# ENFORCING MARKET ACCESS VIA ANTRITRUST POLICY: A COMMENT ON THE WTO'S *TELMEX* DECISION

**By Dr. Delroy S. Beckford***

Within the WTO market access and anti-trust policy may be seen as strange bedfellows, given the lack of agreement on the inclusion of competition matters within the multilateral framework as part of the Singapore issues, [1] but also because the WTO is largely seen as presiding over rules that discipline state conduct as opposed to private conduct.[2] In a Panel decision in 2004, *Mexico-Measures Affecting Telecommunications Services,*[3] the first to address the General Agreement on Trade in Services (GATS), the WTO seemed to have put to the forefront the convergence of multilateral anti-trust enforcement and market access commitments as a significant part of its mandate for the liberalization of trade in services.

The decision, however, raises concerns of whether market access and anti-trust principles can be effectively combined within the WTO context to promote liberalization without a multilateral framework for competition policy, given the mandate of Panels stipulated in Article 3:2 of the Understanding on Dispute Settlement (DSU).[4]

Admittedly, the WTO Agreement contains competition provisions in several of the covered agreements,[5] but there is no comprehensive framework for the merging of anti-trust and market access principles for enhanced liberalization. What exists is a piecemeal approach that is largely reflected in GATS that, as will be shown below, may have greater implications for the multilateral trading system and domestic regulatory discretion than what was originally intended.

Convergence of the two disciplines to ensure greater liberalization is regarded as significant because of hybrid public/private restraints to trade that may nullify market access commitments guaranteed by states under GATT rules that are largely concerned with public or state restraints to trade.

Below I address the effectiveness of this merging from the standpoint of the Panel's anti-trust analysis bearing in mind that for some GATS provisions a finding of an antitrust

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* Senior Legal Counsel, Fair Trading Commission.

[1] Although the Ministerial Conference in Singapore (1996) established a Working Group for the study of the interaction of trade and competition policy, and this was followed up in Doha (2001) with respect to a clarification of the mandate of the Working Group, the issue was subsequently taken off the agenda in accordance with a decision of the General Council. See, for example, Decision adopted by the General Council on 1 August 2004, WT/L/5792.

[2] Private conduct may however be disciplined by WTO rules where there is sufficient government involvement that makes the private conduct a state conduct. See for example, *Japan-Trade in Semi-Conductors*, May 4, 1988, G.A.T.T. B.I.S.D. (35$^{TH}$ Supp.) at 155, 1989, (decision adopted May 4, 1988).

[3] WT/DS204/R, hereafter, the *Telmex* case.

[4] This provides that in the interpretation of the covered agreements there should be no addition to or diminution of the rights and obligations assumed by WTO Members.

[5] See, for example, M. Matsushita, 'Basic Principles of the WTO and the Role of Competition Policy' *Wash University Global Studies Law Review*, p. 369, 2004.

violation is a requirement for a presumption or finding of nullification and impairment of market access commitments.

**Background**

The decision concerned a complaint by the United States against Mexico that it violated its GATS commitments by failing to ensure that Telmex, the once state owned but dominant telecommunications company in Mexico, provide interconnection to U.S. telecommunications suppliers at 'cost oriented' rates and not engage in anti-competitive practices. The U.S. also alleged that Mexico did not provide U.S. telecommunications suppliers 'reasonable and non-discriminatory access' to public telecommunications networks and services as required by the GATS Annex on Telecommunications.

The U.S. complaint arose from Mexico's International Long Distance Rules (ILD) that permitted Telmex to set and charge a uniform interconnection rate for terminating calls to Mexico from the U.S. at prices that were considered excessive and which, because Telmex was authorized to set a settlement rate that was binding on other telecom suppliers in Mexico, was alleged to be a price –fixing cartel operated at the behest of the Mexican government.

**The legal framework**

The GATS contains provisions that stipulate minimum core obligations for WTO Members with respect to competition matters. Article VIII, for instance, enjoins WTO Members to prevent abuse by monopolies in service industries for which specific commitments for liberalization are made, and to ensure that monopoly rights are not exercised in breach of most favoured nation (MFN) obligations.

The obligations allegedly breached by Mexico are contained in the GATS Annex on Telecommunications, the accompanying *Telecommunications Reference Paper* (TRP), and the Schedule of Specific Commitments. In accordance with Article XXIX of the GATS, the Annexes are an integral part of the GATS, and Article XX.3 provides that the specific commitments assumed in the Schedule of Commitments are an integral part of GATS.

Section 5 (a) of the GATS Annex on Telecommunications requires WTO Members assuming these commitments, to ensure that " any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions…"

By contrast, the TRP defines a major supplier in the following terms:

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or
(b) use of its position in the market

Section 1 of the TRP addresses competitive safeguards and is in the following terms:

1.1 Prevention of anti-competitive practices in telecommunications

> 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.

**Was Telmex a Major supplier?**

The Panel found Telmex to be a major supplier because it satisfied the definition in the WTO Reference Paper, as set out above, that is, "a major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunication services…" The Panel referred to Mexico's International Long Distance Rule (ILD) Rule 13 that authorized Telmex to negotiate settlement rates for the Mexican market for termination of southbound calls from the U.S. ILD Rule 13 provided that "the long distance service licensee having the greatest percentage of the outgoing long distance market share for the six months prior to negotiations with a given country shall be the licensee that is authorized to negotiate settlement rates with the operators of said country".[6]

For the Panel the relevant market was the market for terminating southbound calls and not point to point connection that would include northbound calls from Mexico to the U.S. Here, the Panel relied on the U.S.'s submission which drew on the determination by the competition authority in Mexico that treated southbound calls as a relevant geographic market.

The Panel referred to demand and supply substitutability in addressing the issue of the appropriate product and geographic market, but its approach was cursory. It simply said it found no evidence that '…an outgoing call is considered substitutable for an incoming one'. True enough, Mexico had provided no such evidence, claiming instead there was no market for termination services and that the settlement rate was in accordance with a traditional accounting rate regime that took account of two way traffic. That said, the standard analysis of the market was not conducted, and the Panel's approach seemed to have been less than adequate for the conclusion reached.

[6] Cited In Panel Report at 4.

**Did Telmex engage in anti-competitive practices?**

Next, the Panel addressed the question of whether Telmex engaged in anticompetitive practices within the context of the Reference Paper. Relying on dictionaries, it defined anticompetitive practice to mean a practice 'tending to reduce or discourage competition'. It then characterized the uniform settlement rate fixed by Telmex and financial compensation agreements as a horizontal price fixing and market sharing arrangement tantamount to a cartel. The compensation agreements were designed to ensure that carriers accepted no more than their proportionate share of incoming calls as related to their outgoing calls unless they paid for the right to accept more than their quota.

The Panel observed that there is no reference to horizontal price fixing and market sharing arrangements in the Reference Paper but regarded the practice as being covered because the Reference Paper includes in the definition of 'anti-competitive' 'engaging in anti-competitive cross-subsidization' and the list is non-exhaustive and includes pricing issues. This finding was also bolstered by ILD Rules requiring international gateway operators to distribute among themselves incoming calls from a country in proportion to the outgoing calls the operator sends to that country, and to negotiate compensation agreements in accordance with the proportion agreed on if the calls are not distributed accordingly.
A further basis for this reasoning is that the legislation of many WTO Members prohibit such practices i.e. horizontal price fixing and market sharing arrangements.

The Reference Paper refers to three examples of anti-competitive practices that concern exclusionary action by a dominant firm. These are anti-competitive cross-subsidization, use of competitors' information with anti-competitive results, and not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information necessary for them to provide service.

That these are largely limited to exclusionary practices raises the question of whether the price fixing and market sharing arrangement sanctioned by the ILD Rules had the effect of preventing competitors from providing the service within Mexico as suppliers with the ability to terminate southbound calls.

This does not seem to have been the case since affiliates of AT&T and WorldCom, Alestra and Avantel, were at the time of the WTO case, operating their own fibre optic long distance cables that US carriers could have used to transport southbound calls from the US.[7]

There was also little basis on which to claim that the practices being proscribed domestically were prohibited under GATS as a reflection of what WTO Members understood these anti-trust obligations to mean at the time of the agreement. This is so because the panel's ruling in effect amounted to a ban on export cartels for which there is

[7] Gregory Sidak, and Hal Singer, Uberregulation without Economics: The World Trade Organization's Decision in the US-Mexico Arbitration on Telecommunications Services, *Federal Communications Law Journal*, vol. 57, 2004.

yet an agreement at the multilateral level. A ban on export cartels because the termination service at issue supplied by Telmex was an export and not an import, that is, Mexico was in effect selling or exporting its termination service and had put a 'cartel' together for that purpose. But there was no agreement under GATS with respect to export cartels. Indeed, the negotiating position of the US, on that understanding, is reflected in the fact that it maintains no prohibitions against export cartels, but rather exempts them under their Webb Pomerene Export Trade Act 1918[8], provided there is no anti-competitive spill over effect within their economy. Moreover, Mexico had not made any commitments under GATS with respect to exports.

**Was the settlement rate cost oriented?**

In addressing this question the Panel relied on the Long Run Average Incremental Cost (LRAIC) as the appropriate benchmark for cost oriented settlement rates. The Panel concluded that 'cost oriented' means "the costs incurred in supplying the service, and that the use of long term cost incremental methodologies, such as those required in Mexican law, is consistent with this meaning."[9] Apart from relying on the legislation in Mexico to support this interpretation, the Panel also referred to Article 31.4 of the Vienna Convention to determine the special meaning to be attributed to 'cost-oriented' as used by the International Communication Union (ITU). It found that the special meaning attributed to the term under the ITU also supports the view that it refers to the cost of supplying the service and that the widespread use of LRAIC among WTO Members supports this interpretation.

Having determined that the LRAIC is the appropriate benchmark for 'cost oriented', the Panel then compared the price for terminating international calls with the price for terminating calls within Mexico for the same network components[10] and found them not to be cost oriented because the international rates were substantially higher than the domestic termination rates.[11]

Although LRAIC is required by Mexican law in the settlement of interconnection rates, this is not the only meaning that the term 'cost oriented' may bear under its legislation. The law merely requires that domestic interconnection rates *at least* allow recovery of the long run average incremental cost.[12] Thus, the shared understanding of the term to which the Panel referred, by referring to the practice of WTO Members (specifically their domestic legislation) is not conclusively supported by reference to domestic legislation of WTO Members.

There is also little agreement as to what cost-oriented means in the context of the ITU when the LRAIC is to be used. On the one hand, the US's submission was to the effect

[8] 15 U.S.C. § 61-64.
[9] Panel Report, para. 7.177.
[10] The relevant network components are international transmission and switching, local links, subscriber line, and long distance links.
[11] Approximately 77% higher. See Panel Report, para. 7.203.
[12] Panel Report, para. 7.176 ( referring to Article 63 of Mexico's Federal Law on Telecommunications)

that the term implies the cost of supply of the service based on a methodology to calculate cost that is predicated on all fixed costs becoming variable costs over the long run.[13] On the other hand, the Panel referred to the ITU's understanding of LRAIC as involving methods focusing on 'additional future fixed and variable costs that are attributable to the service'.[14] This difference in meaning would seem to suggest some discretion for WTO Members in setting appropriate cost oriented rates to account for some fixed costs, although the Panel rejected this application of the concept with respect to Mexico's defence.

## IMPLICATIONS OF THE DECISION

Has there been a successful merging? It is questionable whether the WTO succeeded in the merging of the two regimes that would provide adequate guidance for future panels. Its analysis on the competition issues was not as robust as is characteristic of domestic competition authorities. Its approach to finding the product and geographic markets did not delve into demand and supply substitution analyses, notwithstanding its reliance on domestic law to support its interpretation of what may be considered anti-competitive practices as understood by WTO Members.

It may be that the current structure of the WTO does not allow for this, i.e. panels are limited to their terms of reference and cannot engage in independent fact finding, as distinct from competition authorities in the domestic setting. This means that a claim that is not rebutted prevails once the applicable burden of proof has been met, whether or not there may be countervailing evidence to rebut the claim.

Bearing in mind that Mexico did not appeal the decision , it may be a source of guidance for how some domestic obligations are to be interpreted to avoid legal challenges in the multilateral arena. The term cost-oriented, for example, features in the legislation of countries that have assumed obligations under GATS with respect to telecommunications services. Section 30 of The Telecommunications Act of Jamaica for example provides for interconnection at cost oriented rates, and it may be that the Panel's approach may offer guidance on interpretation, albeit domestic jurisdictions are not bound by the ruling.

As the ruling stands, international settlement rates must be related to domestic settlement rates to determine if they are cost-oriented. It is not clear from the decision whether international settlement rates must equal domestic settlement rates. The Panel referred to the substantial variation between domestic and international settlement rates, but did not address the question of what would be a reasonable variation between the two rates, and if the international settlement rate would not be considered cost-oriented, however slight the margin of difference between the two rates. Here is a case in which the WTO found cartelization, but no predatory or below cost pricing, and a decision whose very basis may have been the alleged excessive pricing since it is hardly likely that there would have been a dispute if the international settlement rate (even if fixed by a cartel authorized by legislation) were equal to the domestic settlement rate.

[13] Ibid. para. 4.173.
[14] Para. 7.175.

Clarity on these questions would doubtless afford stronger grounding for merging market access and competition principles within the WTO. It remains to be seen whether the decision will be merely a footnote in this process.