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UNDER THE PRESENT WTO
(BILATERALIST) COMPETITION REGIME

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Carmen Otero García-Castrillón*

I. INTRODUCTION

The World Trade Organisation (WTO) was established¹ in 1994, after the conclusion of the Uruguay Round multilateral trade negotiations initiated in 1986². The WTO administers the various multilateral and plurilateral³ trade agreements dealing with products and services. Prior to 1994, the General Agreement of Tariffs and Trade (GATT)-47⁴ was the only multilateral agreement that regulated trade, and was limited to trade in goods. The GATT-47, originally envisioned as part of the Havana Charter for the creation of the International Trade Organisation (ITO)⁵, became the center point for international action in the field due to the lack of ratifications of the Havana Charter. The GATT-94 currently forms an integral part of the WTO without having passed through significant changes.

The WTO's objective is the liberalisation of international trade on the basis of reciprocity and mutual advantages. The different agreements establish rules and procedures to reduce and eliminate obstacles to trade imposed by *governments*. To that end, a dispute settlement mechanism authorises retaliation once the agreements' provisions have been violated, and provides for Member states complaints when, even without violations of the agreements, their expected benefits have been nullified or

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¹ Marrakech Agreement, of 15 April 1994, establishing the World Trade Organisation

² Punta del Este Declaration

³ Agreement on Civil Aircraft, Agreement on Beef Meat; Agreement on Dairy Products.

⁴ General Agreement on Tariffs and Trade

impaired⁶. This mechanism, the efficiency of which has been proven since GATT-47 came into effect⁷, is a basic tool for the working of the system.

The reduction of trade barriers and the abolition of discrimination, in other words the market liberalisation, are themselves important instruments to stimulate international competition. As a result, multilateral trade agreements do also promote normative competition among national legal systems and, hence, among governments⁸, obliged by article XVI.4 of the WTO Agreement to conform their laws, regulations and administrative procedures to the Agreements.

Despite the widespread belief that *private parties'* restrictive practices adversely affect international trade⁹, the treatment of this subject has been very cautious. A proposal by less developed countries to include the issue in the Uruguay Round agenda was turned down by the United States and other developed countries¹⁰. Similarly, the establishment of a working group on competition at the Singapore Ministerial Declaration was made with the understanding that "future negotiations, if

⁵ Havana Charter for the establishment of the International Trade Organisation, U.N. Doc. E/Conf. 2/78 (1948). Reproduced in U.N. Doc. ICITO/1/4 (1948).

⁶ Article XXIII GATT-94 and the Understanding on rules and Procedures Governing the Settlement of Disputes, International Legal Materials, vol. XXXIII, 5 September 1994 at 1226.

⁷ See R. E. Hudec, *Enforcing international Trade Law: The Evolution of the GATT Legal System*. Butterworth. 1993.

⁸ E.U. Petersmann, "Proposals for Negotiating International Competition Rules in the GATT-WTO World Trade and Legal System". *Aussenwirtschaft*. vol. 49 1994. at 240-241. Referring only to GATT. National sovereignty protects the different national policies. When the GATT was established, the rules and its applications cannot cause negative transnational effects, and that is why a competition among rules appear; and "International Competition Rules for Governments and for Private Business: The Case for Linking Future WTO Negotiations on Investment, Competition and Environmental Rules to Reform of Antidumping Laws". *Journal of World Trade* vol. 20 3. 1996. at 15-22.

⁹ *Report on Restrictive Business Practices* (L/1015), adopted 2nd June 1960. *BISD* Sup. 9. 1961. at 170-179. 1997 World Trade Organisation Annual Report (WTO Report) at 30.

¹⁰ E.U. Petersmann, *supra* note 8 at 243.

any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members”¹¹.

Nevertheless, the Agreements concluded in the Uruguay Round, while more strictly regulating governmental practices, show a tendency towards the establishment of obligations prosecuting and sanctioning private parties’ anticompetitive practices. The scope of the Agreements is broader and the traditional concept of market access now encompasses internal barriers and distortions that used to be out of the reach of trade policy. There is also a commitment to examine the anticompetitive effects of some trade rules¹² and transparency gains ground¹³. Moreover, several Agreements force their Members to establish independent judicial or arbitral procedures for the defence of private parties’ interests in issues that relate to their competitive position.

Presently, there is an ongoing debate concerning the negotiation of a multilateral agreement on competition within the WTO¹⁴. Assuming that the principles of competition law and policy contribute to international trade¹⁵ and with the prospect of

¹¹ Singapore Ministerial Declaration, adopted 13 December 1996. WT/MIN (96)/DEC.

¹² E.U. Petersmann, *supra* note 8 at 235. For a detailed description of the Agreements dealing with competition issues, see 247-253.

¹³ As J.H. Jackson, *World Trade and the Law of GATT*. The Bobbs-Merrill Company Inc. 1969, at 462, put it “the lack of information inhibits the entry into that market by new traders and limited entry decreases the amount of competition for that market. Thus, the lack of information is a non-tariff trade barrier resulting in joint benefits to the importing nation’s government and the established traders”.

¹⁴ See in favour (with different approaches) E.M. Fox, “Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade”. *Pacific Rim Law and Policy Journal*. vol. 4 1, march 1995 at 1; E.M. Fox and J.A. Ordover, “The Harmonisation of Competition and Trade Law; The Case for Modern Linkages of Law and Limits to Parochial State Action”. *World Competition*. vol. 19 2, 1995 at 5; W. Fikentscher, “Competition Rules for Private Agents in the GATT/WTO System”. *Aussenwirtschaft* vol. 49, II/III, 1994 at 281. Against: A. Matoo and A. Subramanian, “Multilateral Rules on Competition Policy : A Possible way Forward”. *Journal of World Trade*. vol. 31 5. October 1997 at 95; D. Wood , “The Regulation of International Competition”, *ASIL Newsletter*. March-May 1996 at 13.

¹⁵ The objectives of competition policy would be limited to achieving economic efficiency, consumer welfare and economic development. The maintenance of competition is not a goal in itself, but a means to achieve those objectives, which are consistent with the core objectives of WTO. There is a very

contributing to the support of this solution for the actual problems in the field¹⁶, this article intends to analyse the possibilities and perspectives for private anticompetitive practices prosecution under the actual multilateral WTO Agreements by studying their rules and the dispute settlement mechanism. The analysis will reflect that the Uruguay Round Agreements timidly open the coverage of restrictive business practices. However, regarding dispute settlement among Members, bilateral negotiations remain the fundamental multilateral solutions. In addition, is worth noting the significant introduction in many agreements of commitments on the “governmental control” of anticompetitive practices and the judicial defence of private parties competitive interests in international trade before national courts. This situation, together with a growing common understanding of restrictive business practices, may well indicate that the way for a WTO agreement on competition is open.

II. GATT-94 COMPETITION RELATED RULES

Except for cases of dumping and state trade monopolies and companies enjoying exclusive or special privileges, GATT lacks rules regulating explicitly private parties’ practices. However, the Agreement is somehow related to the Havana Charter, which included rules regarding restrictive business practices. Besides, the national treatment provision provides private parties with the protection of the non-discrimination principle in the field, and the publication and administration of trade regulations rule implements the transparency requirement.

large degree of agreement that the effective application of competition law complements and reinforces the process of trade liberalisation. WT/WGCP/3, 11 October, 1999.

The reflection on these aspects will show that the only case in which substantive competition standards are established refers to the state monopolies or companies with special privileges, and then, the rules are so vague that the determination of their content in a GATT panel could be too complicated. Despite formal issues, the Havana Charter competition principles seem to be of no significance due to State practice. Dumping prosecution heavily depend on the evaluation of state interests. Therefore, Members are subject to almost no compulsion in the field. Nevertheless, the national treatment provision applicable to substantive as well as to procedural rules, permit private parties enjoy equal footing in competition law within national markets.

A. RELATIONSHIP WITH THE HAVANA CHARTER

Chapter V of the Havana Charter deals with restrictive business practices that contracting parties ought to prevent and sanction¹⁷. They are defined in article 46 as those “commercial practices of private parties affecting international trade, restricting competition, limiting market access or leading to monopolistic control, when those practices have negative effects on the expansion of production and trade, and interfere in the obtaining of any of the designated objectives”. *Article XXIX of GATT* incorporated the Havana Charter in anticipation of GATT’s expected merger into the ITO in the following provision:

“The contracting parties (currently Members) undertake to observe to the fullest extent of their executive authority the general principles of chapters I to VI inclusive and of chapter IX of the Havana Charter, pending their acceptance of it in accordance with their constitutional procedures”.

¹⁶ This is without neglecting nor excluding the relevance of the numerous bilateral and regional agreements in the field.

The failure of the ITO does not affect the enforcement of this article¹⁸. Therefore, in principle, private anticompetitive practices could be prosecuted in the WTO indirectly through GATT. In addition it is worth noting that article XXIX has not suffered any modification as GATT was integrated into the WTO. Hence, Chapter V of the Havana Charter is part of GATT-94. Although Members are not obligated by the rules, they have to “observe” the “general principles” underlying them “to the fullest extent” of their executive powers. This should not be a problem given the level of administrative intervention in the field. Nevertheless, it is not surprising that scholars have characterised the situation as “confusing”¹⁹.

Some data lead to the conclusion that Members are not concerned with the commitment to respect these general principles. Hence, it is possible to conclude that there is a general conviction of the lack of obligations in this respect. In 1955 the GATT contracting parties agreed to eliminate the relationship with the Havana Charter with a proposal to derogate article XXIX. The proposal passed unanimously, but was never adopted because one contracting party did not ratify the modification²⁰. In 1960, the Report of the Group of Experts on Restrictive Business Practices rejected a multilateral negotiation on restrictive business practices without considering the

¹⁷ Havana Charter, supra note 5. For a detailed description of the restrictive business practices negotiation, see L.J. Bergstrom, “Should the GATT be Modified to Incorporate A Restrictive Business Practice Provision?”. *World Competition*. vol. 17, 1. at 123-126.

¹⁸ Vienna Convention of the Law of the Treaties, *International Legal Materials* vol. VIII 4 at 679.

¹⁹ P. C. Mavroidis, “Les pratiques restrictives du commerce: la question de la répartition des compétences entre la Communauté Européenne et ses États Membres dans la cadre de l’Organisation Mondiale du Commerce”. *Annuaire Français de Droit International*. XLII. 1996. at 865-866.

²⁰ Report (L/327), adopted 28 February, 5 and 7 March 1955. *BISD* 3 Sup. 1955. at 240 .In March 8, 1955 the Decision on the acceptance of the amendments in the Protocol modifying GATT Part I and articles XXIX y XXX (Doc. G/91, unpublished). After subsequent calls to the contracting parties for its signature, the protocol was abandoned due to Uruguay’s non signing, *BISD* 14 Sup. 1966. at 17-18 and 15 Sup. 1967. at 65.

existence of the Havana Charter and GATT article XXIX²¹. On the contrary, the Report proposed that the interested contracting parties should hold consultation among themselves on particular practices, whether governmental or private. In 1984, a GATT panel questioned the juridical value of article XXIX due to unawareness about the way in which the Havana Charter would have been interpreted had it entered into force²². In spite of the weakness of this argument²³, the panel's reasoning shows the confusion about the viability of this article.

If this was not the situation, why did the United States not use article XXIX reasoning in the case on Japanese measures affecting photographic film and paper (Kodak case)²⁴?. This has been the one case dealing expressly with (governmentally monitored) private parties anticompetitive practices. The only reason one can presume for ignoring article XXIX is that its acknowledgement would have implied admitting the existence of binding general principles on competition, which is contrary to United States long-standing position²⁵. Hence, the historical precedents, as much as State practice, point to the conclusion that, despite formal issues, article XXIX.1 of GATT is, simply, of no consequence.

B. DUMPING

²¹ *Report* supra note 9. In 1955 the Contracting Parties studied and dismissed a proposal to include restrictive business practices in GATT. *BISD* Sup. 3 (1955) at 239.

²² United States-Canada, on the Administration of the Foreign Investments Review Act (FIRA) (L/5504), adopted 7th February 1984. at 140-168.

²³ After this assertion, the panel interprets various Havana Charter articles following the Vienna Convention criteria. *Id.* at 161-162.

²⁴ United States-Japan, on the measures affecting consumer photographic film and paper (Kodak case), adopted 22 April 1998. WT/DS44/R.5.

²⁵ Showing the opposition of the U.S. to a Competition Agreement under the WTO umbrella, J.Klein, (Chief of the U.S. Antitrust Division) "No Monopoly in Antitrust". *Financial Times*. Friday, 13 February 1998, at 22; "A multilateral antitrust code would be a bad idea". "Klein urges caution towards WTO agenda on international trade, competition policy". *ATRR*. vol. 71. 11-21-1996. at 504; "A hasty effort at the WTO is fraught with risk".

Although *dumping* is implemented by private parties and can be an anticompetitive practice²⁶, GATT's approach towards its investigation and sanction goes beyond the issue of international anticompetitive behaviour to focus on a State's interests. Dumping as such is not forbidden, but can be sanctioned when declared prejudicial. Exporting at a price below the normal product value has to negatively affect a "national production branch"²⁷ before the affected State may adopt measures countering the damages. In addition, the damages are balanced with the importing State's general interests²⁸ before adopting any measure. Although this is not usually the case, the importing State's interests can prevent the imposition of antidumping duties even when the existence of adverse dumping has been established.

It is not surprising that antidumping is the most controversial issue when confronted with general objectives of competition and efficiency as proclaimed by national legislations and trade agreements²⁹. It is worth noting that, in most of the cases,

²⁶ Article VI of GATT defines dumping as the introduction of a good in a market at a lower price than its normal value. In Antitrust, predatory pricing is a genuinely exclusionary practice, which, according to R. A. Posner, *Antitrust Law; An Economic Perspective*. The University of Chicago Press. 1976, at 188, is most usefully defined in the following terms: "pricing at a level calculated to exclude from the market an equally or more efficient competitor". In the European Community perspective see, C. Bellamy and G. Child, *Common Market Law of Competition*. Third Edition. Sweet and Maxwell. 1987 at 414. In any case, it is not easy to distinguish between a legitimate competitive response and a predatory or abusive action. In order to establish anticompetitive predatory pricing practices, costs and intent elements are required. Price discrimination could be indicatory of predation, but predation cannot be necessarily inferred from price discrimination, nor price discrimination is, in all circumstances, anticompetitive.

²⁷ Article 4 of the Agreement on the Implementation of Article VI of GATT-94 (Antidumping Code) defines the national branch of production in general terms "as referring to the domestic procedures as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products"

²⁸ Article 9.1 of the Antidumping Code, Id., states: "The decision whether or not to impose an antidumping duty in cases where all the requirements for the imposition has been fulfilled, ..., are decisions to be made by the authorities of the importing Member" regardless of the existence of damages. This balancing exercise is not a justiciable issue at all.

²⁹ This discussion means to show the contradiction between trade and competition laws. Reviewing this issue, see, among many others, P.A. Meeserlin, "Should antidumping rules be replaced by national or international competition rules?". *Aussenwirtschaft*. vol. 49. 1994. at 351-373.

affected States seek an agreement with the exporter, in which the business commits to increasing the price up to the dumping margin established in the investigation.

Therefore, the main rule regarding this private anticompetitive practice is that it can be sanctioned by states in the light of their interests.

C. STATE TRADING ENTERPRISES

Regarding *State monopolies and those companies enjoying special privileges*, article XVII.1.a establishes an obligation for these enterprises to “act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders”. Article XVII.1.b also requires that state trading enterprises purchase and sale “solely in accordance with commercial considerations”. According to GATT Panels, “the commercial considerations criterion becomes relevant only after it has been determined that the governmental action at issue falls within the scope of the general principles of non discriminatory treatment prescribed by the General Agreement”³⁰. Other Members’ enterprises should be afforded “adequate opportunity, in accordance with customary business practice”³¹, to compete for participation in such purchases and sales”. It has been said that this article “imposes on certain enterprises, which may or may not be state-owned or managed, obligations in addition to the obligations of governments themselves, by virtue of the capacity of these enterprises to create serious obstacles to trade”³².

³⁰ FIRA, *supra* note 22.

³¹ This expression was intended to cover business practices customary in the respective line of trade. *Guide to GATT Law and Practice*. WTO. Geneva. 1995, at 442.

³² R. Howse, “State Trading Enterprises and Multilateral Trade Rules: The Canadian Experience”. in *State Trading in the XXIst. Century*. P. Mavroidis and T. Cottier (Eds.). University of Michigan Press. 1999, at 186. Even the WTO information page reads, “The drafters of the General Agreement ... sought

However, no GATT panel has examined whether companies acted in accordance to commercial considerations. This has been attributed partly to the fact that, to be judged, the offending conduct must be compared to some notion of market contestability or a model of normal commercial behaviour, which would require technical economic analysis. This analysis “is difficult to realise through sporadic panel dispute settlement, and would seem to imply continuous surveillance of something like a global competition body”³³.

Along the lines of article XVII, article II (4) contains a broad prohibition on conduct by import monopolies that have the effect of increasing protection beyond that afforded “on average” by the bound tariff for the product in question. This provision applies when a Member “establishes, maintains or authorises, formally or in effect, a monopoly for importation”. Professor Howse has argued that the provision might be applicable, for example, not only to public and private monopolies explicitly recognised in the legislation, but also to effectively exclusive distribution and retailing networks for imported products in which the State has some role in maintaining³⁴.

to ... make state traders behave as private competitive traders ...”. [Http://www.wto.org/english/thewto-e/whatis-e/eol/e/wto05-9.htm#note1](http://www.wto.org/english/thewto-e/whatis-e/eol/e/wto05-9.htm#note1).

³³ Id.

³⁴ In the Kodak case, see supra note 24, the distribution and retailing networks somehow maintained by the Japanese government, were precluding the market access of imported products. But, since those networks were established for national products, there was no *import monopoly* and the case could not be construed as a violation complaint in respect of article II (4).

In addition, article XVII of GATT and, especially, the Understanding on its interpretation³⁵, impose an obligation on the Members, as a control device³⁶, to examine whether their business activities conform with the general principle of non-discrimination in imports and exports. The WTO is also charged with this examination through the Council of Trade in Goods. The particular activities are not described (par. 5), but will be reported by the working group³⁷.

At this point it is worth noting that obligations are directly imposed on (state or privileged by the state) companies. However, the use of these rules has been extremely limited, not to say non-existent.

D. NATIONAL TREATMENT

Article III.4 of the GATT establishes *national treatment* in respect of “all laws regulations and requirements” to the extent that they affect the “internal sale, offering for sale, purchase, transportation, distribution or use of goods”. This article has been interpreted as encompassing not only the rules on their face, but also their *de facto* consequences³⁸. Therefore, this article provides for the defence of equal competitive conditions within a market for national and foreign products³⁹. This does not only mean that Members are obliged to apply their antitrust rules in a non-discriminatory

³⁵ Understanding on the Interpretation of Article XVII of the GATT, International Legal Materials vol. XXXIII 5, September 1994 at 1157.

³⁶ See infra III.B.1.

³⁷ The illustrative list is intended to be a tool to help Members to determine whether they maintain entities which should be notified as state trading enterprises. The work on this issue proceeded slowly. World Trade Organisation Annual Report 1997, supra note 9 at 112. The Illustrative List of Relationships Between Governments and State Trading Enterprises and the Kind of Activities Engaged in by These Enterprises, G/STR/4, show the light the 30th July 1999. It stresses its non-exhaustive character and points, among others 1. the control or conduct of imports or exports; 2. the administration of multilaterally or bilaterally agreed quotas, tariff quotas or other restraint agreements or import or export regulations; 3. the issuance of licenses/permits for importation or exportation; 4. The determination of domestic sales prices for imports etc.

³⁸ *Guide to GATT* supra note 31 at 168.

manner, but also that the characterisation of the rules as substantive or procedural is of no relevance⁴⁰.

Although this rule does not imply any obligation on competition standards, it provides foreign private parties vis a vis nationals with fair protection of their competitive interests within national markets⁴¹. This assertion is confirmed through the acceptance and discussion of an article III (paragraphs 1 and 4) claim in the Kodak non-violation competition dispute⁴².

E. TRANSPARENCY

Article X requires publishing trade laws and agreements, refraining from laws' enforcement until they have been published, and administering trade laws in a "uniform, impartial and reasonable manner" maintaining appropriate tribunals for this purpose. The provision's description of "trade laws and agreements" includes the regulation of sales, distribution, inspection and "any other use of the products", and has been interpreted as covering administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases⁴³. As to the requirement of "uniform, impartial and reasonable" administration of the law, panels have elaborated only on "uniformity" establishing that the requirement is satisfied if

³⁹ Id at 164.

⁴⁰ The Member applying differential treatment will have to prove that the differences do not bring foreign products to a less favourable position. European Community-U.S. Sec. 337 of the Tariff Act, *BISD* Sup. 36 (1990) at 345-402.

⁴¹ In this respect it is especially important the issue of the self-executing character of the rule. See *infra* IV.

⁴² Kodak case, *supra* note 24 at 7.1-7.76. On the relation of the national treatment obligation and the non-violation complaints, see *infra* V.B.

⁴³ Kodak case, *supra* note 24 at 10.388.

rules are applied in a substantially uniform manner⁴⁴. However, the relation of this article with the non-discrimination provisions of article I (most favoured nation treatment)⁴⁵ and III cannot be denied. In any case, transparency is required for the general provision of the law and the criteria used for its application together with the enforcement procedures.

III. OTHER URUGUAY ROUND AGREEMENTS COMPETITION RELATED RULES

As to the other Uruguay Round Agreements it is interesting to analyse, on the one hand, the scarcity of competition rules regarding private practices and, on the other, the establishment of national “control” procedures on behaviours that can affect private parties position in international competition. This procedures can have governmental or “judicial” character. Their existence greatly enhances the defence of the competitive interests of private parties regarding government or other business actions. National treatment and transparency provisions do also play a role when dealing with rights of interested people. However, as previously stated, one should bear in mind that the references to private practices are extremely limited, and then, very general.

A. COMPETITION RULES ON PRIVATE PARTIES

⁴⁴ Panel Report on EEC - restrictions on Imports of Dessert Apples; Complaint by Chile. L/3149 *BISD* Sup. 36 (1989)

⁴⁵ A note by the Director-General, dated 29 November 1968, on the applicability of Article I of GATT to the Agreement on Implementation of Article VI, L/3149, includes the following reference to Article X: “Paragraph 3 (a) of Article X ... shall be administered in a uniform, impartial and reasonable manner. These last words would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others”.

From the perspective of the establishment of competition rules affecting private parties, we can classify the rest of the Uruguay Round Agreements in two groups. In the first group, we include those rules dealing with the governments' behaviour as a purchaser of products and services. In the second group, regulation is focused on government intervention in trade operations as a State power.

In the first group, the Agreement on Government Procurement⁴⁶ introduces some rules to avoid the exclusion of competition among private parties. Articles VI.4 and VII.2 impose an obligation not to develop information, or create situations favouring access to it, for a company when this would provide it with a competitive advantage over the others. It is not unreasonable to think that the access to information would provide with a competitive advantage in almost every case. When regulating the selection procedures, article X expressly mentions as goal reaching the optimum degree of international competition. Besides, with the establishment of national treatment and prohibition of discrimination (article III), transparency is encouraged with a detailed description of measures in articles XVII and XVIII.

In the second group, there are few competition rules regulating private parties' behaviour. By virtue of article 11.b of the Agreement on Safeguards⁴⁷, Members have agreed not to adopt "voluntary export restraints, orderly marketing arrangements or any other *similar measures* on the exports or imports side". Among the "similar measures" the Agreement refers to "export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary imports or export licensing schemes, any of which afford protection".

⁴⁶ Agreement on Government Procurement

The obligation does not extend to prosecution and sanction of those modes of behaviour if implemented by private parties. Article 11.3 states only that Members “*shall not encourage or support the adoption or maintenance of public and private enterprises of non-governmental measures equivalent ...*”. The Agreement on Trade Related Investment Measures⁴⁸ allows States to transitionally continue the application of restrictive measures to avoid affecting the competitive position of already established investors (Article 5.2).

More directly focused in private anticompetitive conducts, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)⁴⁹ refers to the abuse of intellectual property rights (article 8.2), without specifying the abusive conduct; and to contractual licences’ control (article 40), again, without describing the cases in which these licenses could be prosecuted⁵⁰. Along these lines, article IX of GATS expressly recognises the anticompetitive effect of certain practices beyond the abuse of monopoly or exclusive position of article VIII by service providers, but none are described. Some descriptions are found in the Reference Paper on Basic Telecommunications⁵¹ which includes a general commitment of Members to maintain adequate measures to prevent anticompetitive practices of major suppliers.

⁴⁷ Agreement on Safeguards (Safeguards Code)

⁴⁸ Agreement on Trade Related Investment Measures

⁴⁹ Agreement on Trade Related Aspects of Intellectual Property Rights.

⁵⁰ However, it is important to note that in the sanction of these conducts, Members will be constrained by the limitations imposed by article 31.

⁵¹ The Reference Paper on Basic Telecommunications refers to: anticompetitive cross-subsidisation; the use of information obtained from competition, and withholding technology and commercial information.

Hence, while Members' obligation not to encourage or support private anticompetitive conducts is well established, a clear commitment on the prosecution of these behaviours does not exist.

B. "CONTROL" OF ANTICOMPETITIVE BEHAVIOR

In the group of agreements focused on the intervention of the State as a power, the Members are obliged to "control" behaviours that can affect international competition, had they been implemented by other States, non-governmental institutions, State monopolies or companies with special privileges, and, occasionally by private parties. They can also become their own controllers. The control can have a governmental or "judicial"⁵² character. Its existence, together with transparency requirements, reveals a greater commitment towards the compliance with trade rules and, consequently, the defence of a competitive environment. This is especially so when considering the "judicial" control, in which private parties may claim compliance before national courts on Members, and, occasionally, on other private parties. In addition, this system contributes to the implementation of the dispute settlement structure by approaching the exhaustion of remedies requirement in State's international litigation affecting individuals.

1. Governmental control

In the case of other *States*, subsidies play a major role. The Agreement on Subsidies and Countervailing Measures⁵³, although recognising their anticompetitive effects, only forbids subsidies conditioned to export results and those discriminating among

⁵² Within this work, the use of the expression "judicial" intends to stress the difference between the (essentially) administrations initiative in defence of "public" interests and the *ex parte* claim of her own rights. Hence, it does not exclude the possibility of administrative intervention in the "judicial" control. This expression has been preferred to "adjudicative" control due to the "adjudicative" character of the subsidies and antidumping procedures.

⁵³ Agreement on Subsidies and Countervailing Duties

national and foreign products (article 3). There is no obligation to control the adjudication of the subsidies in the country of origin of the product. The regulation refers to control in the country of destiny and consists on investigating their existence and effects and, when the State is harmed, in negotiating agreements with the subsidising country or imposing countervailing duties to compensate for the subsidy's adverse effects. As in the case of dumping, the importing States' interests determine the adoption of such measures (article 19.2). Nevertheless, also following the antidumping code⁵⁴, transparency is carefully regulated (article 22).

The Agreement on Technical Barriers to Trade⁵⁵, as well as the Agreements on the Application of Sanitary and Phytosanitary Measures⁵⁶ and the Preshipment Inspection⁵⁷ cover the actions taken by *non-governmental institutions*. It is the Members which determine whether these institutions adapt to the agreements' rules when acting in their territories. The role of the States is a dual one: on the one side they comply with their treaty obligations, on the other they monitor compliance with the agreed standards. Transparency constitutes an obligation that helps to comply with Members' monitoring task⁵⁸.

In the case of *State monopolies or companies with special privileges*, as in GATT article XVII and its interpretative understanding, in the General Agreement of Trade in Services (GATS) Members have the general obligation to avoid undertakings

⁵⁴ Article 12 of the Agreement on the application of article VI of GATT-94.

⁵⁵ Article 8 and Annex C of the Agreement on Technical Barriers to Trade.

⁵⁶ Article 13 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

⁵⁷ Article 2 of the Agreement on the Preshipment Inspection.

⁵⁸ Article 10 (information through special service for Members and "other Members' interested parties") of the Agreement on Technical Barriers to Trade; article 7 and Annex B of the Agreement on the Application of Sanitary and Phytosanitary Measures, (publication and providing information

adversely affecting the application of the most favoured nation clause when supplying the monopoly or exclusive service. Moreover, the member shall ensure that those companies do not abuse their dominant position in national markets when competing for the distribution of services not included in their monopoly (Article VIII). Differing from GATT - which imposed two tests, one by national authorities and another by the WTO - in this case there is only an obligation to inform the Organisation on companies granted monopolistic rights or given exclusive distribution and of the operations in which they are involved. In addition to informing the other Members and the Organisation (Article III.3 and 4), the transparency commitments regarding this control are the publication, or making available in other way, of all measures affecting the working of the Agreement (Article III.1 and 2).

The Understanding on Commitments in Financial Services⁵⁹ imposes some obligations regarding the elimination or, at least, the reduction, of monopoly rights (Para. 1); requires the removal or limitation of adverse effects in other States caused by discriminatory measures, including restrictions on the range of services a given entity may provide, territorial limits on expansion into the entire territory of the Member, and, very generally, “other measures that ... affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member’s market” (Para. 10.1); and, forces Members to ensure that self-regulatory bodies, or “other organisation or association” accord national treatment to foreign financial service providers whenever membership in these bodies is required to deliver those services in the Member in question (Para. 10.2). In addition, the Annex

through special services to Members; and article 2.5,6,7 (information by preshipment inspection services to exporters) and 8 (publication) of the Agreement on the Preshipment Inspection.

⁵⁹ Understanding of Commitments on Financial Services, <http://www..wto.org/wto/services/21-fin.htm>.

on Telecommunications⁶⁰ contains an obligation to allow service providers of other Members access to public telecommunications networks “on reasonable and non-discriminatory terms and conditions” for the supply of any service included in the Member’s schedule. There is no express reference to publication or transparency, but the general rules of GATS apply.

In the *private parties’* case, apart from the GATT dumping rules, TRIPs and GATS agreements are also important. It has already been noted that TRIPs takes into consideration the abuse of intellectual property rights and refers to contractual licences’ control. In this respect Members enjoy a fair amount of scope to employ compulsory licensing in dealing with anticompetitive practices (article 31(k))⁶¹. It is interesting that, for the resolution of Members’ differences on the determination of anticompetitive licences, the Agreement calls for consultations, which, ultimately, lead to a mutual understanding or a bilateral agreement. The WTO is not called to intervene or mediate the difference⁶². Transparency is required through publication, or otherwise making available, measures related to the Agreement as well as through informing the WTO and the other Members (article 63). Along these lines, GATS article IX recognises the adverse competitive consequences of private practices, and recommends consultation among Members to determine, prosecute and sanction the conducts. This provision refers to providing information between Members in terms similar to those of article III, but, in addition, more information may become

⁶⁰ Annex on Telecommunications, <http://www.wto.org/wto/services/12-tel.htm>.

⁶¹ This means that the resource to compulsory licenses as means for restrictive business practices sanctions is open. C. Otero García-Castrillón, *Las Patentes en el Comercio Internacional*. Ed. Dykinson. Madrid. 1997.

⁶² This does not impede demanding the constitution of a panel based on a *non prima facie* action. See Dispute Settlement Understanding, see *supra* note 6.

available, within the limits permitted under national legislation, if a satisfactory agreement for the protection of confidentiality is reached.

2. “Judicial” control; the defence of private parties interests

Several agreements⁶³ establish an obligation to introduce independent procedures⁶⁴ and reviews for the defence of private parties interests in issues related to their competitive position. Except in the case of GATS⁶⁵, this obligation is unconditional. Regardless of the nature of the controlling institution (“arbitral, judicial or administrative”), the procedures and reviews relate to the revision of administrative action upon the petition of private parties⁶⁶. Only in the TRIPs Agreement do the compromises include procedures for resolving disputes between private parties and cases of criminal nature⁶⁷. In any case, when the Agreements include national treatment obligations⁶⁸, they extend to the prescribed procedures⁶⁹. It could be

⁶³ It is interesting to note that this obligation is not included in Agreements on Import Licensing, that, for the rest, details the licensing procedure; and on Sanitary and Phitosanitary Measures.

⁶⁴ That is so in the following cases: article 11 of the Agreement on Customs Valuation; article 13 of the Antidumping Code; article 23 of the Subsidies and Countervailing Measures Code; articles 2j and 3h and Annex II of the Agreement on the Rules of Origin; and article 4 of the Agreement on Preshipment Inspection. When the intervention of an independent authority is not required, it is compulsory to have an “impartial and objective” review of the decisions, as in article X.3.c of GATT and article VI.2 of GATS, or appellate reviews before judicial authorities, as in article XX.2 of the Public Procurement Agreement and article 11 of the Agreement on Customs Valuation.

⁶⁵ Article VI.2.b of GATS points that the obligation falls “where this would be inconsistent with its constitutional structure or the nature of its legal system”.

⁶⁶ The majority of the Agreements explicitly mention private parties intervention: article 11 of the Agreement Customs Valuation refers to importers or any other person responsible of payment; GATT article X.3.b mention “importers”; article XX of the Government Procurement Agreement and GATS article V.2.a mention “suppliers”; and article 23 of the Subsidies and Countervailing Measures Code mentions “interested parties”. However, when this mention is not made, as in the case of the Agreements on Rules of Origin and Dumping, it is self-evident that the procedures are aimed at the private parties protection.

⁶⁷ Article 61 of TRIPs establishes the minimum margins of the criminal conduct and guidelines as to the condemns.

⁶⁸ Dumping, Subsidies, Rules of Origin, and Custom Valuation Agreements.

⁶⁹ Only article XX.2 of the Government Procurement Agreement expressly refers to the non discriminatory character of the process. Articles 2.1 (non-discrimination in procedures, criteria and activities) and 3.1 (non-discriminatory application of laws and regulations) of the Preshipment Inspection Agreement. GATS article XVII establishes national treatment for providers of services or services within the service supply sectors included the List. The article defines the less favourable treatment as the one leading to modification of competitive conditions in favour of national services or service providers. In addition, article VI.1 establishes that measures shall be administered in a “reasonable, objective and impartial manner”. Article 3 of TRIPs establishes national treatment for

affirmed that, this way, a right to effective “judicial” protection is established⁷⁰, although only seldom are its parameters determined. This constitutes an important step forward in the treatment of private parties in international trade⁷¹ and shows the link between international trade and human rights. As it has been said “it is absurd to expect a country that systematically violates basic human rights to faithfully execute and implement the process that the WTO agreements require”⁷².

Only in the Government Procurement Agreement (article XX.2) and in the TRIPs (articles 42-60), are procedural minimum standards established. From the requirement of “non-discriminatory, opportune, transparent and efficient” procedures⁷³, they reach the establishment of representation and assistance rights and minimum deadlines; the regulation of provisional measures, audience to interested parties and witnesses and the evidence; the obligation to reason and notify the decisions⁷⁴; and the models for eventual sanctions.

nationals of Member States and extends its application to the protection of their intellectual property rights.

⁷⁰ Although the WTO does not deal (directly) with private individuals, it stands on values reflected in the preamble when stating the objectives of the organisation, which may well relate to certain human rights obligations. In addition, the text of the GATT (article XX) and other Agreements (as the Government Procurement - article XXIII-) reflects the recognition of supervening non-trade public values which are meant to prevail in the event of conflict with the trade rules. R. Howse, “Making a Home for Human Rights at the WTO”. *Law Quadrangle Notes*. University of Michigan Law School. vol. 43, 2. 2000, at 79-84.

⁷¹ Although from 1947 article X.3.b. of GATT obliged Members to maintain “judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a Court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers. Provided that the central administration of such agency superior jurisdiction within the time prescribed for appeals to be lodged by importers. Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts”; no claim was ever presented in this respect before a GATT Panel. *Guide to GATT* supra note 31 at 297-298.

⁷² R. Howse, supra note 70.

⁷³ Article XX.2 of the Agreement on Public Procurement. For private parties claims procedures, TRIPs articles 41 and 42 refer to “equitable and fair” procedures.

⁷⁴ This rule is also present in article 11.3 of the Agreement on Customs Valuation, which adds an obligation to inform the appellant of any rights for further appeal.

Regardless of the details of the procedural obligations, it is possible to conclude that trade agreements introduce an important control of administrative action, particularly, in its conformity with the compromises acquired. Primarily, this control can and should be implemented at a national level, in accordance with each State jurisdictional system. This way, the system would approach the exhaustion of remedies requirement in States' international litigation prompting from private parties' claims⁷⁵. Therefore, not only international disputes that may well be resolved at internal level would be avoided, but private parties could obtain faster solutions non-dependent on a State's interest in taking over the case.

Another conclusion would be that private parties not only "suffer" the application of the rules, but have also the right to the review of State action. This is so, among reasons on the stream of values beyond, but behind, the Agreements themselves relating to human and economic rights, because private parties are in the position to "survey" States' compliance with international commitments. Therefore, the obligation of Members to provide for effective remedies and review of governmental decisions related to international trade has been clearly reinforced. These ideas are closely related to the issue of the self-executing character of international trade agreements, supporting a positive approach when the norms satisfy certain requirements. Although there are still no rules addressing directly private

⁷⁵ This does not imply that, at the present moment, internal remedies have to be exhausted before the initiation of an international dispute settlement, as is the case with diplomatic protection. However, the case for exhaustion of local remedies is strong and has been defended by different authors, H.Fuijii, "The Kodak-Fuji Dispute: A Spectrum of Divergent Colours and a Blueprint for a new WTO Procedure for Disputes Involving Government Toleration of Anticompetitive Practices". *UCLA J. of Int'l. L & Foreign Affairs*. vol. 2, 2. Fall/Winter 97-98 at 332; and W. H. Barringer, "Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute". *6 Geo. Mason L. Rev.* Spring 1998 at 463-464.

anticompetitive practices, the self-executing discussion merits some attention when looking at the future with a comprehensive view⁷⁶.

IV. THE ISSUE OF SELF-EXECUTING CHARACTER OF TRADE AGREEMENTS

Private parties' right to bring claims based on international trade agreements before national courts opens a new possibility to prosecute anticompetitive behaviour had it been implemented by a state or by another private party. It is also necessary to stress that in some cases, trade agreements establish rights in favour of private parties whose exercise and defence depend to a certain extent on the self-executing character of international treaties⁷⁷.

In legal terms, it is important to state that this problem cannot be studied only from the perspective of the relationship between national legal systems and international law. The problem goes beyond monism or dualism theories since we are to be focused on the existence of an international obligation. Of course, this obligation can be violated, but that would imply a violation of international law. Thus, the problem is essentially on the interpretation of international rules.

⁷⁶ This does also relate to the prospect of some sort of exhaustion of national remedies requirement, and the introduction of a sort of prejudicial interpretative question, in terms similar to the system of the European Union.

⁷⁷ Leaving aside the direct action in human rights related organisations, the defence of private parties interests in international law can only be sought through two mechanisms. Diplomatic protection does not provide with any certainty because it depends on the discretion of the national state, and in no case protects when this one is the violator. When the state has not implemented a national rule on the lines of its international commitment, the recourse to internal jurisdiction based on international rules depends on the determination of their self-executing character.

The universality of Vienna Convention criteria⁷⁸ and the WTO Dispute Settlement Mechanism offer a definitive possibility of a uniform interpretation⁷⁹. Nevertheless, because the lack of an “interpretative action” before the Dispute Settlement Body (DSB)⁸⁰, in other words, of an action for the petition of a specific report on the interpretation of a rule, it is necessary that a panel be established to resolve a difference between the Members.

No such case has been presented⁸¹ and it would be beyond the scope of this article to examine a possible interpretation on the self-executing character of different agreements’ rules. However, it is important to remember that because the rules are addressed to States their use by private parties before national authorities is not impeded. It is sufficient that the rules contain a clear and unconditional mandate directly affecting the interests of a party. Although national governments tend to exclude *a priori* the possibility of resorting to these articles⁸², scholars defend the self

⁷⁸ See supra note 16, articles 31 and 32.

⁷⁹ In United States Standards for Reformulated and Conventional Gasoline (WT/DS2) and Japan Taxes on Alcoholic Beverages (WT/DS88) cases, the Appellate Body held that the interpretative rules of the Vienna Convention constituted customary international law, having applied them in a number of decisions. Moreover, although the Appellate Body was initially reluctant to take into consideration principles and even rules from non-trade international law areas - precautionary environmental law principle in the Hormones (WT/DS26) and international treaties in the pre-WTO Tuna/Dolphin II (GATT Doc.DS29) cases -, in the more recent decisions the trend has changed - Turtles (WT/DS58)-. The present attitude is fully in conformity with the Vienna Convention interpretative criteria.

⁸⁰ Article IX of WTO Agreement gives the Ministerial Conference and the General Council the exclusive authority to give interpretations of covered agreements.

⁸¹ Had it been, although the Decision would only be binding to the parties in the dispute, it would create legitimate expectations among WTO Members, and should be taken into consideration in subsequent related disputes.

⁸² In the United States, section 102 of Pub.L. 103-475, expressly excludes the direct effect of Trade Agreements rules. Since Treaties are not superior to national law, the application of Treaty rules by U.S. Courts is limited. Nevertheless, as Kirgis points out in “International Agreements in U.S. Law”, *ASIL Insight*. 1997, Courts make interpretations in conformity with international obligations or concede direct effect to international agreements’ rules without explicitly declaring their self-executing character. As to the European Community, Council Decision 94/800 on the celebration in the European Community representation as to the issues falling within its competence of the Agreements resulting from the Uruguay Round Multilateral Trade Negotiations (1986-1994), *OJCE* (1994) L336/1, excludes the direct effect of trade rules. However, the statements in this regard are not binding, provided the European Court of Justice competence on interpretation. In case C 53/96 *Hermés International v. Marketing Choice B.V.*, while GA Teasaura supported the self executing character of TRIPs article 50,

executing character of many GATT⁸³ and other trade agreements' rules⁸⁴. During the Uruguay Round, Switzerland presented a proposal to open a discussion as to how private subjects and entities could be increasingly protected from illicit governmental decisions affecting their trading interests⁸⁵. The (rejected) Swiss proposal was based on the observation that trade rules are best protected and implemented when, in addition to the international level, national authorities apply and enforce trade agreements on the basis of individual rights and obligations.

Considering the scarcity and general character of the substantive commitments regarding international competition, the self-executing nature of procedural rules becomes an extremely interesting issue for private parties⁸⁶. Even authors stating that "it becomes strange for a scholar to insist upon direct effect when political institutions have spoken so clearly in contradiction", and that this is "a policy question to be answered in political terms", recognise that "in the EC and the U.S. systems there are

the Court avoided the controversial issue because there was no need to deal with it in resolving the case. (St. 16 June 1998). However, in case C-149/96 *Portugal c. Council*, the Court established that, *in principle*, WTO Agreements are not taken into consideration in controlling the legality of community acts due to the need of preserving Members' margin for negotiation in dispute resolution within the Organisation. Only when the community act expressly refers to a WTO Agreement provision, or when the Community intends to comply with a WTO particular commitment, will the Court consider these Agreements' rules for legality control purposes (St.23 November 1999).

⁸³ As to GATT rules see E.U. Petersmann, "International and European Foreign Trade Law: GATT Dispute Settlement Procedures against the EEC". *Common Market Law Rev.* vol. 22, 3. 1985. at 486. Panel Discussion moderated by P. C. Mavroidis, "Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders?. Would a System of Direct Action by Private Parties Yield Better Results?". *Journal of World Trade.* Vol. 32-2. 1998, at 148-165, the participants pointed different elements present in this debate, as the role of courts in international economic relations, the exhaustion of national remedies and specially, the "bundle" of interests of the world community (differences between States and private parties among themselves and in their "vertical" relation). Regarding the interest issue, E. Fox stressed that within the European Union, direct effectiveness has contributed greatly to a unitary vision of the "common" Community interests.

⁸⁴ As to GATS and TRIPs rules see P. Eekout, "The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems". *Common Market Law Rev.* vol. 34, 1. 1997, at 32-34. As to patent rules, see C. Otero García-Castrillón, *op. cit.* at 292-302.

⁸⁵ GATT Doc. MTN.GNG/NG/8/W67, 24th January.

⁸⁶ This issue has not been studied by scholars probably because the States have implemented internal procedural regulations in accordance with international commitments, or the national Courts have interpreted the existing internal rules in conformity with international obligations. In addition, these

substantial circumstances in which judges are permitted to decide whether international legal rules have direct effect or are self-executing”⁸⁷. When the rules in treaties on international civil procedure, or on the recognition and enforcement of foreign judgements and decisions, establish guarantees or a particular procedural treatment, in addition to their application *ex officio* they can be invoked by private parties. The fact that these rules are included in trade agreements should not change this conclusion. The virtuality of a rule’s self executing character cannot depend upon the nature of the agreement in which it is included. Moreover, in general terms, it is difficult to find coherence in that, by introducing these rules in the international agreements, States could aim at establishing rights in favour of private parties on which they could not rely⁸⁸.

V. DISPUTE SETTLEMENT

GATT article XXXIII, as implemented by the Understanding on Rules and Procedures regarding Dispute Settlement, provide for different situations in which a complaint can be lodged.

“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
 - (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

commitments accord with national constitutional rules recognising the right of access to justice and due process.

⁸⁷ J. P. Trachtman, “Bananas, Direct Effect and Compliance”. *European Journal of International Law*. 1999 at 676-677.

⁸⁸ A. Cassese, “Modern Constitutions and International Law”. *R des C*. vol. 192. 1985-III, at 144, pointed this aspect saying: “States do not feel so sure as to defer ... to international standards ... they enter into international agreements but do not normally set up internal machinery for ensuring that these are complied with by all national authorities, including lawmakers”.

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.”

Therefore, the claims can be due to a *violation*, a *non violation* or a *situation*. It is important to analyse to what extent restrictive business practices related disputes can be resolved within the WTO as it stands. It will be noted that, not only some conditions will have to be fulfilled, but the burden of proof can become a deadlock. Besides, except when a violation complaint can be construed, no final solution can be assured.

A. VIOLATION COMPLAINTS

In these cases, States face a *prima facie* nullification or impairment of the agreements’ advantages⁸⁹. Once the violation is confirmed, reprisals may be authorised by the Dispute Settlement Body (DSB). Anticompetitive practices could be prosecuted through GATT or other multilateral or plurilateral agreements on the basis of rules that, without expressly dealing with competition, could be applied. For this to occur it is necessary that the national governments be involved in the competitive restriction. Although the practice is not extensive, GATT rules are used to resolve the majority of cases.

Various GATT rules could be effective in this regard. National treatment (article III) protects the competitive relation between national and imported products. “Buy national” policies and the incorrect application of competition law or lack of enforcement, can constitute forbidden discriminations. In this vein, the prohibition of

⁸⁹ J.H. Jackson, *World Trade and the Law of GATT (A legal analysis of the GATT)*. The Bobs Merrill Company, Inc. 1969, at 182, refers to the expression as included in several GATT documents.

quantitative restrictions on imports or exports⁹⁰ can be included (article XI), as well as State monopolies or companies with special privileges (article XVII)⁹¹.

The rest of the WTO Agreements' general prescriptions, specially the national treatment provisions, could be used to resolve similar cases. In addition, these Agreements specific but generally vague competition related rules (Private parties and "governmental control") can also be claimed. Proving violation in these cases can become, not only a burdensome task, but a difficult decision for the DSB, which would have to start filling the rules with a more precise content. Finally, the prove and determination of a violation complaint on "judicial control" provisions of the Agreements should not present special problems.

B. NON VIOLATION COMPLAINTS

GATT article XXIII.1.b permits non violation complaints, also known as *non prima facie* nullification or impairment. These are cases in which, although no agreement rule has been violated, the benefits accruing to the Members from the agreements are nullified or impaired. Claims based on anticompetitive practices can fall under this provision. Even when prejudice is established, retorsions cannot be authorised (article 26 DSU).

These claims are based on the legal principles of effectiveness of the concessions, reciprocity and good faith in the protection of the legitimate expectations⁹² for better

⁹⁰ M. Baccheta, H. Horn and P. C. Mavroidis, "Do Negative Spillovers from nationally Pursued Competition Policies Provide a case for Multilateral Competition Rules?". Paper presented at the Florence Conference on Competition Policy, June 13-14 1997. As the Semiconductors case show (European Community-Japan, Semiconductors, *BISD* 35 Sup. 1989), some kinds of export cartels (administrative structure created by Japan through non-mandatory measures entailing sufficient incentives or disincentives for producers and exporters) may constitute violations of article XI.

market access. The intention of the claimants is to protect the competitive conditions created by the agreement⁹³, which clearly resembles the national treatment provision of Article III. The Kodak panel acknowledged that the difference resides in that the latter “calls for no less favourable treatment for imported products in general”, while the former “calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time; when the concession was granted and currently”⁹⁴.

Any governmental measure, including those related to competition law, can affect the competitive conditions in a market. Some scholars believe that the DSB can only address disputes relating to national markets and that there is no possibility of dealing with situations where the injury takes place in foreign markets⁹⁵. However, in dumping, the possibility is expressly provided (article 14 of the Antidumping Code)⁹⁶, and it is not clear why a claim alleging that the agreements benefits are nullified or impaired as a consequence of a Member’s actions on third markets could not be resolved by a panel⁹⁷. This possibility can be specially relevant because it includes

⁹¹ See supra II.C.

⁹² Legitimate expectations is understood as what could have reasonably have been expected as a consequence of the agreements. *Guide to GATT* supra note 31 at 662-663. In the Kodak case, supra note 24 at 10.61, the panel established that “for expectations to be legitimate, they must take into account all measures of the party making the concession that could have been reasonably anticipated at the time of the concession”.

⁹³ United States-European Community, payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins (L/6627), adopted 25 January 1990. *BISD* 37 Sup. at 86-132.

⁹⁴ Kodak case, supra note 24 at 10.380.

⁹⁵ B.M. Hoekman and P.C. Mavroidis, “Competition, Competition Policy and the GATT”. *The World Economy*. vol. 17 2, March 1994, at 141.

⁹⁶ The argument that even in the expressly contemplated dumping case the adoption of antidumping measures by the third state would be intra-territorial since the effects of price discrimination are internalised in that country, does not contradict this assertion. The “internalisation” by Member A of the prejudicial dumping suffered by Member B, does not obscure the fact that Member B suffered that practice and, being unable to react, asked and obtained member A (self-interested) “assistance”.

⁹⁷ This does not mean that the case would not be difficult, specially because the Member (A) in whose market the damages for the other Member (B) are produced, could also be affected (“internalising the damages”), being generally the first to file a complaint (against Member C). Then, the “third party” (Member B) could join the claim as an interested party (article 10 of the Dispute Settlement

cases in which private parties practices not adequately prosecuted in one Member, have the effect of nullifying or impairing other Member's benefits in a third State market.

The majority opinion in the 1960 Report on International Competition did not recommend the use of article XXIII.1.b to resolve conflicts caused by restrictive business practices⁹⁸, choosing instead to refer the parties to negotiation without the participation of experts called by the GATT. Thus, for many years there were no cases. This led some authors to conclude that “the issue (multilateral agreement on competition) is not really a first-order concern of governments”⁹⁹. This conclusion seems a little bit premature, given that there may well be many reasons for the lack of practice.

To this end, the recent conflict between the United States and Japan regarding the photographic film and paper market (Kodak case)¹⁰⁰, provides with some ideas on the development of such a concern. In the Kodak case, the U.S. took action against Japan's “unreasonable toleration” of “systematic anti-competitive practices” through Section 301 of the Omnibus Trade and Competitiveness Act¹⁰¹. Defending Kodak's petition, the U.S. alleged that, with the support of Japanese legislation, Fuji fashioned an exclusionary distribution system through the use of horizontal price co-ordination,

Understanding) or present its own claim for the same practice (article 9 of the DSU, rules on procedure where there are two or more claimants).

⁹⁸ See *Report ...* supra note 9 at 172-173. However, the minority opinion defended this means for those cases in which consultations, in which experts should participate, did not conclude with a settlement. *Id.* at 176-177.

⁹⁹ M. B. Hoekman and P.C. Mavroidis, supra note 94 at 122.

¹⁰⁰ See supra note 24.

¹⁰¹ Pub. L. 100-418. 102 Stat. 1107 (1998). The Section is aimed at the promotion of U.S. trade by retaliating (through suspension of trade concessions or other measures) against States whose activities are deemed to be unreasonable or unfair (violating or not an international rule). It constitutes an

retail and resale price maintenance, rebates, monitoring and discipline. The U.S. also asserted that Fuji colluded with four main wholesalers to distribute Fuji's brand exclusively throughout their entire sales chain. The legislation, while facially neutral, was said to create a market structure designed to resist foreign penetration.

Several interpretative problems appear when trying to apply article XXIII.1.b in the competition law field. To begin with, one has to consider the meaning of the word "measure" from the action-omission and the normative points of view. It is not clear whether inaction can constitute a measure. This is not an insubstantial issue because, as we have already observed, the lack of enforcement of competition rules affects international trade and may frustrate the Members' expectations from the agreements. This uncertainty, may refrain States resorting to the *non-violation complaints* in the competition field.

While some authors¹⁰² conceive a "measure" as only positive action, others¹⁰³ do accept that inaction may be actionable under article XXIII. Adopting a teleological interpretation in conformity with the text of the article, the emphasis has to be on the results, not on the means. Hence, as the nullification or impairment of the benefits derived from the agreements is the main evil to avoid through article XXIII, the "measures" that could lead to this result should be interpreted in a flexible manner. This implies that not only positive actions, but also passive tolerance can be included.

effective intimidation tool. It has been declared compatible with WTO by a panel report adopted the 22nd, December, 1999. WT/DS152/R

¹⁰² P. C. Mavroidis, *supra* note 19 at 869.

¹⁰³ M. B. Hoekman and P.C. Mavroidis, *supra* note 94 at 141; T.J. Shoebaum, "The Theory of Contestable Markets in International Trade: A Rationale for "Justifiable" Unilateralism to combat

The Kodak case does not refer explicitly to this issue and does not define “measure” in terms of the action-inaction distinction¹⁰⁴, but establishes that its effects should be continuous¹⁰⁵. The challenged measure in Kodak was, among others, the Japanese competition laws, not their absence or lack of enforcement. Taking into consideration the panel reasoning regarding the normative character of the governmental “measure”, it could be predicted that the question of action-inaction would have to be resolved in a case by case basis.

As to the normative character, GATT “jurisprudence” is clear. The panel on semiconductors agreed that non-binding governmental measures had to be GATT consistent as long as the State has sufficiently incentivized them¹⁰⁶. The Kodak panel admits this definition but does not consider that examination of the incentives is the only available criteria. It chooses a broad approach through the analysis of the similar effects between a binding and a non binding measure¹⁰⁷.

One of the major problems with article XXIII.1.b as a means for resolving international competition conflicts, is the evidence. Although one commentator seems to believe the contrary¹⁰⁸, the panels’ general practice¹⁰⁹ and article 26 of the UDS, make clear that the claiming party has to prove in detail her allegations. The causal link between the measures and the nullification and impairment of the agreements’

Restrictive Business Practices?”. *Journal of World Trade* vol 30 3. 1996 at 176, only in cases where there was a normative obligation to act.

¹⁰⁴ Citing the *Concise Oxford Dictionary*, the panel refers to “legislative enactment” and “suitable action to achieve some end”. supra note 21 at 10.41.

¹⁰⁵ Kodak case, supra note 24 at 10.57-10.59.

¹⁰⁶ Semiconductors case, supra note 90 at 154-155.

¹⁰⁷ Kodak case, supra note 24 at 10.49 and 10.50.

¹⁰⁸ P.C. Mavroidis, supra note 19 at 689, “*La partie qui introduit la mesure litigieuse devrait avoir la charge de la preuve, portant, éventuellement, sur le contraire*”.

¹⁰⁹ See *Guide to GATT* supra note 31 at 749

benefits has to be demonstrated in more than a *de minimis* grade¹¹⁰. In pure internal cases, and even in sophisticated legal systems, the investigation and proof of anticompetitive behaviour and its effects on the market is extremely complicated. How could it not be when there are no basic rules of reference?. The evidentiary problem will be more difficult in cases where a claim is based on the lack of proper enforcement of competition rules. Without intending any evaluation of the case, in Kodak, the United States could not prove a causal relationship between the Japanese practices and its frustrated trade expectations. Therefore, the resource to article XXIII.1.b becomes extremely burdensome for the complaining party.

Moreover, Members are not compelled to resort to article XXIII.1.b to resolve disputes regarding competition related conflicts. If a non-violation action is successful, and the panel decides that a Member's non-violation measure nullifies or impairs the benefits of another Member, article 26 of the DSU states that the offending state will not be forced to revoke it. The panel can only recommend a "mutually satisfactory adjustment" to the parties. But any suggestion of its content shall not be binding. Thus, in addition to a "public exposure" of the case, the most that a complaining party can gain is a "recommendation" (not even an obligation) to negotiate. This does not guarantee any kind of success of the negotiation. As the solution would be, in the best of the cases, in negotiation, why would a State use the dispute settlement procedure, which, in every case requires an initial non-satisfactory consultation between the parties?.

¹¹⁰ Kodak case, supra note 24 at 10.84.

On the other hand, regardless of the panel report, the fact that there are no binding international rules on competition means that there is no legal constraint against the adoption of retorsions. There is, however, a high risk of infringing trade rules as the areas covered by the WTO agreements has widened.

Contrary to Hoekman and Mavroidis' conclusion¹¹¹, the limited number of cases exploring article XXIII.1.b's margin of action does not necessarily reflect a lack of concern of the governments about multilateral competition regulation, but a contradiction among the objectives they affirm to pursue (international competition, market opening) and the means they use (a, sometimes aggressive, unilateralism). Or perhaps, then, State's concern *a sensu contrario*: "escape from multilateralism". Until recently, it was not so difficult to modify other States' actions through unilateral trade mechanisms. Moreover, the extraterritorial application of competition law, however, does not always permit reaching the desired objectives, such as the changing of the (anticompetitive) distribution structures in a different country¹¹². Besides, GATT article XXIII.1.b., as we have seen, is not only problematic (the establishment of causality without any standards that can be used as reference is a significant burden), but does not guarantee any solution.

C. SITUATION COMPLAINTS

¹¹¹ See supra note 94.

¹¹² In Kodak case, supra note 24, it could have been possible to construe the case as one of extraterritorial application of U.S. competition law, due to the "direct, substantial, and reasonably foreseeable effects ... on export trade and export commerce with foreign nations, of a person engaged in such a trade or commerce in the U.S" that causes "injury to export business in the U.S." Section 7 of *Sherman Act*. However, the "satisfactory solution" of the case would have been dependent on the "economic" or "business" concerns of Fuji in the U.S. market. In other words, the modification of Fuji behaviour in Japan could not have been enforced by U.S. authorities. Thus, although a fine could be enforced in the U.S., the opening of the Japanese market could not be reached without Fuji agreeing to change its distribution scheme in that country. This is so due to the international law territorial limit to

Article XXIII.1.c permits States to call for the appointment of a panel when “any other situation” exists. Although the European Community tried to invoke it against Japan¹¹³, it is not clear whether it can be used in cases regarding anticompetitive practices. However, the scope of the *situation complaints* has never been studied by a panel, and the documents referring to it show a lack of agreement¹¹⁴. Some commentators argue that the rule is designed for exceptional and emergency situations, thus restrictive business practices are not included¹¹⁵. Others believe that this is not an appropriate instrument for adjusting the GATT framework¹¹⁶. A third group defends its use in competition related matters¹¹⁷. This position seems more acceptable, at least theoretically, because it is the only that gives this article a different content from other GATT provisions.

On the one hand, differing from article XXIII.1.b, a Member’s behaviour would not have to be the source of the nullification or impairment of the agreements benefits. Thus, private party actions could be prosecuted. This is consistent with the drafting history of article XXXIII.1.c, as it was conceived as a general escape clause to enable adjustments of the Members’ mutual rights and obligations when there were changes

the jurisdiction to enforce. For an equivalent situation with absolutely different results see, *U.S. v. Pilkinton plc*, Civ. A N°CV 94-345.

¹¹³ European Community-Japan, market access problems due to marked concentration and interlinking of the structure of production, finance and distribution in Japan, which made it difficult for foreign suppliers to establish Japanese distribution channels. Doc. L/5479, 8 April 1983. The European Community abandoned the claim, because “it would be premature and presumptuous on the Community’s part to prejudge the outcome of the initiative which it had taken” and because “had taken into account of the various recent measures taken by the Japanese government, which went in the right direction”. The representative of Chile said that, as presented by the European Community, this complaint was too general and open-ended”. C/M/167, 6 May 1993 at 9.

¹¹⁴ The situations described in this article include, the ones related to employment and other macroeconomic factors and the ones related to “other factors”. *Guide to GATT* supra note 31 at 658-660.

¹¹⁵ M. B. Hoekman and P.C. Mavroidis, supra note 94 at 139.

¹¹⁶ E. U. Petersmann, “Violation Complaints and Non Violation Complaints in Public International Law”. *German Yearbook of International Law*. vol. 34. 1991, at 227.

¹¹⁷ T.J. Shoebaum, supra note 103 at 176.

to the circumstances prevailing at the negotiations. On the other hand, exceptional situations are covered by GATT article XXI exceptions and by article XXV waiver or their equivalents in other trade agreements. As to the other possible systemic crisis, article XII deals with the balance of payments referring to the intervention of the International Monetary Fund in articles XIV and XV.

However the DSU (article 26.2) points out that, in the case of determination of nullification or impairment, the panel could only formulate “resolutions and recommendations”. Therefore, as in article XXIII.1.b, there is no obligation for the parties to take action to eliminate or modify the adverse conduct or to compromise on a solution.

VI. CONCLUSIONS

The possibility of WTO Agreements for covering international conflicts over restrictive business practices is extremely limited. Although the coverage of competition related aspects has been extended, there are few rules relating to private parties conducts, and, when existing, they are vague. The dispute settlement mechanism is of little or difficult use due to its burdens and proposed solutions.

First, a government has to be involved in some way. Only in the case of Intellectual Property and Services are the anticompetitive practices referred to private parties, and then the WTO will not have a role in conflicts between States, who shall hold consultations and resolve the dispute through negotiation. However, provided that governmental intervention exists, some violation complaints could be successful through general rules like national treatment. Second, except for the case of the more

clear provisions on “judicial control”, violation complaints of the competition and “governmental control” rules will present evidentiary problems and situate the DSB in the position of making a start in filling the provisions by taking account of competition matters in specific cases.

Finally, if there is no trade rule violation (non-violation complaints), the claiming State will have to prove the causal link between its behaviour and the nullification or impairment of the agreements’ benefits. The proof is especially burdensome when there are no minimum standards of reference, which could lead to some presumptions, thus reducing the burden to a certain extent. Moreover, if there is a nullification and impairment determination, the panel can only make non-binding recommendations. The solution to the conflict would have to be negotiated. Therefore, even when resorting to a multilateral organisation, bilateralism seems to be the only final solution to most competition problems in current WTO regime.

Despite the weaknesses of the described competition related rules, their mere existence together with the WTO Agreements reinforcement of the “control” mechanisms provide a good perspective for a multilateral agreement on competition minimum (substantive and procedural) standards. Considering that a prospective vision needs to be comprehensive, avoid contradictions and not lose sight of the international trade objectives, several reasons can support this assertion.

First, even without an agreement in the field, it is more than possible that common grounds on competition will start to be established when Members claim violation of

substantive and “government controlling” competition related rules. The DSB will be called to evaluate conducts without normative references.

In addition, the recognition of private parties defence of their own competitive interests within national jurisdictions merits attention. It reveals the WTO system concern on private parties as the ultimate addressees of the Agreements and reveals a definitive governing of the rule of law. Moreover, although the development of this “right” seriously contrasts with aprioristic rejections of Members like the United States and the European Community Commission of the self-executing character of any trade agreements rules, for those concerned with political issues it is possible to predict that, in the competition field, general rules establishing minimum substantive standards will hardly satisfy the self-executing requirements.

Finally, a WTO Agreement on competition would place the Members dispute resolution beyond the bilateral arena and contribute to improve and ease their resolution.