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COMPETITION ELEMENTS IN INTERNATIONAL TRADE AGREEMENTS: A POST-URUGUAY ROUND OVERVIEW OF WTO AGREEMENTS

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I. Introduction

This overview attempts to avoid adopting any predetermined perspective vis-à-vis the desirability of any particular approach to the trade and competition interface. It has the more limited aim of examining, in a preliminary way, what World Trade Organization (WTO) Agreements may be considered to cover by way of competition-related matters. In doing so, however, it attempts to take an "open-minded" view on how far those agreements may actually go, with a view to stimulating further reflection and discussion. It does not deal with bilateral agreements on enforcement co-operation, or United Nations Conference on Trade and Development (UNCTAD) provisions on restrictive business practices, since the focus here is the trade-competition interface. Nor does this version deal with other trade agreements with a more regional focus -- e.g. North American Free Trade Agreement (NAFTA), Australia-New-Zealand Closer Economic Relations Trade Agreement (UNZCERTA), etc. -- as this would have meant a significantly longer paper. It remains possible, of course, to extend the analysis to the latter if there was a wish to do so in light of the priorities for future work.

II. General overview

There is a complex overlap between competition concepts and norms and those of trade liberalisation:[1]

In some instances, the removal of border trade barriers may provide only limited market access in the absence of action on, for example, monopoly or market dominance issues. Such matters - from a domestic policy perspective - may be the prime subject matter of competition policy. This is the case in a number of services sectors, of which telecommunications is perhaps the clearest example.

In other cases (where significant liberalisation has already occurred through removal of tariffs and other border measures) there is potential for restrictive practices of various kinds to undermine the value of concessions. For instance, the way technical standards are developed (e.g. by industry associations or private standards-writing bodies), promulgated, and translated into mandatory measures may lead to restriction of market access. Similar issues arise where self-regulating professions or associations control entry through licensing and certification. Along the same lines, public and private monopoly may become instruments of protection of a particularly non-transparent kind, favouring local providers for example in their purchasing decisions (hence, the General Agreement on Tariffs and Trade (GATT) provisions on State Trading Enterprises and the panel litigation surrounding, e.g. the practices of Canadian provincial liquor boards).

Thirdly, it has been argued that some issues that have traditionally been conceptualised as *trade* matters may be usefully reconceived when approached from the perspective of being competition problems that could be addressed through either the application of competition concepts within trade

1. See for instance, M.J. Trebilcock (1998), "Competition Policy and Trade Policy: Mediating the Interface" in R. Howse, ed., *The World Trading System: Critical Perspectives on the World Economy Vol. IV The Uruguay Round and Beyond*, Routledge: London, pp. 352-391.

institutions, or transboundary application of domestic competition law (the oft-cited example being anti-dumping).

Fourth, trade agreements may need to hedge the possibility of certain kinds of market access guarantees being misused for anti-competitive purposes.

III. The World Trade Organization Agreements (WTO)

a) The General Agreement on Tariff & Trade (GATT)

While the provisions of GATT have been interpreted as dealing primarily with trade-restricting practices of governments, a number of GATT provisions appear to bear, directly or indirectly, on business practices. This note outlines some of the potentially relevant provisions.

Article II:4

Paragraph II:4 provides:

> "If any contracting party establishes, maintains or authorises, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule."

This provision is based on a recognition that there are "behind the border" practices that can raise the level of protection against imports beyond that which is provided for by border measures bound in a Member's Schedule. It would appear to aim at disciplining those practices so that commitments on border protection are not effectively circumvented. In this case, there is a proscription of conduct by an import monopoly that operates to afford protection "on the average" in excess of that provided for by the bound level of protection for the product in question. This applies where a contracting party "establishes, maintains or authorises" the import monopoly "formally or in effect".

When it comes to interpreting the kinds of practices covered by this provision, it may be useful to recall the reasoning followed by the 1988 Panel under GATT (1947) with respect to the Canadian import, distribution and sale of alcoholic drinks by provincial marketing authorities [2].

The Panel found that, in this case, differential mark-ups on imported as opposed to domestic alcoholic beverages could only be justified to the extent that such a differential was commensurate with differential costs of marketing the imported products. In arriving at this conclusion, the Panel was required to address argumentation that the differential was nonetheless warranted on grounds of "normal commercial considerations". In doing so, the Panel addressed matters such as what would constitute the normal commercial behaviour of firms, and normal conditions of competition:

> "The Panel noted Canada's statement that, in some instances, the differential mark-ups also reflected a policy of revenue maximisation on the part of provincial liquor boards, which

2. BISD 35S/37.

> charged higher mark-ups on imported than on domestic alcoholic beverages because they marketed imported products as premium products and exploited less-price elastic demand for these products, and that this policy was in accordance with the General Agreement because revenue maximisation was justified by normal commercial considerations.
>
> The panel considered that a monopoly profit margin on imports resulting from policies of revenue maximisation by provincial liquor boards could not normally be considered as a "reasonable margin of profit".....[I]n accordance with the normal meaning of these words in their context of Article II and Article 31 of the Havana Charter...."*a reasonable margin of profit" was a margin of profit that would be obtained under normal conditions of competition (in the absence of the monopoly)."*

This provision has particular interest because it rests on a clear recognition that certain practices inside the border which are a function of market structure (in this case, exploitation of monopoly power) should be taken into account when it comes to assessing whether or not market access is being maintained and should be, accordingly, covered by "trade" obligations. It is the **overall** protective effect, inclusive of certain market structure factors, that is to be evaluated. The provision applies only to monopoly for the import of goods, not the distribution of goods.

However, if the fundamental object and purpose of this provision is to secure the integrity of market access commitments against impediments based on certain forms of internal market structure, how far does that extend ? It seems clear that the provision covers monopolies, whether public or private, where those monopoly rights are granted by formal governmental measures, such as legislation or regulation, and it was certainly an instance of this kind that was covered by the Panel Report referred to above. Thus the provision appears to cover what might be called "direct" governmental measures where the monopoly is itself a public entity. It would also appear to cover the situation where the particular actions at issue may be undertaken by an entity that is itself "private" but the fact that it has been authorised as a monopoly in the first place is sufficient to bring it under the discipline.

Furthermore, the adverbial wording *"in effect"* suggests that the obligation may be applicable also in certain circumstances where there is not even formal authorisation by the government. Under this interpretation, the question may be raised as to whether the absence of formal government authorisation would not necessarily be sufficient to quarantine, e.g. certain exclusive distribution and retailing networks for imported products from coverage by this provision. On this basis, the obligation would be equally applicable in circumstances where, as a matter of fact, a monopoly is *effectively* established, authorised or maintained by the government.

It may also be noted in this context that the requirement that "protection" may not be increased above the bound level does not appear to be restricted to a particular class of conduct. It would appear to cover any conduct - whether explicitly targeted at imports or not - which impedes the competitive opportunity for imports. Thus, in the 1992 Panel Report on Canadian Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (*Beer)*[3] a Panel found that a minimum price requirement imposed by a government-sanctioned monopoly violated National Treatment, even though imposed on both domestic and foreign product, as it was set in such a way as to limit the ability of lower-cost foreign producers to compete on price.

3. BISD 39S/27.

It may be worth noting that in its 1989 Report on Korean Restrictions on Imports of Beef, the Panel took the view that the Interpretative Notes to the GATT required Article II:4 to be interpreted in accordance with Article 31 of the Havana Charter.[4] Article 31:5 provided that import monopolies would import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product". The Panel considered it inappropriate to apply Article II:4 in view of the existence of quantitative restrictions in this case. It stressed, however, that "in the absence of quantitative restrictions, an import monopoly was not to afford protection, on the average, in excess of the amount of protection provided for in the relevant schedule, as set out in Article II:4."

Article III

Article III, relating to the national treatment obligation may well be of importance when it comes to competition related matters. This provision is fundamentally about the maintenance of competitive conditions, independent of actual trade effects. It may be useful to note certain aspects of Panel reasoning on this point. In the 1987 Panel Report on United States Taxes on Petroleum and Certain Imported Substances (Superfund)[5], it is noted :

> "Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions in the General Agreement, it does not refer to trade effects...A demonstration that a measure inconsistent with Article III:2 first sentence, has no or insignificant effects would therefore in the view of the panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired."

It may also be noted that more recently, the 1998 Panel Report on Japanese Measures Affecting Consumer Photographic Film and Paper also considered the meaning of "competitive conditions" in Article III:4.[6] The Panel stated that:

> "We recall our earlier findings (with respect to the Article XXIII:1(b) non-violation complaints) that none of the eight distribution "measures" cited by the United States had been shown to discriminate against imported products, either in terms of a *de jure* discrimination (a measure that discriminates *on its face* as to the origin of products) or in terms of a *de facto* discrimination (a measure that in its application upsets the relative competitive position between domestic and imported products, as it existed at the time when a relevant tariff concession was granted). In this connection, it could be argued that the standard we enunciated and applied under Article XXIII:1(b) -- that of "upsetting the competitive relationship" -- may be different from the standard of "upsetting effective equality of competitive opportunities" applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e., when the concession was granted and currently. . . . Here, as in our examination of the same measures in light of the US claim of non-violation nullification or impairment, the evidence cited by the United States indicates that the measures neither (i) discriminate on their face against imported film or

4. BISD 36S/268.

5. BISD 34S/136.

6. Findings at para 10.20 (WT/DS44/R 31, March 1998) Panel Report Adopted 22 April 1998.

> paper (they are formally neutral as to the origin of products), nor (ii) in their application have a disparate impact on imported film or paper. . . . . Additionally, as we also noted earlier, single brand wholesale distribution is the common market structure -- indeed the norm - -in most major national film markets, including the US market. It is unclear why the same economic forces acting to promote single brand wholesale distribution in the United States would not also exist in Japan. . . Accordingly, and essentially for the reasons already stated in our findings on non-violation nullification and impairment, we find that the United States has failed to demonstrate that any of the distribution "measures" in issue accords less favourable treatment to imported film and paper than to film and paper of Japanese origin. The US claim under Article III:4 must therefore be rejected."[7]

As to the reach of this National Treatment obligations regarding imports, it applies "in respect of all laws, regulations and requirements *affecting* their internal sale, offering for sale, purchase, transportation, distribution or use." (emphasis added).

A number of questions may arise in this context. Is a competition law a "law, regulation or requirement" in the sense of Article III? If so, are there situations where those laws can "affect" internal sale, offering for sale, purchase, transportation, distribution or use of imports as well as domestic production? If so, would the obligations be potentially breached in any situation where, as a matter of fact, those laws favour domestically produced goods over imports?

This, it may be noted, is not a question of whether there is a national treatment obligation as regards the actual private practices themselves. Rather, it is a question of the manner in which the actual competition law or regulation itself is applied when it comes to matters that affect the competitive relationship of imported and domestically produced goods.

It may be worth noting in this context the reasoning that has been used by Panels when addressing disputes relating to the obligations of Article III. The cases concerned reflect a view that there is no reason to interpret the term "affecting" in a restrictive manner. For instance, the 1958 Panel on Italian Discrimination Against Imported Agricultural Machinery[8] noted that:

> "...the text of paragraph 4 referred .to laws and regulations and requirements *affecting* internal sale, purchase, etc., and not to laws, regulations and requirements governing the conditions of sale or purchase. The selection of the word "affecting" would imply...that the drafters of the article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products in the internal market." [emphasis in the original].

This reasoning was followed also by the more recent 1989 Panel Report on United States Section 337 of the Tariff Act of 1930[9]. That panel noted, *inter alia*, that:

> "the text of Article III:4 makes no distinction between substantive and procedural laws, regulations and requirements enforcement procedures cannot be separated from the substantive provisions they serve to enforce...Nor could the applicability of Article III:4 be denied on the

7. Ibid at para 10.380-10.382.

8. L/833 adopted 23 October 1958.

9. BISD 36S/345.

> grounds that most of the procedures in the case before the Panel are applied to persons rather than products"

Bearing the above in mind, it may be worth considering, by way of illustration, the subject of the "rights of foreign firms" from this perspective. The conclusion of that survey appears to be that there is, in fact, no discrimination between "foreign" as opposed to "domestic" firms when it comes to respective rights in respect of competition proceedings. What if that had not been the case? One could take the example of the right to bring a private anti-trust suit. If it was the case that a "foreign" firm (which exported goods to the market concerned and considered that certain firm behaviour in the market concerned was impeding its exports) did not have access to such a right but domestic firms did, could this be considered to be a matter covered by Article III of the General Agreement?[10] Be that as it may, it is worth reiterating that there would be no GATT issue unless there is a link to discrimination against imported products.

Article XI

Article XI prohibits governmental use of most quantitative import and export restrictions and prohibitions. As such it does not discipline purely private actions or measures, although a question of some potential interest is whether there are any possible implications of this discipline for how certain private practices are treated.

In this regard, it may be interesting to consider reasoning used in a past dispute settlement case under GATT 1947. In the 1988 Panel Report on Japanese Trade in Semi-conductors[11], the Panel found that Article XI measures were applied even though they did not have the status of being legally binding. In reaching this finding the Panel noted, *inter alia*, that:

> "any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure."

In this particular case, the Panel concluded that the absence of formally legally binding obligations in respect of exportation " amounted to a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements."

In reaching this finding the Panel had taken the view that it needed to be satisfied on two essential criteria:

> "First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second the operation of measures to restrict export...was essentially dependent on Government action or intervention."

This may raise the more general question of what kind of measures, short of formal legislation, would be sufficient to amount to an export restriction under Article XI.

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10. Moving beyond this hypothetical situation, some authors (Bacchetta *et al*, "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, revised and unpublished August 1997) have suggested that the reach of this obligation could extend even further.

11. BISD 35S/116.

Article XVII

This article on State-Trading Enterprises, imposes certain obligations with respect to the conduct of enterprises that are either state-*owned* or state-*controlled* or have been granted by the state "exclusive or special privileges."[12] The possible application of the GATS to such sectors is discussed below. The 1989 Panel Report on Korean Beef considered the scope of Article XVII. The Panel took the view that as the GATT did not concern the organisation and management of import monopolies but only their operations and effects on trade, the existence of a producer-controlled monopoly could not in itself be in violation of the GATT 1947.

With respect to state trading enterprises so defined, Article XVII requires that purchase and sales, including exports and imports should be made "in accordance with commercial considerations"[13]; moreover, other Contracting Parties should be afforded "adequate opportunity to compete for participation in such purchases and sales".

Although the relationship of Article XVII to other GATT provisions has been considered by several Panels[14], no Panel has ever found measures in violation of Article XVII itself. In the case of the national treatment issue, for instance, the 1992 *Beer* Panel Report went even further in considering the applicability of Article III:4 to a government monopoly for the distribution of alcoholic drinks. The Panel stated that it:

> "fully recognised that there was nothing in the General Agreement which prevented Canada from establishing import and sales monopolies that also had the sole right of internal delivery. The only issue before the Panel was whether Canada, having decided to establish a monopoly for the internal delivery of beer, might exempt domestic beer from that monopoly. The Panel noted that Article III:4 did not differentiate between measures affecting the internal transportation of imported products that were imposed by governmental monopolies and those that were imposed in the form of regulations governing private trade. . . . Canada had the right to take, in respect of the privately delivered beer, the measures necessary to secure compliance with laws consistent with the General Agreement relating to the enforcement of monopolies. This right was specifically provided for in Article XX(d) of the General Agreement. The Panel recognised that a beer import monopoly that also enjoyed a sales monopoly might, in order properly to carry out its functions, also deliver beer but it did not for that purpose have to prohibit unconditionally the private delivery of imported beer while permitting that of domestic beer. For these reasons the Panel found that Canada's right . . . did not entail the right to discriminate against imported beer inconsistently with Article III:4 through regulations affecting its internal transportation."

12. While Article XVII applies to trade in goods, not services, it is worth noting that in many countries, state trading enterprises might include enterprises in sectors like broadcasting, telecommunications, and financial services where entities typically have to acquire a license or charter and conform to a variety of regulatory requirements in order to carry on business in the sector in question.

13. The 1984 Panel Report on the Canadian Administration of the Foreign Investment Review Act (FIRA) BISD 30S/140. considered the way in which the terms "commercial considerations" should be considered in the context of this Article. The Panel stated that: "the Panel considers that 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."

14. FIRA, Supra note 14 at 40, para. 5.16; Canadian Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, Supra note 2; and *Beer*, Supra note 3.

In the case of the 1989 Panel Report on Thailand - Restrictions on importation of and internal taxes on cigarettes the Panel stated that: "[t]he Thai Government may use (a governmental) monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions."[15]

Article XX(d)

This article sets out the general exceptions to the GATT 1994. It provides that as long as governmental measures are not applied in a manner: (1) constituting a means of arbitrary or unjustifiable discrimination; or (2) a disguised restriction on international trade then WTO Members may adopt or enforce them where "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the enforcement of monopolies operated under (Articles II:4 and XVII . . ."

The 1955 GATT Working Party on The Haitian Tobacco Monopoly[16] considered whether the licensing of tobacco imports by the local monopoly required a release under Article XVIII:12. The Panel concluded that Article XX(d) would be applicable to the measure if the basic regulations were not otherwise in conflict with any provisions of the GATT (1947). More recently, the 1988 Panel on Japanese Restrictions on Imports of Certain Agricultural Products[17] examined certain import quotas maintained by Japan. The Panel concluded that the enforcement of laws and regulations, providing for an import restriction made effective through an import monopoly inconsistent with Article XI:1 was not covered by the Article XX(d) exception. The 1992 *Beer* Panel limited the scope of the import monopoly to extend its market power to other areas. The Panel found that Canada had the right to take, in respect of the privately delivered beer, the measures necessary to secure compliance with laws consistent with the GATT 1947 relating to the enforcement of monopolies under Article XX(d). The Panel recognised that a beer import monopoly that also enjoyed a sales monopoly might, in order properly to carry out its functions, also deliver beer but it did not for that purpose have to prohibit unconditionally the private delivery of imported beer while permitting that of domestic beer.

Article XXIII:1(b):

The scope of governmental "measures" to which Article XXIII:1(b) may be deemed to apply was addressed in the 1998 Panel Report on Japanese Measures Affecting Consumer Photographic Film and Paper which considered the competitive relationship of the market place in considering the meaning of governmental "measures". The Panel also held the Government of Japan accountable for the actions of various private committees to which the government had delegated functions. With respect to governmental measures generally, the Panel stated that:

> "In GATT jurisprudence, most of the cases of non-violation nullification or impairment have dealt with situations where a GATT-consistent domestic subsidy for the producer of a product has been introduced or modified following the grant of a tariff concession on that product. The instant case presents a different sort of non-violation claim. At the outset, however, we wish to make clear that we do not *a priori* consider it inappropriate to apply the Article XXIII:1(b) remedy to other governmental actions, such as those designed to strengthen the competitiveness of certain

15. BISD 37S/200.

16. L/454, adopted on 22 November 1955, BISD 4S/38.

17. BISD 35S/163.

> distribution or industrial sectors through non-financial assistance. Whether assistance is financial or non-financial, direct or indirect, does not determine whether its effect may offset the expected result of tariff negotiations. Thus, a Member's industrial policy, pursuing the goal of increasing efficiency in a sector, could in some circumstances upset the competitive relationship in the market place between domestic and imported products in a way that could give rise to a cause of action under Article XXIII:1(b). In the context of a Member's distribution system, for example, it is conceivable that measures that do not infringe GATT rules could be implemented in a manner that effectively results in a disproportionate impact on market conditions for imported products. In this regard, however, we must also bear in mind that tariff concessions have never been viewed as creating a guarantee of trade volumes, but rather, as explained below, as creating expectations as to competitive relationships."[18]

b) Agreement on safeguards

The Preamble to the Safeguards Agreement states, *inter alia*, that members recognise "the importance of structural adjustment and the need to enhance rather than limit competition in international markets."

Article 11:1(b) provides that

> "...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**."
>
> The "similar measures" are specified to include -
>
> "export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection" **to the importing country's industry**.
>
> Furthermore, Article 11:3 provides that:
>
> "Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1."

The question arises as to what would amount to "encouragement" or "support" by a government of, e.g. "export moderation" undertaken by private enterprises? Are these criteria different from, e.g. the criteria applicable in Article XI referred to above?

c) General Agreement on Trade in Services (GATS)

The GATS contains a number of general obligations and disciplines that bind all Members irrespective of the specific commitments in their schedules with respect to particular services sectors, as well as general provisions on matters such as dispute settlement. In addition, the GATS also sets out a range of obligations that only apply to sectors in respect of which the Member in question has made specific commitments in its schedule. It is worth noting that GATS Article 1(3) covers "measures taken by non-governmental bodies in the exercise of [delegated] powers."

18. Ibid at 10.38.

In the case of the general obligations and disciplines, binding on all Members irrespective of specific commitments, Articles 7 ("Recognition"), 8 ("Monopolies and Exclusive Service Suppliers") and 9 (Business Practices") contain a number of competition-related provisions. Articles 7 and 3 on Domestic Regulation and Transparency may also be relevant.

Article 7 has the apparent objective of preventing the use of licensing, certification or related requirements as a barrier to entry for foreign providers. The Article *permits* recognition of another Member's licensing or certification on a bilateral or plurilateral basis provided that "adequate opportunity" is afforded to other Members to negotiate their accession, and that the arrangements are not used as a means of discrimination between countries. Article 7 also states that "wherever appropriate" multilaterally agreed criteria are to be employed for recognition and harmonisation of these requirements.

Article 8 requires that monopolies whether public or private respect, *inter alia*, the Most-Favoured-Nation obligation in Article 2 of the GATS. In addition, with respect to sectors covered in a Member's schedule, Article 8 requires the Member to ensure that a monopoly supplier does not "abuse its monopoly position" when it competes in the supply of services outside its monopoly rights.

Article 9(1) provides that "Members recognise that certain business practices of service providers, other than those falling under Article 8, may restrain competition and thereby restrict trade in services." Article 9 obliges Members to accede to any request for consultation with any other Member concerning such practices "with a view to eliminating" them. It also imposes a duty to co-operate in the provision of non-confidential information of relevance to the matter in question.

d) Understanding on commitments in financial services

The "Understanding on Commitments in Financial Services" sets out a framework, supplementing that of the main GATS text, on the basis of which Members have made specific commitments, in their schedules, with respect to measures on financial services. This Understanding contains a number of competition-related provisions:

- Paragraph 1 requires each member to list in its schedule existing monopoly rights; members "shall endeavour to eliminate . . . or reduce" the scope of such rights.

- Paragraph 10.1 states that each Member "shall endeavour to remove or to limit any adverse effects" on other Members of a range of non-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".

- Paragraph 10.2 obligates Members to ensure that self-regulatory bodies, securities or other exchanges or markets, "or any other organisation or association" accord national treatment to foreign financial service providers, whenever membership in these bodies is *required* in order to deliver financial services within the Member state in question.

e) Annex on telecommunications

The Annex 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. This includes access to private leased circuits.

f) Reference paper on basic telecommunications

The reference paper contains a general commitment of Members to maintain adequate measures to prevent anti-competitive practices of major suppliers.[19] In addition, it gives several specific examples of anti-competitive practices. These are:

- Anti-competitive cross-subsidisation;
- Use of information obtained from competitors; and
- Withholding technical and commercial information

Although not defined, anti-competitive cross-subsidisation would presumably occur if a service supplier or group of service suppliers that have market power, under the Reference Paper's definition of a "major supplier" were to use the supranormal profits, or rents, it gains from that segment to sustain a loss-making operation in a segment of the market where competition exists.

With respect to the broader concern of securing effective market access, the most important provisions in the reference paper are arguably those on interconnection with networks of major suppliers. Such interconnections are essential to competition, because otherwise the customers of one supplier cannot communicate with those of others. As Bronckers and Larouche note, "in large part, [these provisions] also seek to prevent anti-competitive behaviour by a major supplier..."[20] Essentially, interconnection must be on terms, conditions and rates that are "non-discriminatory" and the quality "no less favourable" than provided to subsidiaries, affiliates or third parties. Where there is a disagreement between a major supplier and a foreign provider on the terms, conditions or rates for interconnection, dispute settlement is mandated.

g) Agreement on Trade-Related Intellectual Property Rights (TRIPS)

Article 8 provides that:

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

The language "provided they are consistent with this Agreement" may be interpreted to mean that Article 8 is not a blanket limitation or exception clause. Rather, it may be interpreted as confirming

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19. A major supplier is defined as one with the power "to materially affect the terms of participation (having regard to price and supply", either due to control over essential, network facilities or its market position. This would most frequently the case with a former monopolist, whether public or private.

20. M.C.E.J. Bronckers and Pl Larouche (1997), "Telecommunications Services and the World Trade Organization", *31 Journal of World Trade 5,* p. 28.

that the potential bases for any actions to prevent abuse of intellectual property rights are to be those specifically provided for under other provisions of the Agreement, for example compulsory licensing of patents.

In addition, Article 40(1) recognises that 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. Furthermore, Article 40(2) provides that nothing in the TRIPs 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. Moreover, a Member may adopt 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 case of trademarks, the owner's right to prohibit unauthorised use is limited to cases where the use "would result in a likelihood of confusion." However, where an identical sign is used "for identical goods and services", the likelihood of confusion is to be presumed. This raises the question of whether, in that case, the assumption is rebuttable. In general, the limitation of protected rights to where confusion exists reflects the underlying fair competition and consumer protection rationales for protecting marks.

In the case of geographical indications as well (Article 22), the rights which Members must guarantee related to prevention of use of indications "in a manner which misleads the public" or "constitutes an act of unfair competition" within the meaning of the *Paris Convention.* Some additional protections must be provided in the case of wine and spirits.

With respect to patents, compulsory licensing is explicitly contemplated as a remedy, including where [Article 31(k)] an anti-competitive practice has been determined to have occurred. The conditions of compulsory licensing in this circumstance are less onerous than otherwise (for example the license need not be non-exclusive, nor authorised predominantly for the supply of the Party's domestic market). Furthermore, "the need to correct anti-competitive practices may be taken into account in determining the amount of remuneration [to the patent holder] in such cases"...

h) Other provisions[21]

- The Agreement on Technical Barriers to Trade includes rules to ensure that the preparation, adoption and application of technical regulations, standards and conformity assessment procedures *by non-governmental bodies* are not more trade restrictive than necessary (e.g. Articles 3,4,8).

- The Agreement on Preshipment Inspection includes detailed rules for the activities of *preshipment inspection entities* (Article 2).

- The Agreement on Subsidies regulates "market displacement", "price undercutting" and "voluntary undertakings" by exporters in detail (Articles 6,18) and explicitly requires the examination of "trade restrictive practices and competition between foreign and domestic producers" in determinations of "injury" (Article 15).

21. See also Petersmann, "Competition Policy Aspects of the Uruguay Round: Achievements and Prospects"

- What may be interpreted to be competition policy rationales may be invoked for other provisions/agreements. For example dumping, which is "condemned" under Article VI, and against which anti-dumping duties may be imposed subject to conditions defined in the Agreement Implementation of Article VI of the GATT 1994, may reflect, in some instances, a strategy of predatory pricing.

- The concept of non-violation nullification and impairment, based on Article XXIII of the GATT, may provide a basis to challenge denials of market access that fundamentally undermine bargained concessions. It has been argued that it is not precluded that restrictive business parties could be a factor in such situations.

- The Agreement on Trade-Related Investment Measures provides for a review by the Council for Trade in Goods of its operation not later than five years after the entry into force of the WTO Agreement. In the course of this review. “The Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy.”

- The Agreement on Government Procurement also might be relevant when it comes to certain anti-competitive private practices - for instance, by requiring transparency in government procurement decisions

IV. Conclusion

The above survey of provisions in the WTO Agreements is not exhaustive either in descriptive or in analytic terms. However, it does suggest that the WTO Agreements do in fact deal to some extent with the trade and competition interface. The more interesting questions, it is suggested, are (a) how far does that coverage actually (or potentially) extend: and (b) is it necessary or desirable for this to be rationalised or clarified in a more coherent way and/or extended further.

This paper does not attempt to deal with the second question except to the extent that the exercise of reflection on what is or may be there already may shape one’s view on the question of “what is to be done”. Rather, the paper limits itself to the former question. Of course, it is for WTO Members themselves to interpret the rights and obligations under those Agreements. The object of this paper has been essentially to act as an aid to reflection by occasioning certain questions that may (or may not) be considered relevant to the matter at hand.