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BOTTOM LINE:

RED SHIRTS AND RATIONAL BUSINESS TESTS

*Lawrence Spiwak**

The WTO's regulations for foreign telecoms investment have been criticized as ineffectual – can a simple test reform them?

The Regulatory Reference Paper contained in the 1997 WTO Agreement on Basic Telecoms Services was billed as the breakthrough for international telecoms competition because it required Member States to provide, inter alia, cost-based interconnection rates, an independent regulator with transparent procedures, universal service, etc. Yet, five years later, the global telecoms industry is in financial collapse, and competition is nascent at best.

Perhaps much of the blame can be traced back to the Reference Paper itself. Due to the nature of the WTO, Member States are given great latitude on how they want to implement the Reference Paper. This discretion is problematic in practice, however, because even though many Member States may meet the "letter" of the Reference Paper, the reality is that many countries have imposed such egregiously high regulatory entry costs that any investment is economically untenable. As such, these markets are de facto closed, and there are few avenues of complaint and remedy under the current system.

In order to give the Reference Paper some "teeth," I submit for consideration some sort of objective rational business test or "RBT" – that is, given the current regulatory and legal environment, would a rational business invest in a WTO Member State as a competitor to the incumbent?

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* *Lawrence J. Spiwak is president of the Phoenix Center for Advanced Legal and Economic Public Policy Studies (www.phoenix-center.org), an international think-tank based in Washington DC, and the co-author of "*THE TELECOMS TRADE WAR: THE UNITED STATES, THE EUROPEAN UNION AND THE WTO.*" The views expressed in this article do not represent the views of the Phoenix Center, its adjunct fellows, or any of its individual editorial advisory board members.*

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There are several advantages of such an approach: first, private capital knows no geographic border and is the most objective of standards.

Second, the RBT is a forward-looking standard and focuses on the current legal and regulatory environment going forward rather than on the generic costs of entry.

Finally, such a standard would eliminate the animosity held by developing nations – i.e., those Member States with low GDP and therefore low demand for advanced broadband services – created by a "one size fits all" or "benchmarking / best practices" approach.

Take the following two examples to illustrate the point:

First, Brazil: While Brazil may have met its limited WTO commitments, its new buildout requirements require an entrant to invest nearly $1 billion over three years just to obtain a 1% market share to gain access to the national numbering plan and guaranteed interconnection rights. While these asymmetrical entry barriers do not violate the current WTO regime, Brazil would violate the RBT test because its policies make prospective entry so unprofitable as to render their market de facto closed.

As a contrasting example, go to the Global Crossing / US-Japan Cable Network Consortium landing petition dispute of two years ago. The now-bankrupt Global Crossing argued that U.S. government intervention in the WTO was required, not because of the ridiculously high interconnection rates in Japan, but because the costs of being in the telecoms business, such as construction costs and advertising, were too high.

The analytical equivalent of the current regime is that if you want to be a Member of the WTO, then everybody has to wear a "red shirt." While we should encourage a wide diversity of shades, fabrics and designs of this "red shirt," we cannot continue to condone certain Member States' efforts to charge us for a completely new wardrobe