



Trade, Competition and Multilateral Rulemaking: A Warping of the International Legal Order?

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Global competition rules

- **Why even discuss this topic?** WTO talks failed...no serious effort to create a global competition authority or tribunal...but some rules do already exist
- **Other avenues?** ICN ECN OECD UNCTAD regional
- **Global consensus against cartels**
- **But governments won't agree to ban cartels as a binding international commitment**
- **To counter this...‘Judicial activism’ at the global level**
- **Why this is ill-founded, ignores or distorts competition analysis, misinterprets international law, and harms broader trade liberalisation efforts**



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The Problem:

Toleration by a foreign government of business practices that exclude imports of goods or services

No competition rules, or lax competition law enforcement

Solutions:

- Extraterritorial antitrust enforcement
 - obnoxious and difficult to enforce
- Unilateral trade sanctions
 - cause more harm than they solve
- Positive comity 'deputizing'
 - nice but largely ineffective to date
- Enforcement Cooperation
 - largely the way forward but requires maturity, trust, reciprocity
- **To build that...EU proposed a global commitment to have a competition law and enforce it against 'privatized protection'**



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Proposals for Multilateral competition rules

- **1995 Van Miert Report** - Profs Immenga, Jenny and Petersmann:
global competition rules, starting with a ban on cartels but moving on to include abuse, verticals, mergers
- **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’**
 - **Not discriminatory on its face**
 - **Ban cartels**
 - **Cooperate in enforcement**



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Why failure in Cancun in 2003?

- **Broader problem:**

No EU CAP Reform ...so... No New Commitments from trading partners

- **Within the WGTCP:**

- Resistance to review of individual decisions of competition authorities
- Developing countries suspicions of EU motives/MNCs
- Problems with making commitments operational: definitions, exemptions, exceptions



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Other multilateral developments

- OECD Recommendations eg. on hard-core cartels, cooperation
- UNCTAD Set
- European Competition Network
- International Competition Network
 - Demand-based
 - Focussed on improving cooperation, understanding, soft convergence
 - Consensus-based, non-binding best practices
 - No/minimal 'dispute settlement' necessary; maximum is peer review



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Competition rules already at WTO

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



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GATS negotiations

Introduced (...and introducing)

- “market access” standards:
 - beyond national treatment commitment
 - opening markets
- Pro-competitive regulation to those markets
 - Protect competition by preventing “anti-competitive” practices
 - Promote competition by requiring that “major suppliers” provide competitors with non-discriminatory access to their networks



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Telecoms sector

Problem: Concern about exclusion by dominant incumbent (formerly state-owned)

Solution:

- Obligations on WTO Members to *promote* competition
- By requiring their 'major suppliers' to provide 'non-discriminatory access' to their networks to foreign rivals



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Reference Paper – negotiation (1)

Carefully drafted...but a product of multilateral consensus

- Aim was a composite set of regulatory principles
- But needed to be sufficiently flexible to accommodate differences in market structures and regulatory philosophies
- US: *obligations on members to control dominant operator*
- Australia: *identify the relevant carriers*
- Consensus: *focus on control of facilities to define who carriers are*



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Reference paper – negotiation (2)

- Canada: *essential facilities available on monopoly basis*
- Others: *what about former monopolies, now privately held?*
- EU: *it's not about control; it is about significant market power (SMP)*
- Objections: *too broad; EU SMP at 25%*
- Consensus: *some carriers might act anti-competitively even without control over essential facilities*
- Consensus: *concept of market power needed 'major suppliers'*



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Telecoms Reference Paper

- “major supplier”
- Ability to materially affect the terms of participation (price and supply) in the **relevant market** as a result of:
 - Control over essential facilities
 - Use of its position in the market



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Preventing anti-competitive practices in telecoms

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 including:

- 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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Issues with the Reference Paper

Criticisms

- Overall standard is more restrictive than CP
- Appropriate for formerly monopolised sector, but only to *introduce* competition
- Thereafter, competition policy should operate, not regulation
- Open to interpretation by trade experts on panels
- Telmex case broadens RP's application considerably
- Adds further anti-competitive practices to the list



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Run-up to Telmex

- 1995 EU expert group: Petersmann recommended WTO ban on cartels
- Late 1990's: Working Group on T&CP worked towards cartel ban
- WG no consensus, broader failure at Cancun.
Read our lips: No new commitments.
- 2003: New competition rules taken off the multilateral negotiating table by the EU.
- Then...2004: Petersmann's panel on Telmex case...Judicial rule-making? You decide!



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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 from USTR (AT&T and MCI): about system and rate



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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**.*



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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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Two issues for the panel

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

Some reactions to 1. Panel's major supplier 'analysis'

Cavalier attitude to competition policy discipline

- Market definition
- Market Power: 'major'
- Use of its position
 - Legalistic interpretation
 - Lip-service to competition policy concepts
 - Lack of economic analysis
 - Misplaced 'judicial economy' ...

→ 2nd stage of 'analysis'



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2. What are ‘*anti-competitive practices*’?

- Measures at issue (ILD) not covered by examples in the Ref Paper
- Need to define ‘*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**’*



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Ordinary meaning (1): Reliance on dictionaries

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

Panel: ‘anti-competitive practices’:

‘actions that lessen rivalry or competition in the market’

Many national judges start with dictionaries, but

- takes a particular stance: no ‘substantiality’ filter → more interventionist
- ignores better and readily available sources:
competition laws, texts and cases



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Ordinary meaning (2): International documents take away more than they add

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



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Context (1): None provide any context for the RP

Vienna Convention:

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

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



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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 from the Reference Paper?
- Reference Paper's **object and purpose** is the **control of market power** in the telecoms sector



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Object and Purpose (2): 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**, particularly by former monopoly operators, and **abuse of dominance** by these or any other major suppliers. ...”*
- *“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...**”*



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Was there even a cartel?

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’*

*‘the allocation of market share between Mexican suppliers **imposed by the Mexican authorities**, combined with the authorisation of Mexican operators to negotiate financial compensation between them instead of physically transferring surplus traffic, has **effects tantamount** to those of a market sharing arrangement between suppliers’*

- 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.



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'Sovereign compulsion' issues

State-regulated 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-regulated cartels are prohibited by GATS



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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 negotiations, if any, at WGTCP? Why bother?
- Given state of play on negotiations, was this an appropriate reading?



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'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

Disregard

- for the balance between the GC and the DSB

What is Telmex based on?

- Vision of a 'WTO ban on cartels'
- Making up for failure in Cancun



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What can we do about it?

Don't do anything?

Dangerous: leave it to panels? – 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 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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