (3)

Market Access (II):

- A prohibition of delivery by “remote” means is therefore
  - a “limitation on the number of service suppliers in the form of numerical quotas” under Art XVI:2(a), and
  - a limitation on the “total number of service operations” under Art XVI:2(c)

- A market access commitment in a given sector or sub-sector implies a commitment covering all services within that sector or sub-sector
  - Panel only, not appealed
Exceptions (Art XIV)

- Necessity is determined through “a process of weighing and balancing”, including:
  - importance of protected values;
  - contribution of measures to the ends sought;
  - trade impact of the measures.

- Need to show and focus on “reasonably available” alternative measure, which:
  - Must not entail prohibitive costs or substantial technical difficulties;
  - Must preserve the right to achieve the desired level of protection;
  - It is not up to the defending Member to show that there are no reasonably available alternatives to achieve its objectives.
China – Audiovisual products (2009)
China – Audiovisual products

Facts

- Certain Chinese measures prohibited or adversely affected the distribution of foreign goods and services relating to:
  - reading materials: books, newspapers, periodicals, electronic publications
  - audiovisual home entertainment products: videocassettes, DVDs, sound recordings
  - films for theatrical release
China – Audiovisual products

Result

- Wording of China’s commitments on audiovisual services extends to *electronic* distribution of sound recordings
  - not limited to the distribution of sound recordings embedded in physical media
- China’s measures constitute *de jure* national treatment discrimination under GATS Article XVII.
## China – Audiovisual

### China’s Schedule (excerpt)

<table>
<thead>
<tr>
<th>Sector or sub-sector</th>
<th>Limitations on Market Access</th>
<th>Limitations on National Treatment</th>
<th>Additional Commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2. D. Audiovisual Services</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Videos, including entertainment software and (CPC 83202), distribution services</td>
<td>(3) Upon accession, foreign services suppliers will be permitted to establish contractual <strong>joint ventures</strong> with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products</td>
<td>(3) <strong>None</strong></td>
<td>Without prejudice to compliance with China's regulation on the administration of films, upon accession, China will allow the importation of motion pictures for theatrical release on a revenue-sharing bases and the number of such imports shall be 20 on an annual basis.</td>
</tr>
<tr>
<td>Sound recording distribution services</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cinema Theatre Services</td>
<td>(3) Upon accession, foreign services suppliers will be permitted to construct and/or renovate cinema theatres, with foreign investment no more than 49 per cent.</td>
<td>(3) <strong>None</strong></td>
<td></td>
</tr>
</tbody>
</table>
Terms used in GATS schedules should be interpreted in evolutionary manner (AB)

- the terms used in China's GATS Schedule (‘sound recording’ and ‘distribution’) are sufficiently generic that what they apply to may change over time

- Otherwise, very similar or identically worded commitments could be given different meanings depending on the date of their adoption leading to lack of security and predictability
China – Audiovisual products

Key findings (2)

- **technical** feasibility and **commercial** reality at time of commitment: relevant?
  - May be relevant to scope commitment
  - But in this case, even if the electronic distribution of sound recordings had been shown not to be specifically permitted within China at the relevant time, this would not in itself have prevented China from making a valid commitment on these services in its Schedule.
China – Audiovisual products

Key findings (3)

- National treatment (Panel)
  - What are “like” suppliers?
    - “... when origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met,
  - Measures granting less favourable treatment:
    - Prohibition of foreign firms from supplying services that like domestic firms can supply, based only on foreign origin
    - Different requirements in terms of minimum capital required to establish a business
    - Maximum 30-year operating term imposed on foreign firms, coupled with a renewal process.
China – Audiovisual products

Key findings (4)

- Meaning of “sector” (GATS Article XXVIII(e)) (Panel)
  - “A description of a service sector in a GATS schedule does not need to enumerate every activity that is included within the scope of that service, and is not meant to do so.
  - Article XXVIII(e) of the GATS defines "sector" generally as "the whole of that service sector, including all of its subsectors".
China – Audiovisual products

Key findings (5)

- Definition of “commercial presence” in GATS Art. XXVIII(d) (Panel)
  - the term "service suppliers of another Member" supplying a service through commercial presence includes entities that have established a commercial presence in the host Member and/or entities that seek to establish in the host Member".
Final question: Why so few services disputes?

- GATS commitments are often less liberal than the applied regime?
- GATS cases are more complex and abstract compared to goods cases?
- *Ad hoc* solutions between parties are more easily found?
- Alternative mechanisms are available (e.g. arbitration under BITs)?