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**THE WTO DISPUTE SETTLEMENT AND ANTI-COMPETITIVE
PRACTICES: LESSONS LEARNT FROM TRADE DISPUTES**

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ABSTRACT

This article discusses the prospect of dispute settlement on competition cases at the World Trade Organisation in the light of trade disputes regarding alleged anti-competitive practices that impede market access. Notwithstanding the present stalemate after Cancún and the tenebrous prospect of consensus to be reached on international competition rules under the binding WTO framework, the saga of trade disputes demonstrates that trade tools would nevertheless be employed by the WTO tribunals as levers to pry open markets to which access is foreclosed or restricted by anti-competitive practices. However, the *Kodak-Fuji* and *Telmex* disputes harbinger that the WTO dispute settlement in its present capacity is incapable of dealing with competition

issues satisfactorily, and the author argues that to allow WTO tribunals to simply exercise this judicial-creating, gap-filling role is staggering for the legitimacy of not only the dispute settlement mechanism but of the WTO system as a whole. Even if rules can be crafted and agreed upon, one must further recognise that the nature of competition issues is too complex and unique to be cast in a binding regime established and applied by international dispute settlement bodies which lack the legitimacy and expertise to manoeuvre the analytical tools of competition law and policy. It is concluded that without some fundamental changes, the WTO dispute settlement cannot be capable of satisfactorily dealing with anti-competitive practices which may impede access to markets.

A INTRODUCTION

This article discusses the prospect of dispute settlement on competition cases at the World Trade Organisation (WTO) in the light of trade disputes regarding alleged anti-competitive practices that impede market access. Notwithstanding the present stalemate after Cancún and the tenebrous prospect of consensus to be reached on international competition rules under the binding WTO framework, trade disputes demonstrate that trade tools would nevertheless be employed by the WTO tribunals as levers to pry open markets to which access is foreclosed or restricted by anti-competitive practices. However, the *Kodak-Fuji*¹ and *Telmex*² disputes harbingers that the WTO dispute settlement in its present capacity is incapable of dealing with competition issues satisfactorily, and the author argues that to allow WTO tribunals to simply exercise this

¹ WTO *Japan – Measures Affecting Consumer Photographic Film and Paper* (31 March 1998) WT/DS44/R (hereinafter ‘*Kodak-Fuji*’).

² WTO *Mexico – Measures Affecting Telecommunications Services* (2 April 2004) WT/DS204/R (hereinafter ‘*Telmex*’).

judicial-creating, gap-filling role is staggering for the legitimacy of not only the dispute settlement mechanism but of the WTO system as a whole.

The article seeks to explore the issues as follows: Part B sets the scene with a brief introduction to the globalisation of markets and the rise of competition policy, followed by a review of the ereptation of competition rules onto the global agenda directly through the efforts of negotiations in the multilateral arena. This allows the reader to appreciate that the current standstill in negotiations under the binding multilateral framework means that the crucial role of dispute settlement panels in interpreting trade commitments so as to address competition concerns is brought even more sharply into focus. Part C concentrates on the WTO and begins with an overview of ‘competition-related’ commitments under the aegis of the WTO Agreements, since it is indirectly through the interpretation of such commitments in trade disputes that competition issues have arisen in the WTO. The spotlight is then focused on the *Kodak-Fuji* and *Telmex* disputes, which shed some light on the potential of the panels to handle matters of competition law and policy. The author reflects on some of the difficulties and the desirability of allowing the dispute settlement mechanism to involve itself in competition issues, and part D concludes that some fundamental changes must be made before the WTO dispute settlement is capable of satisfactorily dealing with anti-competitive practices which impede access to markets.

B SETTING THE SCENE

1 Competition policy and globalisation

If one were to paint a picture of the global marketplace, it would be a picture splashed with vibrant colours depicting dynamism and brilliance. The global landscape has changed over time - global transactions swirl over national borders, bringing nations

together in the name of ‘harmonisation’, diluting trade barriers and the concept of ‘sovereignty’ that nations fervently cling on to.

Most notably, in the search for a more panoptic vision of international trade policy, anti-competitive practices have been recognised as the next ‘generation’ of barriers to trade in a liberalised world. Globalisation offers fertile soil for anti-competitive practices³: the reduction of tariffs and other barriers after successive trade rounds heightens the incentive for firms to engage in anti-competitive behaviour to preserve their customary turf, and devices used to protect the market increase as industrial structures in economies advance in sophistication. Governments whose freedom to support domestic industries have been curtailed by international rules, may be tempted to maintain lax competition regulation or enforcement, or to grant exceptions protecting specific industrial sectors.

Therefore, the interface between competition⁴ policy and international trade has various aspects⁵, including, for example, the global economic damage caused by international cartels; the conflicts between nations arising from antitrust enforcement; or the potential for unnecessary burdens on international economic activity caused by duplicative or conflicting enforcement policies such as the impact of a merger in different countries. The present contribution will focus on possibly the most widely-discussed aspect of the interaction between trade and competition: anti-competitive practices that may impede market access, and the ability of the WTO panels to tackle such practices in trade disputes.

³ L Brittan & K Van Miert ‘Towards an International Framework of Competition Rules’ (1996) 24(10) Intl Business Lawyer 454, 456.

⁴ Hereafter the terms ‘competition’ and ‘antitrust’ are used interchangeably.

⁵ DK Tarullo ‘Norms and Institutions in Global Competition Policy’ (2001) 94 AJIL 478, 479-485.

These practices include vertical restraints, import cartels, and monopolies. Such conduct excludes a foreign company from a market as effectively as a high tariff would, and the absence of national competition rules or their inadequate enforcement which thereby embolden the relevant practices may create trade tensions. As a result, the intricate interconnection between international and domestic policies increases the complexity of the international milieu. Japan provides some of the celebrated examples where international action has been advanced by the US to remedy deficiencies in Japanese national competition policies.⁶

2 The multilateral arena

Although the focus is on the WTO dispute settlement, an understanding of the efforts advanced towards international antitrust rules in the multilateral arena is essential since the two are inter-related. As we shall see, the current stalemate means that the crucial role of dispute settlement panels in interpreting existing trade commitments so as to address competition concerns is brought even more sharply into focus. One must also appreciate that discussions take place in a variety of multilateral and regional fora⁷, which are quite distinct from the WTO and which have made comparatively greater progress due to their non-binding nature and more narrowly focused agenda. Per contra, the WTO provides a framework of binding rules backed by an effective dispute resolution mechanism, and its *raison d'être* was to focus on global trade policy. An organisation with such attributes does not raise one's immediate hopes as to its congeniality in policing competition issues. Therefore, to allow us to better appreciate and understand the WTO's standing in this plethora of debate, this section will begin with a discussion of competition developments in the wider, 'binding' multilateral

⁶ A Mattoo and A Subramanian 'Multilateral Rules on Competition Policy – a Possible Way Forward' (1997) 31(5) J World Trade 95, 97.

⁷ AD Melamed 'International Cooperation in Competition Law and Policy: What can be achieved at the bilateral, regional and multilateral levels' (1999) 2(3) J Intl Economic L 423.

arena, followed by a brief analysis of more focused regional efforts and non-binding multilateral organisations by way of comparison.

(a) Wide multilateral efforts toward international competition rules

Aficionados of trade and competition will recognise that the symbiosis of trade and competition has a long genesis. The original proposal for an International Trade Organisation of 1949 was predicated on a call for provisions to address restrictions imposed by private companies and cartels. Chapter V of the Havana Charter⁸ set forth rules on ‘restrictive business practices’⁹, but was ultimately abandoned due to audible voices of protest from the US Congress stemming from concerns over international incursions into US domestic political sovereignty. The General Agreement on Tariffs and Trade (GATT)¹⁰ was thus born without competition rules.

In 1960, a GATT Decision¹¹ recommended bilateral and multilateral consultations among governments – an otherwise modest recommendation when compared to the Munich Code, which was a detailed proposal for a binding international competition agreement put forward by a private group of scholars in July 1993, and proposed as a plurilateral agreement in the framework of Annex 4 of the WTO Agreement.¹² This controversial and practically unworkable code however never came into effect.

The quest towards a greater coherent world competition policy was given fresh impetus by Sir Leon Brittan’s call for a global competition framework at the 1992

⁸ Havana Charter for an International Trade Organisation (24 March 1948) UN Doc E/C.2/78.

⁹ *ibid* Article 46.

¹⁰ General Agreement on Tariffs and Trade 1947 (30 October 1947) 55 UNTS 187.

¹¹ GATT Decision on Restrictive Business Practices: Arrangements for Consultations (18 November 1960) 9 BISD 28 (1961).

Davos World Economic Forum.¹³ At the first WTO Ministerial Conference in Singapore 1996, the Working Group on the Interaction between Trade and Competition Policy was formed ‘to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices.’¹⁴ A focused competition mandate seemed promising by the time of the Doha Ministerial Declaration¹⁵, which in essence identified a number of issues to be clarified by the Working Group including core principles, provisions on hardcore cartels, co-operation modalities and capacity building.¹⁶

Unfortunately, negotiations failed at the 5th Ministerial at Cancún, although this was because of a range of politically-based issues rather than because of technical objections to a multilateral framework for a WTO competition policy.¹⁷

Therefore, the wheels of competition rule-making in the ‘binding’ multilateral arena have currently stopped turning. It is hardly expected that Members would achieve a breakthrough and establish a comprehensive antitrust regime – even the EU, which previously embraced the idea with zeal, now foresees little prospect of international agreement on proscribing any but the most hard-core antitrust offences such as cartels. There are many strong concerns against such a normalization movement: firstly, it is axiomatic in any multilateral negotiations that undercurrents of different systems and interests would encumbrance discussions in the name of greater convergence and unity.

¹² Draft International Antitrust Code (1993) 65 BNA Antitrust and Trade Regulation Report 1628 (Special Supp).

¹³ P Marsden *A Competition Policy for the WTO* (Cameron May 2003) 55; L Brittan ‘A Framework for International Competition’ (address delivered to the World Competition Forum, Davos, Switzerland 3 February 1992).

¹⁴ WTO, Singapore Ministerial Declaration, Conference Doc WT/MIN(96)/DEC/W (13 December 1996) (96-5315) [20].

¹⁵ WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1 (14 November 2001).

¹⁶ For an analysis of the proposals see IG Bercero and S Amarasingha ‘Moving the Trade and Competition Debate Forward’ (2001) *J Intl Economic L* 481, 491-499.

¹⁷ T Stewart ‘The Fate of Competition Policy in Cancun: Politics or Substance?’ (2004) 31(1) *Legal Issues of Economic Integration* 7.

Considering the unique nature of antitrust matters, it is a formidable task securing agreement among over 120 members in different stages of development with potentially wide gulfs in socio-economic circumstances, some of which do not even have competition regimes.¹⁸ It has therefore been suggested that a multilateral agreement would likely be so general or so compromised as to be meaningless, or would be the unprincipled result of specific political trade-offs.¹⁹ A further concern is that any meaningful agreement might ‘freeze’ competition law into rigid complex norms unsusceptible to evolving economic frontiers.²⁰ Antitrust statutes are proscribed in general terms and depend on experienced enforcers and judges for interpretation and application in complex, fact-specific evidentiary contexts and differing market circumstances. In this sense, antitrust law is characterised by a common law, case-specific approach, which does not exist in the WTO and may thus overwhelm WTO tribunals.

(b) ‘Focused’ multilateral and regional efforts toward international competition rules

(i) OECD

A rather more intrepid attitude has been taken towards discussions about an international antitrust regime in the Organisation for Economic Co-operation and Development (OECD). The OECD Committee on Competition Law and Policy cultivates a thriving forum for communication and co-operation on a wide range of antitrust issues,²¹ and provides for quasi-rule making through ‘soft laws’.²²

¹⁸ J Epstein ‘The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Market Place?’ (2002) *American U Intl L Rev* 343, 360.

¹⁹ J Griffin ‘The WTO Study of the Interaction between Trade and Competition policy: Timely and Controversial’ (1997) 3(2) *Intl Trade L Regulation* 39, 41; J Klein ‘A Reality Check on Antitrust Rules in the World Trade Organization and A Practical Way Forward on International Antitrust’ (address before the OECD Conference on Trade and Competition 30 June 1999).

²⁰ Trebilcock ‘Reconciling Competition Laws and Trade Policies: A New Challenge to International Cooperation’, in GB Doern and S Wilks (eds) *Comparative Competition Policy: National Institutions in a Global Market* (Clarendon Press Oxford 1996).

²¹ Tarullo (n 5).

(ii) ICN

There is now more competition for the role of enhancing convergence and cooperation in the International Competition Network (ICN). The ICN operates as a dense inter-governmental network of competition agencies which focuses on co-operation and convergence in antitrust enforcement through a results-oriented agenda and informal, project-driven organisation.²³ Non-binding recommendations are adopted to address specific issues.

(iii) UNCTAD

In 1980, Members of the United Nations Conference on Trade and Development (UNCTAD) adopted a non-binding set of rules for the control of restrictive business practices.²⁴ The *UNCTAD Set* is detailed and extensive but non-binding.

(iv) Regional efforts

The European Communities (EC) has a unified, and one of the most dirigiste and successful regional competition policies under Articles 81 and 82 of the EC Treaty (Treaty of Rome, as amended) and the European Merger Regulation 139/2004. The US has been involved in several regional agreements on issues of antitrust cooperation and co-ordination, including the North American Free Trade Agreement and the Free Trade Area of the Americas. The Asia Pacific Economic Cooperation has similarly cultivated a culture of antitrust cooperation among its members.

²² S Cho 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' (1998) 39 *Harvard Intl L J* 1998 311, 338-339.

²³ See ICN <<http://www.internationalcompetitionnetwork.org/aboutus.html>>

²⁴ Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, UN Doc TD/BRP/CONF/10/REV.1 (1980).

C THE WTO

The focus now shifts to the WTO and more specifically to its ‘competition-related’ trade rules, since it is through the interpretation of such rules by WTO panels that competition issues have arisen in trade disputes.

1 WTO ‘competition-related’ rules

Notwithstanding the absence of binding WTO competition rules, in practice it has been impossible to exclude competition policy considerations altogether. While not directly addressing competition law per se, there has been an ad hoc development of competition-related rules in the WTO system which are binding, albeit not in the form of an explicit comprehensive body of rules but rather scattered in an archipelago of legal bases in the WTO Agreement.²⁵

(a) GATT and GATS

- (i) Complainants often invoke the provisions which protect the ‘competitive conditions’ between domestic and imported goods²⁶: Article III GATT on National Treatment; Article XI GATT on prohibition of quantitative restrictions; and Article XVII, the state-trading enterprise clauses.
- (ii) Article VIII of the General Agreement on Trade in Services²⁷ (GATS), deals with monopoly service supplier providers.
- (iii) Service providers may also act so as to restrain competition and thereby restrain trade (Article IX:1 GATS). Article IX:2 provides for consultations among Members.

²⁵ Marrakech Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 3.

²⁶ WTO *EC – Regime for the Importation, Sale and Distribution of Bananas – Report of the Appellate Body* (9 September 1997) WT/DS27/AB/R.

²⁷ General Agreement on Trade in Services, Annex 1B of the WTO Agreement.

**(b) The WTO Agreement on Trade-Related Intellectual Property Rights²⁸
(TRIPS)**

Under Article 40 Members can prohibit licensing practices or conditions that may constitute abuses of exclusive intellectual property rights.

(c) Pro-competitive regulation

The ‘Reference Paper’ on Pro-Competitive Regulatory Principles²⁹ is the most important competition-related trade commitment in the WTO framework. The Paper will be more extensively discussed below in the context of *Telmex*, where its principles were subject to interpretation by the panel.

2 Trade disputes: Kodak-Fuji

The hybrid (public/private) nature of the problem of closed foreign markets offers the alternative remedy down the path of trade accords. One must bear in mind substantive differences, eg the GATT does not regulate private practice, and thus there is the need for an explicit ‘governmental link’ for panels to pronounce on the consistency or inconsistency of a measure.

A few competition-related cases have been indirectly dealt with in the WTO, particularly with regard to the ‘Japan problem’ – as was argued previously regarding sectors such as flat glass and auto parts, the structural uniqueness of Japanese industry reflects a complex interaction of private and government conduct that apparently acts as

²⁸ Agreement on Trade-related aspects of Intellectual Property Rights, Annex 1C of the WTO Agreement.

²⁹ Negotiating Group on Basic Telecommunications, WTO Reference Paper on Basic Telecommunications (24 April 1996) (hereinafter ‘Reference Paper’).

a foreclosure to distribution channels and denies market access in Japan, particularly to foreign competitors. The involvement of the Japanese government – in permitting market barriers to exist through statutory enactments and administrative guidance mechanisms – interweaves the situation with issues of trade.

(a) Factual background

The *Kodak-Fuji* dispute began when Eastman Kodak Company ('Kodak') successfully petitioned the United States Trade Representative (USTR) to utilize Section 301 of the Trade Act of 1974, complaining that anti-competitive practices (allegedly non-price vertical restraints) denied Kodak access to the Japanese market. The definition of 'unreasonable practices' under Section 301 includes government actions constituting systematic toleration of anti-competitive activities by foreign firms with market access restricting consequences. Under Section 301, the threat of economic sanctions is used to force a negotiated solution to the dispute.

The US unilateral approach triggered a firestorm of vehement objections by the Japanese government to this potential usurpation of sovereign powers.³⁰ First, the USTR had advanced with flagrant disregard of the legislative history of Section 301 and comity considerations which requires the prior exhaustion of remedies through the Japan Fair Trade Commission (JFTC). Secondly, in attacking the Japanese vertical restraints, the US had failed to address issues of efficiency – an observation which reveals overt inconsistencies when compared to standards applied in traditional US antitrust analysis. Ironically, Kodak itself employed restrictive business practices to

³⁰ W Barringer 'Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute' (1997-1998) 6 *George Mason L Rev* 459, 463-469.

protect its position in the US market, and the USTR's complete refusal to examine this highlights the inherent difficulties of trade negotiators tackling competition disputes.³¹

The USTR concluded that the Japanese policies and practices were actionable under Section 301.³² It decided to address the situation by a two-pronged plan. This involved discussions with Japan under a consultation and conciliation mechanism, and also in the context of a JFTC investigation into the Japanese consumer photographic materials market.

The JFTC investigation produced a report in July 1997 concluding that there was no violation by Fuji of Japan's Anti-Monopoly Act. This was condemned as a 'whitewash' which overlooked the restraints in the Japanese film sector,³³ and the USTR eventually decided to submit the controversy to WTO dispute settlement. This however involved a revision of the Section 301 case: what was initially a complaint about private practices became a complaint about government measures which allegedly created 'a unique system of distribution and marketing management that has disadvantaged imported photographic materials'.³⁴ This highlights an important difference between trade and competition policies – trade rules apply to governments whilst competition laws ordinarily seek to address conduct by private organisations. It also highlights a gap when employing trade rules to remedy anti-competitive practices – since such rules apply only to governments, this constitutes one step removed from private anti-competitive conduct that might deny market access. It is in the especially knotty areas where one is dealing with what appears to be an interaction of both private anti-competitive practices and government measures that WTO panels may exhibit a

³¹ *ibid* 466. See also DJ Gifford 'Antitrust and Trade Issues: Similarities, Differences and Relationships' (1995) 44 De Paul L Rev 1049.

³² 61 Fed Reg 30929 (18 June 1996).

³³ M Joelson 'The Kodak-Fuji Trade Dispute: A US View' (1998) 4(2) Intl Trade L Regulation 34, 37.

³⁴ First Submission of the United States of America (20 February 1997) 1.

more cautious engagement of trade tools to address the issues concerned – as occurred in *Kodak-Fuji*.

(b) The main allegations

The US Government asserted violation and non-violation complaints under the GATT. For the purposes of this discussion, the article will focus only on the non-violation complaint of the GATT XXIII:1(b), under which it was alleged that the Japanese government's industrial policy in the photographic film and paper sector had upset the competitive position of imported products, thereby frustrating legitimate expectations of improved market-access opportunities arising out of tariff concessions.

(c) Examination of non-violation complaint by the Panel

The Panel began by emphasising that a non-violation complaint is an exceptional remedy for which the complaining party bears the burden of demonstrating nullification or impairment³⁵, and must show: (i) the application of a measure by a member; (ii) existence of a benefit accruing under the relevant agreement; and (iii) nullification or impairment of the benefit as a result of the application of the measure.

The measures challenged by the US included (1) exclusive distribution measures for domestic manufacturers' products thereby excluding imports from nearly two thirds of the market; (2) restrictions on large retail stores which blocked alternative channels to the market; and (3) promotion restrictions limiting the ability of foreign firms to market their products. The Panel analysed whether the application of each measure amounted to a non-violation case.

(i) Application of governmental measure

The Panel took a very broad reading of the term ‘measure’. It referred to the panel in *Japan – Semiconductors*³⁶, which stated that a non-binding measure such as administrative guidance may be caught if it creates incentives or disincentives to act and compliance depends largely on governmental action. This criteria was supplemented with a ‘similar effects’ test, which focused on the effects of a governmental action upon private parties’ behaviour, regardless of the measure’s formal legal character or formality. Private action could be deemed governmental whenever there is sufficient government involvement. Further, it expanded the concept of measure into ‘financial or non-financial, direct or indirect’, and did not rule out the possibility of continuing effects of a measure.

Most of the measures challenged by the US therefore fell within the scope of the non-violation complaint.

This reasoning allows the accommodation of most antitrust-related cases, since most such cases involve non-financial government activities. Moreover, the recognition of the ‘continuing effects’ of a measure provides flexibility³⁷ – an otherwise strict view would render it almost impossible to challenge cases where a country had already established egregious anticompetitive market structures over many years, with the government not having been involved the market directly at the time of the proceeding.

³⁵ Art 26.1(a) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement (hereinafter ‘DSU’).

³⁶ WTO *Japan – Trade in Semi-conductors* (1987) BISD 35S/116 [109].

³⁷ Y Jung ‘Modelling a WTO Dispute Settlement Mechanism in an International Antitrust Agreement’ (2000) 34(1) J World Trade 89, 94-95.

(ii) Benefit accruing under the GATT

The panel noted that the claimed benefits have been that of legitimate expectations of improved market-access opportunities arising out of tariff concessions. The challenged measures must not be reasonably anticipated at the time of the tariff negotiations. It was ruled that the presumption of reasonable anticipation hinged upon whether the measure was adopted before or after conclusion of the relevant round of tariff negotiations: measures adopted *after* a tariff concession raised a presumption (rebuttable by Japan) that the US would not have been able to anticipate those measures. Conversely, a measure adopted *before* a tariff concession would raise a presumption of possible anticipation which must be rebutted.

In the Panel's view, most of the measures in dispute could have been anticipated during the Tokyo and Uruguay Round negotiations. However, the US was not charged with knowledge as to some of the measures which were introduced after the Kennedy Round concessions, and legitimate expectations accruing thereof were deemed relevant.

This interpretation can be problematic: can it hardly be expected that countries participating in negotiations would know the antitrust laws and policies of other countries, given the often complex and opaque nature of such laws?³⁸ Bearing this in mind, one would suggest that perhaps 'reasonable anticipation' of trading partners' competition policies could be facilitated in light of the principle of transparency as appended on the Doha Declaration. In this respect, it is interesting to note that the panel rejected the US argument that by failing to provide clear and predictable standards under its Premiums and Large Store Laws, Japan had violated the requirement of transparency set forth in Article X GATT. In comparison, the Appellate Body took a

³⁸ *ibid* 95.

wider approach to Article X in the *Sea Turtles*³⁹ case, and one could argue that similar principles might also be applied to competition policy: a requirement that national competition policies are understandable and clearly articulated can certainly have an impact on import competition, if this would facilitate the awareness and knowledge of other members' competition laws.

(iii) Causation of nullification or impairment of benefits

To prove nullification or impairment, the panel stated that the upsetting of the competitive position of imports must be demonstrated. The measure must have made more than a de minimis contribution to nullification or impairment.

It was concluded that the US had failed to prove this – the distribution measures were ‘origin neutral’ and mainly designed to ‘improve the various inefficiencies and deficiencies in Japan’s distribution system’. Further, there was no causality as the single-brand distribution structure of the Japanese market already existed before 1970 when the measure was introduced. The same conclusions were reached on the other challenged measures.

The Panel did invoke the possibility of de facto discrimination ie a formally origin-neutral measure might be applied so as to upset the competitive position of imports, but the US failed to prove any such disparate impact to support this claim. If this approach is taken, then any challenge against origin neutral measures would face insuperable difficulties to prove nullification or impairment. A mere demonstration of disparate impact is not sufficient unless it is also indicative of a disguised attempt at

³⁹ WTO *US – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R.

discrimination. In the case of Japanese *keiretsu*⁴⁰, given the central role they play in corporate governance and organizational structures in Japan, it would be a challenge to assert that the primary purpose for their adoption has been to differentially disadvantage foreign producers, even though that may be a rather unfortunate consequence.⁴¹

(d) Reflections

As discussed earlier, most would accept that it is doubtful that the WTO could have, at least not in the foreseeable future, a comprehensive antitrust agreement on anything but on the most hard-core offences, whilst differences would certainly remain on such issues as vertical restraints and abuse of dominance. Yet, these are the areas in which the most concrete market access concerns have been raised.⁴² This was why *Kodak-Fuji* was riveting since it raised the prospect of a new approach for dealing with antitrust concerns. However, by erecting some major impediments to future claims, the panel signalled that the non-violation route was not to be an effortless avenue through which Members could anticipate for such issues to be resolved.

The problem is that the case goes well beyond traditional GATT dispute issues and propels panels into the realm of domestic distribution structure and private business practices. *Kodak-Fuji* was the first time a panel dealt with the conflation of private anti-competitive practices which appeared to deny market access, with government laws or policies that themselves impeded competition. Therein lies the danger of being entangled in difficult and controversial issues of assessing the proprieties of Japanese distribution relationships in complex evidentiary contexts, and then further having to

⁴⁰ (Long-term closely interconnected relationships among Japanese enterprises through formal and/or informal relations) – A Helou ‘The Nature and Competitiveness of Japan’s Keiretsu’ (1991) 25 J World Trade 99.

⁴¹ M Trebilcock and R Howse *The Regulation of International Trade* (2nd edn Routledge London 1998), 478.

ensure any interpretation is compatible with established GATT principles.⁴³ In this respect, by focusing on the narrow technical issues, the panel's reticence is perhaps more understandable.

The case therefore reveals important aspects that we must bear in mind when considering whether competition issues should be brought under the purview of the WTO in order to address the market-access problem of restrictive practices. It raises important questions as to how the WTO should address such disputes, and particularly whether the WTO panels should bear the burden of this responsibility.

The dispute was a difficult challenge for the world trading community because of its intersection of trade and competition law elements. Kodak had first pursued its remedy down the road of trade accords by starting with an aggressive approach under Section 301. Such unilateralism produces strenuous conflict from other trading partners, mainly due to the danger of frustrating the objectives of establishing bilateral and multilateral regimes to resolve disputes.

Kodak had also attempted a remedy of competition law, but this was not without obstacles due to the limited application of extraterritoriality⁴⁴ and comity concerns – in practice the Department of Justice (DOJ) has rarely applied US antitrust laws to extra-territorial conduct that harms US exports.⁴⁵ Comity concerns would also have stopped enforcement by the DOJ, and the USTR's Section 301 action was hence in blatant

⁴² E Fox 'What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect' (2002) 70 *Antitrust L J* 371.

⁴³ Joelson (n 33).

⁴⁴ J Griffin 'Extraterritoriality in US and EU Antitrust Enforcement' (1999) 67 *Antitrust L J* 159; W Sugden 'Global Antitrust and the Evolution of an International Standard' (2002) 35 *Vanderbilt J Transnational L* 989, 1005-1014.

⁴⁵ See J Klein 'Anticipating The Millennium: International Antitrust Enforcement At The End of the Twentieth Century' (address before the Fordham Corporate Law Institute 24th Annual Conference on International Law and Policy 16 October 1997), on the problems of extraterritoriality. The US district

disregard of any such considerations. Further, even when the JFTC was eventually approached, there were huge qualms about its investigation and findings, most adequately expressed by labelling its report a 'whitewash'.

The above analysis reveals two problems. First, when nations become embroiled in market access disputes of an antitrust nature, the absence of international competition rules means that firms have to rely on the assiduity and tenacity of domestic competition authorities. There may inevitably be a fastidious distrust in the ability of other institutions to resolve the dispute, and non- or under-enforcement of antitrust may create trade tensions as reflected in *Kodak-Fuji*. Professor Fox⁴⁶ acknowledges this as a 'dispute-resolution gap', and that recourse to an impartial decision-maker who is trusted to apply the rule of law to the facts may be the most critical need in order to alleviate tensions.

Therefore, allowing the incorporation of competition issues into the WTO may help soothe the tensions that unilateral actions or antitrust issues may bring, and avoid galvanizing any ill-feeling between states. The argument is that these issues should be handed to WTO tribunals which can rule under what circumstances restrictive business practices are a barrier to trade. This brings us to the second problem: is the WTO the right forum to unravel these problems?

Hansen⁴⁷ supports the view that the WTO can and should step into the legal gap concerning competition policy in order to safeguard the international trading system. She points out that a rule holding governments accountable for measures that have a

court in *US v Nippon Paper Industry. Co Ltd* 52 F Supp 2d 173 (D Mass 1999), 178, discussed the reality of these problems.

⁴⁶ E Fox 'Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade' (1995) 4(1) Pacific Rim Law & Policy J 15.

⁴⁷ P Hansen 'Antitrust in the Global Market: Rethinking 'Reasonable Expectations' (1999) 72 Southern California L R 1601.

causal and disproportionate impact on imports subject to a prior tariff commitment is consistent with the text and purpose of the WTO agreements. Further, it is suggested that government policies that *tolerate or encourage* restrictive business practices that erode tariff commitments in a manner that is disproportionate to the practices' purported benefits should also be caught. By way of comparison, whilst Roessler⁴⁸ supports the tackling of competition issues under the WTO, he takes the view that the non-violation route is a highly dubious avenue to take. He argues that panels should grant the right of retaliation against the denial of unnegotiated benefits only in those rare situations in which the WTO members have provided them with prior normative guidance. Otherwise, it would be an illusion to expect that panels could deal appropriately with the subject of anti-competitive practices that adversely impact on trade. Indeed, the film panel certainly seemed vigilant that the non-violation remedy should be approached carefully, thereby creating significant barriers to future claims. This is in line with the concern expressed towards the ambiguous flexibility embedded in the notion of non-violation cases to deal with competition issues – it would be difficult to accept that the complicated impact of current competition policies must be assessed in terms of reasonable expectations derived from tariff concessions made two or three years ago.⁴⁹

Hansen's approach places much confidence in the dispute settlement as the appropriate forum to resolve such disputes. The dilemma of the WTO dispute settlement mechanism is as follows: on the one hand, it is true that one must not overlook the panel's role of protecting the credibility of tariff commitments. A rule that permits the toleration or encouragement of restrictive business practices would be the antithesis of government efforts to liberalize trade, and a circumvention of the issues may provoke a pre-emptive reaction by some countries thereby undermining the stability and future credibility of the WTO. On the other hand, the current lack of

⁴⁸ F Roessler 'Should Principles of Competition Policy Be Incorporated into WTO Law Through Non-Violation Complaints?' (1999) *J Intl Economic L* 413.

⁴⁹ Cho (n 22) 321.

consensus in international competition suggests a political risk in cases involving competition issues.⁵⁰ Cho⁵¹ makes the credible point that undesirable and inappropriate cases could damage the credibility of the WTO system. These are the so-called ‘wrong cases’, which are particularly problematic when they are initiated with respect to an issue to which the WTO community has yet to reach a consensus. Significantly, the consensus on competition policy in the WTO currently remains shrouded in doubt after Cancún. Should the dispute settlement process now bear the brunt of deciding what the law ‘should be’? The absence of international agreement even after hard and protracted rounds of bargaining suggests that this is a sensitive area in which tribunals should be cognizant of the dangers of over-activism, and should not substitute their view for that of the political parties. A converse argument would be that perhaps this lack of political consensus is precisely why panels should take an interpretative gap-filling role: where trade negotiators fail to reach agreement, the dispute settlement procedures undoubtedly offers an avenue for the creation of commitments to open markets. However, this poses a dangerous risk of over-adjudication and a delegation of ‘lawmaking’ authority to panels, with perturbing consequences for the legitimacy of the dispute settlement mechanism, and of the WTO as a whole.

Even supporters such as Hansen remark that there should be caveats if tribunals should assume such a role⁵², bearing in mind the lack of expertise and fact-finding capacities of panels, and the admonishment against rulings that ‘add to or diminish the rights and obligations’ of WTO members.⁵³

The strain on the legitimacy and institutional integrity of the WTO is but only one aspect of the debate. Another concern that has been expressed is that since the

⁵⁰ Hansen (n 47) 1640.

⁵¹ Cho (n 22) 330 (referring to R Hudec ‘GATT Dispute Settlement After The Tokyo Round: An Unfinished Business’ (1980) 13 Cornell Intl L J 145, 159), on this point.

⁵² Hansen (n 47) 1643.

⁵³ Article 3.2 DSU.

dynamics of the WTO process reflects a proclivity towards market-access, work on a WTO competition policy would be heavily influenced by the market access norms of trade policy at the expense of distorting the efficiency and consumer welfare norms of competition policy.⁵⁴ This brings us to the widely-debated conflict in the interface between trade and competition policy.

The leitmotif of the GATT/WTO rules is market access, which has been defined as a set of rules that establish competitive conditions for both domestic and foreign products. Therefore WTO Members are, in principle, unconstrained where they regulate internal measures, but subject to the limit that the measures are applied without discrimination to domestic and foreign products. This limit is, in essence, what can be contested before dispute settlement, and this limit also circumscribes the notion of nullification and impairment.⁵⁵ Thus, the WTO is primarily concerned with the non-discriminatory application of internal measures, independent of efficiency arguments.

On the other hand, competition laws pursue the objectives of economic efficiency and consumer welfare. Market entry is not an objective but merely a sometimes implemented means towards the end of increasing the competitiveness of markets – it is plausible to have efficient, albeit not maximally open, markets. Conversely, market access is an end *in itself* under trade policy. This view is contested by the assertion that trade and competition policy both share the same goal of achieving efficient markets: ‘one lowers trade barriers to increase the efficient operation of market forces, one does not break up efficient market structures to increase trade flows’.⁵⁶ The response to this would be: yes, the creation and preservation of an open market promotes an efficient allocation of resources throughout for the benefit of consumers,

⁵⁴ Tarullo (n 5) 483.

⁵⁵ P Mavroidis and SV Sielen ‘The Application of the GATT/WTO Dispute Resolution System to Competition Issues’ (1997) 31(5) J World Trade 5, 43.

⁵⁶ P Marsden ‘A WTO Rule of Reason’ (1998) 19(8) ECLR 530, 534.

and to this extent competition law can and *does* complement liberal trade policy. However, that is not to say that they share the same goal of efficiency. Trade law generally focuses on the promotion of economic opportunity for importers – whether this leads to efficient structural modifications is not of compelling concern.⁵⁷

Therefore, the anxiety is whether one can ensure the market access which is so imperative to free trade in the WTO, without compromising competition policy's core discipline of protecting merit-based competition and the efficient operation of markets. This conflict surfaces even within the competition community itself: the conundrum faced by many competition authorities is whether 'the winner takes all' is the simple logic of *competition* and intervention is only necessary when consumer welfare is actually threatened; or whether a much more interventionist approach should be taken to restrain a dominant firm so as to protect *competitors*.

Reverting to *Kodak-Fuji* as an example: whereas the US saw a well-coordinated and elegantly veiled scheme to exclude foreign products, the Japanese Government asserted that its measures had been directed at improving industrial efficiency, and at protecting small- and medium-sized stores from large stores. Who should assess whether such government measures restricted market access for imports in a way that was disproportionate to the measures' purported benefits of improved efficiency? The currency of efficiency is not readily converted into that of market access for the purpose of evaluation, and panels certainly exhibit neither the expertise nor legitimacy to engage in such tedious balancing assessments.

⁵⁷ Mavroidis and Van Sien (n 55).

3 Trade disputes: Telmex

Indeed, one cannot help harbouring deeper reservations about the WTO's potential to handle matters of competition policy in light of its pioneer competition case *Telmex*.

(a) Commercial Background to the Dispute

Mexico privatized its monopoly telecommunications provider Telmex in 1990, and competition in the Mexican long distance market began on 1 January 1997, when six new carriers started to operate, including Avantel and Alestra, which were part-owned by US corporations AT&T and MCI respectively. By the end of 1997 the new entrants had gained 18.8% of the domestic long distance market and 31.6% of the international market.⁵⁸

Through an international alliance signed in 1995, Telmex has cooperated with Sprint (a major US long distance carrier) to provide long-distance services between the two countries. AT&T and MCI had to settle for deals with smaller Mexican players and could not benefit from Telmex's larger network. They thus lobbied the USTR for assistance: the American complaint was that Mexico's anti-competitive International Long Distance (ILD) Rules precluded Mexican carriers from competing with each other to carry calls into Mexico.

⁵⁸ OECD 'Background Report on Regulatory Reform in the Telecommunications industry', at <<http://www.oecd.org/dataoecd/2/60/2497378.pdf>>, 8.

(b) The US Complaint

On 17 August 2000, the US Government initiated a formal WTO complaint alleging that Mexico's Telecommunications Regime was inconsistent with Mexico's GATS commitments – including in particular the Reference Paper commitments. Three main claims were asserted that Mexico had failed to: ensure that US carriers were afforded cost-based interconnection; prevent its dominant carrier from engaging in anti-competitive practices; and ensure reasonable and non-discriminatory access to its public telecommunications transport networks and services.

As the consultations which ensued did not resolve the matter, the US requested for the establishment of a WTO panel. The present contribution will focus only on the second claim.

(c) Competition concerns in the WTO Telecommunications Regime

The main body of the GATS and its several annexes are applicable to every WTO Member. In addition, each Member attaches its own schedule with individual specific commitments made on market access, national treatment, and any additional commitments.

There was a growing awareness in negotiations that market access commitments were not enough to ensure markets became and remained competitive,⁵⁹ and that procompetitive 'asymmetric regulation' was needed in the telecommunications sector in order to ensure that new entrants would be able to compete effectively with dominant incumbents. To that end, the WTO Telecommunications Agreement was concluded in

⁵⁹ M Bronckers 'The WTO Reference Paper on Telecommunications: a Model for WTO Competition Law?' in M Bronckers and R Quick (eds) *New Directions in International Economic Law* (Kluwer Law International The Hague 2000) 371, 374-375.

1997. Many Members, including Mexico, undertook specific commitments⁶⁰ and additional commitments in the form of the Reference Paper.

(d) Measures in dispute

The US argued that Mexico had not met the requirements of Section 1.1 of the Reference Paper, which provides that ‘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.’ It was alleged that far from proscribing such behaviour, Mexico maintained measures that *required* Mexican telecommunication operators to adhere to a horizontal price-fixing cartel led by Telmex (the ‘major supplier’ on the US-Mexico Route). This was based on two main requirements:

- (i) Telmex was obliged to negotiate a ‘uniform settlement rate’ which was applied to the other Mexican operators to the termination of the services at issue.
- (ii) The system of ‘proportionate return’ required operators to distribute among themselves incoming calls from a country in proportion to the outgoing calls the operator sends to that country. Telmex had to accept traffic from, or give up traffic to, other suppliers depending on whether the proportion of incoming traffic surpassed, or fell short of, its proportion of outgoing traffic. To this end, Telmex may enter into approved ‘financial compensation agreements’ with other operators.

(e) The Panel’s findings

It was noted that Section 1.1 contained three key elements: (i) A ‘major supplier’; (ii) ‘anti-competitive practices’; and (iii) ‘appropriate measures’ which must be maintained. The panel rose to the challenge of clarifying and offering guidance on the meaning of

⁶⁰ Mexico: Schedule of Specific Commitments, Supplement 2, (1997) WTO Doc GATS/SC/56/Suppl.2.

the terms which were largely left undefined, but many concerns are raised with regard to its over-expansive interpretation.

(i) Is Telmex a ‘major supplier’?

The Reference Paper defines a major supplier as a supplier with 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 control over essential facilities; or use of its position in the market.

The panel accepted that three factors must be examined: what the ‘relevant market’ is; whether Telmex had ‘the ability to materially affect the terms of participation... in that market’; and whether that ability resulted either from ‘control over essential facilities’ or from ‘use of its position in the market’.

What is the ‘relevant market’?

The panel applied the notion of demand substitution put forward by the US and decided that the ‘relevant market’ was the termination in Mexico of telecommunication services from the US.

Does Telmex have market power?

The US argued that Telmex had market power in the relevant market, based on various factors.

First, Rule 13 provided that the operator with the largest percentage of calls to a country was to negotiate the liquidation tariffs with operators of that country. This

would be the uniform rate charged by all Mexican carriers. Therefore Telmex could ‘materially affect the terms of participation’, and it was argued that this notion corresponded to the concepts of ‘market power’ and ‘substantial power’ used by the US and Mexican competition authorities respectively.⁶¹

The US drew further support from a finding by Mexico’s competition authority – the *Comision Federal de Competencia* (CFC) – in 2001 that Telmex had substantial power in international services.

The US also drew attention to various indications of Telmex’s persistent dominance: Telmex’s large market share of over 50% which supported a presumption of market power; an absence of significant new competing suppliers; and Telmex’s ability to maintain above-competitive prices for a sustained period of time.

Mexico defended its ILD Rules on the ground that they helped protect and promote investment in domestic infrastructure, since an incumbent carrier was prevented from using its market position to negotiate better deals than entrants, and large carriers could not conspire to exclude smaller carriers. The CFC decision was ‘currently under review’ by Mexican courts because it was ‘based on data from 1996... when the telecommunications market was not yet fully open.’ It was further submitted that 27 concessionaires may now provide long-distance services in Mexico, including three US-affiliated carriers, and new entrants had also gained significant market share compared with other countries that opened the sector to competition under similar conditions.

The panel did not appear to address any of these arguments and simply concluded that because Telmex was *legally* required to negotiate settlement rates for the

⁶¹ *Telmex* [7.152].

entire relevant market, it therefore ‘patently met the definitional requirement... that it had “the ability to materially affect the terms of participation”, particularly “having regard to price”.’

Does Telmex’s market power result from ‘control of essential facilities’ or ‘use of its position in the market’?

The panel simply stated that ‘the ability to impose uniform settlement rates on its competitors is the “use” by Telmex of its special “position in the market” ’ as granted under the ILD Rules, and it was this ability that allowed Telmex to materially affect the terms of participation. In view of that, Telmex was a ‘major supplier’ within the meaning of the Reference Paper.

However, the panel then went a step further. It noted that Section 1 establishes an obligation with respect to ‘suppliers who, alone or together, are a major supplier’. Accordingly, ‘[s]ince we have already found that Telmex alone is a “major supplier” within the meaning of Section 1, and that the practices at issue involve acts of all the Mexican suppliers who are gateway operators, we can conclude also that Telmex and all the other Mexican gateway operators are *together* a “major supplier”.’⁶²

Commentary

The panel’s approach to finding ‘market power’ seems overly legalistic and simplistic. If the dispute settlement is to take a greater role in competition matters, panels must recognise that the concept of market power is not a straightforward issue but involves complex economic analysis. Telmex may have indeed been able to affect the terms of participation with regard to price, but price is only one aspect of the ‘terms

⁶² *ibid* [7.226].

of participation’, and the panel critically neglected to consider the combination of multiple factors such as the changes in market shares, or actual and potential competition to assess the extent to which Telmex had actually been able to restrict competition.

One might put forward the view that its finding that all the Mexican operators were together a major supplier was excessively inductive and lacked any substantial basis. This reasoning is not supported by the facts, given the large number of Mexican operators – most with relatively small market shares.⁶³ Indeed, whilst it was right to highlight Section 1’s reference to the word ‘suppliers’, the panel ignored its juxtaposition within the phrase ‘together, are a major supplier’ – if read together with its earlier definition of ‘major supplier’, Section 1 must mean that *together*, the suppliers must materially affect the terms of participation. In this case however, only Telmex fixed the price.

(ii) What are ‘anti-competitive practices’?

Meaning of ‘anti-competitive practices’

The Reference Paper does not define the term ‘anti-competitive practices’, but offers an indicative and non-exhaustive list: ‘engaging in anti-competitive cross-subsidization; using information obtained from competitors 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 which are necessary for them to provide services.’ The panel again displayed no hesitancy to asseverate its consistently expansive interpretation.

It first turned to *The Shorter Oxford English Dictionary* and *Merriam Webster Dictionary* for guidance and concluded that ‘the term “anti-competitive practices” is broad in scope, suggesting actions that lessen rivalry or competition in the market.’⁶⁴

The panel then referred to the context of the Reference Paper. It was noted that the examples given focused on ‘monopolization or the abuse of a dominant position in ways that affect prices or supply.’ However, in a magnificent leap in reasoning the panel went on to state that ‘the definition of a major supplier in terms of suppliers “alone or together” and the requirement in Section 1.1 of “preventing suppliers from engaging in or continuing anti-competitive practices” also suggests that horizontal coordination of suppliers may be relevant.’⁶⁵ Further, ‘cross subsidization... indicates that “anti-competitive practices” can include pricing actions by a major supplier.’⁶⁶ When one reads these two conclusions collectively, the panel had thereby managed to find that a Reference Paper designed primarily to address anticompetitive practices by a dominant operator could also be interpreted to be focused on horizontal price-fixing and market-sharing.⁶⁷

The panel attempted to draw further support for this reasoning from Members’ own competition legislation, but rather than examining any competition laws, it relied on a background note by the WTO Secretariat to find that such practices included agreements to fix prices or share markets.

Various international instruments that address competition policy were then examined – eg Article 46 of the Havana Charter and the *UNCTAD set* recognized

⁶³ P Marsden ‘WTO decides its first competition case, with disappointing results’ (2004) 16(May) Competition L Insight 3, 5.

⁶⁴ *Telmex* [7.228].

⁶⁵ *ibid* [7.232].

⁶⁶ *ibid* [7.230].

⁶⁷ Marsden (n 63) 6.

restrictive business practices such as price-fixing and market allocation. The panel furthermore referred to the OECD Recommendation on the strict prohibition of cartels.

Finally, the panel turned to the ‘object and purpose’ of the Reference Paper commitment – a teleological, pragmatic approach in rather stark contrast to the panel’s earlier literal interpretation. The panel pointed out that an analysis of the Reference Paper commitments showed that Members recognized the monopolistic character of the telecommunications sector, and that removing market access and national treatment barriers were not deemed sufficient. Accordingly, ‘Members agreed to additional commitments to implement a procompetitive regulatory framework designed to prevent continued monopoly behaviour, particular by *former* monopoly operators, and abuse of dominance by these or any other major suppliers.’ This focus on monopolistic conduct by a dominant incumbent was nevertheless glaringly discordant with the panel’s finding that this therefore ‘supports our conclusion that the term “anti-competitive practices”... includes horizontal price-fixing and marketing-sharing agreements.’

Commentary

The methodology of the panel lacks sophistication and coherent reasoning.

As the ‘security and predictability’ of the multilateral trading system is a priority and the DSU prohibits panels from ‘adding to or diminishing the rights and obligations’ in the agreements, panels thus usually take the safest refuge from political criticism by adopting a traditionally strict textual attachment to the legal texts accepted by governments. The *Telmex* panel, like previous panels, cited the Vienna Convention⁶⁸ to justify some of its interpretive techniques, but ignored the commonly cited Article 31(1) which states that ‘[a] treaty shall be interpreted in good faith in accordance with the

⁶⁸ Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

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’ provided by dictionaries must be read in *context* – in this case, the context of a multilateral agreement designed to address anti-competitive practices. Thus, whilst ‘competition’ certainly means a process of rivalry, any international body trying to define it should take some account of the widely differing international positions on what degree of rivalry is appropriate, and what ends it should seek.⁶⁹ As mentioned earlier, the conundrum faced within the competition community is whether ‘competition on the merits’ should simply prevail, or that intervention is also justified so as to protect competitors. None of this was considered by the panel.

Neither does the panel provide any satisfactory basis for employing the note of the WTO Secretariat, *UNCTAD set* or the OECD Hard-Core Cartel Recommendation to succour its interpretation. None of those documents were made ‘in connection with’ or ‘regarding the interpretation... or application’ of the Reference Paper so as to comprise its ‘context’. The *travaux préparatoires* might have been more relevant.

The panel’s attempt of an interpretation in light of the ‘context’ and ‘object and purpose’ of the provisions results in the rather perverse outcome of inviting more censure than applause. There are disconcerting gaps between its reasoning and conclusion, and a tautological expansion of the scope of the Reference Paper as a consequence. Some ambiguity certainly lurks in the reference to ‘suppliers’, both in the definition of a major supplier and in Section 1.1. On this face, it has been suggested that the clause could cover collective dominance or even agreements between non-dominant companies.⁷⁰ However, this author takes the view that the Reference Paper cannot support the latter interpretation due to two reasons: first, the suppliers must ‘together’,

⁶⁹ Marsden (n 63).

as a ‘major supplier.... [engage in or continue] anti-competitive practices.’ The language here strongly connotes the situation of collective dominance rather than any horizontal arrangement between suppliers. One should further bear in mind that the Reference Paper focuses on some very specific situations that arise in the telecommunications sector, many cases in which no arrangement between smaller parties would likely be able to materially affect the terms of participation in the relevant market.

Whether practices required under a Member’s law can be ‘anti-competitive practices’

Mexico argued that the focus of Section 1.1 is on anti-competitive ‘practices’ by a major supplier that are not required under a Member’s law, and not to governmental measures that may have an anti-competitive effect. In fact, the ILD Rules were alleged to be part of the regulatory framework of laws intended to increase competition.⁷¹ The US however claimed that anti-competitive practices do not change their nature simply because they are compelled by national laws, lest a Member could easily avoid its obligations by formally requiring such practices.

The panel expressed its awareness that a firm complying with a specific legislative requirement of some Members may be immunized from being found in violation of domestic competition law – this was probably raised with the state action doctrine of some Members in mind. It goes well beyond the scope of this article to fully explore the issues, but a brief discussion is essential.⁷² The difficulty in the application

⁷⁰ Bronckers (n 59) 378.

⁷¹ *Telmex* [7.221].

⁷² For interesting discussions of the issues involved, see D Ehle ‘State Regulation Under the US Antitrust State Action Doctrine and under EC Competition Law: a Comparative Analysis’ (1998) 19 ECLR 380; H Schepel ‘Delegation of Regulatory Powers to Private Powers under EC Competition Law: Towards a Procedural Public Interest’ (2002) 39 CML Rev 31; L Gyselen ‘Anti-Competitive State Action in the Area of Liberal Professions: An EU/US Comparative Law Perspective’, *European Competition Law*

of this doctrine is to decide when a Member State can be held liable for anti-competitive behaviour on the part of undertakings that infringes the competition rules, since a balance must be drawn between competition and the deference to state sovereignty. According to the *effet utile* doctrine in the EU⁷³, Member States are required not to intrude or maintain in force measures which may render the competition rules ineffective.⁷⁴ Recent case-law⁷⁵ has evolved towards a single liability standard that focuses on whether a Member State has assumed full responsibility for the restriction of competition. If it has ‘wholly relinquished’ to private economic operators the powers of, eg the setting of tariffs, the measure is unlawful. Anti-competitive state measures in the US are in principle immune from the application of the federal antitrust laws, even if they frustrate the latter’s objectives.⁷⁶ The Supreme Court applies a two-pronged test.⁷⁷

Essentially, as long as a state retained effective control over the regulation of its economy, its political decision to restrain market forces is respected in the EU and US.⁷⁸ The panel in *Telmex* did not undertake any such analysis. One should point out that the ‘settlement rate’ had to be submitted to the Federal Telecommunications Commission (‘*Comisión Federal de Telecomunicaciones*’), which was a semi-autonomous agency of the Secretariat of Communications and Transportation. Similarly, the ‘financial compensation agreements’ had to be duly notified to the Commission. Therefore, the rules applicable to *Telmex*’s practices appear to possess a public regulatory dimension. Mexico indeed voiced its concern against the US interpretation, whereby all government regulatory measures that restrain the actions of a major supplier in a

Annual 2004: The Relationship between Competition Law and (Liberal) Professions (Hart Publishing Oxford) (forthcoming, copy with author).

⁷³ Case 13/77 *Inno v ATAB* [1997] ECR 2115; Case 267/86 *Van Eycke v Aspa* [1988] ECR 4769; Case C-2/91 *Criminal Proceedings against Wolf W. Meng* [1993] ECR I-5751; Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff* [1993] ECR I-5801.

⁷⁴ Schepel (n 72) 32.

⁷⁵ Case C-35/96 *Commission v Italy* [1998] ECR I-3851; C-35/99 *Criminal Proceedings against Manuele Arduino* [2002] ECR I-1529; Gyselen (n 72).

⁷⁶ *Parker v Brown* 317 US 341 (1943).

⁷⁷ *California Retail Liquor Dealers Assn v Midcal Aluminium* 445 US 97 (1980).

manner that interferes with the operation of a freely competitive market would be prohibited.⁷⁹ Nonetheless, the issue of drawing an appropriate line between state regulation and competition did not appear eminent for the panel – instead, it grandly swept the state action doctrine aside by stating that ‘international commitments made under the GATS... are, however, designed to limit the regulatory powers of WTO Members... In accordance with the principle established in Article 27 of the Vienna Convention, 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.’

Therefore, the ILD rules required practices by Telmex that were ‘anti-competitive’ within the meaning of the Reference Paper.

Commentary

The limitation of Members’ regulatory powers under international commitments without further clarifying the extent of this limitation is unsatisfactory, since the interconnection of barriers to trade with domestic regulations is an intricate matter. Mexico’s concern was that the legitimacy of a WTO Member’s internal regulatory policies would be judged in circumstances where no multilaterally agreed-upon benchmarks exist: ‘If the drafters of Section 1 meant to include government regulatory measures, they would have provided objective benchmarks for assessing the legitimacy of such measures.’⁸⁰

The panel’s approach further implies the subjection of national measures to judicial control at international level to a greater degree than within the EU or the US.

⁷⁸ Ehle (n 72) 396.

⁷⁹ *Telmex* [4.291].

⁸⁰ *ibid.*

This is an antithesis of the prevalent view of the distinctly discordant deregulatory momentums latent in different international organizations: whereas federalist theories permeate the US debate and the EC has to attempt to reconcile the goals of the single market with the residual Member States' authority in domestic economic policy⁸¹, a cautious approach is usually taken in a multilateral context of the WTO. It is therefore surprising that the WTO is implicitly inflicting a comparatively deeper cut on Members' regulatory autonomy. Perhaps the difference is to some extent explicable: both the US and EU established the state action doctrine in the acknowledgement that antitrust laws do not restrict public regulatory activity. If one views the Reference Paper as a *trade* commitment intended to limit the regulatory powers of contracting parties, then the enhanced scrutiny of government regulation may be justified. A riposte however would be that the Reference Paper is nonetheless a *competition-related* trade commitment – in this respect, one must recognise the power of states to regulate commercial conduct. Therefore, if the Commission had not completely delegated its regulatory role to Telmex, it might have been better to analyse the state measures under the wider inquiry as to whether 'appropriate measures' had been adopted, rather than to conclude that the ILS rules themselves were 'anti-competitive' within the meaning of the Reference Paper. To have done so without a coherent economic analysis of the issues renders the panel's temerarious conclusion even more egregious.

Whether the ILS Rules require a major supplier to engage in anti-competitive practices

The panel found that the uniform settlement rate together with the proportionate return system had the 'classic features of a cartel'. Mexico, on the other hand, refuted that the rules in fact *favoured* competition, in that the uniform rate protected entrants from predatory pricing by incumbent suppliers, and from being played off against each other by major foreign operators, while the proportionate return system prevented foreign

⁸¹ Ehle (n 72) 395.

operators from imposing predatory pricing on their Mexican affiliates. This was rejected by the panel, which took the view that Mexico gave no evidence that its existing competition laws were inadequate to deal with predatory pricing, or that it had well-founded reasons for believing that predatory pricing by foreign affiliates would occur in Mexico without the ILD Rules. Neither did Mexico show ‘that predatory pricing could not be dealt with... in ways other than through uniform pricing.’

- (iii) Has Mexico maintained ‘appropriate measures’ to prevent anti-competitive practices by a major supplier?

The panel turned to the meaning of the word ‘appropriate’ in its general dictionary sense, which suggested that ‘appropriate measures’ are those that are suitable for achieving their purpose. At a minimum, if measures *legally require* certain behaviour, then they cannot logically be ‘appropriate’ in preventing that same behaviour. Therefore, since the ILD Rules legally require anti-competitive conduct by a major supplier, Mexico had thus failed to maintain ‘appropriate measures’ to prevent such acts.

The panel’s failure to recognize that the ILD Rules pursue, according to Mexico, ‘legitimate policy development objectives’, seems to stem from the reluctance to examine the ILD Rules in the broader context of the Mexican telecommunications regime. Indeed, it adheres to the adamant view that the measures simply direct a major supplier to act anti-competitively and thus should be condemned, although one harbours reservations about the inherently condemnable nature of the measures in question if one recalls that the panel had interpreted the acts as tantamount to a price-fixing cartel, when what was at stake was rather a denial of access that amounted to an abuse of dominance.

Thus, the panel held that Mexico had violated Section 1.1 to maintain (and indeed requiring) anti-competitive practices by a major supplier.

The Dispute Settlement Body adopted the panel report on June 1, 2004. Mexico did not exercise its right to appeal under Article 16 of the DSU, but reached a resolution with the US including an agreement to revise its ILD Rules.⁸²

(f) Reflections

Many dissatisfactory aspects of the report have been highlighted. The fundamental critique is directed towards the panel's findings of a cartel. This can only be a meretricious finding – while no one would deny the pernicious effects of cartels and their eradication as the cornerstone of any good system of competition law, the fact that negotiating states did not incorporate something as obvious as a cartel ban into the Reference Paper must not have been unintentional.⁸³ It is clear that the drafters of the Reference Paper only intended for it to apply to a limited class of anti-competitive practices, although it is unclear why this limitation was applied. Other restrictive practices may not have been considered pertinent or could simply have been too difficult to negotiate. Therefore, the panel is treading on sensitive and controversial ground by reading in new commitments that Mexico – or any other signatory - had simply not offered: a ban on cartels and particularly a ban on state-authorised cartels. The virtue of such bans must be severed from this observation.

However, utter ululation at the daring activism of WTO panels in stretching obligations beyond the intention of drafters would be unfair – in the interests of balance, it is appropriate to offer the reminder that the panel certainly had its work cut out for it

⁸² WTO '*Mexico - Measures Affecting Telecommunications Services - Notification of an Agreement*' (2 June 2004) WT/DS204/7.

⁸³ Marsden (n 63).

when confronted with the task of clarifying the meaning of the excessively vague terms of the Reference Paper.⁸⁴ For example, key concepts such as ‘anti-competitive practices’ are left undefined without any further elaboration as to how they should be applied. Mere technical terms are given as examples – if one looks at the discussions on the concept of ‘essential facilities’, for example, in the EC⁸⁵ and the US⁸⁶, one realizes that the application of such a doctrine has gone through controversial developments through case-law, and is certainly not a straightforward issue.⁸⁷ In evaluating similar restraints in a primarily trade liberalizing organisation such as the WTO, should requests for access to facilities of established domestic suppliers be granted more easily in the vein of traditional concerns of free trade and market access, or should the competition law inquiry of economic efficiency or consumer welfare be followed?⁸⁸ Similar questions have been raised with regard to the evaluation of vertical restraints in the context of *Kodak-Fuji*. Therefore, the complexity surrounding the interpretation of competition principles can be measured by the appreciation that the drafters of the Reference Paper offers nothing specific on the terms, but this breeds the danger of misinterpretation by panels. Particularly with regard to the rather narrow margins for judicial creativity in WTO dispute settlement, it ‘cannot and should not carry much of the weight of formulating new rules... by way of filling gaps in existing agreements’⁸⁹, to avoid overstepping its legitimacy or eliciting opprobrium from member states. Bearing in mind the conflict between trade and competition, it is doubly important that it is made clear whether the application of these rules is meant to be driven by market

⁸⁴ Bronckers (n 59) 383.

⁸⁵ Case C-418/01 *IMS Health* [2004] 4 CMLR 28; Case C-241-242P/91P *Magill TV Guide* [1995] ECR I-743; Case C-7/97 *Oscar Bronner* [1998] ECR I-7791.

⁸⁶ *Verizon Communications Inc v Law Offices of Curtis V. Trinko LLP* 124 S Ct 872 (2004).

⁸⁷ D Ridyard ‘Compulsory access under EC competition law - a new doctrine of "convenient facilities" and the case for price regulation’ (2004) 25(11) ECLR 669; I Forrester ‘Compulsory licensing in Europe: a rare cure to aberrant national intellectual property rights?’ at <<http://www.ftc.gov/opp/intellect/020522forrester.pdf>>.

⁸⁸ Marsden (n 13), 532-33.

⁸⁹ JH Jackson ‘Dispute Settlement in WTO: Emerging Problems’, (1998) 1(3) J Intl Economic L 329, 347.

access concerns or broader competition concerns. The Reference Paper is lacking in the articulation of any such policy guidance, and the *Telmex* panel averted the issue.

Perhaps this sheds some light on why the panel typified *Telmex*'s arrangements as a cartel. This was convenient - cartels are after all hazardous to both competition and trade. However, the author takes the view that this was not a sound conclusion – the panel's verbiage borders on paralogism, and its approach in dealing with the market access problem of anti-competitive practices is sorely lacking in analytical rigour.

Therefore, *Telmex* sends out two signals. On the one hand, it demonstrates that the WTO dispute settlement in its present capacity is incapable of dealing with competition issues satisfactorily. This should serve as a wake-up call for Members to accelerate negotiations in this area, or simply accept that panels are the emerging vehicle for filling the void by interpretative gap-filling on matters in the cadre of trade and competition interaction.⁹⁰ Nations, particularly the US⁹¹, must recognise that any reticence or apprehension towards the role of the WTO in competition matters must be curbed, if the trade-off is having more misinterpretations of trade commitments. On the other hand, this means that Members need to move towards some sort of consensus on principles that panels can authoritatively identify and apply. The challenge is to construct rules sufficiently specific in order to render countries' international commitments clear and justiciable and therefore not subject to abuse or misinterpretation, while at the same time maintaining sufficient generality to preserve the menagerie of legal traditions and interests around the world. Here the quagmire is that overly precise rules might be the result of political trade-offs and 'freeze' competition law into rigid complex norms unresponsive to labile economic frontiers,

⁹⁰ R Sharma and J Rosychuk 'The Collision of Trade and Competition Law: Assessing the Aftermath of the WTO *Telmex* Decision' *Tradeweek*, Canadian Association of Importers and Exporters, Inc (15 July 2004) 115(17).

⁹¹ SE Foster 'While America Slept: The Harmonisation of Competition Laws Based upon The European Union Model', (2001) 15 *Emory Intl L Rev* 467.

whilst overly vague and general rules would be limited in efficacy or susceptible to dangerous misinterpretations. Nations might rather not risk the danger of an unfavourable compromise, and therefore decide to abandon the idea of a competition regime under the aegis of the WTO altogether.

The author has already expressed the view that it is not in the foreseeable future that consensus may be reached on concepts where the most difficult conflicts will arise. Therefore, although negotiations ought to be re-invigorated, perhaps at present it would be better to exclude these issues from the dispute settlement, rather than to state an open-ended compromise formula which will prove to be problematic for WTO tribunals.⁹² A more realistic approach which limits any assessment by panels is desirable since overly ambitious attempts would only set dangerous precedents, as demonstrated so acutely in *Telmex*. Therefore, *Telmex* has shed some light on the dangers of allowing trade panels to carry out this interpretive gap-filling role – if the WTO is to play a role then meaningful guidance must be formulated; but if this proves impossible because of the multifarious interests and compromise at stake, then perhaps it is better that one accepts that the WTO is not the right forum to address these issues after all.

D CONCLUSION

The lesson learnt from trade disputes is that the dispute settlement bodies cannot responsibly tackle the problems of anti-competitive practices which foreclose market access in a satisfactory manner. Panels have had to grapple with the complex issue of private agreements and hybrid government-private arrangements as the new barriers to a liberalised marketplace, in a vacuum where international antitrust rules do not exist, and where neither international trade laws nor national competition laws are able to deal

⁹² Bronckers (n 59) 389.

with such conduct adequately. The stretching of judicial creation runs the risk of undermining the legitimacy and integrity of the WTO – this sends out a nudge to Members to work towards formulating rules which panels can apply. However, Part B has elucidated the deadlock at the negotiating table, and it is hardly hopeful that consensus is to be achieved on the areas in which the most perplexing market access concerns have arisen. Therefore, perhaps the very nature of the WTO is such that it simply does not offer the appropriate platform to address these issues.

One might argue that the straightforward answer that the WTO should simply steer away from competition issues ignores the reality of the situation – Marsden points out that it is an ineluctable fact that further commitments will be ‘created’ through interpretation in dispute settlement proceedings even in the absence of substantive rules dedicated to this area.⁹³ Therefore, he suggests that rather than risking marginalisation by adhering to the status quo, the better approach is to engage in the debate and ensure that what is eventually agreed in Geneva and what panels rely on is helpful. Marsden seeks to devise a framework which ensures meaningful access to new markets without distorting the competitive forces of a free market economy, and formulates a ‘guideline’ by which Members would undertake to prohibit exclusionary business arrangements that ‘substantially impede access to their market and which are thereby likely to lessen competition substantially in the relevant market for the products at issue.’

It escapes the ambitions of this article to engage in the broader debate as to the kind of substantive market access rules panels should apply to address such disputes. Such guidance, which makes a worthy attempt at accommodating both trade and competition principles, certainly merits careful consideration and discussion. However, there is a fundamental pragmatic objection: can panels apply it, and will panels apply it? Even with the adoption of luculent guidance, there are still many difficult questions left

⁹³ Marsden (n 13) 253.

unanswered, eg the concept of a ‘substantial lessening of competition’ is not straightforward and provides a certain degree of discretion and limits within which to exercise it. There is potential for dissonance even within the competition community itself as to the application of the test – eg the EU does not apply such a test⁹⁴ – and so with the trade community in the picture, how is one not to expect even greater antagonism? In any case, even if the precise application of such a test could be agreed upon (however unlikely), the actual application of the principles to a dispute would inevitably require a sophisticated market analysis applied by experienced authorities to complex factual scenarios. Is a trade panel really capable of undertaking such an analysis? Further, will panels actually apply such an approach if there is no obligation to apply competition analysis when interpreting WTO provisions anyway? With the jury still out on so many questions, perhaps the answer is that given the current state of affairs, the WTO is indeed simply not the right forum after all.

Therefore, one must recognise that the nature of competition issues may be too complex to be cast in a binding, detailed regime established and applied by international dispute settlement bodies, and too unique for states to relinquish their sovereignty to an international body which is bereft of the integrity, legitimacy and expertise to manoeuvre the analytical tools of antitrust law and policy. This explains the success and promise of non-binding frameworks as discussed in Part B – eg the ICN is already taking impressive strides towards a multilateral forum for addressing antitrust issues.

The more realistic scope of application of dispute settlement to competition matters currently lies in enforcement issues, ie core principles and due process requirements to reinforce the credibility of domestic competition authorities. Whilst enforcement ought to remain ultimately in the hands of national agencies, the role of panels is limited to ensuring that national competition authorities gave considerations to

⁹⁴ Although the ‘significant impediment to effective competition’ test under the European Merger

due process requirements, rather than assessing the substantive impact of national competition policies on market access. Most proposals presented to the WTO now stress an approach based on core principles such as non-discrimination, transparency and procedural fairness.⁹⁵ Such initiatives, albeit rather modest, present a more realistic approach to increasing the effectiveness and involvement of the WTO without an overly ambitious agenda which would only lead to stalemate.⁹⁶

A contemporaneous concern is the improvement of the dispute settlement mechanism – including institutional building⁹⁷, ie choosing the panel composition more selectively to effectively cope with complex, fact-specific disputes; and ‘strategic cooperation’ with other organizations capable of providing technical and professional support to panels in specific areas that should be investigated.⁹⁸ Former panels have already recognized the necessity of this dependence in other areas of WTO law⁹⁹, eg the consultation of the World Health Organization in *Thai Cigarette*.¹⁰⁰ Further, the DSU explicitly entitles a panel to seek information and technical advice from any body that it deems appropriate.¹⁰¹ Such reliance has great potential in the area of competition policies – here the author has in mind organisations such as the ICN in light of its success and vast repository of expertise.

Therefore, the quest is towards enhancing the ability of dispute settlement to assess antitrust matters, which would in turn secure the legitimacy and reliability of its rulings on such matters – but only when greater consensus becomes attainable. In the

Regulation 139/2004 arguably has the same coverage.

⁹⁵ Bercero and Amarasingha (n 16) 492.

⁹⁶ Note that the Technical Barriers to Trade Agreement and the TRIPS agreement already include such commonly agreed principles.

⁹⁷ Cho (n 22) 341-343.

⁹⁸ *ibid* 339.

⁹⁹ *ibid* 340.

¹⁰⁰ WTO *Thailand – Restriction on Importation of and Internal Taxes on Cigarettes* (7 November 1990) DS10/R, BISD 37S/200.

¹⁰¹ Article 13 DSU.

absence of analytical dedication, panels would simply be awarding a trade remedy to complainant corporations who wish to gain access to a foreign market, and who could simply issue the loudest complaint to their governments to assist them in doing so. *Telmex* was the first substantial WTO competition case, it certainly would not be the last, and fundamental changes must be made before any laudability may be accredited to the dispute settlement mechanism to address anti-competitive practices which raise market access concerns.