



## Telmex: a little (competition) learning is a dang'rous thing

*Which Competition Policy for Regulated Industries?*  
Anticompetitive state intervention: evolution of standards and remedies  
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## Global competition rules

- **Why even discuss this 'academic' topic?** WTO talks failed...no serious effort to create a global competition authority or tribunal...but some rules do already exist (GATT, GATTS, TRIPs, Telecoms)
- **Other avenues?** ICN ECN OECD UNCTAD regional
- **Global consensus against cartels**
- **But governments have not agreed to a binding international commitment that they must ban cartels or face international review of their decision, dispute settlement and trade sanctions**
- **To counter this... 'Judicial activism' at the global level?**



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## Competition rules already at WTO

- GATT (consultations on RBPs; NVNI route *Kodak-Fuji*)
- TRIPS (abuse of IPRs)
- GATS (monopolies and exclusive suppliers)
- Telecoms Reference Paper (abuse of dominance, 'major supplier', essential facilities, 'anti-competitive practices')
- Developing WTO jurisprudence: *Telmex* 'cartel' case



## Proposals for Multilateral competition rules

- **1995 EC Experts Report** - Profs Immenga, Jenny and Petersmann: called for global competition rules, starting with an obligation to ban cartels
- **WTO Working group on the Interaction of T&CP 1996**  
7 years of talks: but... could not agree on multilateral commitments on even the most basic subjects:
  - Have a competition 'measure'
  - Ban cartels
  - Not discriminatory on its face
  - Cooperate in enforcement
- **Cancun 2003**: WTO governments said "Read our lips: No new commitments"
- New competition rules taken off the multilateral negotiating table by the EU
- **2004**: Telmex Petersmann panel at WTO Judicial rule-making? You decide



## Telmex Facts

### Mexican Measures (ILD Regulation)

- Supplier with largest share of traffic negotiates settlement rate
- Rate authorised by Mexican government
- Proportionate return system

### Purpose:

- Prevent free-riding (and possible predation) by foreign suppliers
- Compensate Telmex for its Universal Service Obligation

Complaint by ATT and MCI call termination rate too high – “anticompetitive”

US brings WTO case against Mexico for violating its Reference Paper commitments



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## Telecoms Reference Paper

*Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are*

- a “major supplier”
- *from engaging in or continuing “anti-competitive practices”*
  - Anti-competitive cross-subsidisation
  - Using information obtained from competitors with anti-competitive results
  - Not making available to other suppliers on a timely basis technical information about essential facilities etc



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## Two issues for the panel

1. Is Telmex a major supplier?
2. Has it engaged in anti-competitive practices?



## 1. Is Telmex a 'major supplier'?

### Three part test from the Reference Paper

- 'in the relevant market for basic telecommunications services'
- 'the ability to materially affect the terms of participation (having regard to price and supply)'
- 'as a result of:
  - (a) control over essential facilities; or
  - (b) use of its position in the market'



## Test 1 of 3 What is the relevant market?

### Call termination or two-way traffic?

- UK and EU competition policy: 'call termination' but controversial, and only found after detailed study in each case
- Economic analysis, pricing, constraints, switching?

### Petersmann panel ignored this debate and the evidence

- *'whether a consumer would consider two products as substitutable'*
- *'we find no evidence that ... an outgoing call is considered substitutable for an incoming one. One is not a practical alternative to the other.'*



## Test 2 of 3 Does Telmex have market power?

US claimed Telmex had 70+% market share

But... - 1996 data

- decreasing position, 27 concessionaires
- countervailing US duopsony

### Panel ignored all of this; no SSNIP test

Focussed only on Mexican regulation

*'Telmex is legally required to negotiate settlement rates for the entire market ... we find that it has patently met the definitional requirement'*



## Test 3 of 3 'Control over essential facilities' or 'use of its position'

Petersmann panel: not a separate step requiring any analysis

*'the ability to impose uniform settlement rates on its competitors is the 'use' by Telmex of its special 'position in the market,' which is granted to it under the ILD Rules'*

But **Telmex does not impose the settlement rate**  
– **Mexican law does.**



## So... conclusions on the Panel's major supplier 'analysis'

Cavalier attitude to competition policy discipline

- Legalistic interpretation
- Lip-service to competition policy concepts
- Lack of economic analysis
- Misplaced 'judicial economy' ...

→ 2<sup>nd</sup> stage of 'analysis'



## 2. What are 'anti-competitive practices'?

- Measures at issue not covered by examples in the RP
- Need to interpret 'anti-competitive practices'

Vienna Convention:

- '[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'



### 'Ordinary meaning' (1): Reliance on dictionaries

'Ordinary meaning' used so panels don't add to or create new commitments

Petersmann panel: 'anti-competitive practices':

*'actions that lessen rivalry or competition in the market'*

Many national judges start with dictionaries, but

- ignores better and readily available sources:  
competition laws, texts and cases



## Ordinary meaning (2)

- WTO Secretariat note on laws; Havana Charter; UNCTAD Set
- mentions cartels, vertical agreements, mergers, abuse of dominance → **no guidance**
- WGTCP discussions
- ‘hard-core cartels ought to be banned...’
- **But panel ignored ‘explicit consensus’ NOT to negotiate such rules**
- OECD Hard-Core Cartel Recommendation
- obviously concerns cartels
- **but specifically exempts state-authorised cartels**



## Context: None provide any context for the Reference Paper

- WTO Secretariat note
- Draft Havana Charter
- UNCTAD Set
- WGTCP talks
- OECD Hard-Core Cartel Recommendation

### But...Vienna Convention:

*a treaty's "context" can include any agreements between the parties "made ... in connexion with the conclusion of the treaty" or subsequently "regarding the interpretation of the treaty" or practice "in application of its provisions"*



## Object and Purpose (1)

- Of course cartels are anti-competitive practices...  
but no mention of cartels in the Reference Paper
- Non-exhaustive list...but if cartels so prevalent in this sector, why not listed? Would have been a key negotiating 'deliverable'!
- If such consensus about cartels, why absent?
- Reference Paper's **object and purpose** is the **control of market power** in the telecoms sector



## Object and Purpose (2): Petersmann Panel reasoning ...

- *“Telecoms markets are ‘characterised by **monopolies or market dominance**. ... Accordingly many members agreed to additional commitments to implement a procompetitive regulatory framework **designed to prevent continued monopoly behaviour... and abuse of dominance**”*
- *“Mexico’s Reference Paper commitment to the prevention of “anticompetitive practices” by major suppliers **has to be read in this light...**”*
- *“**Therefore** ‘the object and purpose of the Reference Paper commitments made by members **supports our conclusion** that the term “anticompetitive practices”... **includes horizontal price-fixing and market sharing agreements...**”*

???!!!



## Was there even a cartel?

### Petersmann Panel:

*'the removal of price competition **by the Mexican authorities**, combined with the setting of the uniform price by the major supplier, has **effects tantamount** to those of a price-fixing cartel'*

*but...there was no cartel – they were State measures.*

- State-authorized cartels are not banned by competition law or WTO law.
- Expressly exempted from the OECD Hard-Core Cartel Recommendation.



## 'Sovereign compulsion' issues

State-authorized cartels are exempt from competition law prohibition

- Mexico: measures intended to be pro-competitive  
EU: not 'practices' because required by the State  
not 'anti-competitive' because no room for competition in such a regulated system  
US: a State-run cartel is still a cartel; Mexico is evading its obligations

**Panel...** aware of the State action doctrine, but...

*'a requirement imposed by a member under its internal law on a major supplier cannot unilaterally erode its international commitments made in its schedule to other WTO members to prevent major suppliers from continuing anticompetitive practices'*

So... State-authorized cartels now prohibited by GATS



## Panel findings

- **Telmex is a “major supplier”**
- Mexican measures set Telmex up as the ringleader of a State-authorized cartel
- **Cartels (including State-authorized cartels) are “anti-competitive practices”**
- Mexico must ‘bring its measures into conformity with its obligations under the GATS’
- **WTO: Mexico must ban this cartel**



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## Is reading-in such a ‘cartel ban’ so very bad?

- Effect on Reference Paper(s)? Expanded
- Effect on future Reference Papers? Chilled
- Effect on ‘competition’ negotiations, if any, at WTO? Why bother?



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## Possible Objections to my Critique

- Q. *A cartel is an anti-competitive practice – what's the big deal?*  
A. This wasn't a cartel; State cartels have reasons.  
Panel making law through the back door. Reading in a commitment that does not exist in Mexico, nor internationally (no 'explicit consensus')
- Q. *This decision only binds the parties.*  
A. Don't be naïve - long awaited, and much watched.  
Even if true, commitments were read-in that Mexico did not offer.
- Q. *These are trade commitments - competition policy analysis not required*  
A. These are clearly competition policy concepts. You can't have competition rules without their analysis and self-discipline!



## (More) Possible Objections to my Critique

- Q. *It's a cartel case - economic analysis not required*  
A. Analysis of market definition and market power clearly required.  
Panel states 'effects tantamount' to price-fixing. Really? On what basis?
- Q. *Give this Panel some credit for a good first effort.*  
A. Not good enough. Mentioning competition concepts without applying them. Reading in commitments that do not exist. Not calling for competition expertise.



## 'Constructive ambiguity' is only tolerable if Panels do their job

Panel decision not supported by

- the facts
- the RP or its context, object or purpose
- competition policy
- international consensus

What is Telmex based on?

- Petersmann's vision of a 'WTO ban on cartels'
- Making up for failure in Cancun

Disregard

- for the balance between the rule-makers (GC) and the 'judiciary' (DSB)



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## What can we do about it?

**Need guidance. More cases will follow.**

Clearly can't leave it to trade experts on panels.

Strive to provide a principled analytical anchor at the WTO for:

- the creation of *new* commitments and
- the interpretation and application of *existing* commitments

- **Focus on the common elements of exclusionary practices**
- Combine the work on them by ICN, OECD, UNCTAD and WTO
- **First, address exclusionary abuse of market power (e.g the Reference Paper principles) in the trade context, but using competition analysis.**



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## Conclusion

- By all means, help global consensus against cartels
- Ban 'export cartels' at WTO – a good start!
- Outside WTO: continue demand-driven enforcement cooperation, bilaterally, regionally, and globally...including in trade agreements
- But stay away from WTO rules in this area, and in particular, from dispute settlement in trade fora



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