"Competition Law and International Trade from the GATT to the WTO: the undeniable reality of an emergent Jurisprudence".

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Abstract

Liberalising trade is not limited to diminishing trade barriers or decreasing tariffs rates, but also ensuring that these efforts are maintained: this is the role of competition rules.

It is common knowledge that for decades Countries have been trying to agree on international harmonised competition rules. Aware of this interaction between trade and competition policies, they knew efforts had to be undertaken to make them co-exist. Unfortunately the dream never came true. And parties only inherited rules of competition hardly recognised, or implicitly applied within the International Trade Law Framework. Even if some implicit rules of competition have been 'injected' in some of the General Agreement on Tariffs and Trade provisions in the early 1950's, it is only the new 1994 World Trade Organisation Agreements that have consecrated this orientation, drafted so to discipline the Parties as for competition-related behaviour; even if by definition WTO Agreements were not competition agreements.

Far from the debate of their potential harmonisation, the thesis identifies these rules, analyses their evolution within time and their very application through the study of WTO cases. It will establish that the emergence of a competition jurisprudence is an undeniable reality.

Résumé

Libéraliser le commerce ne se limite pas à réduire les barrières commerciales ou diminuer les tarifs douaniers, mais également s'assurer que les efforts sont maintenus : c'est à ce stade que le droit de la concurrence intervient.

Incontestablement, les Etats se sont efforcés pendant des décennies à se mettre d'accord sur des règles harmonisées de droit de la concurrence. Conscients de l'interaction entre les politiques d'Echanges commerciaux et de Concurrence, ils savaient que des efforts devaient être entrepris en ce sens afin de créer une coexistence entre ces deux politiques.

Malheureusement le rêve ne devint jamais réalité. Les Etats ne recueillirent que des règles de concurrence à peine reconnues, ou implicitement appliquées dans le cadre du droit du commerce international. Même si quelques règles de droit de la concurrence ont été insérées dans le contenu de l'Accord General sur les Tarifs douaniers et le Commerce dès le début des années 50, ce n'est qu'en 1994 que les Accords de la toute nouvelle Organisation Mondiale du Commerce ont consacré cette teinte concurrentielle, rédigés de sorte qu'une discipline concurrentielle soit maintenue sur les Parties; même si par définition ces accords n'étaient pas des accords de droit de la concurrence.

Loin de débattre sur une éventuelle harmonisation de ces règles, la thèse les identifie, analyse leur évolution dans le temps ainsi que leur application au travers d'une étude de cas au sein de l'OMC; établissant ainsi que l'émergence d'une jurisprudence est aujourd'hui une réalité indéniable.

Introduction

As it has always been argued and is still maintained nowadays, competition policies have been and remain a complement to international trade regulation. Neither field can be severed from the other. As a World Bank Publication puts it[1]:

> "Competition Policy" is often treated as synonymous with competition law for dealing with anti-competitive private conduct in trans-national markets.
> [But the internationalisation of trade and hence of competition issues], ... mean little unless national and trans-national policies reflect a comprehensive approach to the promotion of competition - in the sense of creating the conditions and opportunities for merit-based competition and consumer/customer benefit in all markets. Such a comprehensive approach does not however [seem to] fit comfortably into the [World Trade Organisation's] trade-driven and rules-based framework. There are difficulties relating to objectives, coverage, analytical framework, substantive provisions and enforcement.

Nevertheless, even if the current context leaves out some serious points during competition negotiations to find a common ground for an international agreement, similar to the General Agreement on Trade and Tariffs or the World Trade Organisation Agreements, the actual force of globalisation does not allow the Contracting Parties to stop any effort on this path to harmonisation. The debate remains open and negotiations must continue.

In the meantime, the Countries have to rely on the actual rules of competition embedded in the WTO Agreements. While the focus of the international society is

[1] Vautier, Kerrin et al., "Competition Policy, Developing Countries, and the WTO", World Bank, July 1999, at 1. Online: Worldbank <www.web.worldbank.org>.

actually on how to combat cartels, and increase the co-operation between the countries' authorities through harmonised rules, the current issues must be addressed and cannot be postponed.

These competition rules have evolved during the time after the war until the creation of the World Trade Organisation (WTO). They have always been present, yet unspoken. And through time, they have been changed, framed, and officially recognised. They have been incrementally accepted in order to face anti-competitive behaviour, which in reality has never been denied.

Thus through time, on the international level, means have been found in order to deal with these specific issues.

The purpose of this paper is to analyse the means used through time. It is to understand how all countries, while conscious of the necessity of competition rules, have actually handled their competition issues. It is to understand how the situation has evolved from the time the competition principles were unspoken, still hidden behind political manoeuvrings, to the time of their out-loud recognition and embedding in Agreements.

Nowadays there is a general acknowledgement that there are competition rules inherited from the history of the international trade law negotiations, and the purpose here is to learn about the application of those rules; this is far from the debate over the need for an international agreement on international competition rules. Indeed, the paper will not linger over the question of whether an international agreement should exist and how to achieve this goal. Rather it will highlight the way to settle competition matters without such an agreement, but with the means at our disposal.

Chapter one will be about the context of the creation of the International Trade Agreement so as to better grasp the evolution of the competition rules within this framework.

A historical context is needed to understand the application and the spirit of the Agreements before the WTO creation and after. This background might be already known by the reader but it allows us to place the competition rules into the context of the time.

The focus will be on the question: what traces of competition rules can be found within the trade agreements, their identification and early application?

In Chapter II, whereas the rules of competition are still unspoken and hardly articulated by the Working Parties and Panels, national competition policies are questioned in the pre-WTO cases of the 1980's. Examples of those cases are given. They are an illustration of the early learning of the Members on how to handle competition matters such as cartels.

Chapter III reveals a change in the international perception of the competition principles. The Contracting Parties, after the difficulties encountered in the early age of the GATT and the lessons learned from the cases of the 1980s, realise they can no longer circumvent the acceptance of an international agreement on competition rules. While the so-wanted International Organisation is finally created, the Contracting Parties address the competition rules on a sector by sector basis. The agreements are not directly named as competition agreements, but in light of their content, are nothing else: whether the GATS, the TRIMS or the TRIPS. Finally there are competition rules, identified and accepted as such. They are to be important for the future as chapter IV

illustrates.

Eventually the principles officially embedded in the WTO Agreements were invoked by the Members and applied by the Dispute Settlement Body constituted in 1994. The illustrative case, the Telmex case, involved the application of these newly agreed texts. It is still up to now *the* case of reference in competition regulation with regard to telecommunications. Chapter IV gives a detailed explanation of the case and its scope.

These rules are in all the countries' interests, both developing and developed countries. It is important to accept that these rules exist on the international level, even if their application is not harmonised between nations. They are needed to maintain the market equilibrium and sustain liberalisation. Whether these rules are sector-based or not, is not of relevance for now. But whether they are recognised is of importance. Intellectual property rights, labour standards, environmental protection are related to trade globalisation. They all are linked to this ideal of a fair market. Efforts should focus on ensuring that these rules are not set aside or misinterpreted.

Chapter I

The GATT: an International Trade *and* Competition agreement?

This Chapter will examine the evolution and recognition of international trade law. In parallel, it will introduce the background to the competition rules enacted within this framework.

Both the history and the substantial evolution of these rules are needed to realise how competition rules have been framed and implicitly applied through time during the 1950's era.

It is a basic explanation of the GATT provisions. At first sight it seems almost too simplistic but nevertheless, these basic provisions are the ones that are still the centre of attention. That is why to identify them within the context of their birth seems important.

Historical Perspective:

ITO, GATT, Parallel Evolution.

It is important to understand how the past has influenced the actual spirit of the WTO agreement.

By analysing the general environment within which the negotiations on the creation of an international trade organisation took place; one can better understand how it is actually applied and related to competition matters if the case may be.

Of course this same environment has evolved since then, but it is interesting to sort out the initial reasons for such a creation, so to better understand the rationale behind the actual application of the agreement.

Besides, no jurisprudence (if existing) can be analysed without understanding the underlying reasoning of the body that might have created it. This is why a retrospective view is necessary.

Birth of an ideal International Trade Organisation

The International Trade Organisation history goes back to the 1930's, and is mostly related to a project launched after 20 years of a "painful experience of world-wide depression"[2].

[2] Armand von Dormael, *Bretton Woods Birth of a monetary system* (New York: Holmes & Meier Publishers, 1978) preface.

Lessons had to be drawn from these dark ages and trade restrictions could no longer remain on the agenda if the mistakes of the past were not to be repeated: the use of tariffs in 1930 by the United States followed by other countries like Canada, France, Spain, Mexico; or preferential tariffs within Commonwealth countries through the imperial tariff preferences, which were restrictions that had created an unbalanced flow of goods and an unfair competitive market.

"Stability without rigidity and elasticity without looseness"[3] was the new policy to stand by.

And as already mentioned, this goal could not be achieved without a better tailored competition policy. But here lied the greatest challenge: tailoring this competition policy. "International competition problems [were] not a new phenomenon. Several international solutions [had already been] developed to tackle these problems [...] and none of them was successful"[4]. All the ancient principles had to be rethought, and the institutional framework rebuilt.

It is in this context that the Bretton Woods Institutions took shape; this is why the International Monetary Fund and the World Bank were conceived. Similarly this is why an International Trade Organisation (ITO) was needed. Of course the political context prevailing at this time had favoured few economic actors that have imposed their vision of world trade. Their aim was to open trade inter-nationally, to shape economic relations in order to allow a better "expansion and balanced growth of

[3] *Ibid.*

[4] Roland Weinrauch, *Competition Law in the WTO The Rationale for a Framework Agreement* (Wien : NWV Neuer Wissenschaftlicher Verlag ; Berlin : BWV Berliner Wissenschafts-Verlag ; Antwerpen : Intersentia, 2004) at 107.

international trade"[5]. The idea mainly formed in the thinking of the United States policy makers

The Negotiations, Backgrounds and Contexts

Negotiations took place in 1943 initially on a bilateral basis between the United States and United Kingdom; negotiations carried on under article VII of the U.S.-UK Lend Lease 1941 Agreement[6] in order to achieve this idealistic goal of an international trade organisation. The results were incorporated in a pamphlet entitled "Proposals for Expansion of World Trade and Employment". The United States then elaborated this pamphlet into a draft Charter.

This draft has essentially been influenced by the U.S. policy and goals. It has been called the "direct expression of [U.S.] views on the appropriate form of concerted international action in the commercial policy area"[7].

The two negotiating countries had a complementary vision of what the international trade framework should look like: an international code of behaviour that countries would have to abide by. They shared the same strategic approach; this is why their encounter was characterised by Professor Gardner as the 1943 'Seminar'[8].

But this view was not shared by the other countries: the "code-of-laws approach was ill-adapted to the nature of the international economy and to the international financial

[5] *Supra* note 2.
[6] Text printed in Harley Notter, *Postwar Foreign Policy Preparation* (Washington, D.C.: Department of State Publication No. 3580, 1949) appendix 8, at 463-64.
[7] Kenneth Dam, *The GATT Law and International Economic Organisation* (London and Chicago: The University of Chicago Press, 1970) at 12.
[8] Richard Gardner, *Sterling Dollar Diplomacy* (Oxford: Clarendon Press, 1956) at 103.

system"[9]. It was too rigid, and flexibility was essential in markets where no "economic patterns [were] established yet"[10].

Eventually and evidently the United States faced opposition, not only based on protectionist grounds (besides "continuation of certain U.S. protectionist policies"[11]) but also because of the public perception of the draft which was viewed as imposing a policy with too many obligations. Moreover, developing countries already invoking special treatment could not bear the same burden as easily as could the United States or Europe in general.

Despite this constant opposition, the Duet kept on negotiating, a track followed afterwards by other countries. But contrary to all expectations these negotiations led to the drafting of a General Agreement on Tariffs and Trade (GATT) with the loss of the idealistic International Trade Organisation.

New negotiations on the GATT, away from the ITO.

The context had changed. Negotiating countries were less and less convinced by the potential success of the ITO. Mainly the United States, in light of the hardened process of drafting this Charter and because of limited powers of negotiations (the delegation of powers was limited to commercial issues), took the initiative to start parallel discussions on a field where they were sure of results: tariffs reductions.

The reader must keep in mind that at this time the ITO drafting was not yet a failure and countries were still trying to succeed. But under the previously mentioned

[9] *Supra* note 7 at 15.
[10] *Ibid.*
[11] *Ibid.* at 14.

circumstances, it had become obvious that a new orientation had to be given to the negotiations. Taking advantage of the already existing infrastructure of the ITO, the negotiating parties decided to start those parallel negotiations, with the same staff for both processes and meetings at both times for the ITO Charter drafting and the GATT design. This is how it happened:

In December 1945, two detailed sets of proposals were adopted by the United Nations Economic and Social Council in early 1946. They were to be considered as the basis for the project of creating the International Trade Organisation.

A Preparatory Committee comprising 18 key governments was appointed to prepare a draft Charter for consideration by the Plenary Conference. The drafting lasted 17 months from October 1946 to March 1948. A first meeting was held in London during October and November of 1946, and ended with a first draft based on the Preparatory Committee work.

A second Committee gathered in New York on January and February 1947 and drafted a second text.

Eventually the Preparatory Committee met in Geneva from April to August 1947 and agreed on a third and final draft to be submitted to the Plenary Conference.

It is at this point that "a proposal to conduct a round of tariff negotiations before the ITO Charter's entry to force surfaced"[12], while the plenary Conference opened at Havana on November 18, 1947 leading to the ratification of the Charter, the 'Havana Charter', in 1948[13]. That was the key moment when the parallel negotiations started.

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[12] Robert E. Hudec, *The GATT legal system and World Trade Diplomacy,* 2nd ed. (United States: Butterworth Legal Publishers, 1990) at 49.

[13] Chronological description cited in Robert E. Hudec, *The GATT legal system and World Trade Diplomacy,* 2nd ed. (United States: Butterworth Legal Publishers, 1990) at 11ff.

"Even before the Preliminary Committee held its first meeting, the United States invited 15 key countries to participate"[14] in simultaneous negotiations.

The U.S. suggested a long and detailed code of 26 articles covering almost all parts of trade restrictions and stressing issues in which the Country had no practice in and vice versa. It offered the draft of an escape clause that would allow States to withdraw particular concessions at a later date if in fact they injured domestic producers[15].

But no stringent rules on subsidies were ever adopted, as the United States threatened to retrieve from the negotiations. Hence, export subsidies or agricultural support issues were set aside. It would be reasonable to say that the overall results were not significant in the bigger picture of the negotiations.

It was mainly a question of diplomacy and political commitment rather than a real and conscious undertaking.

"The London report of the Preparatory Committee set out a lengthy recommendation concerning the mechanics of the negotiations and went on to recommend that the results of the negotiations be

> incorporated in an agreement among the members of the Preparatory Committee which would contain either by reference or by reproduction, those general provisions of Chapter V [the trade policy of the ITO Charter] considered essential to safeguard the value of tariff concessions and such other provisions as may be appropriate"[16].

The Final Act of the General Agreement on Tariffs and Trade was signed on October 30, 1947. The tariffs concessions made by the major participants came into effect in the following year.

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[14] *Supra* note 12.
[15] *Ibid.* at 17.
[16] *Ibid.* at 50.

Hence the initial idea was to gather less participating countries than the ones already involved in the ITO Charter drafting. With fewer negotiators, a consensus could be more easily found. The GATT would later on be absorbed in the ITO when this latter came into force; at least that was the original objective.

But even with fewer participants, the GATT had to be curtailed in its content and two major limitations were imposed: firstly, acceptance of the provisions on a temporary basis, through the Protocol of Provisional Application. The rules were binding to the fullest extent not inconsistent with existing legislation. The effect of such a reservation was that governmental action required by such legislation would not be considered as a GATT violation. Secondly a decision was made to avoid making GATT a formal international organisation. It had to be considered as a mere trade agreement in light of U.S. limitations of powers to negotiate. Besides, the appearance "of sneaking the ITO into effect by the back door" had to be avoided[17].

That is why one talks of CONTRACTING PARTIES with this idea of a collective entity (a legacy that continues in the present). "Every other hint of organisational existence was ruthlessly hunted down and exterminated"[18].

Aside from this peculiarity, GATT was perceived, unlike the ITO Charter (or the initial code proposal), as the perfect expression of the flexibility needed. Because of the political aspect of the agreement, obligations were unique, adapted to the context of the negotiations. They remained legal per se but suited to the economic context, and parties approached those obligations as flexible, "pliable enough to lead to mutually acceptable solutions"[19]. That was the spirit of the GATT agreement when adopted.

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[17] *Ibid.* at 51.
[18] *Ibid.*
[19] *Ibid.* at 25.

GATT and Disputes Resolution.

'This spirit' had an impact on the dispute resolution process. As not institutional and not legal per se, the GATT did not include any provision on decision-making of any kind. GATT was considered as an economic and trade agreement, a new generation of agreements. Reluctant to accept any sort of external judicial 'intrusion', only economic experts could judge States' behaviour. "There was a strong distrust of lawyers and what was understood to be legal method. The insistence on the importance of economic judgement was, as in the earlier statements, essentially a plea for discretion. The British amounted to an admission that the flexibility so worrisome to Continental delegations was a deliberate objective"[20]. The ITO decisions were still to be considered as 'law' but it had to retain some flexibility. And this latter could not be reachable with lawyers and judges, considered as failing "to understand the need for compromise in these matters"[21].

Eventually the GATT was tinged with this phobia of legality. "The only disputes procedure contained in the final text of the Agreement was a nullification and impairment provision copied almost verbatim from the Geneva draft of the ITO"[22]. Whereas, since the Havana Conference, the ITO Charter had been changed to admit a separation in the Organisation power -- between its power to issue recommendation for non-violation complaints and to authorise a suspension for violation complaints --

[20] British memorandum at the London 1946 meeting cited in Robert E. Hudec, *The GATT legal system and World Trade Diplomacy*, 2nd ed. (United States: Butterworth Legal Publishers, 1990) at 29.
[21] *Supra* note 12 at 26.
[22] *Ibid.* at 52.

the GATT chose to remain with the Geneva Convention in the basic nullification and impairment with no separation whatsoever[23].

It was mainly justified by the temporary basis of the agreement, at the behest of the U.S. who were seeking to avoid any resemblance with an organisational structure.

With the loss of the ITO, a Lost Competition Jurisdiction.

The Success of the GATT negotiations meant the loss of the ITO Charter. Satisfied with the tariffs reductions, the Contracting Parties did not consider it necessary to make supplemental efforts to obtain an agreement on the creation of an International Trade Organisation.

The direct consequence of such an evolution with regard to competition matters has been the loss of the ITO mandate to intervene against anti-competitive behaviour. Indeed the Havana Charter had as its goal the creation of an international trade organisation, and it was already unanimously accepted that trade regulation could not be separated from competition regulation; hence the existence of a complete chapter dealing with restrictive business practices, inter alia, article 46 on the General Policy towards Restrictive Business Practices[24]:

> 1. Each Member shall take appropriate measures and shall co-operate with the Organisation to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives act forth in Article 1.
>
> 2. In order that the Organisation may decide in a particular instance whether a practice has or is about to have the effect indicated in paragraph 1, the Members agree, without limiting paragraph 1, that

[23] *Ibid.* at 52-53.
[24] Online: <www.worldtradelaw.net/misc/havana.pdf >.

complaints regarding any of the practices listed in paragraph 3 shall be subject to investigation in accordance with the procedure regarding complaints provided for in Articles 48 and 50, whenever

(a) such a complaint is presented to the Organisation, and

(b) the practice is engaged in, or made effective, by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises, and

(c) such commercial enterprises, individually or collectively, possess effective control of trade among a number of countries in one or more products.

3. The practices referred to in paragraph 2 are the following:

(a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product:

(b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;

(c) discriminating against particular enterprises;

(d) limiting production or fixing production quotas;

(e) preventing by agreement the development or application of technology or invention whether patented or unpatented;

(f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants;

(g) any similar practices which the Organisation may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.

The ITO had a power of consultation (article 47) whenever a Member State considered that such a practice existed. Similarly, the Organisation was given under the Havana Charter (article 48) a right to investigate with a specific procedure to follow. It could undertake studies on its own initiative or at the request of any Member State, any organ of the United Nations or any other intergovernmental organisation (article 49).

Members had to make all appropriate efforts and "take all possible measures by legislation or otherwise [...] to ensure, within [their] jurisdiction that private and public commercial enterprises [did] not engage in practices which [were] as specified [in provision 46-2 and 46-3] and [had] the effect of [restricting business] and [Members had] to assist the Organisation in preventing these practices" (article 50-1). The Havana Charter "vested the ITO with a positive duty to prevent anti-competitive conduct"[25].

But the balance of the different actors' interests at instance led to the loss of this competition jurisdiction, and almost understandably in light of the historical context, such powers enshrined in an international institution were threatening. As previously mentioned, "every [...] hint of organisational existence was ruthlessly hunted down and exterminated"[26] and a fortiori in competition matters where sovereignty remained the rule.

But liberalising trade could not be limited to diminishing trade barriers or decreasing tariffs rates alone. Insurance that these efforts were maintained was another necessary element: competition policies were needed and this need was acknowledged.

The consensus was that "Competition law [...] complements trade policy by ensuring that the reduction or elimination of government barriers to trade are not negated by the anti-competitive behaviour of private firms through the abuse of market power or through collusive behaviour. Like a liberal trade policy that removes government

[25] Joseph Wilson, *Globalisation and the Limits of National Merger Control Laws* (The Hague; London; New York: Kluwer Law International; Frederick, MD: Distributed in North America by Aspen Publishers, 2003) at 193.
[26] *Supra* note 12 at 51.

barriers to competition at the border, competition policy removes private barriers to competition behind the border"[27].

Liberalisation meant fair competition, and no country, including the United States, objected.

The Contracting Parties were aware that competition regimes entailed by definition protection of domestic markets and national interests, while international trade favoured open markets and focused on economic actors with no taint of any national sovereignty. At that time, almost ineluctably the drafters understood that provisions similar to Chapter V of the Havana Charter could not be abandoned on a whole.

And eventually the GATT drafters, despite their opposition to this "positive duty to prevent anti-competitive conduct"[28] of the ITO, remained attached to a competition-oriented policy.

After 1948, other initiatives were undertaken to favour a coordinated competition policy at an international level. Even if the Contracting Parties could not agree on an international organisation in charge of competition matters, they remained convinced that actions had to be taken.

The Organisation for Economic Cooperation and Development (OECD) "issued generalised recommendations against restrictive business practises for multinational enterprises"[29]. Similarly "the United Nations launched a program to establish a New International Economic Order for the lifting up of the less developed and developing countries, and in that connection organised a project for a world competition code

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[27] Kevin Kennedy, *Competition Law and the World Trade Organisation: the limits of Multilateralism* (London: Sweet and Maxwell, 2001) at 4.

[28] *Supra* note 25.

[29] OECD, Guidelines for Multinational Enterprises, Annex to the Declaration of 21 June 1976 by Governments of OECD Member Countries on International Investment and Multinational Enterprises, cited in Eleanor Fox, "Competition Law and the Millennium Round" (1999) 2 J. Int'l Econ. L. 666.

under the aegis of the United Nations Conference on Trade and Development (UNCTAD). The three bloc countries -- industrialised, socialist and less developed and developing countries -- negotiated the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted as a voluntary code in 1980"[30].

On their way towards a potential harmonised international competition policy, those countries experienced on a domestic scale their own improvements or changes. The United States for instance, "made a sweeping turn" in its Antitrust Law: from a broad socio-political policy against economic concentration and corporate power to a minimum scope of the Law, lessened fairness concerns, more efficiency[31].

These events influenced to some extent the GATT application and interpretation.

[30] Eleanor Fox, "Competition Law and the Millennium Round" (1999) 2 J. Int'l Econ. L. 667.
[31] *Ibid.*

GATT-1947, unspoken competition rules:

Identification and Implicit Application.

No provision as such clearly appeared in the Agreement as preventing anti-competitive conduct, but doubtless had the effect of prohibiting any distortion of competition.

Even if not evidently stated, some provisions already made reference to competition policies to abide by.

While the Agreement was waiting to become the foundation of an international organisation, it had to deal with competition matters, and after successive *ad hoc* arrangements, the Agreement managed to become an informal institution. The main objective by then was to eliminate the post-war quotas and obtain further general reductions in tariffs. Slowly the structure had to adapt and shape itself in accordance with these needs.

This is how the Agreement turned out to be a perfect tool of flexibility and even if not purported to intervene in competition matters, did so almost it in spite of itself.

Unspoken rules of competition in the GATT-1947: (still to be found nowadays in the WTO Agreement).

There are some provisions that from their very own nature could be likened to competition-related provisions.

The first ones are obviously articles I and III, the most well-known articles of the

GATT agreement.

Article I-*General Most-Favoured-Nation Treatment*[32],

> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

By definition, the article's purpose is to avoid any kind of discrimination between the products -- like products only -- entering a territory. Equal access is to be granted. Thus as soon as a privilege is granted to one country through negotiations, the conceding party has to grant this very privilege to all the other Contracting Parties. Hence there is no unfair competition between the 'like products'.

Article III-*National Treatment on Internal Taxation and Regulation*, notably paragraphs 1 and 4[33],

> 1. The contracting parties recognise that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production
>
> [...]
>
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements

[32] WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: <www.wto.org>.
[33] *Ibid.*

> affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

As far as this article is concerned, its goal is to prohibit any kind of discrimination but on the territory, unlike article I, which applies on the border of the territory. It is a prohibition on a national level, in order to prevent "members from circumventing tariff concessions through non-tariff barriers to import trade that might undermine the benefit of a tariff reduction"[34]. Any kind of protectionism is prohibited through national legislation or regulation (paragraph 4).

Similarly other provisions act as guidelines with regard to the competitive-related behaviour to adopt.

Article VI-*Anti-dumping and Countervailing Duties*[35]

> 1. The contracting parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
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> > (*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
> > (*b*) in the absence of such domestic price, is less than either
> > (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
> > (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

[34] *Supra* note 27 at 131.
[35] *Supra* note 32.

> Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

For some countries 'dumping' is one of the main anti-competitive behaviours, as by definition the product is introduced on the import market at less than its normal value on the exporting market. More precisely the price of sale of this product on the importation market is less than its cost of production in the exporting country. Hence, the like-products are in an unfair marketing situation, and the importing country cannot face such low production costs. This strategy can lead to the elimination of competition for this product in the importing country.

Another case, another provision: article XI which deals with one of the plagues of the post-war period, the *Quantitative Restrictions with their General Elimination*[36],

> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The scope of this provision is broad: both import and export quotas are concerned even if exceptions exist.

By far the most invoked provisions in the 1950's and after was article XXIII-*Nullification or Impairment*[37].

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> > (*a*) the failure of another contracting party to carry out its obligations under this Agreement, or

[36] *Ibid.*
[37] *Ibid.*

> (*b*) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
> (*c*) the existence of any other situation,
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

This article has been one of the most invoked grounds of action of the Contracting Parties at the eve of GATT's expansion in its application (as seen further in the chapter).

Article X is another illustration, less overt, of how Trade had to be fairly competitive: through the *Publication and Administration of Trade Regulations*[38]

> 1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
> 2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefore, shall be enforced before such measure has been officially published.

[38] *Ibid.*

> 3. (*a*) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

Indeed such regulations were not as obvious as tariff barriers or quotas, and could act like invisible obstacles to market access.

Then how did the parties handle situations implying such unspoken competition principles; did they handle them as such? And how did the Working Parties intervene? They had to face implicit competition-related situations, situations completely new to them. Similarly they had to rule but could not do it like competition authorities, as they had not been granted such a role. (The historical context has shown how reluctant the Contracting Parties were to deal with competition matters). The different cases given as illustrations of the early stages of GATT application well depict this situation, where the rules were unspoken (but still identified), admitted but not easily articulated.

Learning how to rule:

The first cases did not imply any competition-related rule as they were handled as political matters. The GATT was a diplomatic tool in its first applications. And as such only a political answer could be given. That is why the first rulings were made by the Chairman. His intervention was mainly aimed at giving more authority to the ruling. But later, complaints remained under the subsidiary working groups' scrutiny, groups composed of the principal interested parties on all sides of the issue. "If the

principals [could not] agree, the working party [had] no answer"[39]. And under their scrutiny, matters became 'legal'.

The first case under the Working Party examination was based on the aforementioned Article XXIII-GATT. It involved the United States, alleging that Cuba had nullified or impaired the benefits of a tariff concession on textiles. "The complaint involved a new Cuban regulation which prohibited all but a few well-established importers from importing textiles; the regulation also prescribed quite burdensome documentary formalities for trade that was allowed. The gravamen of the U.S. complaint was a non-violation nullification and impairment-whether or not the new regulation was in violation of GATT obligations, it had stopped trade and had thereby nullified the benefits of the Geneva tariff concession"[40]. The United States refused any sort of consultations arguing that there was no need to talk but that they had a right to retaliate. "The U.S. complaint was disposed of by referring it to a working party charged "to recommend ... a *practical solution* consistent with the principles and provisions of the General Agreement""[41]. The United States won its point only when the issue was broadened and de-legalised, and after the Cuban withdrawal of its regulation. This decision is unfortunately not the best illustration of a competition matter as such, due to its strong political context: it involved the United States and Cuba in the 1950's. But beneath this political layer one can easily recognise the situation of restrictions in market access for textiles importers. They did not have equal opportunities because of those non-tariff barriers. Nevertheless the case was not argued with this tinge of competition but rather in a "de-legalised manner".

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[39] *Supra* note 12 at 77.
[40] *Ibid.* at 76.
[41] GATT/CP.2/SR.23 (Sept. 10, 1948), pp. 8-9, emphasis added, cited in Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy,* 2nd ed. (United States: Butterworth Legal Publishers, 1990) at 77.

The Fifth and Sixth Session (1950-51) revealed an enthusiasm and a growing respect for the disputes work. With this enthusiasm, Parties learned to articulate their argument better and two cases were illustrative of this trend: a case between the United States and Czechoslovakia[42] and another one between the Netherlands and United Kingdom[43].

The first one has revealed innovations in the ruling as it involved competition issues directly in its subject matter and also referred to a case as precedent, competition issues. Czechoslovakia charged that an escape clause tariff increase by the United States did not meet the criteria of GATT Article XIX, dealing with Emergency Action on Imports of Particular Products. As previously noted, it is a provision negotiated by the United States allowing States "to withdraw particular concessions at a later date if they in fact injured domestic producers"[44], where the injury is due to excessive imports on this domestic market in a certain timeframe. The products at instance were namely "hats, caps, bonnets and hoods for women's wear of a certain description and within a certain price range"[45]. A Working Party was appointed and composed of the principals, and neutrals voting as a bloc. This situation was (and remains) subject to controversy. The provision had been drafted to deal with the legal right to withdraw from one's obligations and thus, as exceptional had to be construed restrictively with regard to its requirements. The Working Party found the United States innocent on the margin, the proof of absence of serious injury being questionable. That was the whole issue: how to prove the serious injury? It had to be proven that the three sets of following conditions as hereunder had been fulfilled:

> *(a)* There should be an abnormal development in the imports of the product in question in the sense that:

[42] CP.5/106 (Mar. 27, 1951).
[43] CP.5/12 (Oct. 26, 1950).
[44] See above page 11.
[45] *Supra* note 42 at 2.

(i) the product in question must be imported in increased quantities;
(ii) the increased imports must be the result of unforeseen developments and of the effect of the tariff concession; and
(iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

(b) The suspension of an obligation or the withdrawal or modification of a concession must be limited to the extent and the time necessary to prevent or remedy the injury caused or threatened.

(c) The contracting party taking action under Article XIX must give notice in writing to the CONTRACTING PARTIES before taking action. It must also give an opportunity to contracting parties substantially interested and to the CONTRACTING PARTIES to consult with it. As a rule consultation should take place before the action is taken, but in critical circumstances consultation may take place immediately after the measure is taken provisionally[46].

The accuracy in figures was not contested by the Czechoslovak representative: there was indeed an increase in the imports of the products at instance, but the conclusion of a right to withdraw from their obligations was questioned. The American representative argued that unforeseen events influenced the imports of the products: a change in style of the hats which triggered an increase of imports they could not have anticipated. This increase resulted in quantities of hats that represented according to the United States delegate more than 95 % of the market share. With this increase, American producers had to adapt their labour forces to the demand.

But the Czechoslovak representative counter-argued that "it is universally known that fashions are subject to constant changes – "change is the law of fashion""[47], but these changes had nonetheless affected the labour market and employment of this small industry.

[46] *Supra* note 32 article XIX.
[47] *Supra* note 42 at 6.

Even though Czechoslovakia contended that the hat market was sufficiently protected by the (reduced) tariffs, the Working Party agreed that they had been an effect on the United States producers.

The serious injury in the case at instance was not however clearly established. The Working Party argued it needed not to ascertain the seriousness of the injury, as the United States was entitled to "the benefit of any reasonable doubt"[48]. The decision would have otherwise involved a subjective element that is an economic and social judgement, something the Working Party did not want.

Eventually "no facts have been advanced which [provided] any convincing evidence that it would [have been] *unreasonable* [emphasis added] to regard the adverse effects on the domestic industry concerned as a result of increased imports as amounting to serious injury or a threat thereof; and the facts as a whole certainly [tended] to show that some degree of adverse effect [had] been caused or threatened. It must be concluded, therefore, that the Czechoslovak Delegation has failed to establish that no serious injury has been sustained or threatened"[49].

This case has similarly signalled another innovation by carrying forward a former case, as precedent - the Australian Subsidy case[50]. This case was the first real one grounded on the provision XXIII-*Nullification and Impairment*. It was brought forward in the U.S.-Czechoslovakia decision because the Working Party defined in this precedent the situation of a NON-violation nullification and impairment, a new theory at the time. Similarly, it defined this notion of 'reasonable anticipation' that was the standard to consider whether there was an impairment or nullification of advantages.

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[48] *Ibid.* at 16.
[49] *Ibid.*
[50] GATT/CP.3/61 (July 27, 1949). Also GATT/CP.3/SR.41 (Aug. 12, 1949).

The case involved a complaint filed by the Chilean Government against the Australian system of subsidies. This latter granted a tariff concession to "Chile binding duty free treatment"[51] on a certain type of fertilisers and a subsidy before World War II. But the Australian government terminated the subsidy given to Chile, while continuing to support other types of fertilisers produced by other countries. According to the Chilean delegation, this new subsidy policy annulled or threatened the tariff concession being given. There was no express violation of the GATT but it created a situation of non-violation nullification or impairment. The Working Party "agreed that ... [the nullification or] the impairment would exist if the action of the Australian Government which resulted in upsetting the competitive relationship between [the fertilisers] *could not reasonably have been anticipated* [emphasis in the text] by the Chilean Government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated the duty-free binding on [the Chilean fertilisers]"[52]. A non-violation nullification or impairment was simply considered as an impossible reasonable anticipation of the consequences, an interpretation resulting from the phrase of article XXIII: "benefit accruing to [the injured party] under the Agreement". "The ordinary meaning of 'reasonably anticipated' would be the actual predictability [...]. The purpose of the nullification and impairment remedy would be to preserve the balance of the original exchange of values"[53].

The second case concerned a British internal Tax that was being applied unequally to foreign and domestic products, in violation of Article III-*National Treatment on Internal Taxation and Regulation*. The Netherlands filed the complaint,

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[51] *Supra* note 12 at 159.
[52] *Ibid.* at 162.
[53] *Ibid.* at 163.

an action supported by several other governments. Again this case involved competition matters as the unequal treatment between domestic and foreign products led to a distorted market. But again this issue has been hidden under the political significance of the ruling. Indeed this case constituted a precedent at the time, as a great leader conceded where diplomacy had failed. The United Kingdom admitted its violation and promised to take the necessary measures through a legislative process. What happened after these first cases?

Slowly the caseload increased, as the number of the contracting parties did. They were all aware of this great potential that the GATT was becoming. A political tool for some, an economic one for others, it was getting more and more credibility, the Working Parties becoming less and less sorcerer's apprentices, and continuing to learn.

Still learning how to rule:

Three other cases are of interest (of course amongst many others...) in analysing the "GATT's disputes business"[54] in the early stages of its application: the Belgian Family Allowances[55], and the U.S. Dairy Quotas[56], the Norwegian Sardines[57], other illustrations of an evolution in GATT interpretation of the application of the unspoken competition rules.

[54] *Supra* note 12 at 135.
[55] CP.G/32 –1S/59 (Nov. 7 1952). Online: WTO <www.wto.org>.
[56] CP.6/26 (Sept. 19 1951). Online: WTO <www.wto.org>.
[57] CP.G/26 – 1S/53 (Oct. 31, 1952). Online: WTO <www.wto.org>.

The Belgian Family Allowances: as one can understand, the financing system of these allowances was at issue. They were initially financed by employers but to increase the contribution, the Belgian government thought of adding a tax of up to 6 per cent on imports of goods. The law in itself and at first sight was contrary to the GATT provision II which allowed the equalisation of certain internal taxes (on the payrolls) by levying the same amount on imports but only "in respect of the like domestic product". There was a clear breach of article II as the targeted products were not like domestic products, this situation creating a market distortion. Yet the violation was never invoked as another one existed. The law indeed granted an exemption from this tax to countries that would be able to prove a similar social system of family allowances. This provision was clearly in contradiction with article I-GATT 1947 as discriminating amongst countries. But again and oddly, this was not the issue at stake. Norway and Denmark, the complainants, were concerned because they had been refused the exemption while Sweden with a similar social regime to theirs had been granted this exemption. They brought the issue before the Contracting parties in 1951 in order to obtain from the GATT Working Group a decision in their favour and to help them to get in the "favoured group"[58]. After negotiations and oppositions amongst the parties, the Working Party issued a report.

It could not argue as for the legality of the statute as such, indeed it was enacted in 1939 and could be subject to the reservation present in the Protocol of Provisional Application of the General Agreement[59]. And as it was not argued, the Working Party did not settle on this issue. It was in a difficult position; the members had to act as a referee on a discrimination, instead of putting an end to it. But they rendered a decision: "the report ended with a recommendation that Belgium consider removing

[58] *Supra* note 12 at 138.
[59] See above page 12 for explanation on the Protocol of Provisional Application of the Agreement.

'the discrimination complained of' and went on to suggest that repeal of the entire tax would be best"[60]. That was all they could do. Belgium had to react. It did by granting another exemption to Switzerland early 1953. Only in 1955, Belgium reported that a statute would abolish the tax, to all the concerned countries' satisfaction. This case well illustrates the content of competition principles in the GATT-1947 denied by the Contracting Parties. They were not ready yet to work on an international fair competition system. All they cared for was their very own situation and they did not even bother to prevent unfair competitive legislation. The programs at stake were clearly discriminatory programs and market-distorting but the Countries did not seem willing to change the situation.

The U.S. Dairy Quotas: this case is merely the illustration of the GATT enforcement powers. It all began in 1951. The United States after negotiating tariffs had to impose a "flat embargo on imports of butter"[61] because of domestic overproduction. A bill was enacted comprising severe quantitative restrictions in one of its section, section 104, on a wide range of farm products. Cheese was mainly targeted and the Netherlands mainly affected. GATT proceedings were initiated but the United Stated, without waiting for a ruling, recognised a violation of GATT obligations, notably article XXIII: nullification and impairment. There was again in this case an evident market distortion due to these quantitative restrictions. But what at first could have been considered as a simple illustration of competition matter became a political issue as the repeal of the section took some time to occur. The GATT proceedings only served as a means of pressure on the Unites States. No effort was made to defend section 104 but its repeal seemed impossible. The House and the

[60] *Supra* note 12 at 144.
[61] *Ibid.* at 181.

Senate could not agree on an abolishment. Worse, they voted in favour of keeping the statute with two liberalising amendments and increased quotas. The Netherlands then asked for retaliation. They wanted a decrease in American imports. The "report of the Working Party took the compromise settlement [as usual] and turned it into a third party ruling"[62] so to completely endorse the decision. It granted to the Netherlands the right to retaliate but recommended "a measure somewhat different in magnitude from that proposed by the Netherlands"[63] as for the decrease of imports sought. They implemented their new quotas in 1953 up to the time that the United States changed its legislation. Relaxing the quotas on cheese in 1959 led to a decreased level of retaliation.

The Norwegian Sardines: in 1925 and 1927, the Norwegian Government secured an agreement with Germany that the same tariff of 30 per cent would be applied on all its sardines: pilchards, herrings and sprats included. After the war and during the Torquay negotiations (1950-51) within the GATT framework, the Norwegian government requested a reduction of tariffs. Germany agreed only for herrings and sprats. Their main supplier of pilchards, Portugal, was not part of the Agreement yet, hence the current Portuguese tariffs of 14 per cent were not binding on anyone but Germany.

Norway obtained a reduction from 30 per cent to 20 per cent on herrings and 25 per cent on sprats. They requested at the same time a promise from Germany that the tariff rate for sprats and herring would not be less favourable in the future than the rate for pilchards. But after the ratification by Portugal of the GATT, Germany concluded that

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[62] *Ibid.* at 193

[63] L/61 (Nov. 7, 1952), cited in Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy,* 2nd ed. (United States: Butterworth Legal Publishers, 1990) at 193.

it had to apply the 1923 rates of 14 per cent to all its trading partners, including Norway, as Portugal was a new Contracting Party. Germany was bound by this 1923 tariff on the pilchards but at the same time broke its alleged promise to Norway: herrings and sprats were treated less favourably, the rate applied being 20 and 25 per cent, more than the 14 per cent applied to the pilchards. This is why Norway filed a complaint in September 1952. The main issue was the promise made or assurance given by Germany, which was hard to prove as it was an oral act. The Panel (no longer Working Party since the Seventh session, 1952), considered the issue under article I. But a claim was not possible. The Panel indeed proceeded by defining the relevant market. It assessed that even if the products could be seen as like-products in light of the article I definition, Germany separated the products in their customs classification with no objection at all from Norway. They were considered different in their preparation.

Thus the whole case aimed at dealing with the supposedly given assurance: whether it had nullified or impaired Norwegian advantages under article XXIII-*Nullification and Impairment*. The Panel concluded "that such impairment would exist if the action of the German Government, which resulted in upsetting the competitive relationship between preparations of *clupea pilchardus* and preparations of the other varieties of the clupeoid family could not reasonably have been anticipated by the Norwegian Government at the time it negotiated for tariff reductions on preparations of *clupea sprattus* and *clupea harengus* [similar reasoning to the Australian Subsidy case of an assumed anticipation[64]]. The Panel [further] concluded that the Government of Norway had reason to assume, during these negotiations that preparations of the type of clupeae in which they were interested would not be less favourably treated than other

[64] See above page 28ff.

preparations of the same family and that this situation would not be modified by unilateral action of the German Government. In reaching this conclusion, the Panel was influenced in particular by the following circumstances:

> *(a)*the products of the various varieties of clupeae are closely related and are considered by many interested parties as directly competitive;
> *(b)*that both parties agreed that the question of the equality of treatment was discussed in the course of the Torquay negotiations; and
> *(c)*although no conclusive evidence was produced as to the scope and tenor of the assurances or statements which may have been given or made in the course of these discussions, it is reasonable to assume that the Norwegian delegation in assessing the value of the concessions offered by Germany regarding preparations of clupeae and in offering counter concessions, had taken into account the advantages resulting from the continuation of the system of equality which had prevailed ever since 1925"[65].

Again the Panel found a middle-ground solution. "The finding was a carefully negotiated exchange of sorts"[66]. The Norwegian government could have reasonably relied on such an assurance, although there was no evidence of the content of the assurance itself. The decision lacked logic but "the findings were an artful bit of impressionistic drafting which solved the case, correctly, while at the same time reconciling the interests of both delegations"[67]. Nothing else mattered.

Evolution?

As one can see, Article 46 of the ITO Charter was no longer on the agenda, neither in the GATT content, nor invoked by Parties. There was no provision on Restrictive Business Practices (RBPs) or more commonly Cartels, similar to article 46 that could have been considered as a competition rule.

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[65] *Supra* note 56 at 4.
[66] *Supra* note 12 at 177.
[67] *Ibid.* at 178.

There were few attempts to regulate cartels. The first attempt died in 1955.

In 1958, the Parties adopted a resolution on RBPs and a group of experts was appointed "to study and make recommendations with regard to whether, to what extent if at all and how the Contracting Parties should undertake to deal with restrictive business practices in international trade"[68].

The expert group recommended in its 1960 report "that the Contracting Parties should now be regarded as an appropriate and component body to initiate action in the field ... and should encourage direct consultations between contracting parties with a view to the elimination of the harmful effects of particular restrictive practices"[69]. They encouraged Contracting Parties to consult but the group of experts could not agree on the ground of an action. Article XXIII-*Nullification or Impairment* seemed for a minority to be appropriate for such an action. But for a majority, an action based on this article "would involve the great risk of retaliatory measures under the provisions of paragraph 2 of that Article [see supra for content], which would be taken on the basis of judgements which would have to be made without adequate factual information about the restrictive business practices in question"[70].

Despite this lack of consensus, the Parties adopted in 1960 a Decision on Arrangements for Consultations on Restrictive Business Practices[71]. Again only a recommendation was issued exhorting the Parties to consult at the request of any contracting party. An incentive to cooperate was advocated with an obligation to convey information to the Secretariat continuously.

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[68] Resolution of Nov. 5, 1958 on "Restrictive Business Practices-Appointment of Group of Experts", BISD, 7th Supp. 29 (1958), cited in Kevin Kennedy, *Competition Law and the World Trade Organisation: the limits of Multilateralism* (London: Sweet and Maxwell, 2001) at 141.

[69] GATT, L/1015, BISD, 9th Supp. 170, 171 (1960), cited in Kevin Kennedy, *Competition Law and the World Trade Organisation: the limits of Multilateralism* (London: Sweet and Maxwell, 2001) at 141.

[70] *Ibid.*

[71] "Decision on Restrictive Business Practices: Arrangements for Consultations", BISD, 9th Supp. 28 (1960).

But eventually, the complex issue of the cartels could not be dealt at an international level because of this lack of consensus, some countries even considering that the cartels were not harmful to *their* economy. The Contracting Parties could not accept their sovereignty seemingly being encroached upon. Competition matters had to remain within a domestic framework, the latter being the most appropriate. Only domestic anti-trust authorities could handle this issue, a debate which was just begun. Similarly export subsidies were another competition matter that was dealt on a case by case basis as there was no provision regulating them until 1957. Several complaints against export subsidies lacked serious legal foundation.

This situation lasted "until the Review Session amendments to article XVI became effective in 1957[72]

> 2. The contracting parties recognise that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.
> 3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.
> 4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidisation beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies"[73].

[72] *Supra* note 12 at 97, see text accompanying note 14.
[73] *Supra* note 32.

The 1950's era:

In light of what has been mentioned, one realises that there was no tendency to follow a common pattern in the rulings as GATT was in its early application. The Chairman or the subsidiary working groups were literally experimenting with new methods and reasoning in each new case.

One cannot conclude that there was any sort of Competition 'Jurisprudence' at this time as the General Agreement was only at its beginnings.

Nevertheless, the Disputes procedure gained more and more maturity, and one starts to see some logic in the results and more certainty in the outcomes.

"The disputes procedure did manage to acquire a reputation for effectiveness during this period. Formal rulings were honoured for the most part. The other complaints produced a good record of proclaimed success [...]. Probably the best measure of the overall attitude toward the procedure is the fact that governments did use it, again and again"[74].

[74] *Supra* note 12 at 108.

Chapter II

The 1980's era: competition policies at stake.

The identification and application of the competition rules in the previous era have led to a new perception of those same rules in the 1980's cases. They were not yet recognized, but the Working Parties were at least as aware of their existence as the Contracting Parties were.

With old dilemmas to be solved and means of settlement to find, and with almost a revival of the GATT structure and use, competition matters were 'trendy' again.
Three cases illustrate this tendency.

After two decades of few cases, due to the apathetic attitude of the Contracting Parties, old issues resurfaced in the reappearance of the Restrictive Business Practices (RBPs). As nothing directly addressed this issue within the GATT provisions, RBPs had to be dealt with, one way or another.

Three cases at the time involving the question of RBPs can serve as examples. These cases well illustrate the uncertain methodology of settling disputes. They clearly show how a 'neutral' quasi-tribunal dealt with competition matters at a time when they were not officially recognized.

The Canadian Foreign Investment Review Act Dispute[75]:

In 1973, the Canadian Parliament enacted legislation "in recognition that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment [was] a matter of national matter"[76]. This rationale underpinned the government's move to review and assess any new business on the basis of whether it would be beneficial to Canada. This review process gave birth to requirements not directly enjoined by the text of the legislation, but necessary in order to get the investment approved. Those requirements could cover any aspect of the investment, employment, research and development or participation of Canadian shareholders and managers. The requirements were the results of (alleged) negotiations between the Government and

[75] *Canada- Administration of the Foreign Investment Review Act* (1984), 30th Supp. BISD (1984). Online: WTO<www.wto.org>.
[76] *Ibid.* at 2.

the investors. Several kinds existed, and at least three of them have been identified: undertakings on purchases, manufacturing undertakings and export undertakings.

The first category of undertakings, the undertakings on purchases, were conditional on goods being "available", "reasonably available" or "competitively available" in Canada "with respect to price, quality, and delivery or other factors specified by the investor"[77].

The second category, manufacturing undertakings, implied for the investors the requirement "to manufacture *in* [emphasis added] Canada, products or components of a product used or sold by the firm"[78].

As for the last category of undertakings, they involved restrictions on exports for the investors, so to leave more opportunities for Canadian producers to sell their products abroad.

Approximately 90 per cent of the investments under review were considered as beneficial to Canada and thus allowed. They were legally binding: the investors could be subjected to a remedial order in case of non-fulfilment of their obligations.

The polemical point of the dispute was the nature of the undertakings, and not the Act as such. They were considered as private contractual relationships, thus not covered by the GATT as they did not amount to any provision dealing with investments. Nevertheless the Panel ruled on each of the undertakings after a complaint filed by the United States. This latter "requested the Panel to find that the written undertakings obtained by the Government of Canada under the Foreign Investment Review Act which [obliged] foreign investors subject to the Act

> (a) to purchase goods of Canadian origin in preference to imported goods or in specified amounts or proportions, or to purchase goods from Canadian sources;

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[77] *Supra* note 75 at 3ff.
[78] *Ibid.*

(b) to manufacture in Canada goods which would be imported otherwise

[were] inconsistent with Articles III:4[79], III:5[80], XI[81] and XVII:1(c)[82] of the General Agreement,

and that the undertakings which [obliged] foreign investors

(c) to export specified quantities or proportions of their production

[were] inconsistent with Article XVII:1(c) of the General Agreement, and that any such undertakings therefore [constituted] a prima facie case of nullification and impairment under Article XXIII of the General Agreement. The United States further requested the Panel to suggest that the CONTRACTING PARTIES recommend that Canada (a) make clear that it [would] not regard as binding, or seek to enforce in the

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[79] "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product". In WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO <www.wto.org>.

[80] "No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1". In WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO <www.wto.org>.

[81] "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party". In WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO <www.wto.org>.

[82] "(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, [...] such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment [...]

(*b*) The provisions of subparagraph (*a*) of this paragraph shall be understood to require that such enterprises shall, [...] make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(*c*) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (*a*) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (*a*) and (*b*) of this paragraph". In WTO, *The legal Texts, the Results of the Uruguay*

context of the *Foreign Investment Review Act*, any undertaking of the kind found to be inconsistent with the General Agreement, and (b) that it [would] cease eliciting and accepting such undertakings as part of investment proposals"[83], even if those undertakings were of a private nature.

Undertakings on purchases

According to the complainant, the undertakings on purchases obliging the investors "to purchase goods in Canada whenever 'available', 'reasonably available' or 'competitively available' had the effect of according less favourable treatment to imported goods"[84].

They prevented the investors from freely choosing between the imported or domestic goods, even when the imported goods were more competitive in terms of quality or price. The market was artificially maintained in favour of the domestic products by erasing any competitiveness. Besides, when the "investment approval [was given], the undertaking became legally binding on the investor, who was no longer free to modify his purchase undertaking without the permission of the government"[85]. Moreover, investors had to purchase the goods from an intermediary in some cases, a "Canadian middleman"[86] in the distribution chain, increasing their costs.

The Canadian Government argued that the investments were of a private nature and hence could not be under the Panel's jurisdiction. And even if it was the case, investors without such undertakings would have likewise purchased those domestic

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Round of Multilateral Trade Negotiations (Cambridge: University Press, 2003). Online: WTO <www.wto.org>.

[83] *Supra* note 75 at 5.

[84] *Ibid.*

[85] *Ibid.* at 6.

[86] *Ibid.*

products. "Where undertakings were given, they reflected a decision by the investor about how he intended to conduct his business in Canada"[87]. In other words whenever "available", "reasonably available" or "competitively available", the investor would have chosen the domestic product.

The United States argued that "the effect of such undertakings was to restrict the internal market for various imported products by requiring the individual firms to use specified amounts or proportions of Canadian products"[88]. There was an overt distortion of market.

Manufacturing Undertakings

They acted as an 'involuntary market sharing'. Their purpose was to reserve a portion of the internal market for products of domestic origin and by the same way to exclude imported goods. That was clearly a discrimination inconsistent with article III-5.

Again Canada counter-argued that these undertakings reflected a choice that would have made the investors without the undertaking. Furthermore as of private nature they could not be considered as requirements in light of article III-5.

Undertakings on exports

Eventually the United States stated that the undertakings to export specific amounts or proportions of production were inconsistent with article XVII-1-*State Trading Enterprises*, prohibiting "government interference with the operation of commercial

[87] *Ibid.*
[88] *Ibid.* at 8.

considerations"[89]. The export levels of the firms could not be considered as in accordance with commercial considerations. No investor would voluntarily bind his exports levels to fixed amounts and proportions "given the uncertainty of markets and conditions of competition. Once the undertakings were accepted, the investor could not adjust its export sales in accordance with commercial considerations, but was dependent on the consent of the Canadian government to make a change in the undertaking. He might therefore [have been] forced to dump products abroad to meet his obligations"[90]. The export performance requirements restricted trade and created "artificial export targets for products with which the industries of other contracting parties had to compete"[91].

Conclusions

In light of the nature of the undertakings, the Panel considered that they were requirements under article III GATT-1947.

"The Panel felt [...] that even if this was so, private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, [possessed] under Article III:4 of the General Agreement and which they [could] exercise on behalf of their exporters. This [applied] in particular to the rights deriving from the national treatment principle, which - as stated in Article III:1 - is aimed at preventing the use of internal measures 'so as to afford protection to domestic production'. The Panel found that undertakings to purchase goods of Canadian origin without any qualification [excluded] the possibility

[89] *Ibid.* at 10.
[90] *Ibid.*
[91] *Ibid.* at 11.

of purchasing available imported products so that the latter [were] clearly treated less favourably than domestic products and that such requirements [were] therefore not consistent with Article III:4.

When these undertakings [were] conditional on goods being 'competitively available' (as in the majority of cases) the choice between Canadian or imported products [could] frequently coincide with normal commercial considerations and the latter [would not be] adversely affected whenever one or the other offer [was] more competitive. However, it is the Panel's understanding that the qualification 'competitively available' [was] intended to deal with situations where there [were] Canadian goods available on competitive terms. The Panel considered that in those cases where the imported and domestic product [were] offered on equivalent terms, adherence to the undertaking would [have entailed] giving preference to the domestic product also when subject to 'competitive availability', [...] contrary to Article III:4. The Panel considered that the alternative qualification 'reasonably available' which [was] used in some cases, [was] a fortiori inconsistent with Article III:4, since the undertaking in these cases [implied] that preference [had] to be given to Canadian goods also when these [were] not available on entirely competitive terms.

Taking into account all the above considerations, the Panel considered what scope might exist for modifications of administrative practices under the *Foreign Investment Review Act* so as to bring them into conformity with Canada's obligations under the General Agreement"[92].

Then the panel considered the potential breach of article III-5 as for the undertakings of purchases and manufacturing. However it concluded that it did not find

[92] *Ibid.* at 12ff.

enough grounds to consider the undertakings at instance in light of article III-5, even though it had already found them inconsistent with article III-4.

Similarly the Panel addressed the issue in light of article XI, and considered that article XI dealt with the importation of goods and not imported goods. To interpret otherwise would render article III-*National Treatment* superfluous. Hence the Panel found that the purchases undertakings were not inconsistent with article XI.

Eventually, the Panel concluded on the export undertakings and found that article XVII-1 could not be applied to such commitments. The Panel found that "there [was] no provision in the General Agreement which [forbid] requirements to sell goods in foreign markets in preference to the domestic market [...]. Therefore, when allowing foreign investments on the condition that the investors export a certain amount or proportion of their production, Canada [did] not, in the view of the Panel, act inconsistently with any of the principles of non-discriminatory treatment prescribed by the General Agreement for governmental measures affecting exports by private traders"[93].

As such legislation has been a means to circumvent overt tariff barriers while affording protection to domestic producers, the WTO Agreements in 1994 addressed these conditional private undertakings. The Trade-Related Investment Measures Agreement was negotiated on this issue in response to this governmental practice. This provision is still in force today:

> 1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
>
> (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source,

[93] *Ibid.* at 16.

> whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; [...][94].

The Copper Cartel Dispute[95]:

Only a Report of the Representative of the Director General was issued and no official Panel ruling was rendered.

Context

"This dispute began in the 1960s"[96]. The European Community claim mainly targeted the Japanese market structure.

"It [...] maintained that their copper smelting and refining industry [had] suffered from serious difficulties in obtaining adequate supplies of copper concentrates on acceptable terms. These difficulties were seen as stemming from market distortions resulting from the Japanese smelters often offering higher prices for concentrates than what the EC smelters [believed] 'normal market conditions' justify, thus enabling them to obtain inequitably large shares of concentrates.

The EC smelters and refiners [...] alleged that the high internal price of refined copper in Japan, which made it possible for Japanese smelters to offer such high prices for concentrates, [was] a result of 'questionable practices', including high Japanese tariffs

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[94] WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO <www.wto.org>.

[95] *Good Offices Report of the Personal Representative of the Director General* (1989), 36th Supp. BISD (1989). Online:<http://gatt.stanford.edu/page/home>.

[96] *Ibid.* at 1.

on imports of refined copper, concealed import restrictions, possibly hidden subsidies, and a price cartel operated by the Japanese producers.

The Japanese authorities [...] insisted that the Japanese import duties [were] consistent with their GATT obligations, that there [were] no hidden restrictions on imports, that there [was] no producers' cartel in Japan, and that the purchasing terms for copper concentrate [were] a purely commercial matter and so [were] completely outside the purview of the GATT"[97]. As argued by the Canadian Government in the *Foreign Investment Review Act* case, Japan maintained that the private nature of the purchases, having a 'purely commercial nature' could not be subjected to the Panel review.

The Japanese market has always been a point of controversy because of its very nature. The distribution structure has always been criticised since war, as by 'tradition', the industry is organised through alliances "among suppliers, intermediaries, and other firms that operate vertically and horizontally and are centred on financial entity"[98], alliances named Keiretsu.

Two years after the Canadian Case, the European Community requested the constitution of a panel to examine whether this alleged producer's cartel on copper existed in Japan.

Procedure

"[The] dispute first came before the GATT Council in 1982 and [had been revisited], with inconclusive results, several times since. In December 1987, [...] the parties requested the Director-General, or an individual nominated by him in consultation

[97] *Supra* note 95 at 1 and 2.
[98] Online: definition<www.academyofcg.org/codes-glossary.htm>.

with the parties, to mediate in this dispute"[99]. An independent expert was named to establish the facts. He completed his study in 1988, a study which helped in drafting the report.

"The parties presented their positions in joint meetings on 12 July 1988 and 15 December 1988.

The parties requested the Director-General, on the basis of this fact finding exercise, to offer an advisory opinion with a view to resolving the dispute"[100].

The Personal Representative of the Director-General issued a report in 1989, and concluded that "Japan [had] not violated any of its GATT obligations. Nor was any evidence presented of the existence of a producer's cartel. Although certain kinds of government assistance (research funds, aid for stockpiling, unemployment aids, etc...) have been extended in both Japan and the E.E.C., these [did] not appear to be of the sorts or amounts that have had any significant impact on the competitive position of the industry in either Japan or the E.E.C."[101]

The Semiconductor Case[102]:

In 1981, the Japanese semiconductor exports exceeded for the first time those of the United States, while the latter could hardly access the Japanese market. Fearing tremendous losses in the sector, the United States filed a collective complaint against Japan for dumping. On September 1986, both countries formally concluded an Arrangement concerning Trade in Semi-Conductor Products, and subsequently was notified to the GATT. The Arrangement included three main provisions: the first one

[99] *Supra* note 95 at 2.
[100] *Ibid.*
[101] *Ibid.* at 3.
[102] *Japan-Trade in Semi-Conductors* (1988), 35th Supp. BISD (1988). Online: WTO <www.wto.org>.

related to access to market, providing assurance that there would be greater support given to expand sales of foreign produced semiconductor; the second provision dealt with the prevention of dumping in three subsections. The first subsection dealt with the suspension of present anti-dumping cases, the second with the monitoring of costs and prices on a list of semiconductors exported to the United States and the third with the monitoring of third countries markets. The last section related to periodic and emergency consultations.

In the Arrangement application, the Japanese Government encouraged Japanese users and producers to purchase foreign semiconductors from all sources, seeking their utmost co-operation. The Japanese Government submitted any export to approval with fixed thresholds while monitoring the costs and export prices, ensuring a level of costs always superior to the American one. Manufacturers and exporters were required to report on their data, a failure to do so leading to a fine or a penal liability (never a denial of approval). Forecasts on the demand and production levels were published on a regular basis.

Because of all these measures and mainly because of the monitoring system, the European Economic Community claimed that "its benefits accruing from the GATT were nullified or impaired by the very nature of"[103] those provisions.

> "Some of the measures so introduced were upsetting international competitive relationships unilaterally and artificially. This was all the more prejudicial in that the sector concerned was one in which the parties to the Arrangement had at present a dominant position in world production and trade, and was at the same time of fundamental importance to the industrial development of contracting parties concerned"[104].

[103] *Ibid.* at 8.
[104] *Ibid.*

In summary, the problems were that firstly, the monitoring measures of third countries markets were in breach of article VI-*Anti-Dumping and Countervailing Measures*[105] and XI-*General Elimination of Quantitative Restrictions*[106], secondly, the provisions on access to the market included conditions for discriminatory implementation inconsistent with article I-*Most Favoured Nation,*[107] and finally there was a lack of transparency in the implementation of the Arrangement, in violation of article X-*Publication and Administration of Trade Regulations*[108]. The Community also claimed a violation of article XVII-1 (c)-*State Trading Enterprises*[109].

First Claim

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[105] "The contracting parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry". In WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO <www.wto.org>.

[106] *Supra* note 81.

[107] "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". In WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO <www.wto.org>.

[108] "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private". In WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: <www.wto.org>.

[109] *Supra* note 82.

To support its claim, the E.E.C. first challenged the Third Country Monitoring System as such. Through the Arrangement, the United States and Japan had artificially increased the prices of semiconductors. Japan "[had] taken the appropriate action to ensure that the Japanese semiconductors [were] being sold at no less than their cost in third country markets"[110]. The United States argued that this third country monitoring was necessary to circumvent the anti-dumping measures by exports from Japan to the United States through third countries markets.

But as the E.E.C. argued, "since Japan and the U.S. directly produced or, controlled through overseas manufacturing plants, a pre-dominant share of the world semiconductor production, the government-mandated export price control would lead to a situation in which the importing countries would be forced to pay a price for such imports in excess of what normal conditions of competition would imply"[111]. The Ministry of International Trade and Industry (MITI) increased its scrutiny on the export licences, and exercised with zeal, administrative guidance in order to avoid the United States retaliatory measures. Besides, the monitoring was merely watching and did not constitute restrictions on exports. The forecasts were only guidelines. "In these circumstances, the possible decrease in prices was liable to create a high expectation of demand expansion, leading to capacity investment, over-production and excessive competition over market shares. These conditions of over-production and excessive competition might [have promoted] a price war and [destabilised] the balance between the demand and supply"[112]. All these measures were not legally binding but in everybody's interests.

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[110] *Supra* note 102 at 9.
[111] *Ibid.*
[112] *Ibid.* at 10.

Second Claim: article VI.

The E.E.C. was not convinced that an exporting country was entitled under article VI to initiate actions in order to stop the dumping. It asserted that this article provided an "exclusive right to the importing country to decide whether or not to take action"[113]. This was an argument challenged by Japan: there was no explicit provision prohibiting the exporting country to take actions.

Third Claim: article XI

In its claim under article XI, the E.E.C. considered that the Monitoring system was incompatible with the provisions of this article as it artificially raised export prices through governmental intervention. "These policies have meant artificially high prices and short supply for U.S. semiconductor users"[114]. They were to be considered as restrictions within the scope of article XI, whether legally binding or not.

Fourth Claim: the MFN Clause

The E.E.C. challenged the Monitoring system under article I on the basis that it applied "to only 16 countries, 14 of which were contracting parties". Japan contested this view arguing that "some minor markets were exempted solely for the sake of administrative efficiency and in practice 97 per cent of total export volume [...] were covered"[115].

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[113] *Ibid.* at 11.
[114] *Ibid.* at 13.
[115] *Ibid.* at 15.

Fifth claim: Article XVII-1 (c)

The action taken by the Japanese companies was the result of the Government intervention which prevented them from acting in accordance with commercial considerations.

Eventually, the E.E.C. claimed that access to the Japanese market through this Arrangement favoured U.S. producers, whereas Japan replied that this agreement only encompassed "foreign based firms or capital affiliated companies"[116]. This Arrangement was in violation of the GATT objectives: to reduce tariffs and other barriers to trade. It had been implemented without observing the requirements of transparency under article X-GATT 1947.

All these elements led to the nullification or impairment of the benefits accruing to the Community under the General Agreement.

The United States, intervening as a third party to the conflict, and certainly aware it had a great role in the dispute, participated in the argument in favour of Japan. Explaining the rationale behind the conclusion of the Arrangement, it maintained there was no preferential access to the market granted to U.S. producers. Similarly it argued the E.E.C. was itself in contradiction with its contentions with regard to article VI: while asserting an increase in prices, the Community had previously complained about low semiconductor prices within its territory and initiated anti-dumping investigations. "Artificially inflated prices and prices significantly below costs of production obviously could not co-exist"[117]. There were no quantitative restrictions but merely a focus on prices.

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[116] *Ibid.* at 17.
[117] *Ibid.* at 20.

Conclusions

The Panel examined the E.E.C. complaint one claim at a time.

It started with the Monitoring System under article XI. Were the measures at stake restrictions inconsistent with article XI? Could the governmental guidelines, as not legally binding, constitute such restrictions? The Panel assessed that the word "measures" used in the provision had a meaning broad enough to cover those administrative guidelines whether binding or not. Precisely because they included incentives for the Japanese producers to conform, and as the Government intervened to assure their compliance, they were in effect, even if not in substance, binding. Thus "the Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semiconductors at prices below company-specific costs to markets other than the United States, inconsistent with article XI-1"[118].

Still ruling on the Monitoring System, the Panel analysed the export approval, whether the delays (about three months) to obtain such approbation could be considered as restrictions within the scope of article XI-1. The Panel found that "the export licensing practices in Japan, leading to delays [...were] not [automatic] and constituted restrictions on the exportation of such products inconsistent with article XI-1"[119]. Had they been given within a week after the application, they would have been considered as automatic.

After ruling on the Monitoring System under article XI, the Panel considered article VI and the two parties' arguments. Was there an exclusive right for the

[118] *Ibid.* at 31.
[119] *Ibid.*

importing country to decide whether to take actions? Article VI was silent on this distinction and hence there was no possible definitive and categorical answer.

The Panel further addressed the alleged breach of the *Most Favoured Nation Provision*, article I-GATT. But as the measures had already been found inconsistent with article XI, their discriminatory nature was no longer relevant.

It kept this similar reasoning as for the claim based on article XVII.

Eventually the Panel turned to the E.E.C. complaint of preferential access to the Japanese market for the U.S. producers. "The Panel examined the Arrangement and concluded that nothing in it would prevent Japan from implementing its market opening provisions on a most-favoured-nation basis. [... Besides] no evidence had been submitted to [the Panel] demonstrating that companies from other countries were prevented from establishing themselves in Japan on the same terms as the United States companies"[120].

Transparency in the application of the Arrangement had been respected in light of article X: the Arrangement had been notified to the GATT Contracting Parties and they were allowed to ask further questions and seek supplemental information if needed.

The Panel finally found that only the Monitoring System of Third Country Market was inconsistent with article XI and therefore led to the nullification and impairment of the benefits accruing to the Community. The other claims were found to be non valid. "The Panel [recommended] that Japan bring its measures relating to the sale for export semiconductors to contracting parties other than the United States into conformity with the General Agreement"[121].

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[120] *Ibid.* at 33.
[121] *Ibid.* at 34.

The United States-Japan Arrangement; Illustration of a Voluntary Restraint Agreement (VRA).

As already mentioned, the Arrangement created by definition artificial competition conditions. This raises the question of why such agreements even exist. In the Semiconductor case, because of the leverage the U.S. had over Japan (the antidumping complaint), it was able to negotiate such an unbalanced arrangement. On one hand, Japan had no choice but to agree, unable to resist such economic pressure. The U.S. actions demonstrated what the whole rationale behind VRAs was at the time: to take advantage of one's commercial partner's lack of bargaining power. On the other hand Japanese below-costs prices had triggered this situation. Japan was to be held liable for competition distortion, as the one limiting its exports and monitoring the markets of third countries, even if the distortion was a bilateral decision. To some extent, it was almost 'unfair' to let Japan bear the whole burden of responsibility.

Then why was it allowed? How was the Japanese-American 1986 Arrangement renewed in 1996 with no further objection? A potential and common answer is that competition issues are national matters to be dealt with between the concerned countries. But it should be noted that these agreements have an impact on third countries. As soon as markets are tailored in an artificial way, the world-wide balance is impaired unless the flow of goods remain limited within the geographical boundaries of the 'contractual parties'; a situation which hardly exists.

It was only in 1998 that the World Trade Organisation required Member States to terminate any existing VRA. Prior to this, and as illustrated in the last case, the Panel did not even recognise them as such. They were solely extra-treaty arrangements, agreements between the parties. At the time they were gently qualified as 'managed

trade' even if a prima facie breach of the GATT provisions such as article I-*MFN*, or XIX-*Emergency Action on Imports of Particular Products*:

> "1. (*a*) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. [...]
> 2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action"[122].

Reactions were not non-existent. "In the words of a 1984 GATT Report on the subject of VRAs:

> Exporting Countries which accepted so called 'grey-area' actions did so primarily because, even if they were satisfied that the requirements of the GATT safeguard provisions had been met [entitling the exporting country to compensation in the form of reduced tariffs on other unrelated products of export interest in that country], they felt they had little choice and the alternative was, or would have been, unilateral action in the form of quantitative restrictions, harassment by antidumping investigations, countervailing action, enforcement by pricing mechanisms, etc., involving greater harm to their exports in terms of both quantity and price"[123].

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[122] *Supra* note 94.

[123] "Report of the Chairman of the Safeguards Committee", BISD, 30th supp. 216, 218 (1984), cited in Kevin Kennedy, *Competition law and the World Trade Organisation: the Limits of Multilateralism* (London: Sweet and Maxwell, 2001) at 166.

But even with this lucid statement, several other VRAs, in addition to the Semi-conductor Arrangement, have existed from the late 1960's to the early 1990's, all different. For example the Multifibre Arrangement on textiles and clothing governed the market since 1974 (and expired in January 2005). This Agreement is peculiar as it was negotiated under the GATT auspices while its main provisions would have been considered illegal under the GATT. The rationale behind this undertaking was to negotiate restrictions among textile exporting and importing countries "to prevent market disruption or to counter market-disruptive import surges originating from low-wage producing countries"[124]. Hence importing countries were allowed to impose quotas. But this Agreement was exceptional, an exception understandable with regard to its content, and an ambitious investment as it involved 43 countries, alongside a limited scheduled duration.

The other known VRAs were of smaller scope and rarely negotiated in such a manner: for instance the Arrangement reached in 1969 between the E.E.C., the United States and Japan, limiting steel exports.

The impacts of such arrangements have never been clearly assessed due to an evident lack of transparency (they were by definition governmental interventions). What could be ascertained was an increase in domestic prices of the importing countries and thus a loss for the consumers, always the ultimate victims of any market distortion. It was only after the Uruguay Round in 1994 and the newly ratified World Trade Organisation, that VRAs have been properly combated. The New Agreement on Safeguards "breathed new life into moribund article XIX. The Preamble of the Agreement states that members recognise "the importance of structural adjustment

[124] Online: <http://www.commercialdiplomacy/cd_dictionary/>.

and the need to enhance rather than limit competition in international markets"[125]. To that end, Article 11.1 (b) f the Safeguards Agreement prohibits resort to grey area measures in the future"[126]:

> [...] a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side[127].

Prior to the WTO and its agreements, it seems (again) that the competition rules were still to be implied on the international level. The Panel did not want to get involved, or perhaps did not dare to. In any case it would have been impossible to have acted in such a manner: the Panel had never been given a competition authority role.

1994 changed the whole situation.

It was high time that the Governments made changes and they took the radical step of accepting that Competition matters be handled at an international level: with the Agreements negotiated throughout the Uruguay Round came the advent of a new competition regime within the International Trade Organisation Framework.

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[125] *Supra* note 94.
[126] Kevin Kennedy, *Competition law and the World Trade Organisation: the Limits of Multilateralism* (London: Sweet and Maxwell, 2001) at 167.
[127] *Supra* note 94.

Chapter III

WTO and its improvements: Competition at last?

At last in 1994, competition rules were recognised and enshrined within a formal structure in the creation of the World Trade Organisation.

The new Panels had means to combat anti-competitive behaviour. Yet the approach was sector-based, and still is, but new ways to settle competition matters were born.

Rules are no longer hidden, unspoken, but inscribed, official, the advent of a new era.

This Chapter will give an overview of this approach: the TRIPS, the TRIMS and the GATS.

A detailed presentation of their content is necessary, even if for some readers it is superfluous, because this content will be of relevance to understand the subsequent analysis. The Telmex case in chapter IV further is based on these texts, mainly the GATS. That is why a reminder of how the text is structured is of relevance; especially since this structure is complex, as it is based on national commitments.

The advent of a new era for competition matters became possible through a twofold evolution: of substance, with the newly negotiated agreements, and also of form, with the newly reformed dispute procedure.

The Procedural Evolution.

Even if not central to the study at instance, the Dispute Settlement Body (DSB) has played a great role in shaping the framework of competition rules within the International Trade Law horizon.

It is important to understand that without the evolution of the DSB, the potential for the existence of competition within the WTO would have been certainly more problematic.

The pre-WTO cases already studied illustrate an 'instinctive' procedure to settle the matters between the countries, a procedure created by the Panel, with no timeframes, and rulings easier to block - the losing country on its own could block the adoption of the ruling.

But since 1994, changes have occurred.

As introduced on its Website[128], the WTO considers the Dispute Settlement as "the Central Pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without [this] means of settling disputes, the rules-based system would [have been] less effective because the rules could not [have been] enforced". Thanks to its new procedure, "the trading system [has become] more secure and predictable". This predictability has been grounded since 1994 within the

[128] Online: WTO<understanding the WTO<unique contribution<www.wto.org>.

drafting and ratification of a Dispute Settlement Understanding, an agreement joined to the GATT that establishes the rules to be followed for any dispute. "First rulings are made by a panel, [this official body of experts which role could be assimilated to a tribunal's one], and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible", another innovation at the time. All members have to agree to block the ruling adoption, including the complainant. This is called the reverse consensus.

Thanks to these improvements within the review process, parties have seen more structured outcomes and decisions, have better accepted their defeats, and rulings have slowly become more and more credible. With this increasing credibility, competition rules, notably, were given an official role and a greater importance. Not to say that 'a competition jurisprudence' was born but at least the notion of 'precedent' started to appear in the dialogue of the member states. A certain logic emerged, and the Panellists no longer based their decision on such arbitrary factors.

The system has evolved from a refusal to ever consider competition matters while applying unspoken competition principles, to a quasi acceptance that these latter should be considered and thus included in Agreements.

As Peter Sutherland has explained in his Report[129] "the complaint process is a learning process for participating countries", and they learned with time.

The Substantial Evolution

[129] Consultative Board composed of Peter Sutherland, Jagdish Bhagwati, Kwesi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer, Thierry de Montbrial, "The Future of the WTO, Addressing institutional challenges in the new millennium, Report by the consultative board to the Director-General Supachai Panitchpakdi" (2004) at 50. Online: WTO<www.wto.org>.

With the negotiations and drafting of new WTO Agreements, that are the TRIPS, TRIMS and GATS, competition matters were seriously considered. "Most of [the Agreements could] be regarded as related to competition policy in that they [have limited] the ability of governments to impose trade measures that would [have had] the effect of restraining or distorting competition from foreign sources in markets for goods and services"[130].

The Trade-Related aspects of Intellectual Property Rights or TRIPS Agreement.

Aware of an undeniable reality, Contracting Parties realised way before the Uruguay Round (1986-1994) that not all goods could be efficiently protected at an international level through the current GATT-1947 because of their very nature. Ideas, knowledge were now the new objects of trade and they similarly needed protection in proportion to their increasing importance. "Most of the values of new medicines and other high technology products [lied] in the amount of invention, innovation, research, design and testing"[131]. Music, films, books, computer software, and online services, were the new products to be equally treated nation-wide (Article III-*National Treatment*) or to be beneficial to all countries (Article I-*Most Favoured Nation* Clause).

With these innovations, a new type of protection had to be thought of. Creators had to be given rights over their creation, Intellectual Property rights; and their bargaining

[130] WTO, "Working Group on the Interaction between Trade and Competition Policy, Report to the General Council", WT/WGTCP/2, at 21, para. 58, cited in Kevin Kennedy, *Competition Law and the World Trade Organisation: the Limits of Multilateralism* (London: Sweet and Maxwell, 2001) at 146 note 73.

[131] Online: Understanding the WTO< Intellectual Property<www.wto.org>.

was to be framed in law. This was already happening on a national level, but disparately.

> "New internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and for disputes to be settled more systematically.
> The Uruguay Round achieved this goal. The WTO's TRIPS Agreements is an attempt to narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules. It establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. The Agreement covers five broad issues: how basic principles of the trading system and other international intellectual property agreements should be applied, how to give adequate protection to intellectual property rights, how countries should enforce those rights adequately in their own territories, how to settle disputes on intellectual property between members of the WTO [and finally] special transitional arrangements during the period when the new system is being introduced"[132].

These rights were to be framed because of their very nature: exclusive for the creator; they could facilitate anti-competitive practices through the abuse of position.

Even if the TRIPS-Agreement has mainly targeted the trade of intangible goods, some provisions can be considered competition-related.

> Article 7-*Objectives*[133]
>
> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

> and Article 8-*Principles*[134]
>
> 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

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[132] *Ibid.*
[133] WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO<www.wto.org>.
[134] *Ibid.*

> 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

This latter provision, understood in light of provision 7, allows countries to react against any abuse of intellectual property rights. Specifically, developing countries needed a tool to combat developed countries, the main owners of intellectual rights, and to prevent them from abusing their dominant position within the field in which they held an exclusive right. However, it should be noted that this clause is not an exception-clause as the measures must remain consistent with the provisions of the Agreement.

Article 40, contrary to article 8, is an exception-clause as it addresses the control of *Anti-Competitive Practices in Contractual Relations*[135]:

> 1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
> 2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member [...].

This article obviously confers a supplemental means for developing countries to combat any abuse of the dominant position granted through exclusive intellectual property rights.

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[135] *Ibid.*

Unfortunately, nothing deals with the exhaustion of rights, as article 6-*Exhaustion*[136] provides:

> For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

This notion has had an impact on the way competition matters are handled. By definition, exhaustion of rights deals with diversion of trade and fairness in the trading flows.

> "Under a system of national exhaustion, the right holder (whose rights arise by virtue of that national jurisdiction) loses the right to control resale, in that particular country, of intellectual property protected goods which were sold with his consent. He will however be able to prevent importation of goods sold abroad under a different jurisdiction, even if they had been sold with his authorisation (parallel imports). Under a regime of regional exhaustion such as the one applicable within the European Union, the right to control re-sale of goods sold with the consent of the right holder is exhausted within that particular region only. Provided there has been substantive and extensive economic and judicial harmonisation in that particular region, parallel imports within that region will in principle be allowed, while right holders will retain protection against parallel imports from third countries"[137].

This notion remains controversial, mainly because of the scope of this loss of rights. If there are still discussions at the European Community level about the extent of the jurisdiction, then one can understand how hard it is to address the issue on an international level - hence article 6 of the TRIPS.

Another right where exclusivity is more than ever predominant is the trademark, or the protection of commercial signs. Article 16-*Rights Conferred*[138] accords this exclusivity to the owner of a registered mark:

> 1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for

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[136] *Ibid.*

[137] International Chamber Of Commerce, Commission on Intellectual and Industrial Property, "Policy Statement, Exhaustion of intellectual property rights" (Jan. 2000), online: ICC<www.iccwbo.org/home/statements_rules/satements>.

[138] *Supra* note 133.

> goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

This provision is well known on a national level and is purported to prevent any deceptive practice towards the consumers generally.

Similarly with regard to the geographical origin of the goods in light of their quality or reputation, article 22 prevents members from misleading the public[139]:

> 2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:
>
> (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
>
> (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

The most controversial issue exposing major competition matters is the issue of compulsory licensing. In the patent field, that is where an innovation or technological creation is protected, the same way as for trademarks: exclusivity is the key word. But under certain circumstances, and generally with regard to pharmaceutical patents, exceptions to this exclusivity may be granted by the Government, under article 30-*Exceptions to Rights Conferred*[140]:

> Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

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[139] *Ibid.*
[140] *Ibid.*

In order to prevent an owner of a patent from taking advantage of his position in an abusive way, and especially when public health is at stake, or to thwart anti-competitive behaviour, a Contracting Party can "force a patent owner to licence a government entity or a third party designated by the member"[141].

Due to the exceptional nature of this provision, there are several conditions to be fulfilled before such a compulsory licensing is allowed, conditions such as:

> (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorisation from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly; [...][142].

The use cannot be exclusive (article 31-d), the scope and duration must be limited for the time of the authorised use (article 31-c), and there are many other conditions.

The Trade-Related Investment Measures or TRIMS Agreement.

As previously mentioned in chapter II, there were no provisions dealing with investments in the GATT-1947 Agreement (hence the polemic in the Canadian *Foreign Investment Review Act*, as seen in chapter II). The newly drafted agreement on investments was then needed.

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[141] Kevin Kennedy, *Competition Law and the World Trade Organisation: the Limits of Multilateralism* (London: Sweet and Maxwell, 2001) at 152.
[142] *Supra* note 133.

A Trade-Related Investment Measure is by definition "any measure imposed by a government [...] on a foreign investor [...] as a condition for investing in the host country. [It] can be positive or negative"[143]. These include financial incentives, subsidies, or local-content requirements, and exports/imports requirements.

The Agreement is short and based on the *National Treatment provision* and the *Prohibition of Quantitative Restrictions*, article 2[144]:

> 1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

A list of the measures to be considered as inconsistent with article III and article XI is provided in the TRIMS Annex.

Unfortunately, this Agreement cannot be considered a great help or an improvement, at least with regard to competition matters. Indeed, it has introduced no supplemental means of preventing anti-competitive behaviour, as it is silent in the area where improvements were needed: the area of Restrictive Business Practices. Potentially only one point of influence over the handling of subsequent competition matters can be highlighted: Foreign Direct Investments, where international competition policy intersects with national investments policies.

> "For example, parent companies may impose export restrictions on their foreign subsidiaries in order to reap the benefits of specialisation and maximise profits. However, these export restrictions could conflict with export promotion policies of host countries. Consequently, as a condition of approving a foreign investment, some host countries imposed performance requirements in the form of local content or exports requirement to counteract intra-firm trade restrictions. Recognising that performance requirements themselves could distort trade flows and competition in national and international markets, the TRIMS Agreement bans requirements imposed as a condition of approval of a foreign investment that limit a firm's use of

[143] *Supra* note 141 at 162.
[144] *Supra* note 133.

imported products to an amount related to the volume or value of local products that it exports"[145].

Similarly the Agreement has listed in its Annex other requirements like the ones present in the *Canadian Foreign Investment Review Act*: the requirement for foreign investors to agree "to source inputs locally as a condition to approving certain large foreign direct investments in the [host] country"[146].

> Annex on the illustrative list.
> TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
>
> (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or
>
> (b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports[147].

The General Agreement in Trade and Services-GATS.

The GATS represents in its content the most significant agreement with regard to competition matters in the services field. Compared to the other WTO Agreements, it is binding to the extent the Contracting Parties are willing to be bound: indeed each Member commits to liberalise its services in the field it chooses. Respecting Contracting Parties' sovereignty, public services have been excluded and no provision imposes on public authorities a privatisation of its industries.

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[145] *Supra* note 141 at 164.
[146] *Ibid.* at 143.
[147] *Supra* note 133.

The Agreement is divided into several parts. There are mainly three sets of dispositions: a principal text that sets forth the general obligations and disciplines, annexes that contain the applicable rules for each sector, and the specific commitments made by the Contracting Parties.

More precisely a first part simply defines the way services can be provided - trade in services being, for the purpose of the Agreement, the supply of a service:

> (a) from the territory of one Member into the territory of any other Member [or mode 1]
> (b) in the territory of one Member to the service consumer of any other Member [or mode 2]
> (c) by a service supplier of one Member, through commercial presence in the territory of any other Member [or mode 3]
> (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member [or mode 4][148].

A second part focuses on the general obligations and disciplines regardless of the commitments.

> "A basic most-favoured-nation [MFN] obligation states that each party "shall accord immediately and unconditionally to services and service providers of any other Party, treatment no less favourable than that it accords to like services and service providers of any other country". However, it is recognised that [MFN] treatment may not be possible for every service activity and, therefore, it is envisaged that parties may indicate specific [MFN] exemptions. Conditions for such exemptions are included as an annex and provide for reviews after five years and a normal limitation of 10 years on their duration"[149].

These exemptions are historically justified: before the GATS ratification, countries had already adopted preferential commercial conditions in services, either bilaterally or within the framework of a regional agreement. In order to respect their anterior undertakings, they were allowed to keep those preferential commercial conditions for a limited period of time.

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[148] *Supra* note 133.
[149] Online: WTO<legal texts<GATS<summary<www.wto.org>.

Part III addresses other obligations: the National Treatment and Market Access obligations. They are not general obligations but limited to the national schedules of commitments. These commitments cover the access to the market and the degree of access, and the potential limitations on national treatment. For instance a government can commit to give access to the banking market (under the access to the market provision) while limiting the licensing (under the limitation of access to market provision), and the number of subsidiaries of the foreign bank (under the national treatment exception). Indeed "the national-treatment provision contains the obligation to treat Foreign Service suppliers and Domestic Service suppliers in the same manner. However, it does provide the possibility of different treatment being accorded the service providers of other parties to that accorded to domestic service providers. However, in such cases the conditions of competition should not, as a result, be modified in favour of the domestic service providers"[150].

Independently of any commitment, *Monopolies and Exclusive Suppliers and Business Practices* are addressed. Article VIII[151] provides that:

> 1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

Article IX[152] deals with restrictive business practices:

> 1. Members recognise that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.
> 2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1.

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[150] *Ibid.*
[151] *Supra* note 133.
[152] *Ibid.*

Alongside the GATS, there are three GATS-related agreements on trade and services that regulate specific sectors: the Uruguay Round Understanding on Financial Services, the GATS Telecom Annex, and the 1997 Agreement on Basic Telecommunications Services.

(i) The Uruguay Round Understanding on Financial Services

This Understanding aimed to harmonise the structure of the financial services sector and its market access. It supplements part III of the GATS on specific commitments in the national treatment and market access domains. "It serves an important function in restraining anti-competitive business practices in the financial services sector"[153].

Similarly to GATS exemptions, limitations or conditions can be described under the condition to be existing non-conforming measures (a difference with the GATS where conditions can be inscribed even if there are future non-conforming measures).

The Access Market is regulated in eight sub-sectors[154]: Monopoly Rights: Members shall endeavour to eliminate them; Financial Services Purchased by Public Entities: MFN and National Treatment shall be applicable to non-resident financial services suppliers in the purchase or acquisition of financial services by public entities; Cross Border Trade: delivery and purchase shall be made possible cross border; Commercial Presence: a right to establish a commercial presence shall be granted to non-resident financial service suppliers; New Financial Services: permission shall be granted to non-resident financial service suppliers to offer any new service; Transfers of Information and Processing of Information: no measures shall be taken to prevent transfers of information or the processing of information necessary to the conduct of

[153] *Supra* note 141 at 157.

[154] *See* Understanding Round On Financial Services, cited in WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO <www.wto.org>.

the business; the Temporary entry of Personnel: this entry shall be permitted in case of commercial presence and when there is no available qualified personnel within the host country; and finally Non-discriminatory Measures: by definition members commit to remove any discriminatory measures.

(ii) The GATS Telecom Annex

The Telecommunications Sector is dual by its nature, as a distinct sector of economy and as a technical infrastructure used by other economies, according to section 1 of the Annex:

> 1. Objectives
> Recognising the specificities of the telecommunications services sector and, in particular, its *dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities* [emphasis added], the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex *provides* notes and supplementary provisions to the Agreement[155].

One can understand how powerful the owner of the infrastructure is, as this means of delivery is crucial to the other economies. That is why the GATS Telecom Annex has been negotiated to avoid any abuse of position, through the use of those essential facilities. The scope of the Annex is the use and access of public telecommunications transport network and services. But

> (c) Nothing in this Annex shall be construed:
> (i) to require a Member to authorise a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or

[155] See the GATS Telecom Annex, cited in WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO<www.wto.org>.

(ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally[156].

The key element of the Annex, and the usual point of debate (if not the point of dispute like in the Telmex case, as seen in Chapter IV further), is paragraph 5-*Access to and use of Public Telecommunications Transport Networks and Services*[157]:

(a) Each Member shall 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, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).

Once more, the non-discriminatory obligation and most-favoured nation clauses are required under the notion of 'reasonable and non-discriminatory terms and conditions'. The Foreign Suppliers shall be granted a right to access and use the public telecommunications network, as provided in article 5 (b) and (c)[158]:

(b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:

(i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;
(ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and
(iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

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[156] *Ibid.*
[157] *Ibid.*
[158] *Ibid.*

> (c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

As long as they amount to reasonable and non-discriminatory terms and conditions, Members can impose three kinds of restrictions to the access and the use of the network. Article 5(e) and (f)[159]:

> e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:
>
> (i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;
>
> (ii) to protect the technical integrity of public telecommunications transport networks or services; or
>
> (iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.
>
> (f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:
>
> (i) restrictions on resale or shared use of such services;
>
> (ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;
>
> (iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);
>
> (iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;
>
> (v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or

[159] *Ibid.*

(vi) notification, registration and licensing.

"Developing countries are given a special dispensation that allows them to protect [...] their domestic telecommunications infrastructure and service capacity through reasonable conditions on access and use, notwithstanding the limitations imposed on members by paragraph 5 in that connection"[160], article 5(g).

It should be noted that the Annex is not subject to the logic of commitments. It sets out general obligations for access and use of public telecommunications transport networks (and only general obligations), applicable to all members and all sectors, and it applies to all the operators regardless of their competitive situation (not necessarily major suppliers, defining a larger scope of application than the one of the Reference Paper, as seen further).

(iii) The 1997 Agreement on Basic Telecommunications Services

This Agreement was negotiated during the Uruguay Round. But due to divergent points of view on their respective regulatory regimes between the United States and the other QUAD Members (the E.U., Japan, Canada), agreement was reached only three years after the GATS. This Agreement is *the* competition policy document dealing with telecommunications. As previously mentioned, a facilities-owner can use his position to prevent new entrants from accessing the market. To ensure fair competition between the incumbents, and in light of the specificity of the market, "under the rubric of regulatory principles, the Negotiating Group on Basis Telecommunications developed an annex, known as the Reference Paper, on competition principles"[161]. This Paper requires member States to take the appropriate

[160] *Supra* note 141 at 157.
[161] *Ibid.* at 160.

measures to prevent such situations from happening, and to establish national telecom regulators if they are still non-existent. The notion of regulation is important: regulation preserves market equilibrium. The regulators do not intervene as legislators but as referee in the balance between antagonist objectives: competitiveness and management of systemic risks for instance.

"The Reference Paper also describes the [...] measures national regulators are to take with regard to anti-competitive conduct by *major* suppliers [emphasis added]:

-adopt safeguards against anti-competitive practices by major suppliers, such as cross-subsidisation, withholding technical and commercial information, or using information obtained from competitors with anti-competitive results.

-require cost-based and timely interconnection on non-discriminatory terms, rates, and quality.

-adopt transparent and non-discriminatory universal service requirements

-adopt transparent and publicly available licensing criteria, including a statement of reasons for licensing denial.

-maintain the independence of regulators from suppliers of basic telecommunications services.

-adopt transparent and non-discriminatory rules for the allocation of scarce resources

-require publication of international accounting rates"[162].

Section 1 provides in the Prevention of anti-competitive practices in telecommunications that:

> Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a *major* [emphasis added] supplier from engaging in or continuing anti-competitive practices[163].

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[162] *Ibid.*

[163] Online: WTO<Trade Topics<Services<Telecommunications<www.wto.org>.

Similarly, section 2 states with regard to Interconnection that:

> 1. [..] On the basis of the specific commitments undertaken, to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier.
> 2. [..] Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:
> (a) Under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
> (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and
> (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities[164].

There is however one factor that limits the otherwise comprehensive structure of the agreement – an incomplete mechanism for settling disputes. Under the Reference Paper anti-competitive practices and interconnection disputes are differentiated but no specific mechanism exists for resolving the anti-competitive issues. Only the interconnection disputes are covered (they shall be settled before national competition regulators).

One has to understand the context of the Reference paper drafting that has influenced its content. During the competition debates, the Reference Paper had been seen as a tremendously hopeful step towards achieving a common competition policy. All negotiators had agreed on a necessary compromise to regulate telecommunications field, subject to usual anti-competitive behaviour. But the compromise had to set a

[164] *Ibid.*

level for the playing field. And the question was what level to choose. High standards were practically impossible to reach. Therefore "the Members accepted that the result would not necessarily be the ideal, let alone, best practice"[165]. They could not do otherwise. "To accommodate the different political and legal structures of WTO Members, negotiators agreed ... that the principles needed to be sufficiently flexible to accommodate differences in market structures and regulatory philosophies among the various participants. No single uniform regulatory system should be imposed"[166]. Hence Countries would choose whether to include this reference paper as additional commitments in their schedules or not, and the extent to which they wanted to.

As understood in light of the GATS and its related agreements, what matters in the services sector is the commitment basis of any obligation regulated under articles XVI-*Market Access*, XVII-*National Treatment*, and XVIII-*Additional Commitments*, of the GATS[167] (the Reference Paper being an additional commitment).

The Commitment corresponds to the scope of the liberalisation, and it is usually the ground of any claim in case of services-access dispute (like in the Telmex case, as seen in Chapter IV further). That is why it is important to understand the structure of a commitment.

(iv) The Structure of a GATS-Commitment

The structure is more complicated to read than a simple tariff. The Schedule is inscribed in a box with eight entries instead of the simple entry line of a binding tariff.

[165] Philip Marsden, *A competition policy for the WTO* (London: Cameron May, 2003) at 230.
[166] *Ibid.* at 229 note 65.
[167] *Supra* note 155.

Here is an example of what a schedule looks like[168] (with the imaginary country of Arcadia)

Box C: Sample Schedule of Commitments: Arcadia

Sector or sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
ALL SECTORS INCLUDED IN THIS SCHEDULE	4) Unbound, other than for (a) temporary presence, as in intra-corporate transferees, of essential senior executives and specialists and (b) presence for up to 90 days of representatives of a service provider to negotiate sales of services.	3) Authorization is required for acquisition of land by foreigners.	
II. SECTOR-SPECIFIC COMMITMENTS			
4. DISTRIBUTION SERVICES C. Retailing services (CPC 631, 632)	1) Unbound (except for mail order: none). 2) None. 3) Foreign equity participation limited to 51 per cent. 4) Unbound, except as indicated in horizontal section.	1) Unbound except for mail order: none). 2) None. 3) Investment grants are available only to companies controlled by Arcadian nationals. 4) Unbound.	

There are four basic columns. The first one specifies the sector or sub-sector concerned. The second sets out the limitations on the market access, within the ones mentioned in article XVII (Market Access Provision) while the third enunciates the national treatment limitations in accordance with article XVII (National Treatment

[168] Online: WTO<Trade Topics<Services<gats training module<www.wto.org>.

Provision). The last column is reserved for additional potential commitments, like the commitment to be bound by the Reference Paper (Mexico having done so, as seen in the Telmex case, Chapter IV further).

"Any of the entries under market access or national treatment may vary within a spectrum whose opposing ends are full commitments without limitation ("none") and full discretion to apply any measure falling under the relevant Article ("unbound"). The schedule is divided into two parts. While Part I lists "horizontal commitments", i.e. entries that apply across all sectors that have been scheduled, Part II sets out commitments on a sector-by-sector basis"[169].

Conclusion

This is the situation since 1994; there are competition rules. These rules are accepted, and even applied by an organ considered as the unique contribution to the stability of the international trade regime.

The Panel's work has credibility and invites respect.

Far from the time of the debate over whether there should be an international competition agreement, competition principles are now no longer unspoken, but 'loudly' argued. Yet how exactly do these principles serve the purpose of maintaining this international trade regime equilibrium? How do the Panels, which have not been officially granted a competition authority role, as already mentioned, address competition issues? By acting as if they were neutral, they paradoxically attain it.

[169] *Ibid.*

But for how long? As will be illustrated in the Telmex case, it is hard to believe that the Panel's apparent neutrality will remain intact. Before trying to find an agreement on international rules of competition, the first step might be to assess the Panel's true role. Is this unspoken role that of a competition authority? This question will be the focus of the next chapter.

Chapter IV

"The Telmex Case" and The Panel: the unspoken role of a competition authority?

Chapter IV is crucial to this thesis since it discusses what is best understood as the high water mark of the explicit recognition of competition principles within the WTO: the Telmex case, involving the United States and Mexico [170] .

Telmex dealt with trade in telecommunications services under the GATS; more particularly, with access to the Mexican telecom market by U.S. carriers and their use of the Mexican network. To date, it is the only case that has addressed the Telecommunications Annex to the GATS, and was the first case to reach a WTO panel under the GATS.

[170] *Mexico-Measures Affecting Telecommunications Services* (2004), WTO Doc. WT/DS204/R (Panel Report), online: WTO<www.wto.org>.

As seen in chapter III, the GATS commitments, such as those under the Telecom Annex and the Reference Paper incorporated into many Member State schedules, have decisively influenced "how the Members intervene in their markets"[171].

The Telmex case illustrates graphically how the Reference Paper, operating together with the Telecom Annex, serves to create what amounts to a supervening competition law framework that layers over domestic law.

The dispute between the United States and Mexico was spawned by the differential treatment afforded to various U.S. telecom service providers within the Mexican market. Sprint had entered into an exclusive agreement with Telmex, Mexico's incumbent carrier with by far the largest share of the domestic market. AT&T and MCI were left to enter into arrangements with much smaller Mexican partners and faced restricted access to Telmex's network, and thus sought the intervention of the U.S. Trade Representative.

The United States Government requested that Mexico's legislation be changed to allow all American suppliers to have access to the Mexican market and to have an equal use of the networks. It grounded its action on sections 1 and 2 of the Reference Paper and on section 5 of the 1997 Telecom Annex, both of which had been included in the Mexican Schedule of Commitments.

The United States requested that the Panel make the following findings[172]:

> Mexico's failure to ensure that Telmex provides interconnection to United States basic telecom suppliers on a cross-border basis on cost-oriented, reasonable rates, terms and conditions is inconsistent with its obligations under Sections 2.1 and

[171] Philip Marsden, *A Competition Policy for the WTO* (London: Cameron May, 2003) at 232.
[172] See the United States' first written submission, paragraph 297, and the United States' second written submission, paragraph 129. See also the United States' second oral statement, paragraph 88.

2.2 of the Reference Paper, as inscribed in Mexico's GATS Schedule of Commitments, GATS/SC/56/Suppl.2.

Mexico's failure to maintain measures to prevent Telmex from engaging in anti-competitive practices is inconsistent with its obligations under Section 1.1 of the Reference Paper; as inscribed in Mexico's GATS Schedule of Commitments, GATS/SC/56/Suppl.2; and in particular, that Mexico's ILD Rules (specifically Rule 13 along with Rules 3, 6, 10, 22 and 23) empower Telmex to operate a *cartel* [emphasis added] dominated by itself to fix rates for international interconnection and restrict the supply of scheduled basic telecommunications services;

Mexico's failure to ensure United States basic telecom suppliers reasonable and non-discriminatory access to, and use of, public telecom networks and services is inconsistent with its obligations under Sections 5(a) and (b) of the GATS Annex on Telecommunications; and in particular, Mexico failed to ensure that United States service suppliers may access and use public telecommunications networks and services through:

(i) interconnection at reasonable terms and conditions for the supply of scheduled services by facilities-based operators and commercial agencies; and
(ii) private leased circuits for the supply of scheduled services by facilities-based operators and commercial agencies.

The Panel's reasoning is of importance in better understanding how competition issues have been handled by an organ supposedly not in charge of competition matters, and that certainly eschews being characterized as a competition or an anti-trust authority.

(Mexico's commitments under review are given in annex).

<u>The First Challenges, under the Reference Paper:</u>

Section 2: scope of commitments, mode 1.

As already mentioned, the Reference Paper has been drafted to ensure fair competition between the incumbents and new entrants in the telecommunications domain. Member

States which had included the Reference Paper in their schedules of commitments undertook to take the appropriate measures to prevent any anti-competitive behaviour and to establish national telecom regulators if not yet in existence.

According to the U.S., Mexico undertook the interconnection obligations of section 2 as additional commitments. The Panel summarized Mexico's response as follows[173]:

> "According to Mexico, the Reference Paper was intended to accommodate different political and legal regimes in WTO Members, and is sufficiently flexible to accommodate differences in markets structures and regulatory philosophies.
> In Mexico's view, [...] the principles and definitions in the Reference Paper [had to be] interpreted in light of the domestic regulatory system of the WTO Member in question".

In other words Mexico argued that thanks to its flexibility, the Reference Paper could be tailored to the purposes of its domestic legislation.

(i) The Commitments: existence and scope.

The Panel first established whether there were any interconnection commitments under sections 2.1 and 2.2, as the section specifies that it applies only "on the basis of the specific commitments undertaken". They had to identify the services at issue before concluding that they had been liberalised.

Services at stake?

According to the United States, the services at issue were interconnection between Telmex and United States suppliers of basic telecom services on a cross-border basis. But Mexico claimed under its legislation and limitations to its commitments, the United States had to hand off telecom service to a Mexican partner at the border and that thus the service could not be considered as cross-border.

[173] *Supra* note 170 at para. 4.5.

The Panel agreed with the United States, concluding that the focus was on the service itself and not the supplier. In its view, any other interpretation would have rendered commitments under any mode of supply incoherent.

Commitments undertaken?

The United States wanted the Panel to find that Mexico's commitments related to access to the supply of basic telecommunications services, including through private leased networks. However, the Panel found that Mexico had undertaken commitments only on a facilities based-public telecommunications network, in light of the wording of the commitments, as argued by Mexico. As for Mexico's routing requirement, the Panel found it could not be considered as a restriction of mode 1: it is not listed in Article XVI-2 of the GATS[174].

(ii) Did Mexico fulfil its commitments?

As previously mentioned[175], section 2 of the Reference Paper requires that interconnection be ensured with a *major supplier* (emphasis added) at any technically feasible point in the network, and that interconnection be provided under non-discriminatory terms, conditions, *at cost oriented rates* (emphasis added) which have to be reasonable with regard to economic feasibility.

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[174] "2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
(a) limitations on the number of service suppliers [...];
(b) limitations on the total value of service transactions or assets [...];
(c) limitations on the total number of service operations or on the total quantity of service output [...];
(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service [...]
(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment". Cited in WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO<www.wto.org>.

[175] See above Chapter III.

To decide whether these requirements had been fulfilled by Mexico, or whether section 2 had been respected to the extent of the commitments made by Mexico, the Panel first had to establish that Telmex was a major supplier, and thus to define the relevant market. If Telmex was indeed a major supplier, then it had to establish that the applied rates were cost-oriented.

Relevant market

The United States defined the relevant market "according to well-accepted principles of market analysis deriving from competition law"[176]. It used the notion of substitutable goods: as between two goods, both products can be included in a single market if they are sufficiently close substitutes for each other or, when the price of one is increased, buyers will switch to the other product. This notion is also used under the *Mexican Federal Law of Economic Competition*[177], where the relevant market is determined by considering "the possibilities of substituting the goods or services in question, with others of domestic or foreign origin, bearing technological possibilities, and the extent to which substitutes are available to consumers and the time required for such substitution"[178].

The Panel in essence followed the U.S. position and determined that international telecommunications services, whether involving termination (delivery) of cross border supply or originating through a commercial presence in the country, were distinct from domestic telecommunications services and not substitutes. There could be only one market: the termination of voice telephony, circuit-switched data transmission and

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[176] *Supra* note 170 at para. 4.152.
[177] See *FLEC*. Approved by the Congress on 18 December 1992, promulgated by the President on 22 December 1992, published on 24 December 1992, entered into force 180 days after publication. See also *Code of Regulations to the Federal Law on Economic Competition* published in the Official Gazette on 4 March 1998, entered into force on 5 March 1998 (with the exception of Article 6 which entered into force 6 months from 5 March 1998)
[178] See *FLEC*, Article 12.

facsimile services supplied on a cross-border basis from the United States into Mexico[179].

Major Supplier[180]

The United States claimed that under the Mexican legislation, Telmex was guaranteed the status of major supplier. A major supplier is defined in the Reference Paper as "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"[181].

Under Rule 13 of the *Mexican International Long Distance Rules*[182] (or 'ILD' Rules), "[t]he long-distance concessionaire with the greatest percentage of the outgoing long-distance market in the last six months prior to negotiation with a determined country, shall be the one to negotiate the liquidation tariffs with the operators of such country". Telmex occupied that position and the rate it negotiated became the uniform rate charged by all Mexican carriers under Rule 10.

In light of the ILD Rule 13, Telmex was in position to materially affect the terms of participation (having regard to price and supply) in the relevant market, in other words was a major supplier. This dominance resulted from its control over essential facilities or use of its position in the market. The United States noted that "a large market share on the order of 50% or more, particularly when sustained over time, [was] well

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[179] *Supra* note 170 at para. 4.155.
[180] *Ibid.* at para. 7.145.
[181] Online: WTO<Service Telecommunications<Reference Paper<www.wto.org>.
[182] See *Rules for the Provision of International Long-Distance Service To Be Applied by the Licensees of Public Telecommunications Networks Authorized to Provide this Service* (ILD Rules) (Reglas para Prestar el Servicio de Larga Distancia Internacional que deberán aplicar los Concesionarios de Redes Públicas de Telecomunicaciones Autorizados para Prestar este Servicio). Issued by the Commission; published in the Federal Gazette on 11 December 1996; entered into force on 12 December 1996.

recognised by competition authorities and telecommunications regulators as relevant evidence of a firm's market power, though not the sole determining factor, and the higher the market share, the more readily it [would] support a presumption of market power"[183]. Furthermore, the United States submitted that "Telmex's significant market power [was] indicated by the absence of significant new suppliers of international telecommunications services in Mexico during the past few years"[184]. Also, the United States argued that "Telmex's market power [was] demonstrated by its ability to maintain prices for a sustained period of time well above the levels that could be expected to prevail in a competitive environment"[185]. But Mexico claimed its legislation sought to protect and promote investment in domestic infrastructure.

However, even the Mexican competition authority, in an earlier decision, had concluded that Telmex had *'poder sustancial'* in international services in light of its large share of the international long-distance market", "its ability to set payment charges applicable to international traffic", and its "advantages arising from its vertical integration that enable it to set prices for cross-border dedicated circuits and enjoy significant advantages from the resale of international port services"[186]. However, it should be noted that this decision was under the review of Mexican authorities at the time of the WTO Panel.

Mexico counter argued that even if Telmex had a major position in the market, this did not mean that it had abused of its position.

The Panel considered the potential major and dominant position of Telmex on the defined market and concluded that: "a firm had market power if it had the ability profitably to maintain prices well above costs, and protection (either governmental

[183] See the United States' first written submission, paragraph 93.
[184] See the United States' first written submission, paragraph 95.
[185] See the United States' first written submission, paragraph 97.
[186] See the United States' first written submission, paragraphs 84-90.

limitations or market circumstances) against a rival's entry or expansion"[187]. In light of ILD Rule 13, Telmex had this market power.

Cost-oriented Rates?

According to Mexico, since the notion of cost-oriented rates was not defined in the Reference Paper, flexibility had to prevail. But the United States argued that the costs at issue, even if not explicitly defined, had to be "related to the cost incurred in providing the good or service", where this was given its ordinary meaning[188].

The Panel offered elaborate reasons as to what cost oriented rates could mean. It detailed each Party's legislation with regard to their definition of costs incurred.

Mexican law requires the use of "long run average incremental cost" ('LRAIC') principles, which are consistent with interconnection rates that relate to the cost of providing that service"[189]. The notion of incremental cost is, of course, one that has been debated in competition law circles for decades in connection with determining the most appropriate test for predatory pricing. Several academics have debated for decades over whether it is the most appropriate notion to be used for predatory pricing practice tests (tests made by national competition authorities). The long run average incremental cost has been defined as "the per-unit cost of producing the predatory increment of output whenever such costs were incurred"[190]. The Panel further referred to a report of the International Telecommunications Union[191], stating that[192]:

> Incremental cost methodologies were becoming the *de facto* standard for interconnection pricing around the world. These methods focus on the

[187] See the United States'first written submission, paragraphs 79-81.
[188] See the United States' first written submission, paragraph 107.
[189] See the United States' first written submission, paragraph 110.
[190] Bolton, Brodley, and Riordan, 'Predatory Pricing', cited in Michael Trebilcock, et al. *The Law and Economics of Canadian Competition Policy* (Toronto, Buffalo, London: University of Toronto Press, 2003) at 312.
[191] Online: ITU Website< http://www.itu.int/ITU-T/>.
[192] ITU, *Trends in Telecommunications Reform: Interconnection Regulation*, 3rd edition, sec. 4.2.1.2, page 40. This paragraph also states that countries that apply long run incremental cost methodologies include United States, Australia, EC, Colombia, and South Africa, and that "numerous developing countries have adopted or proposed" some form of this model.

> additional future fixed and variable costs that are attributable to the service. Setting rates in line with long run incremental costs reflects the view that the regulator should require prices from dominant or major suppliers that most closely imitate a fully competitive market, where prices are driven down towards marginal or incremental costs.

The increasing use of incremental cost methodologies indicates the special meaning that the term "cost-oriented" is acquiring among WTO Members[193].

Were those cost-oriented rates reasonable and economically feasible? The United States argued that such rates could not be assessed as reasonably and economically feasible if, as was true in Mexico, they varied upon "the general state of the telecommunications industry, the coverage and quality of the network"[194].

Section 1: scope of the commitment and extent.

Section 1 of the Reference paper 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"[195].

The United States claimed that Mexico's ILD Rules[196]:

> have operated to prevent competition in the termination of cross-border switched traffic, held international interconnection rates artificially high, and allowed foreign suppliers no choice but to pay Telmex-negotiated rate if they wanted to supply services on a cross-border basis. According to the United States, Mexico's ILD rules have empowered Telmex to engage in monopolistic practices with respect to interconnection rates for basic telecom

[193] *Supra* note 170 at para. 7.175.
[194] *Supra* note 170 at para. 7.183.
[195] In the Spanish version: "*1.1 Prevención de prácticas anticompetitivas en telecomunicaciones: Se mantendrán las medidas apropiadas, con el propósito de prevenir que, los proveedores que se constituyan, de manera individual o conjunta, como proveedor principal, se involucren en, o continúen con prácticas anticompetitivas.*"
[196] See the United States' first written submission, paragraph 206.

services supplied on a cross-border basis and to create an effective cartel dominated by Telmex to set rates for such interconnection.

As previously mentioned, Mexico answered that the Reference Paper did not apply to its domestic legislation: it sets out "principles and definitions" for regulatory authorities and does not mean that a single and common regulatory system should be imposed. Mexico submitted that section 1.1 did not require the Panel to act as a *domestic anti-trust authority*[197] (emphasis added).

But in light of the practices at stake, and in light of the questioned provisions of the Reference paper in issue, the Panel could not avoid asking itself the kinds of questions a domestic anti-trust authority would ask. Herein lays the novelty of the case within the body of the WTO jurisprudence.

According to the Panel, the analysis of section 1 focuses on three key elements: was there a major supplier, was there anti-competitive behaviour, and were appropriate measures to prevent such a behaviour being maintained.

(i) Telmex, major supplier.

The Panel already ruled that thanks to the domestic legislation, rule 13 of the ILD Rules, this operator was in position to materially affect the terms of participation in the relevant market (see supra).

(ii) Anti-competitive Practices?

The Practices? Section 1.2 provides a non exhaustive list of examples of anti competitive practices, yet there is a list of examples[198]:

(a) Engaging in anti-competitive cross-subsidisation;
(b) using information obtained from competitors with anti-competitive results; and
(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially

[197] *Supra* note 170 at para. 4.256.
[198] *Supra* note 181.

> relevant information which are necessary for them to provide service.

In the absence of a definition of anti-competitive practices, the Panel had to develop one from other sources including the Contracting Parties' competition legislation and other international instruments[199]:

> The members' own competition legislation [has given some indication on] the meaning of 'anti-competitive practices'[200]. Many WTO Members maintain laws to ensure that firms do not undermine competition in their markets. The term "anti-competitive practices" is often used in these laws to designate categories of behaviour that are unlawful. The range of anti-competitive practices that are prohibited varies between Members, but practices that are unlawful under the competition laws of Members having such laws include *cartels* [emphasis added] or collusive horizontal agreements between firms, such as agreements to fix prices or share markets, in addition to other practices such as abuse of a dominant position and vertical market restraints.

The Panel has also turned to international instruments including Article 46 of the 1948 Havana Charter for an International Trade, the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices[201]. It also mentioned the efforts of the WTO Working Group on the Interaction between Trade and Competition Policy, and the OECD recommendation calling for strict prohibition of cartels[202].

The Panel concluded by highlighting the intertwined relation between competition law and international trade law goals, already expressed by Kevin Kennedy[203]:

> An examination of the object and purpose of the Reference Paper commitments made by Members supports our conclusion that the term "anti-competitive practices", in addition to the examples mentioned in Section 1.2,

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[199] "Overview of Members' National Competition Legislation", Note by the Secretariat, WT/WGTCP/W/128/Rev.2, 4 July 2001.

[200] *Ibid.*

[201] United Nations Set (1980), Part D, at para. 3. Online: UNCTAD <http://r0.unctad.org/en/subsites/cpolicy/english/aboutus.htm>.

[202] OECD Council Recommendation Concerning Effective Action Against Hardcore Cartels (adopted by the OECD Council at its 921st Session on 25 March 1998 [C/M(98)7/PROV]). Online: OECD <www.oecd.org>.

[203] Kevin Kennedy, *Competition Law and the World Trade Organisation: the Limits of Multilateralism* (London: Sweet and Maxwell, 2001).

> includes horizontal price-fixing and market-sharing agreements by suppliers which, on a national or international level, are generally discouraged or disallowed. An analysis of the Reference Paper commitments shows that Members recognised that the telecommunications sector was characterised by monopolies or market dominance in many cases. *Removing market access and national treatment barriers was not deemed sufficient to ensure the effective realisation of market access commitments in basic telecommunications services* [emphasis added]. Accordingly many Members agreed to additional commitments to implement a pro-competitive regulatory framework designed to prevent continued monopoly behaviour, particularly by former monopoly operators, and abuse of dominance by these or any other major suppliers. Members wished to ensure that market access and national treatment commitments would not be undermined by anti-competitive behaviour by monopolies or dominant suppliers, which are particularly prevalent in the telecommunications sector. Mexico's Reference Paper commitment to the prevention of "anti-competitive practices" by major suppliers has to be read in this light[204].

The Panel then proceeded to applying this definition to the facts of the case instead of the title.

Anti-competitive at instance?

The ILD Rules imposed two main requirements on Telmex. The negotiated settlement rate with suppliers in other markets wishing to supply the Mexican market was subjected to approval by the Mexican authorities. Furthermore, Telmex had to give up traffic to or accept traffic from other suppliers depending on whether the proportion of incoming traffic surpassed or fell short of its proportion of outgoing traffic[205].

The United States considered the two requirements to be a price fixing cartel and a market sharing agreement - a conclusion shared by the Panel. But the Panel did not limit the practice to Telmex alone[206]:

> We note that Section 1 establishes an obligation with respect to 'suppliers who, alone or together, are a major supplier'. The practices at issue involve not only Telmex, but all the other Mexican suppliers who are gateway operators. Since we have already found that Telmex alone is a "major

[204] *Supra* note 170 at para. 7. 237.
[205] *Ibid.* at para. 7.256.
[206] *Ibid.* at para. 7.228.

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".

(iii) Preventive measures?

According to the United States, no measure has been taken by Mexico to prevent anti-competitive practices from arising. On the contrary, domestic Mexican legislation had the effect of preventing foreign carriers to act from competing on the Mexican territory. The United States argued that Mexico's rules "that require its telecommunications carriers to adhere to a Telmex-led horizontal-price-fixing cartel, restrict competition for the termination of international switched telecommunications services"[207]. In other words, the United States claimed that the ILD Rules, far from preventing anti-competitive behaviour, were themselves anti-competitive.

Mexico accepted that, its legislation that required adherence to the Telmex network, but argued that the legislation was not anti-competitive *per se*. Mexico claimed its approach was analogous to the Rule of Reason, a doctrine developed by the United States Supreme Court, and first invoked in 1911, in the *Standard Oil* Case[208]. This Doctrine had been defined as "a standard used in restraint of trade actions that requires the plaintiff to show and the fact-finder to find that under all circumstances the practice in question unreasonably restricts competition in the relevant market"[209]; and as "the Judicial Doctrine holding that a trade practice [violated] the Sherman Act only if the practice [was] an unreasonable restraint of trade, based on economic factors"[210]. Mexico argued that its ILD Rules formed part of Mexico's regulatory framework and

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[207] *Ibid.* at para. 4.264.
[208] *Standard Oil Co. of New Jersey v. US*, 221 U.S, 31 S. Ct. 502 (1911).
[209] Online: Rule of Reason<definition<www.answers.com>.
[210] Bryan A. Gardner, *Black's Law Dictionary,* 8th Ed. (USA: Thomson West, 2004) *s.v.* 'Rule of Reason".

in combination with its uniform settlement policy served to preserve competition among domestic carriers, and to promote investment in the domestic telecommunications infrastructure. It was thus a reasonable restriction on competition. The Panel rejected Mexico's position. It considered the legislation anti-competitive as such. The Panel refused to accept the argument that it was a legitimate governmental requirement to act in an anti-competitive manner: 'le fait du prince'[211] or State Action Doctrine could not be used as an 'excuse'. Its reasons in this regard are worth quoting in *extensu*, because they illustrate how trade law comes to incorporate competition law principles:

> The Panel [...] is aware that, pursuant to doctrines applicable under the competition laws of some Members, a firm complying with a specific legislative requirement of such a Member (e.g. a trade law authorising private market-sharing agreements) may be immunised from being found in violation of the general domestic competition law, [did not however agree on such a lenient acceptance]. The reason for these doctrines is that, in most jurisdictions, domestic legislatures have the legislative power to limit the scope of competition legislation. International commitments made under the GATS "for the purpose of preventing suppliers ... from engaging in or continuing anti-competitive practices"[212] are, however, designed to limit the regulatory powers of WTO Members. Reference Paper commitments undertaken by a Member are international obligations owed to all other Members of the WTO in all areas of the relevant GATS commitments. In accordance with the principle established in Article 27 of the Vienna Convention[213], a requirement imposed by a Member on a major supplier under its internal law cannot unilaterally erode its international commitments made in its schedule to other WTO Members to prevent major suppliers from "continuing anti-competitive practices"[214]. The pro-competitive obligations in Section 1 of the Reference Paper do not reserve any such unilateral right of WTO Members to maintain anti-competitive measures[215].

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[211] "Cas de force majeure découlant d'une décision de la puissance publique". Online: Definition <http://juristprudence.free.fr/Lexique.htm>.

[212] Section 1.1 of the Reference Paper. Online: WTO<Service Telecommunications<Reference Paper<www.wto.org>.

[213] See *The Vienna Convention on the Law of Treaties*, 1969, Art. 27. See *also* Ian Brownlie, *Principles of Public International Law*, 5th ed. (Clarendon Press, 1998) at 34.

[214] *Supra* note 212.

[215] *Supra* note 170 at para. 7.244.

[216] See the GATS Telecom Annex in WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO<www.wto.org>.

The Second Challenge: under the Annex

Section 5: Access to and Use of the Public Telecommunications Transport Networks and Services.

The United States claimed that Mexico had made commitments with regard to the granting of access to and use of the public telecommunications transport networks and services, and access to and use of private leased circuits, on reasonable terms and conditions.

The US argued that since Mexican legislation prevented foreign suppliers from owning public telecommunications networks and services, it contravened Mexico's Telecommunications Annex obligations.

Mexico counter argued that only access to and use of public telecommunications had to be loosened up, not the supply of the service.

Mexico relied in this regard on section 2 (c) of the Annex, which provides:

> (c)Nothing in this Annex shall be construed:
>
> (i) to require a Member to authorise a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its schedule; or
>
> (ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally[216].

[216] See the GATS Telecom Annex in WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO<www.wto.org>.

But the Panel found that section 2(c) of the Annex does not exclude the supply of telecommunications services from its the scope or from its objectives. However, as previously ruled, private leased networks could not be included in the commitments as they were not inscribed in the schedules.

Extent of application of section 5 within the commitments framework.

It should be recalled that Section 5 provides in part that:

> (a) Each Member shall 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 for the supply of a service included in its Schedule. This obligation is applied, *inter alia,* through paragraphs (b) through (f).

According to Mexico, the United States should have proven not only a *prima facie* violation of Mexico's obligation to grant the U.S. carriers a right to access and use the telecommunications network[217] but also that Mexico's restrictions were not based on reasonable and non-discriminatory terms[218]. The United States claimed that the burden of proof was on Mexico to establish that its restrictions were reasonable and non discriminatory.

The Panel ruled that in light of the wording of section 5, the section had to be taken as a whole, as all sub-sections were intertwined in their application.

Therefore it assessed whether each of the provisions had been breached, all read in light of one another. It concluded that[219]:

> The obligation contained in section 5 (a) of reasonable and non-discriminatory terms, informed the other paragraphs of Section 5, and likewise informed by elements of these paragraphs. [The Panel found that it]

[217] See page 77 above in chapter III.
[218] *Ibid.*
[219] *Supra* note 170 at para. 7.309.

could not examine what constituted 'reasonable terms and conditions' for access to and use of public telecommunications network and services in isolation from the question of whether or not a particular condition was imposed other than necessary as required in section 5 (e).

It read each of the sections in light of the subparagraphs and concluded that there was a violation of section 5 taken as a whole.

Conclusions and Recommendations:

In the light of [its] findings, the Panel [concluded] that: [220]

Mexico has not met its GATS commitments under Section 2.2(b) of its Reference Paper since it fails to ensure that a major supplier provides interconnection at cost-oriented rates to United States suppliers for the cross-border supply, on a facilities basis in Mexico, of the basic telecommunications services at issue;

Mexico has not met its GATS commitments under Section 1.1 of its Reference Paper to maintain 'appropriate measures' to prevent anti-competitive practices, since it maintains measures that require anti-competitive practices among competing suppliers which, alone or together, are a major supplier of the services at issue;

Mexico has not met its obligations under Section 5(a) of the GATS Annex on Telecommunications since it fails to ensure access to and use of public telecommunications transport networks and services on reasonable terms to United States service suppliers for the cross-border supply, on a facilities basis in Mexico, of the basic telecommunications services at issue;

Mexico has not met its obligations under Section 5(b) of the GATS Annex on Telecommunications, since it fails to ensure that United States commercial agencies, whose commercial presence Mexico has committed to allow, have access to and use of private leased circuits within or across the border of Mexico, and are permitted to interconnect these circuits to public telecommunications transport networks and services or with circuits of other service suppliers.

The Panel has found that, contrary to claims of the United States:

Mexico has not violated Section 2.2(b) of its Reference Paper, with respect to cross-border supply, on a *non-facilities* basis in Mexico, of the basic telecommunications services at issue;

Mexico has not violated Section 5(a) of the GATS Annex on Telecommunications, with respect to the cross-border supply, on a *non-facilities* basis in Mexico, of the basic telecommunications services at issue;

Mexico has not violated Section 5(b) of the GATS Annex on Telecommunications, with respect to the cross-border supply, on a *non-facilities* basis into Mexico, of the basic telecommunications services at issue.

[220] *Ibid.* at para. 8.1ff.

It therefore recommended that the Dispute Settlement Body request Mexico to bring its measures into conformity with its obligations under the GATS.

Since the decision, Mexico has brought its legislation into conformity with its obligation under GATS. It has refused to appeal the decision but has negotiated the implementation of the ruling and recommendations with the United States Trade Representative in an Agreement.

In its Report of December 6th 2004 to the DSB Chairman, the Government of Mexico informed the DSB that[221]:

> It [had] complied with the first phase of that agreement by publishing, on August 11, 2004, its new international telecommunications rules. These rules [have eliminated] the uniform settlement rate system, the proportional return system and the right of the carrier with the greatest proportion of outgoing traffic to negotiate the related settlement rates. The new system [...] enable all of Mexico's long-distance carriers to negotiate their rates freely, not merely with United States carriers, but with carriers worldwide [...; potentially making] the Mexican telecommunications market yet more competitive. Similarly, Mexico [informed it was] drafting regulations for the establishment of commercial agencies. Once [...] developed, Mexico will have fully complied with the DSB's recommendations and rulings.

Nonetheless, an extension of the reasonable period of implementation has been requested by Mexico, in order to meet its objectives).

The Grounds of reasoning:

As already noticed the Panel did not intervene as if it were an anti-trust authority, with a broad margin of manoeuvre. Instead it based all of its reasoning on the arguments provided by the Parties as required by the terms of reference. While principles of the Reference Paper are unquestionably "most important competition-

[221] *Mexico-Measures Affecting Telecommunications Services* (2004), WT/DS204/9, (Status Report to the Chairman of the Dispute Settlement Body), online: WTO<Dispute Settlement<www.wto.org>.

related trade commitment in the WTO framework"[222]; one must be cautious in extending the applicability of the Panel decision beyond its context.

Despite this caution, the reasoning of the decision has been questioned not only because of its implications but also because of the alleged "weaknesses of reasoning and inadequate competition analysis"[223]. The appointed panellists were certainly knowledgeable: Raymond Tam a Manulife insurance executive from Honk Kong, Bjorn Wellenius, a telecoms expert from the World Bank, and Professor Ernst-Ulrich Petersmann, a "noted academic and writer on trade and competition issues"[224] who also acted as the Chairman. Yet a few deficiencies in reasoning seem to have weakened the credibility of the outcome.

Some have blamed a misuse of International Public Law instruments such as the Vienna Convention: the Panellists should have construed the wordings within the full international context, reasoning they did not follow. Similarly it is argued that they should not have used OECD Recommendations because of their non-binding nature, or the Havana Charter, an agreement not even entered into force. As Marsden puts it[225]:

> The Panel read a cartel ban into [the section 1.1 of the Reference Paper] commitment to ban 'anticompetitive practices'. [But no such international agreement has been obtained yet, otherwise would be known...]. Even if [a cartel ban could have been read] into the Reference Paper, one would have thought that, if the Parties wanted to ban State-sponsored cartels as well, they would have mentioned it in the text. Instead they chose quite technical terms such as 'cross-subsidisation' and 'essential facilities'.

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[222] Philip Marsden, "WTO decides First Competition Case-With Disappointing Results" (2004) *Competition Law Insight,* May 3, at 3.
[223] *Ibid.* at 7.
[224] *Supra* note 222.
[225] Philip Marsden, *A competition policy for the WTO* (London: Cameron May, 2003) at 233.

Given the elimination of a competitive market and discrimination against carriers, arguably would have been better to characterize the challenged behavior as abuse of dominant position rather than cartel behavior.

Finally the Panel has expanded its findings on a major supplier to include all Mexican providers instead of focusing only on Telmex, but providing no reasons for embracing a joint major supplier approach notwithstanding that it had set aside the State Action Doctrine ('le fait du prince').

The Telmex case and the Panel interventionism.

What seems striking in this decision aside from being the first case in telecommunications field is the very interventionism of the Panel.

Indeed, at no point in the dispute was the jurisdiction of the WTO challenged, although it could have been. None of the U.S. firms had made "a public request for the Mexican competition authority"[226], which is the usual procedure to follow in the face of anti-competitive behaviour.

However, the U.S. firms had no incentives to make such an application because, as Marsden puts it "they [would have had] to survive a rigorous market analysis and satisfy a competition law standard that competition in the relevant market had been proven [to be] diminished, impaired or prevented [as required under the Mexican legislation]"[227]. Yet the Panel did not review whether local remedies were exhausted.

According to Marsden, the U.S. firms knew that they[228]:

> had a better chance of success if Geneva-based trade panellists reviewed their complaint under the pro-competitive rules of the Reference Paper. They

[226] *Ibid.*
[227] *Ibid.*
[228] *Ibid.*

> would not have had to find evidence of 'harm to competition' but simply a failure by Mexico to honour its commitments to promote its competition by increasing foreign entry.

Even if the Panellists were chosen in light of their background in telecommunications, and were aware of the legal and technical complexity of the regulation of the domain, Marsden asserts that they did not have the competence to intervene on competition matters as such, due to the early stage of application of the GATS.

According to Dr. Marsden, herein lay the danger: "when trade negotiators fail to reach an agreement, dispute settlement panels will create new commitments to open markets"[229], producing "WTO dispute settlement panels in reviewing highly complex anti-trust analyses while lacking the competence to do so"[230]. The relevant provisions of the DSU are articles 3(2) and 19(2)[231]:

Article 3 (2) *General Provisions*

> The dispute settlement system of the WTO is a central element *in providing security and predictability* [emphasis added] to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law* [emphasis added]. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 19 (2) *Panel and Appellate Body Recommendations*

> In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

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[229] *Supra* note 222 at 2.
[230] Andrew Scott, "Cain and Abel? Trade and Competition Laws in the Global Economy" (2005) 68(1) MLR 146 note 71.
[231] See Dispute Settlement Understanding in WTO, *The legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: University Press, 2003). Online: WTO<www.wto.org>.

Thus, the question is not whether there should be an international competition agreement, but how international competition principles already embedded in the WTO framework should be shaped by the Panellists within the interpretation process.

With regard to the Telmex decision, the concern lies in the use of the WTO Forum under the doctrine of the *forum conveniens*[232], the best forum is the court in which an action is the most appropriately brought considering the best interests and convenience of the Parties and the witnesses. Yet, it would appear that the best court to act would have been the Mexican Competition authority, the most appropriate, and the 'most convenient'. But the United States (or other Member States in the future) has used the DSB in order to lighten their burden of proof with regard to competition hardship, when it was apparently not the best forum to hear the case (as for competition-related matters).

Because of these concerns and risks, Dr. Marsden has proposed a new condition to be eligible for an action before the DSB. He has offered "an analytical framework that would set out a series of conditions for bringing a complaint to the WTO about alleged toleration of exclusionary business arrangements ... [these conditions combining] to require proof that such arrangements [have substantially impeded] market access and thereby substantially lessened competition in the relevant market. In addition, even if these conditions [were] satisfied, WTO Members [would] be obliged to ensure that any remedial action that they [would take, would not] itself lessen competition substantially"[233]. "His hope is that this proposal can satisfy the

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[232] Bryan A. Gardner, *Black's Law Dictionary,* 8th ed. (USA: Thomson West, 2004) *s.v.* 'Forum Conveniens'.
[233] *Supra* note 225 at 254.

self-declared ordinance that the only way of moving the 'trade *versus* competition' debate is to ensure that the concerns of both sides are being addressed"[234].

"To provide an impetus for competition experts to engage in his project, [he] has warned that –wither their involvement –'some' competition rules will soon be agreed on a multilateral footing and/or developed through the dispute settlement decisions[235]. He is explicit in prompting his peers in the competition Diaspora to jockey for position to influence this progress, rather than cede the integrity of competition policy to trade specialists by default"[236].

One can understand Marsden's position with regard to cases such as Telmex: he battles in favour of blocking the ongoing trend of settling competition disputes within the DSB. At least he does not accept that a solution is given to the application of the current WTO Agreements. The Panels need guidance in the application of the competition precepts, whose existence is not denied. This guidance must be provided by this Competition 'Diaspora'.

His proposal would be effectively applicable, but only if, competition reasoning is applied at the eligibility level, implying expertise. The Panellists would have to be chosen in light of their knowledge within the competition domain. This would not change the actual problem of the Panellists' competence to intervene, raised by Dr. Marsden.

Besides, this would not alter either the fact that the Panel would still interpret the WTO competition rules. Maybe it would appear more as an anti-trust authority even if

[234] Supra note 230 at 153.
[235] *Supra* note 225 at 253-254.
[236] *Supra* note 230 at 152.

not the case by its nature. That would generate a need to ensure that its interpretation creates the right rules[237].

Moreover, the question of the scope of the proposal remains. How can an exclusionary business arrangement be defined, especially at an international level? Doctor Marsden's idea is largely inspired by European Union Law, and is linked to the combined notion of market access and discrimination applied in this common market[238]; but how to find a common notion on an international level? The current context of the negotiations has revealed Members' opposition to adhering to the European vision for a competition framework.

Which cases would be under such a scrutiny: all competition-related disputes? This framework would have to be well drafted, neither too narrow nor too broad, the result of a compromise. It would have to meet international agreement on the thresholds to apply. Moreover, the imposition of conditions would extend an unwanted phenomenon: competition analysis within the DSB.

Yet Marsden offers a guideline "by which WTO Members would undertake to prohibit those 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"[239].

But before such a guideline comes to life, if it comes to life, a temporary solution has to be found, and only the Dispute Settlement Body seems to be in a position to find it.

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[237] *Supra* note 225 at 253.

[238] See Dr. Marsden's explanation on the evolution of the European Union jurisprudence of the non-discriminatory and market access principles in his book, *A competition policy for the WTO* (London: Cameron May, 2003) Chapter VII.

[239] *Supra* note 225 at 284.

Conclusion

The conclusion that can be drawn from Telmex is a 'successful' intervention into a Member's domestic legislation. The United States through its complaint has made it possible for any other Contracting Party to shape another Country's domestic regulation with regard to competition matters.

Telmex has become one of the most well-known examples of the application of WTO competition principles.

Today it can be considered as one of the first cases of application of the GATS-related agreements, an illustration of how to interpret their competition rules.

Similarly, it has shown the extent of influence of such rules on Members' regulation. There are only few other similar illustrations of their application, in different domains but unfortunately none related to telecommunications field. (Only the future will indicate how much impact the case did really have on telecommunications field).

Indeed the Panel used the WTO Agreements competition principles and notions in other cases. The 'Korea-Various measures on beef' case is one illustration[240].

In this case, the Appellate Body analysed the notion of market with regard to article III-4 *National Treatment*. Three elements had to be satisfied to consider whether the Korean Measures applied were consistent or not with the provision: likeness of

[240] *Korea- Measures affecting imports of fresh chilled and frozen beef* (2000), WTO Doc.WT/DS161/AB/R WT/DS/169/AB/R (Appellate Body report), online: WTO<Dispute Settlement<www.wto.org>.

products, the nature of the measure at stake, and the last element disputed in the case on appeal, a discrimination in treatment of the products.

In other words, the issue of equal opportunities for an effective market access was addressed.

> "Any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III and this conclusion can be reached even in the absence of any imports (as hypothetical imports can be used to reach this conclusion) confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III. The object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products"[241].

Also addressed was the notion of conditions of competition that had to be equal.

The Appellate Body considered that if the treatment of imported goods was different but not less favourable than the treatment of domestic products, there was no violation of the national treatment provision. In other words, there was not necessarily a violation *per se.* (As in the Telmex case, a *per se* rule was invoked[242]). It referred to another case where the standard was described as follows:

> "The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions* [emphasis added] for imported products in relation to domestic products. "[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given."[243]

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[241] *Ibid.* at para. 627. (footnotes omitted)

[242] See chapter IV above at 99.

[243] Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 16-17. The original passage contains footnotes. The second sentence is

"Whether or not imported products are treated 'less favourably' than like domestic products should [have been] assessed [...] by examining whether a measure modifies the *conditions of competition* in the *relevant market* to the detriment of imported products [emphasis in the text]"[244].

In first instance, the Panel tried to follow a disciplined method highlighted by the Appellate Body report, by examining the conditions of competition. It went on to analyse the limited "possibility for consumers to compare imported and domestic products"[245] in the relevant market. It assessed the market shares, and the potential market opportunities for imported goods. Similarly it evaluated the costs of distribution of the imported goods.

The purpose here is not to go into the details of the decision, but to point out that this decision reveals that the WTO Dispute Settlement Body has learned to accept competition principles; and is learning how to apply them, case after case.

In a nutshell, the newly agreed WTO texts have become the object of a new jurisprudence, a new object of interpretation, as much as the GATT texts were previously.

Indeed the general broad and different rulings rendered by the DSB since its creation in 1994 have become case law, whether one likes it or not.

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footnoted to *United States - Section 337 of the Tariff Act of 1930* ("*United States – Section 337*"), BISD 36S/345, para. 5.10. The third sentence is footnoted to *United States – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; and Japan – *Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(b). The fifth sentence is footnoted to *Italian Discrimination Against Imported Agricultural Machinery*, BISD 7S/60, para. 11.

[244] *Supra* note 240 at para. 137.

[245] *Ibid.* at para. 139.

One can talk of the general jurisprudence of the WTO independently of the nature of the agreements; a jurisprudence that "has provided a measure of predictability for the general application of the Agreements.

In the opinion of many impartial observers, [despite the young age of the DSB…] this jurisprudence is [to be considered as] extraordinarily rich and detailed"[246].

"There is no doubt that this jurisprudence will have an effect on general international law broader than the borderlines of the WTO system. In addition, it [has illuminated] certain key WTO treaty obligation questions, and [provided] some rule stability by resolving ambiguities, all with creditable and elaborately reasoned opinions"[247].

This jurisprudence whatever field is concerned, has brought tremendous stability to the whole structure of the WTO.

This jurisprudence, like the Telmex case, has paved the way for international principles of competition. This decision might be addressed in the future as a "precedent", as in Common Law jurisdictions. Even if by definition in international proceedings the doctrine of precedent has no place; it is quite evident that the Panellists will be motivated by this concept of *stare decisis*[248].

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[246] Consultative Board composed of Peter Sutherland, Jagdish Bhagwati, Kwesi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer, Thierry de Montbrial, "The Future of the WTO, Addressing institutional challenges in the new millennium, Report by the consultative board to the Director-General Supachai Panitchpakdi" (2004) at 51. Online: WTO<www.wto.org>.
[247] *Ibid.*
[248] *Ibid.* at 52.

Will this motivation be definitive or determinative? There is no certainty but it will most probably be an inspiration, "a security and predictability"[249].

The weight to be given to the case will determine the choice of orientation in the WTO Agreements application. But it will also mean that the Panels will hold the power to choose this orientation.

But issues and concerns arise with these assumptions: the "extent to which the WTO international procedures [will] give deference to members' governmental decisions [...] a question which certainly engages issues of 'sovereignty'"[250], more certainly in the competition field.

What to think of such a role granted to the panellists? They are compensating for the lack of consensus on harmonised principles through their interpretation of the texts.

Some have argued that "gap-filling is not an appropriate role for the Dispute settlement system"[251]. Even if to some extent all jurisdictional institutions fulfil this role, the critics target the absence of the Panellists' competence to do so in competition matters. Indeed, as much as in the Telmex case, the Panel in the Korean Beef case followed a line of reasoning that has been considered as limited if not hollow. There was no thorough argument on how to define the relevant market at instance, but just an indication of its importance in the evaluation of the provision potential breach. This absence of complete reasoning has proved the limits of the Panel's competence to intervene in competition matters to the extent of an anti-trust authority.

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[249] *Ibid.* note 36
[250] *Ibid.* at 51.
[251] *Ibid.* at 55.

Even if the panellists went on to examine the conditions of competition between the domestic and imported like-products; they did not follow a thorough and disciplined competition-related reasoning, according to the Appellate Body that highlighted but questioned this reasoning[252].

Moreover, the harmonisation of competition principles can only come about, according to these same opponents, through negotiations and not through *stare decisis*.

However, how long does one have to wait before any international agreement is formed? In light of the actual context of the last round, there are few hopes.

One should understand that the actual situation does not allow the Members to prevent the DSB from intervening, as it is the only organ that brings some clarity to the texts' interpretation. Yet blaming its intervention because it does not reflect the majority of the Contracting Parties' opinion is understandable to some extent. But with no improvements at the political level, it seems that it is better to have some jurisdictional progress than no progress at all. Otherwise would mean to acknowledge the existence of the competition principles but to refuse any of their application; and that would represent a step backward.

The current situation is a final acknowledgement of competition precepts, their application and recognition throughout cases. As seen in this study, since 1948 until now, there has been a slow but certain evolution within the process of framing competition principles on an international level: from a self-restrained trend to an activist approach[253]. The sole problem with this framing has been the boundaries.

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[252] *Supra* note 246 at para. 141.

[253] Alberto Alvarez-Jimenez, "Emerging WTO Competition Jurisprudence and its Possibilities for Future Development" (2004) 24 NW. J. INT'L L. & BUS. 441 at 38.

Competition rules are considered as sovereign, and any attempt to broaden their territorial scope has been and still is viewed as an encroachment on this sacred sovereignty. However these rules exist within the WTO Agreements and Parties have to abide by them. Any agreement at an international level is an international commitment to which the Parties have to adhere to. There is no loss of sovereignty when a Country has agreed with others to abide by negotiated rules. Unpredictability would ensue from any behaviour taken to circumvent their obligations. As much as the United States has used the Telecom Annex in the Telmex case to force Mexico to change its regulation, Mexico would be entitled to use these same tools to force the United States to change its own regulation if the case may be. Equal chances should prevail.

Co-operation is needed and good faith also.

It is astonishing to see how much polemic such rules have created, whereas international trade rules harmonisation has never triggered so much enthusiasm in terms of political involvement.

There is a strong belief that the role of domestic competition authorities will be diminished if the DSB is entitled to some extent to intervene in international matters. But the DSB intervenes in order to maintain the WTO structure and coherence. Yet, this coherence is only possible if the complementary role of competition rules is respected. As Kevin Kennedy has stated, "Competition law [...] complements trade policy by ensuring that the reduction or elimination of government barriers to trade are not negated by the anti-competitive behaviour of private firms through the abuse of market power or through collusive behaviour. Like a liberal trade policy that removes government barriers to competition at the border, competition policy

removes private barriers to competition behind the border"[254]. Both international trade and competition policies are intertwined.

But if the Governments consider that the Dispute Settlement Body should not intervene, then it should be high time Governments intervene. In the meantime, at least one organ is trying to maintain coherence, to the extent of its abilities.

[254] Kevin Kennedy, *Competition Law and the World Trade Organisation: the limits of Multilateralism* (London: Sweet and Maxwell, 2001) at 4.

Annex

MEXICO - SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
Sector or subsector	**Limitations on market access**	**Limitations on national treatment**	**Additional commitments**
2.C. TELECOMMUNICATIONS SERVICES Telecommunications services supplied by a facilities based public telecommunications network (wire-based and radioelectric) through any existing technological medium, included in subparagraphs (a), (b), (c), (f), (g) and (o). Radio broadcasting, cable television, satellite transmissions of DTH and DBS services and of audio digital services are excluded.	(1) None, except the following: International traffic must be routed through the facilities of an enterprise that has a concession granted by the Ministry of Communications and Transport (SCT). (2) None (3) A concession from the SCT is required. Only enterprises established in conformity with Mexican law may obtain such a concession.	(1) None (2) None (3) None	Mexico undertakes the obligations contained in the reference paper attached hereto.
	Concessions for spectrum frequency bands for specific uses will be granted by public invitation to tender.		
	Foreign governments may not participate in an enterprise set up in accordance with Mexican law nor obtain any authorization to provide telecommunications services.		

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
Sector or subsector	**Limitations on market access**	**Limitations on national treatment**	**Additional commitments**
	Direct foreign investment up to 49 per cent is permitted in an enterprise set up in accordance with Mexican law. Telecomunicaciones de Mexico (Telecomm) has exclusive rights to links with Intelsat and Inmarsat. Services other than international long-distance services which require use of satellites must use Mexican satellite infrastructure until the year 2002. (4) Unbound, except as indicated in the horizontal section.	(4) Unbound, except as indicated in the horizontal section.	
(a) Voice telephony (CPC 75211, 75212) (b) Packet-switched data transmission services (CPC 7523**) (c) Circuit-switched data transmission services (CPC 7523**)	(1) None, except as indicated in 2.C.1. (2) None (3) As indicated in 2.C.3. (4) Unbound, except as indicated in the horizontal section.	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section.	
(f) Facsimile services (CPC 7521** + 7529**)	(1) None, except as indicated in 2.C.1. (2) None	(1) None (2) None	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
Sector or subsector	**Limitations on market access**	**Limitations on national treatment**	**Additional commitments**
- Commercial agencies.	The establishment and operation of commercial agencies is invariably subject to the relevant regulations. The SCT will not issue permits for the establishment of a commercial agency until the corresponding regulations are issued. (4) Unbound, except as indicated in the horizontal section.	(4)Unbound, except as indicated in the horizontal section	

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