COMPETITION POLICY : STRENGTHENING INTERNATIONAL COOPERATION AND RULES

Annexes to the report of the Group of Experts

ANNEXES TO THE REPORT

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ANNEX 1

Reflection paper of Professor Immenga

Substantive Rules of an International Competition Law

I. Introductory Remarks: Principles

It might be considered as too ambitious or even adventurous to develop substantive rules which are designed to govern conflicts in international competition. The globalization of economies, however, increasingly raises the question of an international code as a basis to overcome rising controversies between governments and between firms with regard to aspects of competition.
To start a discussion it seems to be advisable not to develop rules of a code but to present a non-exhaustive list of principal issues and options. This list should start with some observations with regard to principles, which might determine the formulation of rules.

First principle: The preservation of market access

As a consequence of the Uruguay Round achievements and the reduction of governmental restrictions of trade there will be a considerable increase of free movement of goods and services. In contrast to the EC framework, however, the newly developed GATT rules do not regulate private anticompetitive behaviour. This is a disregard of firms' possibilities to restrict cross-border market access. Consequently, there have to be instruments against private actions complementary to the GATT rules which might replace governmental barriers by private ones.

Second principle: Development of rules as close as possible to existing GATT rules.

To preserve a consistency of rules and institutions and to promote political acceptance the WTO system should be extended along the lines of the present system in order to develop international competition rules as a plurilateral agreement. (Annex 4 of the WTO Agreement)

Third principle: Harmonization of competition and trade rules.

There is a rising consensus of the interrelation of competition and trade issues. The respective rules have to be developed in consistency. It should be studied, to which extent trade rules (e.g. antidumping) could be substituted by competition rules.

Fourth principle: Introduction of basic rules which are internationally accepted.

Already at the present stage of developments in competition policy it seems to be possible to achieve a general consensus on lower levels: a ban on clear anticompetitive behaviour as price cartels or a misuse control of dominant firms.

Fifth principle: Basics of implementation

A cautious approach requires the implementation of international rules as part of national law, which are minimum rules and applicable to international activities only.

Sixth principle: Careful enlargement of existing institutions of international trade.

It seems necessary to establish an international forum for consultations and information exchanges which, furthermore, might act as an addressee of notifications.

Seventh principle: Development of rules against governmental business behaviour.

Governments might act like private firms. They own corporations and grant monopolies in certain branches of the economy. Furthermore, state institutions might influence private business actions. Rules against private business actions should be applicable in case of government actions as well.

Eighth principle: Development of rule-oriented competition and trade policies.

Competition issues to a large extent and even more trade issues are influenced by politics. To achieve a more stable framework for international trade the influence of politics should be gradually reduced and replaced by general applicable rules.

II. Horizontal Agreements

1. Hard core cartels

Issues:
This form of horizontal agreements concerns price fixing, output restraints, market division, customer allocation, collusive tendering. These kinds of behaviour are opposed to competition and - as for instance market divisions - impede cross-border market access. It might be discussed, if this list should be extended (e.g. according to UNCTAD CODE Sect.D).

Options:
- Prohibition
- Misuse control
- Exemptions (de minimis rules or for export cartels)

An absolute ban with regard to the above mentioned forms of cartels seems to be appropriate. It would be based on a general consensus. The prohibition should include export and import cartels. Both are directly opposed to trade objectives. They should be permitted only, if they are necessary to enter foreign markets. A ban on export cartels would be in line with recent GATT rules on voluntary export restraints (VER; Art.XIX GATT as a result of the agreement on safeguards). De minimis rules might be envisaged with regard to a local character of cartels or to quantitative limitations.

2. Other anticompetitive agreements (horizontal cooperation)

Issues:
Competition policy has to distinguish between "naked" cartels and those agreements, which by their nature imply positive effects. An often cited example is R & D cooperation. Agreements of this kind might improve rationalization or even increase competition in the field of parameters which are not concerned by the cooperation.

Options:
- Exclusion from competition rules during a first stage when developing an international code
- Individual exemptions
- Group exemptions
- Introduction of a rule of reason
- General misuse control

Cooperation agreements should not generally be excluded from competion rules. They might produce severe anticompetitive effects or even disguise "naked" cartels. Individual exemptions as provided by the EC-law are impossible, as long as there is no supranational authority. Group exemptions or a legalization of certain kinds of agreements as for instance according to the German law seem to be difficult to achieve on an international level. A general misuse control does not provide sufficient predictable criteria. Therefore, the introduction of a rule of reason similar to the US-law seems to be preferable. Quantitative thresholds might be envisaged. The rule of reason should refer expressly to three points:
- Balance against procompetitive effects
- Balance against efficiencies
- Cooperation as a condition to enter a new market (e.g. joint purchasing)

III. Vertical Restraints (Distribution Strategies)

Issues:
Distribution strategies include contractual and economic ties such as vertical price fixing, exclusive arrangements, and the inducement by economic pressure or influence upon a supplier to behave anticompetitively. Thereby vertical restraints may harm competition and restrict cross-border trade.

National competition policies and international code of conduct generally contain a strict prohibition of resale price fixing. Beyond this common understanding policies with regard to vertical restraints are controversial because of their contradictory effects. They may be anti- or procompetitive. The evaluation depends on various factors:
- Balance of intra- and interbrand competition
- The market structure, in particular dominance of one of the acting or contracting firms
- Extent of vertically practised systems
- Anti- and procompetitive effects may vary in different countries

Options:
- Besides resale price maintenance no general prohibition because of the uncertain competitive effects of vertical restraints.

- Dealing with vertical restraints in relation with dominance only. This approach would reflect the relevance of the market structure and an often prevailing intention of monopolizing. Wide spread parallel contractual systems, however, are disregarded.
- Specific exemptions might be considered according to products (e.g. automobiles), services (e.g. pubs), or distribution systems (e.g. franchising). This is one of the legal instruments of the EC-Law when it deals with vertical restraints. But it does not seem to be an appropriate approach in a worldwide system. Detailed provisions would be necessary and the difficulties to achieve an overall agreement will be insurmountable.
- The Draft International Antitrust Code (by the Munich Group)[1] proposes a misuse control with complementary presumptions. This kind of control provides a flexible response while presumptions may grant at least a certain degree of legal security.

IV. Abuse of Intellectual Property Rights

Issues:
- Industrial property right laws grant legal monopolies or at least monopoly-like positions. This implies an unavoidable conflict with competition laws. One of the objectives of competition laws is the delimination of the legal scope of industrial property right laws. What is inherent in the granted monopoly? Potential conflicts arise with licensing practices.
- The legal monopolies provided by industrial property right laws may be extended by exclusionary practices (licensing contracts might include non-competition or non-contestation clauses). These practices will cause harm to competition similar to the effects of vertical restraints. Furthermore, these practices might be used to create or strengthen market power.

Options:
- Conflicts between industrial property right laws and antitrust laws as well as abuses might be prevented by detailed, though not exhaustive lists of clauses which are regarded to be inherent in the legal monopolies or acceptable under standards of a rule of reason. This is basically the approach of the Draft International Antitrust Code and the German law.
- Anticompetitive effects of the exercise of intellectual property rights might be qualified under general rules for horizontal and vertical agreements. Exemptions might be granted individually or by group exemption. The EC-Law has been developed on these lines.
- The US-Law similarly applies its general rules of dominance, horizontal and vertical agreements. Restrictions which are deemed to be anticompetitive but justified with regard to the intentions of industrial property right laws might be qualified as reasonable.

The last approach is in accordance with the TRIPS agreement which deals expressly with abuses of intellectual property rights (Art.40) under the heading of "Control of Anticompetitive Practices in Contractual Licences". The obligations imposed on the contracting parties are not far-reaching. In general, however, they are determining the rationale of a general applicable solution. It might be discussed, whether specific rules beyond TRIPS will be necessary. An institutional extension of the WTO, however, has to comprise the enforcement

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[1] published in Fikentscher/Immenga, Draft International Antitrust Code, 1995; Aussenwirtschaft, 1994, 331; Antitrust & Trade Regulation Report, 1993, Vol. 65, No. 1628, Special Supplement

of anticompetitive effects of the abuse of intellectual property rights.

V. Dominance

Issues:
- Market dominance - by one or more enterprises - is generally accepted. Divestiture has not become a common practice of competition policy even in countries, where authorities dispose of this instrument.
- Dominance might be detrimental to competition. Dominant firms tend to increase their market power (monopolizing). Restrictive practices harm customers and suppliers or competitors. Exclusionary effects are obviously detrimental to international trade.
- Rules against the abuse of a dominant position might be conduct or result-oriented. In this context policies might aim at the protection of competition or competitors.
- Abusive practices are vertical restraints or actions against competitors. Exclusive dealings, tying arrangements as well as predatory pricing or rebate practices have to be mentioned. Discrimination practices have to be included. Art.86 EC-Law as well as the German law include an abuse by exploitation of consumers. This view, however, might easily result in price controls.
- Practically it is difficult to ascertain a conduct of predatory pricing (see AKZO-case)[2]. Antitrust practice, however, has developed some appropriate standards. With regard to trade issues it is clear, that efficient rules against predatory pricing may substitute antidumping rules which include the risk of protectionist abuses by petitioners and antidumping authorities.

Options:
- The US-Law contains general prohibitions against monopolizing; separately it deals with vertical restraints. This approach extends the abuse by conduct-approach to non-dominance. It seems to be more appropriate, however, to start from market structure.
- Art.86 of the EC-Treaty may serve as a model. Its application should be strictly conduct-oriented. Exploitation abuses, however, should be excluded. The denomination of specific practices might be subject of further discussion.

VI. Merger Policy

Issues:
- It has to be questioned, if time for a real international merger policy already has come. Merger policy is the instrument of competition policy which comes very close to industrial policies. These policies are by their nature still national ones. Consequently, there are considerable divergencies with regard to mergers in competition law. Different standards are applied. They might be competition-oriented like in the European Union or they are considered as a part of a broader economic policy. In the latter case the decisive criterion is the public interest standard.
- Considering this background any endeavour to bring about a convergence of substantative rules does not seem to be appropriate. Developments and progress might be achieved in the

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[2] Commission ABl. 1985 L 374/18-23; ECJ Case C-62/68, 1991, 3359

area of process, but not in substance.

Options:
- Any regulation in the area of merger policy might build upon the OECD-Study by Wood/Wish recently submitted. Regulations have to be brought about step by step.
- A convergence of procedural requirements has to have priority. This is particularly important with regard to notifications. Thresholds, time limits, and specifications of information should be harmonized.
- All relevant proposals agree on the necessity of a close cooperation of all competition authorities concerned. Cooperation has to refer to an exchange of relevant information, an understanding on appropriate investigations based on mutual assistance, and on harmonized rules on confidentiality.

VII. Public Undertakings/State-Sanctioned Monopolies/State Action

Issues:
- Undertakings under government control dispose of a special status. In principle they are financially independent and in practice they cannot go bankrupt. Therefore they can behave on markets irrespectively of business aspects. It might be questioned, whether they should be obliged to behave according to market principles.
- Enterprises to which the state granted exclusive rights are in a similar position. They are free from market restraints and may use their powers to impede competition.
- It might be argued that these particular situations of enterprises in the economy reflect specific public interests. This means, that market-oriented rules will not be applicable or at least not to their full extent.
- State owned enterprises and granted monopolies should be considered as instruments of national economic policies. Control and influence of governments will be used to pursue public interests and to impose respective conduct on their enterprises and monopolies. Competition law particularly on an international basis has to decide, to which extent state influence on markets should be regulated.

Options:
- An international competitive order might impose the obligation on public undertakings and state-sanctioned monopolies to behave according to market principles. It has to be recognized, however, that a broad discretion determined by a business judgement rule has to be respected. It might be difficult, therefore, to enforce this kind of obligation.
- The EC-Treaty goes much further. Art.37 provides the elimination of all exclusive trading rights and monopolies. Of course, this remedy will not be available on an international level.
- Art.90 of the EC-Treaty starts from the assumption of an unrestricted application of the competition rules. There is one exemption only for restraints of competition which are appropriate, indispensible an proportional to meet a specific public purpose. (Art.90 Sec.2 EC-Treaty). The Draft International Antitrust Code is following this line. It has to be recognized, however, that the application of such an exemption requires a definition of public interests independently from national aspects.
- The authorization of anticompetitive behaviour by states presents a specific problem which in particular has been dealt with by the US-State Action Doctrine. The EC-Law addresses this problem only with regard to public undertakings and state-sanctioned monopolies. States are

not permitted to influence these undertakings in a way, which is contrary to the Common Market rules of competition. This approach will surely cover the most frequent forms of state action and should be extended to all undertakings independently of any institutionalized state influence.

Closing remarks:

Obviously the formulation of substantive rules depends heavily on existing institutions. This is true for measures of enforcement as well. Some allusive remarks have already been made in the context with specific rules. In general, it should be made clear, that gradual steps seem to be appropriate. They range from registration or notification to investigations, publications, recommendations, and prohibitions. There should be a discussion, which of these measures of enforcement shall be attributed to which of the above mentioned restraints of competition.

ANNEX 2

Reflection paper of Professor Jenny

The relationship between trade policy and competition policy raises several substantial problems.

1) First the objectives of the two types of policy are not the same. Whereas in most countries antitrust law and competition policy are designed to promote market structures or processes which will lead to economic efficiency and are not primarily concerned with fairness, trade policy is concerned with maximizing the opportunities for international trade (securing market access) and, to a certain extent, with fairness (for example in antidumping procedures).

   Some horizontal anticompetitive practices tend to restrict market access (such as for example an international cartel or a concerted boycott by manufacturers of a country to deal with distributors of their country who buy from foreign manufacturers) and their elimination will improve both economic efficiency and market access.

   But it is also true that situations which do not necessarily impede competition (or efficiency) nevertheless entail market access difficulties. For example vertical restraints of trade between a manufacturer and its distributors or the existence of vertically related firms in a country may be acceptable from the point of view of the national competition laws (in particular when there are numerous competing national manufacturers) but may restrict market access for foreign firms.

2) Second, the scope of competition laws is restricted in many ways; Competition laws usually appy to behaviour of firms or undertakings supplying goods or services but not to the behaviour of buyers (whether private or public) or to acts of governments; What is more, in each country, various types of regulations exempt specific sectors from antitrust laws or limit the scope for competition in sectors which are not exempted. So access to markets can obviously be impaired by behaviour or acts of government which cannot be caught by antitrust laws (whether at a national or an international level).

3) Third, competition policy and competition laws do not discriminate among firms according to their nationality whereas trade policy does. Competition policy enforcers are indifferent as to the functioning of a market on which there are 10 firms of equal sizes from the same country and the functioning of a market on which there are say eight national firms and two foreign firms. From a trade policy perspective the two situations are different.

4) Fourth, competition policy and trade policy use different yardsticks to judge reality. Thus antitrust laws tend to rely on the consideration of market processes (do the firms act independently) and market structures (does a merger lead to the creation of a dominant position) to determine whether a situation restricts competition. Trade

specialists rely on performances to determine whether or not a remedy is needed (if there ae no significant American exports to Japan then the situation must be corrected).

5) Fifth, remedies in the trade aea and the competition area are quite different. Whereas remedies in the competition laws are typically designed to increase competition (through injunctions or penalties), remedies "against unfair practices take the form of restrictions on access to the import market" or "of negotiated global import or export targets" (G. Feketekuty, "The new Trade Agenda", Group of Thirty, Occasional Paper, Washington DC) which often reduce competition or prevent it.

Consequences of these observations:

I) The problem of trade in its relation to competition is extremely complex and not fully understood. What is clear is that one has to distinguish between the objective of fairness and the objective of efficiency which are in certain cases consistent and in other cases inconsistent; between acts of states (subsidizing, not enforcing competition rules at home, regulating etc...) and acts of firms (dumping, participating in an international cartel, blocking artificially access to a market etc...); between acts originating in the exporting country or in the importing country or truly international acts.

I do not know at this point of serious empirical studies analyzing which type of behaviour or acts are the most frequent and/or the most important when considering impediments to free trade. Yet such a study would be extremely valuable (in this respect one could recommend that a research program "on the causes and costs of various types of impediments to international trade" should be undertaken analogous to the "Research on the cost of Non-Europe" which the EEC commissioned at the end of the eighties).

Given their diversity, there is no reason to believe that all of the acts and behaviour which impede international trade and/or competition can be treated the same way. This means that different types of measures and/or institutional arrangements must be sought simultaneously. This means that there are several fora where the question of trade and competition should be simultaneously examined.

II) The prospect for an agreed set of international competition principles (appying to firms of trading nations) which would significantly and simultaneously develop competition and ensure fairness and access to markets in international trade at the multilateral level is limited (see, for example E.M. Graham and J.D. Richardson "Summary of Project on International Competition Policy", Institute for International Economics).

Whereas some common rule could conceivably emerge in the area of horizontal practices of firms (such as a ban on horizontal cartels whether national or international, export catels and import cartels), there will be a lot of difficulties to find common rules in the areas of vertical restraint of trade or of abuses of dominant positions both because there is no consensus among economists on the appropriate measures and because there may be conflicts between measures which could be considered to increase competition and efficiency and measures which could be conceived to ensure market access.

The likelihood of a consensus on the substance of rules governing international trade and

competition will be increased if a larger proportion of the trading nations have domestic competition laws and if these laws are more similar. Thus it appears that encouraging convergence of national laws is possible a prerequisite and certainly a facilitating device to further the cause of free trade among nations. Valuable work in this area can be done within the context of OECD and possibly within the UNCTAD.

Simultanzously in each nation a greater consistency must be achieved between the rules governing competition and the rules governing anti-dumping.

III) The prospect for a significant role for the WTO (or a WTO affiliated organization) in the direct enforcement of mutually agreed upon international competition rules applying to firms of trading nations is remote for various reasons. On the one hand, the direct enforcement of these rules by an international body implies that this body either has extensive investigatory and enforcement powers in the nation of the alleged offending firms or that it can rely on the competition authorities of that country to use their own investigatory powers at the request of the international body to enforce the international law against domestic firms. Both solutions imply that the trading countries give up national sovereignty. Whereas such a solution is possible in the context of voluntary bilateral or regional agreements among countries having similar levels of development and/or common borders, it seems much more difficult to achieve at a world level.

It would seem that a system in which national authorities enforced the international rules themselves (i.e. these rules would be provisions voluntarily integrated into their respective national competition laws) would be preferable. It is probably easier to convince two countries that each should have a provision in its domestic competition law prohibiting export cartels than to convince them to agree to an international law (enforced by an international body) prohibiting export cartels.

Along those lines I would endorse some of the proposals set forth by E. Fox (in Comparative Competition and Trade Policy Project). (item 2 : these consensus principles should be incorporated by the contracting nations into their national antitrust laws (...); item 6 : Nations whose commerce is injured by consensus wrongs launched from or in another contracting nation should be accorded the right to request enforcement of the injuring nation's antitrust law and, failing satisfaction, they should be accorded the right in the injured nation to seek enforcement of its antitrust law; item 8 : nations should accept as permissible use of national law to reprehend [acts of persons of another contracting nation performed largely on the territory of the latter nation] if the acts are wrongs under [the international agreement] or factual wrongs under the law of both the injuring and the injured nation and they significantly affect the regulating nation's commerce).

The role of the international body (with regard to firms behaviour) would then be uniquely:

1) to establish procedures which have to be followed by the national authorities having jurisdiction over the firms when they investigate cases in which a foreign government (or a foreign firm) alleging an illegal conduct in international trade causing harm in its domestic markets has requested the procedings (for example

which data must be gathered by the national authority prior to making a decision);

2) to verify that these procedures have been followed;

3) to play a direct role only if it is found that
a) there was no national competition law or authority or no provision for international restraints of trade in the national law
b) no action was taken by the national authority on the complaint
c) the standard international procedure was not followed by the national authority (for example the relevant data was not gathered before the adoption of a decision).

IV) These solutions are not incompatible with some of the proposals put forth by F.M. Scherer in "Competition Policies for an Integrated World Economy" although, on the whole, Scherer assigns a larger role to the international body (which he calls International Competition Policy Office) in the enforcement area (with the assumed collaboration of national authorities) than what we have suggested is feasible.

One of the interesting proposals of Scherer is proposal 2 : " ... all substantial single-nation export and import cartels and all cartels operating across national boundaries must be registered and the mechanisms of their operations must be documented with the ICPO." (and made public). Indeed as he points out (quoting Judge Brandeis)" Sunlight is said to be the best disinfectant; Electric light the most efficient policeman".

V) The above proposals are directed at solving one of the international trade problems (i.e. frictions which arise from anticompetitive behaviors by firms). Now as we mentioned earlier there are probably many other sources of trade frictions (such as national regulations on norms and standards, government subsidies, acts of governments in procurement markets etc...). These other sources of frictions or of distortions are likely to increase with the degree of state intervention in market mechanisms. Thus coordinated deregulation and privatizations should be promoted.

The WTO seems to be the appropriate forum to define rules on the acceptable behaviour of government and to enforce them.

ANNEX 3

Reflection paper of Professor Petersmann

Issue: What type of approach should be followed to achieve international rules on competition? - Proposals for a "building block approach"

1. Why the EC's Regional Experience is Important for the WTO

a) The WTO aims at a deeper "integrated approach"

For half a century, the post-war system of international economic cooperation rested on *separate* worldwide agreements and institutions for the international movement of goods, services, persons, capital and payments. International competition policies relating to goods, services, investment and intellectual property have also been regarded as separate. This post-war approach differs from the EC's "integration approach", which underscores the mutually supporting role of the liberalization of goods, services, persons, investments and of common competition rules for market integration. It also differs from the, albeit less comprehensive, integrated regulation of the international movements of goods, services, persons, investments and related payments, intellectual property rights, environmental and competition problems in the 1994 Agreement establishing the World Trade Organization (= WTO). The WTO's "integrated approach" and attempt at "deeper integration" have increased the need for competition rules protecting market access and market presence in the context of WTO law.

b) The EC's unique "integrated competition law" experience is relevant for the WTO

The EC's experience in the international regulation of economic integration, and in negotiating and administering international trade agreements with supplementary "competition rules" (in the broad sense, as used in Articles 85 ff of the EC Treaty, covering both governmental and private anticompetitive practices), is unique in the world. Its significance goes far beyond economic arguments (such as promoting economic efficiency and consumer welfare through deregulation and undistorted competition). The respective provisions in the EC Treaty, the EEA Agreement, the 'Europe Agreements', the EC's Free Trade Area Agreements with EFTA countries, the Agreement on Partnership and Cooperation with Russia, in the bilateral EC-USA Agreement, and also the unilateral application of EC competition law to foreign anticompetitive practices offer a variety of complementary multilateral, bilateral and unilateral approaches to "trade and competition", which can serve as "building blocks" for negotiations on worldwide competition rules. The "European acquis communautaire" of liberal trade and competition rules, the need for international cooperation between EC and foreign antitrust authorities in the international enforcement of EC competition law, and the EC's interest in improving access to foreign markets and a "level playing field", by inducing other countries to enforce effective competition laws, suggest that the EC is in a better position than any other country to initiate negotiations on worldwide competition rules.

The reasons for combining trade and competition rules in a regional context are likewise valid in the WTO context. For instance:

aa) Rules on the liberalization of private market access barriers and distortions are a logical complement to the liberalization of governmental tariffs and non-tariff trade barriers and have proven to be essential for the integration of markets. Thus, the General Agreement on Trade in Services (GATS) explicitly recognizes that "effective market access" (Article XIX) may not be achieved without supplementary rules on anticompetitive business practices (Article IX), "monopolies and exclusive service suppliers" (Article VIII). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) explicitly acknowledges that its objective "to reduce distortions to international trade" (Preamble) requires rules on e.g. the "control of anti-competitive practices in contractual licences" (Article 40).

bb) Competition rules can help to fill "gaps" in trade policy rules (cf. Article 90 EC Treaty) and, in view of competition policy's focus on consumer rights, to overcome the "producer bias" of trade rules (cf. Article 91 EC Treaty). The WTO Agreement includes a large number of competition rules which deal with trade-related competition issues in an unsystematic piecemeal manner.

cc) Trade rules (such as those of the WTO) can provide a negotiating forum, a "policy review mechanism" and a dispute settlement system for negotiating, coordinating, supervising and enforcing international competition rules.

dd) Reciprocal international competition rules are necessary for reforming domestic competition laws (e.g. exemptions for export cartels) and for rendering them more effective (e.g. their application to foreign anticompetitive practices without jurisdictional conflicts)[1]. They need to be adjusted to alternative trade policy instruments (cf. the prohibition of VERs, OMAs and compulsory cartels in Article 11 of the 1994 Agreement on Safeguards).

c) <u>There seems to be enough political support for multilateral competition rules</u>

The territorial scope of the principles of EC competition law has been continuously expanded to now more than 25 countries in Europe. The EC Commission intends to include competition principles inspired by Articles 85, 86, 90 and 92 of the EC Treaty also in its future trade agreements with the countries around the Mediterranean Sea and with successor states of the former Soviet Union. Most of these countries are GATT/WTO contracting parties, or are applying for GATT/WTO membership, and are likely to support - for economic, political and legal reasons (such as promoting a rule-oriented settlement of international competition policy conflicts) - the extension of an "integrated approach" to the WTO. The North

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[1] On the "domestic policy function" of the "reciprocity principle" and of reciprocal "package deal negotiations" for overcoming <u>domestic</u> political opposition to trade and competition policy reforms see: E.U. Petersmann, Why Do Governments Need the Uruguay Round Agreements, NAFTA and the EEA? in: Swiss Review of International Economic Relations (Aussenwirtschaft) 1994, 31-55.

American Free Trade Area (NAFTA) and some other free trade area agreements, such as the Australia-New Zealand Closer Economic Relations Agreement (= ANZCERTA) and the Andean Common Market Agreement, are also based on integrated sets of trade and competition rules, albeit of a less ambitious character compared with those contained in the EC Treaty. In its recently published assessment of the Uruguay Round Agreements, the UNCTAD Secretariat concluded that "there appears to be a general consensus among States that negotiations should be undertaken on an agreement on trade-related competition policy under the aegis of the World Trade Organization."[2] This assessment might not yet be shared by all competition policy bureaucracies (notably in the USA). Yet, an EC initiative for multilateral competition rules is likely to be supported by a large number of developed and less-developed countries.

2. "Building Blocks" for a "Plurilateral Agreement on Competition and Trade" (PACT) in the WTO

An attempt to *supplement* and *extend* the existing unilateral, bilateral and plurilateral approaches by worldwide competition rules should build on the existing experiences and aim at their progressive extension to like-minded countries ("building block approach"). Just as the GATT 1947 was modelled on the more than 30 bilateral trade agreements concluded by the USA on the basis of its 1934 Reciprocal Trade Agreements Act, the development of worldwide competition rules in the WTO should build on, and would be facilitated by, a progressive multilateralization of the existing bilateral agreements on cooperation between competition authorities and on the regional competition rules of European integration. The negotiation of additional bilateral and multilateral competition rules are complementary strategies which should be pursued simultaneously.

Such negotiations will benefit from the preparatory work by OECD and UNCTAD. But their objective of integrating trade and competition rules, for instance by coordinating trade policy and competition policy remedies and protecting market access and undistorted competition more effectively through an "integrated approach", can be achieved only by making such rules part of the WTO Agreement. Such a "WTO approach" is made possible by Article II of the WTO Agreement, according to which "Plurilateral Trade Agreements" negotiated among a limited number of WTO members may be included in Annex 4 as an "integral part" of the WTO Agreement without creating "either obligations or rights for Members that have not accepted them" (Article II:3). Such a Plurilateral Agreement on Competition and Trade (= PACT) could become - together with the proposed negotiation of a plurilateral agreement on cross-border investment - the still "missing pillar" of the GATT-WTO system. As in EC law, such competition and investment rules could greatly strengthen and complement other parts of the WTO world trade and legal system (e.g. the GATT, GATS and TRIPS Agreements) and facilitate the future liberalization of trade in goods and services. The PACT could be based on the following "building blocks":

a) Reaffirmation of the applicability of WTO consultation and dispute settlement procedures

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[2] The Outcome of the Uruguay Round: An Initial Assessment, UNCTAD 1994, at p.243.

to trade-related RBPs

The 1960 GATT Decision on "Arrangements for consultations" on restrictive business practices (= RBPs) "at the request of any contracting party... on a bilateral or multilateral basis as appropriate" explicitly recognized "that the activities of international cartels and trusts may hamper the expansion of world trade and... thereby frustrate the benefits of tariff reductions and of removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement"[3]. In GATT dispute settlement practice, GATT rules were consistently construed as "provisions establishing conditions of competition", and GATT dispute settlement procedures were also made available for complaints over certain government-supported RBPs. The GATS and the TRIPS Agreement explicitly deal with RBPs and provide for consultation and dispute settlement procedures for complaints over certain RBPs.

A reaffirmation that RBPs may "nullify or impair" benefits accruing under the WTO Agreement and may be "actionable" under the WTO consultation and dispute settlement procedures, could be a logical starting point for a PACT. It would protect and strengthen the market access commitments under GATT and GATS law by providing a multilateral forum for consultations, dispute settlement proceedings and the progressive development of case-law on trade-related RBPs whenever they impair the market access commitments and competition rules of WTO law. A comprehensive WTO jurisdiction to review trade-related RBPs in goods trade, services trade, trade-related investment measures (= TRIMS) and trade-related intellectual property righs (= TRIPS) could also promote an overall consistent interpretation of the existing and future competition rules of WTO law. By reviewing trade-related RBPs on a case-by-case basis, the case-law could progressively clarify to what extent the different kinds of "violation complaints", "non-violation complaints" and "situation complaints" available under GATT-WTO law may be appropriate remedies against trade-related RBPs.

b) Multilateralization of the EC-USA Agreement Regarding the Application of their Competition Laws, with incentives for the joining of third WTO members

The bilateral 1991 "Agreement between the Commission of the EC and the Government of the USA Regarding the Application of their Competition Laws"[4], which needs to be renegotiated anyhow following the EC Court ruling of 9 August 1994 which "annulled the act by which the EC Commission concluded this Agreement"[5], could serve as a model for a "Plurilateral Agreement" (in terms of Annex 4 to the WTO Agreement). It would be open to all other WTO members which share the view "that the sound and effective enforcement

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[3] BISD 9S/28

[4] The text of the Agreement was not published in the EC's Official Journal. It is reproduced e.g. in: World Competition 15 (September 1991), 155-162.

[5] Case C-327/91, France vs. EC Commission, judgment of 9 August 1994 (not yet published). The Court did not clarify that, notwithstanding the infringement of the EC's treaty-making powers and procedures, the agreement must be presumed to remain in effect under international law.

of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them" (Preamble).

The PACT would require the introduction of effective national competition laws and independent competition authorities, where they do not yet exist, and would provide for the applicability of the WTO Dispute Settlement Understanding (DSU) in order to make the international notification, information, cooperation and consultation requirements "actionable" and enforceable under the DSU. The jurisdictional rules, cooperation requirements and multilateral dispute settlement procedures could promote the avoidance or resolution of jurisdictional conflicts resulting from e.g. the proliferation of national merger control laws, their unilateral "extraterritorial" enforcement against foreign RBPs and from international discovery efforts abroad. The PACT could also provide for the applicability of the WTO "Trade Policy Review Mechanism" to trade-related competition policies of contracting parties, so that the interface between trade and competition rules could be regularly reviewed both in the PACT Committee and in the General Council of the WTO. Third WTO members should be invited to join the PACT. They could be attracted to do so e.g. by a commitment of member countries to take the cooperation between competition authorities into account in the administration of their unfair trade laws. Increased cooperation among competition authorities would enhance legal security for private enterprises and reduce the costs of duplicate investigations and contradictory decisions.

c) An agreed list of international substantive minimum competition rules

The procedural, institutional and jurisdictional provisions should be supplemented by agreed minimum standards on substantive competition rules for transborder cases. These could be progressively supplemented and should leave enough latitude to WTO members to develop their own competition laws and apply "higher" standards according to their particular needs. The competition rules should apply to all goods and services sectors in order to enhance the consistency of trade and competition rules. They should also apply to both governmental and private anticompetitive practices, since public undertakings and government-induced RBPs can distort trade and competition no less than private RBPs. A requirement to incorporate the international rules into domestic laws and to enable their enforcement through independent domestic competition authorities and courts should be supplemented by a national treatment obligation in the sense that domestic competition laws must treat transborder cases (e.g. export cartels) no less favourably than domestic cases (e.g. legal voidness of both export and import cartels).

In view of the detailed WTO Agreement on Subsidies, the PACT would not have to include subsidy disciplines. It should focus on per-se-prohibitions of horizontal "hard core cartels" with an international dimension (such as price fixing, output restraints, market sharing and bid-rigging), agreed criteria and jurisdictional rules for "rule of reason" examinations (e.g. of horizontal cooperation agreements on research and development, joint ventures, mergers, abuse of dominance and non-price vertical restraints), monopolization and public undertakings (e.g. a rule similar to Article 90 of the EC Treaty). International per-se-prohibitions of non-price vertical restraints and of abuses of dominant positions may neither be acceptable nor desirable in view of the continuing divergence of views among economists on their pro- and anticompetitive effects in concrete situations. Alternative international minimum standards for "rules of reason" could specify procedures, jurisdictional rules, presumptions and criteria to

be observed in case-by-case examinations by domestic authorities (e.g. for the balancing of pro- and anticompetitive effects, principles on "negative comity" and "positive comity"). At the request of adversely affected countries, observance of the procedures and criteria could be enforced through cooperation among competition authorities and, ultimately, through WTO dispute settlement proceedings.

An alternative approach could consist of rather general competition policy principles - e.g. on the model of the EC's Europe Agreements[6] - so that contracting parties could adjust their respective implementing legislation to their particular needs and negotiate subsequent agreed interpretations. Reference could also be made to existing internationally agreed competition rules, such as the UN "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" of 1980, or to the "Model Law on Restrictive Business Practices", prepared by UNCTAD's "Intergovernmental Group of Experts on Restrictive Business Practices"[7], as guidelines for national competition laws. Failure to incorporate, apply and enforce the internationally agreed principles into domestic laws would be actionable and sanctionable under the WTO's Dispute Settlement Understanding (= DSU). Apart from the agreed substantive and procedural minimum standards (such as rights of complaints, private action and judicial review), each contracting party would remain free to introduce "higher" national standards and to adjust the rules, procedures and institutions to its particular traditions and needs.

d) A commitment to use future "GATT Rounds" and "GATS Rounds" for negotiating additional market access commitments relating to RBPs

Similar to GATT Article XXVIII bis and GATS Article XIX, the PACT could explicitly provide for periodic negotiations on additional competition rules or "specific commitments" relating to RBPs, such as national monopolies or companies with "exclusive or special privileges" (Article XVII of GATT) which, even though not prohibited under GATT and GATS law, may restrict trade and competition and may be liberalized in exchange for reciprocal concessions. Such market access negotiations relating to RBPs are already taking place bilaterally (e.g. in the context of the USA's "Structural Impediments Initiative" vis-à-vis Japan) as well as multilaterally (e.g. in the context of the GATS negotiations on "market access commitments"). In those fields where there is no consensus on general competition rules, bilateral negotiations on specific commitments to be incorporated into the GATT and GATS "schedules of concessions" might offer an alternative means for progressively

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[6] See e.g. Article 62:1 of the Agreement EC-Hungary: "The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Hungary: (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition; (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Hungary as a whole or in a substantial part thereof; (iii) any public aid which distorts"... (O.J. of the EC No. L 347 of 31 December 1993, at 15).

[7] See UNCTAD document TD/B/RBP/81/Rev.3 of 2 August 1994.

liberalizing RBPs and for "learning by doing". Such bilateral commitments could serve as models for future negotiations on general rules.

e) No establishment of an international competition authority

The actual enforcement of the PACT rules would remain primarily a national affair. The PACT would coordinate national competition laws and policies through international minimum standards as well as through international notification, information and cooperation requirements among competition authorities. The "positive comity" principle would entitle a country adversely affected by a foreign RBP to request the foreign country concerned to take enforcement actions provided for by its own laws, to examine such a request bona fide and to justify its final decision. But there would be no legal obligation to proceed with the enforcement action requested if the country concerned concluded that the international minimum standards and its domestic competition laws did not justify such action. Yet, the PACT requirements of information, "positive comity" and of access to foreign competition authorities and courts could also be made enforcable through the WTO dispute settlement system with its ultimate possibility of "cross-retaliation" or authorization of unilateral ("extraterritorial") application of domestic competition laws to foreign RBPs (e.g. if the "positive comity" obligations under the PACT were not fulfilled). The WTO dispute settlement and enforcement procedures could thus avoid the experience that e.g. the competition rules in the bilateral free trade area agreements between the EC and EFTA countries were not effectively implemented in several EFTA countries (such as Switzerland). The enforcement mechanisms at the national level (e.g. private actions for damages or for declaratory judgments that prohibited cartels are not enforceable at law) and at the international level would complement and reinforce each other.

In view of the continuing divergencies among domestic competition laws (e.g. regarding abuses of dominance and non-price vertical restraints) and among domestic interpretations of discretionary "rules of reason" (e.g. regarding merger control and restructuring), a worldwide competition authority (e.g. on the model of the EC or EEA Treaty) with autonomous investigation, regulation and decision-making powers does not appear politically acceptable in the near future. Economically, it might even not be desirable because "regulatory competition" within agreed international framework rules would promote experimentation and decentralized "learning by doing" and would reduce the risks of errors by centralized authorities or of protectionist abuses of their discretionary regulatory powers. Even in a decentralized system based on national competition laws and policies and their coordinated application to "foreign" RBPs, uniform interpretations and the progressive development of general PACT rules could be promoted through the PACT Committee and the WTO mechanisms for dispute settlement, "authoritative interpretations", supervision and negotiation of additional rules. The PACT Committee and WTO dispute settlement panels dealing with "PACT disputes" must include competition policy experts. Their expertise, traditional focus on consumer interests and institutionalized participation in the WTO system could thereby contribute to the progressive integration of trade and competition rules and policies.

f) Effective dispute settlement and enforcement rules

The international notification, information, consultation, "negative comity" and "positive comity" obligations, as well as the international minimum standards for substantive domestic

competition rules, should be enforceable and sanctionable under the WTO dispute settlement procedures.[8] The dispute settlement and enforcement problems of a PACT are largely a function of the procedural and substantive obligations included into a PACT. As a "plurilateral agreement" in terms of Annex 4 of the WTO Agreement, the dispute settlement procedures of a PACT could deviate from the general "Dispute Settlement Understanding" (DSU) in Annex 2 of the WTO Agreement and provide for special rules so as to meet specific concerns of competition policy.

The relationship between the enforcement of domestic competition rules through domestic courts (e.g. in the USA and the EC) and international dispute settlement procedures (e.g. international complaints over the alleged inconsistency of domestic court decisions with the international minimum standards of a PACT Agreement) raises difficult procedural questions (e.g. prior exhaustion of domestic judicial remedies before the invocation of international dispute settlement procedures?) and substantive law questions (e.g. regarding the appropriate standards of review and remedies at the international level). Governments and trade lawyers have had 45 years of practical experience with such procedural and legal issues in the context of the GATT/WTO dispute settlement system where, for instance in the field of antidumping and countervailing duty law, lower court decisions were challenged in GATT panel rulings and subsequently revised through US Supreme Court decisions in conformity with the international GATT dispute settlement findings[9]. Competition lawyers, especially when they are unfamiliar with the GATT dispute settlement system, seem to be sceptical towards such international dispute settlement procedures and point to the fact that, so far, the conciliation procedures in the 1979/1986 OECD Guidelines on Cooperation on RBPs Affecting International Trade appear to have never been invoked. In order to accommodate such concerns, the international dispute settlement procedures of a PACT might be introduced progressively and refined in the light of the practical experience. They could also deviate from the general WTO dispute settlement system if the DSU rules, for instance the possibility of parallel invocation of both domestic and international dispute settlement procedures, should be considered inappropriate for a PACT.

Especially the following four categories of international disputes could arise and should be actionable under the dispute settlement system of a PACT:

aa) Disputes over international procedural obligations

In case of non-notified foreign RBPs, or if information on foreign RBPs is inadequate or contested, the adversely affected country could invoke the notification, information, consultation and "positive comity" obligations of the PACT. If the notification and information requirements were not voluntarily met, it could request either the PACT Committee or a PACT dispute settlement panel to order specified notifications and

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[8] See E.U.Petersmann, Reflection paper on Issue No.4: Enforcement of International Competition Rules through GATT-WTO Dispute Settlement Procedures, September 1994.

[9] See e.g. E.U.Petersmann, GATT dispute settlement proceedings in the field of antidumping law, in: Common Market Law Review 1991, 69-114.

informations. If invocation of the "positive comity" obligations would not lead to enforcement activities by the other country, the adversely affected country could either request a finding by a PACT panel on whether the non-enforcement of domestic competition rules violates the international minimum standards of the PACT; or it could unilaterally apply its own competition laws to the foreign RBPs provided this is consistent with the "negative comity" obligations of the PACT. A third option could be to resort to domestic court proceedings in the foreign country for judicial review of whether the alleged RBPs are inconsistent with the domestic competition law. A delicate question would be how to regulate the relationship between these various remedies (e.g. free choice? successive or alternative use?). It should be noted that WTO law already includes various requirements of access to domestic courts and, in general, permits simultaneous recourse by private parties to domestic courts and WTO by WTO members to dispute settlement proceedings in the WTO.

bb) Disputes over international per-se-prohibitions

Claims of violations of international per-se-prohibitions (e.g. of horizontal "hard core cartels" with an international dimension) could be examined by a PACT dispute settlement panel. A panel finding of such a violation would entail the international "secondary obligations" recognized in GATT-WTO law (i.e. cessation of the illegal act, possibility of authorization of countermeasures pending the withdrawal of the illegal act, such as suspension of reciprocal market access obligations). The PACT could also provide, as suggested by Sir Leon Brittan, for additional civil law sanctions, such as that RBPs violating per-se-prohibitions are not enforceable at law. Such a rule would have the political advantage of making domestic courts part of the international enforcement system. Both WTO panels and domestic courts would have the power to order the submission of relevant factual informations, or to decide on the basis of presumptions and rules on the allocation of the burden of proof.

cc) Disputes over international rules-of-reason

In those areas where there is no international consensus on justiciable per-se-prohibitions of RBPs, the PACT would only define minimum standards for national rules-of-reason, principles of international comity and rules on conflicts of jurisdiction (e.g. in case of merger control). These international rules would also be enforceable through PACT dispute settlement panels and, ultimately, through the authorization of countermeasures. But, since the application of the domestic rules-of-reason would be guided only by international minimum standards and would require the appraisal of complex economic matters, the international PACT panel would have to apply a limited standard of review with due deference to the national scope of discretion (e.g. review by PACT panels of whether the relevant procedural rules have been complied with, whether the statement of the reasons for the national decision is adequate, whether the facts have been acurately stated, whether there has been any "manifest error of appraisal" of the facts or a "misuse of powers"). Due to the national scope of discretion, panel findings of violations of the international minimum standards would, in most cases, only entail an obligation to reconsider the domestic decision with due regard to the panel findings. The consistency of the new decision of the domestic competition authority with the international minimum standards could be re-examined by the existing PACT dispute settlement panel

within a prescribed period of time.

dd) Disputes over nullification or impairment of market access commitments as a result of RBPs

One advantage of integrating trade and competition rules in a WTO PACT Agreement would be to strengthen the linkage between market access commitments and RBPs so as to better secure effective market access and undistorted competition. This could be achieved in various ways, such as:

- "violation complaints" under the PACT dispute settlement system whenever the substantive or procedural obligations of the PACT are violated;
- "non-violation complaints" under Article XXIII of GATT in case of "nullification or impairment" of GATT concessions through unforeseen subsequent governmental measures which, even though not inconsistent with GATT law (such as a production subsidy, establishment of a state trading monopoly, granting of trade-distorting special privileges to import-competing enterprises, non-enforcement of PACT obligations to prevent private market access restrictions), adversely affect the competitive conditions which could be reasonably expected under the reciprocal GATT concession;
- "non-violation complaints" pursuant to Articles IX, XXIII of GATS if unforeseen subsequent governmental measures, even if not inconsistent with GATS law (e.g. non-enforcement of PACT obligations to prevent private market access restrictions), "nullify or impair" the competitive conditions that could be reasonably expected under the GATS Schedules of Concessions;
- "violation complaints" pursuant to Articles VIII, XXIII of the GATS whenever monopolies and exclusive service suppliers restrict competition in a manner inconsistent with PACT obligations and contrary to Article VIII of GATS (which should be construed in conformity with the PACT competition rules among PACT member countries);
- "violation complaints" and/or "non-violation complaints" under Article 64 of the TRIPS Agreement if, for instance, abuses of intellectual property rights and anti-competitive practices in contractual licences were inconsistent with PACT rules and, among PACT member countries, might therefore also be recognized to be inconsistent with e.g. Article 8 of the TRIPS Agreement, or to be "actionable" under Article 64 of the TRIPS Agreement (note that Article 64:2 excludes 'non-violation complaints' for a period of 5 years after the entry into force of the WTO Agreement on 1 January 1995).

The "nullification or impairment" of GATT and GATS market access commitments or TRIPS obligations as a result of RBPs and of non-enforcement of PACT obligations could therefore become an additional cause of action under the WTO dispute settlement system. Thus, even if a PACT dispute settlement panel could not find a violation of an international per-se-prohibition or rule-of-reason (e.g. because a vertical restraint of competition in a foreign country does not specifically violate the domestic and international competition rules), there might be a case of "nullification or impairmant" of specific market access commitments negotiated under GATT law or GATS law. This is particularly so in the field of intrnational trade in services because, in contrast to GATT tariff bindings and the comprehensive GATT prohibitions of non-tariff trade barriers, market access commitments under the GATS prohibit only the six kinds of market access restrictions listed in Article XVI GATS and can be easily undermined by

other governmental or private market distortions. The bona-fide and reciprocity principles underlying the past GATT case-law on "non-violation complaints" could be progressively refined and developed in WTO and PACT practice through agreed definitions and dispute settlement practice[10].

Issue: Enforcement of international competition rules through GATT-WTO dispute settlement procedures?

1. Dispute Settlement and Enforcement Problems of a Plurilateral Agreement on Competition and Trade (PACT)

Given the practical experience that international competition rules (such as those in UNCTAD's RBP Code and in the EC's free trade area agreements with EFTA countries) may remain ineffective unless they are supplemented by effective enforcement and dispute settlement procedures, enforceability of international competition rules - both at the international and at the domestic level - must be a primary concern in future negotiations on such rules. Would the incorporation of a PACT[11] into Annex 4 to the 1994 Agreement Establishing the World Trade Organization (= WTO) contribute to the effectiveness and enforceability of international competition rules?

The dispute settlement and enforcement problems of a PACT are largely a function of the substantive and procedural obligations included into such a PACT. The WTO's Dispute Settlement Understanding (=DSU), and the special and additional dispute settlement procedures in the "covered agreements" (such as the GATT, GATS and TRIPS Agreement), offer a wide variety of "political" and "legal" dispute settlement methods: consultations; good offices; conciliation; mediation; panel procedures; Appellate Body review procedures; legally binding rulings and recommendations by the Dispute Settlement Body (= DSB); arbitration; rights of access to national courts; private "independent review procedures" (e.g. under the Agreement on Preshipment Inspection); or national "challenge procedures" (e.g. under the Agreement on Government Procurement)[12]. Three points are important:

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10 For a more detailed analysis see: E.U. Petersmann, The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948, in: Common Market Law Review 1994, 1157-1244; Petersmann, Violation Complaints and Non-Violation Complaints in Public International Trade Law, in: German Yearbook of International Law 34 (1991) 175-229.

11 See: E.U.Petersmann, Reflection paper on Issue No.2: What type of approach should be followed to achieve international rules on competition? Proposals for a "building block approach".

12 For a detailed survey and analysis see: E.U.Petersmann, The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948, in: Common Market Law

a) The new "automatic" panel, appellate review and arbitration procedures offer more effective and quicker "legal methods" for the settlement of international disputes among governments and for the enforcement of dispute settlement rulings by the DSB than any other international organization. The additional "political methods" of dispute settlement (e.g. by means of consultations and agreed dispute settlements) are helpful whenever the parties are prepared to negotiate a dispute settlement.

b) The DSU leaves it to the parties to each "Plurilateral Trade Agreement" whether, and to what extent, their dispute settlement procedures will be governed by the DSU or by special and additional dispute settlement procedures. The parties to a PACT would thus remain free to negotiate their own dispute settlement rules. If they decide to apply the DSU, only those members that are parties to the Plurilateral Trade Agreement may participate in decisions and actions taken by the DSB with respect to such disputes (cf. Article 2 DSU).

c) The WTO Agreement already includes an increasing number of "competition rules" e.g. in the Agreement on Preshipment Inspection, the GATS and the TRIPS Agreement, which are "actionable" and enforceable under the DSU. Inclusion of a PACT into Annex 4 of the WTO Agreement would contribute to the overall consistency of international trade and competition rules and their respective dispute settlement and enforcement procedures. Also some of the "new subjects" in the WTO's work program - such as the proposals to negotiate rules on cross-border investments and trade-related environmental rules in future "WTO Rounds" - have important competition policy dimensions. A PACT outside the WTO legal system could not cover the "interface problems" of competition rules and the WTO's rules on trade in goods and services, trade-related investment measures, environmental measures and intellectual property rights. A separate PACT dispute settlement system outside the WTO could even run into conflict with the requirement in Article 23 of the DSU to submit disputes over "nullification or impairment of benefits under the covered agreements... to the rules and procedures of this Understanding".

2. Past GATT Dispute Settlement Practice relating to RBPs

The GATT Contracting Parties have so far never systematically examined the possiblity of drawing up additional GATT rules on restrictive business practices. Most GATT rules and Tokyo Round Agreements set out governmental obligations for the treatment of goods. Obligations for enterprises (e.g. in GATT Article XVII), for non-governmental standardizing bodies (e.g. Article 4 of the 1979 Agreement on Technical Barriers) and for restrictive business practices, such as price undertakings by exporters (e.g. Article 4:5 1979 Subsidiy Code) or "price undercutting by dumped imports" (e.g. Article 3:2 1979 Antidumping Code), are exceptional in GATT law and in the 1979 Tokyo Round Agreements. GATT law does not require contracting parties to have national competition laws. If such competition laws exist, GATT law prohibits to apply them to imported goods in a less favourable manner than to like domestic products (Article III). In a Decision of 1960, the GATT Contracting Parties adopted "Arrangements for consultations" on restrictive business practices "at the request of any

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Review 1994, 1157-1244.

contracting party...on a bilateral or a multilateral basis as appropriate".[13] These arrangments recognize "that the activities of international cartels and trusts may hamper the expansion of world trade and...thereby frustrate the benefits of tariff reductions and of removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement"; but they have so far never been invoked in GATT practice. The GATT dispute settlement practice has, nonetheless, contributed to clarifying certain interrelationships between trade and competition problems in GATT law. For instance:

a) As stated in the 1990 Oilseeds Panel Report, "CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition"[14] so that an infringement of GATT obligations entailing a potentially adverse change in the competitive conditions is considered to constitute a prima facie case of "nullification or impairment" without a need to show a decline in the volume of trade ("trade damage").

b) The interrelationships between the liberalization of trade policy border measures and internal governmental distortions are taken into account to some extent. Thus, GATT dispute settlement practice has established 3 conditions - that (1) a tariff concession was negotiated, (2) a governmental measure, not inconsistent with GATT, had been introduced subsequently which upset the competitive relationship between the "bound" product and directly competitive products from other origins, and (3) the measure could not have been reasonably anticipated by the party to whom the binding was made at the time of the negotiation of the tariff concession - for "non-violation complaints" under Article XXIII:1,b in order to protect competitive benefits, which could be reasonably expected from reciprocal tariff bindings, from being undermined by unforeseen production subsidies on the "concession product" or by other trade-distorting measures.[15]

c) The GATT dispute settlement system can be invoked also against certain government-supported private restraints of competition. Thus, the 1988 Panel Report on Japanese export restrictions on semi-conductors concluded that the "administrative guidance" by the Japanese

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[13] GATT Basic Instruments and Selected Documents, 9th Supplement, at p.28 (= BISD 9S/28).

[14] BISD 37 S/86-132, at 130

[15] See e.g. the 1990 Oilseeds Panel Report which noted that the provisions in Article XXIII:1,b, "as conceived by the drafters and applied by the CONTRACTING PARTIES, serve mainly to protect the balance of tariff concessions. The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as the result of the application of any measure, whether or not it conflicts with the General Agreement" (BISD 37/86-132, at 127).

government in support of private "voluntary export restraints" on semi-conductors was inconsistent with GATT Article XI:1.[16] By contrast, the 1988 "Good Offices Report by the Personal Representative of the Director-General on the Dispute between the EC and Japan concerning Certain Pricing and Trading Practices for Copper in Japan" did not uphold the EC's complaint against alleged Japanese government support of cartel practices by Japanese copper smelters; it concluded that the high Japanese import tariffs and domestic prices of refined copper, which enabled Japanese copper smelters to offer higher prices for the purchase of copper concentrates than their EC competitors, were not due to violations of GATT rules or cartel practices.[17]

3. Would the WTO "Dispute Settlement Understanding" Provide an Adequate Framework for the Enforcement of a PACT?

3.1 Probability of an increasing number of WTO disputes over trade-related RBPs

In contrast to the traditional GATT rules on trade in goods, the new WTO agreements e.g. on preshipment inspection, GATS and TRIPS include - similar to competition law - many rules for the treatment of persons (e.g. service suppliers, investors) and their private rights (e.g. intellectual property rights). The WTO agreements on trade in goods also include more rules referring to RBPs such as "compulsory import cartels" (Article 11 of the Agreement on Safeguards), or requiring the examination of "trade restrictive practices and competition" in determinations of "injury" (Article 15 of the Agreement on Subsidies). The WTO Agreement further includes new notification, information and "positive comity" obligations relating to RBPs of service suppliers (Article IX of the GATS) and control of anticompetitive practices in contractual licenses pertaining to intellectual property rights (Article 40 of the TRIPS Agreement). Moreover, Article 9 of the Agreement on Trade-Related Investment Measures, Article 6 of the Agreement on Preshipment Inspection, Articles IX and XV of the GATS, and Articles 8:2 and 40 of the TRIPS Agreement call for the future examination of the competition policy aspects of specified trade provisions. The existing competition rules in the WTO legal system, the progressive liberalization of governmental market access barriers, and the US policy of extraterritorial application of US antitrust laws to anticompetitive conduct in foreign markets even as soon as US exports are harmed, are likely to give rise to more WTO dispute settlement proceedings over trade-related RBPs and to prompt future negotiations on additional competition rules in various fields of WTO law.

3.2 Similarities between trade-related "GATT disputes" and competition-related disputes under a PACT and their impact on dispute settlement procedures

Like GATT law, a PACT would be based on obligations addressed to governments, e.g. to incorporate agreed competition rules into their domestic laws, to properly enforce domestic competition laws in accordance with agreed criteria, to inform and cooperate with the competition authorities of other contracting parties, and to participate in PACT negotiations and dispute settlement proceedings. This intergovernmental nature of PACT obligations would

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[16] BISD 35 S/116-163

[17] BISD 36 S/199-202

justify the DSU rule that private parties have no standing before dispute settlement panels and that only WTO members can initiate dispute settlement procedures. But in this as well as in other respects, the PACT dispute settlement system could also deviate from the general WTO dispute settlement system (e.g. by allowing national competition authorities to initiate PACT dispute settlement proceedings).[18]

WTO dispute settlement panels are required to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" (Article 11 of the DSU). Panels have comprehensive rights to seek information and technical advice from any individual, governmental body or expert group (cf. Article 13). The confidentiality of information and of panel deliberations is protected (cf. Articles 13 and 14).

Would compliance with PACT obligations be more difficult to establish than in other WTO dispute settlement proceedings because, inter alia, it may depend on the gathering of information abroad on alleged RBPs, on the protection of private confidential information, and on special expertise in competition law and economic analyses (e.g. definition of the relevant market and entry barriers)? There might, indeed, be a need for specific remedies both at the international and at the national level. Yet, it must not be overlooked that WTO disputes e.g. over antidumping determinations, financial services commitments and intellectual property rights may also be of a highly fact-intensive nature and may raise issues similar to competition policy issues.

a) A highly fact-intensive nature is typical also of many GATT and WTO disputes e.g. in the field of antidumping and countervailing duty law, subsidies, state trading enterprises, tax discrimination, import licensing practices or intellectual property rights. In dispute settlement proceedings over compliance with international competition rules, just as in GATT dispute settlement proceedings over antidumping measures or abuses of intellectual property rights, two kinds of facts would have to be established: those relating to private business practices, and those relating to the application of international competition rules by national authorities. Future WTO disputes - e.g. over private preshipment inspection activities, adoption and application of standards by non-governmental standardizing bodies, monpolies and exclusive service suppliers, or intellectual property rights and licensing contracts - will increasingly involve private rights and private information protected as business secrets. If the parties to the dispute do not submit sufficient evidence, a WTO panel could either have to apply rules on burden of proof or exercise the panel's right to seek information and technical advice from any individual, body or expert group. But the panel, unlike many national competition authorities, would not have the means of compelling information directly from private persons

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[18] Appendix 1 to the DSU states, inter alia: "The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decison by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB."

or member countries; it could do this only indirectly by requiring the competition authorities of the parties to the dispute to use their fact-finding and investigatory powers. If the existing WTO rules on seeking of information and protection of confidentiality should prove inadequate, a PACT should provide for all additional rules and requirements that are necessary (e.g. an obligation to establish national competition authorities with powers to compel information from enterprises under investigation).

b) Information, notification and 'positive comity' requirements already exist in the GATS and TRIPS Agreement and are actionable under the DSU. Provisions on information-gathering abroad are also included in the Antidumping and Subsidy Agreements. A PACT could provide for any additional obligations, procedures and sanctions that are considered necessary. The existing arrangements for the sharing of confidential information among enforcement agencies of different countries, e.g. in the EC-USA Agreement regarding the application of their competition laws or in the field of tax law and securities regulation, could serve as models.

c) Special legal and economic expertise will be necessary for dealing with "PACT disputes", just as it is necessary for dealing with most other disputes e.g. on TRIPS and on specific GATS obligations. It could be ensured notably by appointing competition experts as panel members and as PACT Committee members, by exercising the right of panels to seek technical advice from "expert groups", and by establishing a "competition policy division" within the WTO Secretariat.

d) Legal standards of proof and of review will have to differ depending on whether per-se-prohibitions of RBPs, discretionary rules-of-reason or "positive comity" obligations are at dispute. But WTO law already includes differing standards of review by panels, e.g. regarding the establishment of the facts by antidumping authorities and regarding their interpretations f antidumping law (cf. Article 17.6 of the WTO Antidumping Agreement). In a similar way, a PACT could prescribe specific standards of review.

e) Legal remedies under GATT law have in most cases been limited to the determination of violations of GATT rules and a "ruling" requiring the withdrawal of illegal measures ex nunc. Compensatory concessions or countermeasures are rarely used and, if so, only as temporary measures pending the withdrawal of illegal measures. Since 1985, 5 panel reports have also recommended "specific remedies" and, in 4 disputes, led to rulings requiring the reimbursement of illegally levied antidumping or countervailing duties.

The need for "specific remedies" might also arise in dispute settlement proceedings over intellectual property rights and other private rights. The PACT contracting parties would remain free to provide for specific remedies both at the national level (e.g. administrative, civil and criminal sanctions against certain hard core cartel offences, injunctions to deter anti-competitive conduct, undertakings and divestiture) as well as at the international level (e.g. dispute settlement rulings that specific domestic injunctions and sanctions be used, authorization of countermeasures when dispute settlement rulings are not implemented, including the possibility of extraterritorial application of the competition laws of the adversely affected country). The WTO would also enable "cross-retaliation" (e.g. trade remedies if competition remedies are not implemented).

3.3 Need for clarifying the applicability of the various kinds of complaints under the DSU

About 90% of the more than 250 dispute settlement proceedings under GATT Article XXIII related to "violation complaints" (Article XXIII:1,a) that foreign governmental measures violate specific GATT rights and obligations. The remaining 10% of these disputes were "non-violation complaints" (Article XXIII:1,b) that foreign governmental measures (including government support for RBPs), although not in violation of specific GATT rules, "nullified or impaired" the competitive benefits which could reasonably have been expected under reciprocal "GATT concessions" (see above section 2,b). The rare "situation complaints" (Article XXIII:1,c) never led to a panel report or dispute settlement ruling based on Article XXIII:1,c of GATT.

The competition rules and information, notification and cooperation requirements of the PACT would be "actionable" and enforceable by means of "violation complaints". "Non-violation complaints" might be useful in order to cover unforeseen cases e.g. of "nullification or impairment" of market access commitments by RBPs that are not specifically forbidden by the PACT. "Situation complaints", which have never been successfully used in GATT practice, should not be provided for in view of their undefined criteria and vague functions as an escape clause in cases of "changed circumstances".

There could also be a need for clarifying the impact of the PACT on the interpretation and application of other WTO agreements. For instance, non-enforcement of the competition rules of a PACT could also justify "non-violation complaints" under Article XXIII of GATT or Article XXIII of GATS if the competitive conditions, which could be reasonably expected under GATT concessions or under GATS market access commitments, are "nullified or impaired" through private market access barriers prohibited under the PACT.[19]

4. Need for Supplementary National, Bilateral and Multilateral Enforcement Mechanisms

As in the case of the TRIPS Agreement, for instance, the effectiveness of international competition rules will primarily depend on their incorporation into domestic competition laws and on their enforcement through administrative, civil and/or criminal procedures by independent domestic authorities, private action and courts. A PACT should therefore specify minimum standards for national investigations, remedies and enforcement measures and should guarantee private access to domestic competition authorites and courts. Cooperation among competition authorities from several countries, based on international information, notification and "positive comity" obligations, would offer a second level of enforcement activities. Only if such national and international enforcement measures by private plaintiffs, competition authorities and courts would remain ineffective, could the PACT dispute settlement procedures be invoked as a third level of enforcement measures. The PACT should regulate the relationships between these three levels of enforcement measures and decide, for instance, whether access to the international PACT dispute settlement procedure should be made subject to prior exhaustion of local remedies and of "positive comity" procedures. The PACT could also prescribe private rights to petition national investigations, and to initiate the

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[19] See on this aspect my discussion paper No.2, section 2 (f) (dd).

bilateral cooperation procedures among competition authorities and the multilateral PACT dispute settlement procedures against foreign RBPs.

ANNEX 4

Enforcement and dispute settlement in the GATT and the WTO[20]

I. Introduction

This paper highlights the characteristics of the GATT's dispute settlement system and its evolution to the "Understanding" on dispute settlement which is part of the Final Act of the Uruguay Round and a cornerstone of the new World Trade Organisation.

The GATT has, since the entry into force of the World Trade Organisation on 1 January 1995, been integrated into the broader framework of the WTO. Its dispute settlement provisions therefore remain applicable today. They are now, however, part of a wider set of rules covering, next to trade in goods, also trade in services and the trade-related aspects of intellectual property rights. The WTO's Understanding on dispute settlement overarches these three fields.

II. Enforcement of law and dispute settlement in the GATT system.

II.1. Historical evolution.

GATT's dispute settlement system, as it was negotiated after the second world war, is original and specific and has no equivalent in other fields of international relations. The main objectives of the mechanism are : *1.* to protect the rights of contracting parties, *2.* to promote the security and predictability of the system and *3.* where necessary, to restore the balance of advantages negotiated in GATT Rounds.

Procedures are strictly inter-governmental and private firms (or non-governmental organisations or individuals) do not have access to the dispute settlement system. In keeping with this approach remedies are also inter-governmental, although in the cases of anti-dumping and countervailing duty measures domestic remedies do affect the exports of specific firms. In the latter context the GATT system, while recognizing that dumping and subsidization can cause injury to competing national firms, does contain precise conditions which have to be fulfilled before measures can be applied.

Within the Community GATT law and panel rulings have not had direct effect [1].

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20 Paper prepared by DG I

1 See, however FEDIOL vs Commission, cases 187/85 and 188/85, Judgement of 19 July 1988, from which it can be induced that GATT provisions can serve to interpret Community regulations through which GATT Agreements have been transposed into EC law.

GATT members are called contracting parties, in recognition of the fact that the General Agreement was primarily of a contractual nature and extrapolated only a limited number of provisions of the 1947 draft Havana Charter, which foresaw the creation of an International Trade Organisation (ITO) on an equal footing with the Bretton Woods Institutions (IMF and World Bank). The ITO never came to be and the provisional General Agreement evolved to become the main framework governing trade relations between its contracting parties.

When seeking to validate its GATT rights a contracting party can have recourse to a wide array of procedures, ranging from bilateral or multilateral consultations to good offices, conciliation or arbitration, working parties, Council Decisions or to panels. This reflects the basic objective of the system, which is to reach a mutually satisfactory resolution of conflicts rather than the imposition of the rule of law. An ongoing procedure can be abrogated at any time if the parties to the dispute have reached a settlement. Moreover the mechanism cannot in any way, through interpretation or otherwise, create new obligations for contracting parties or replace the negotiating process.

Despite the above the emphasis on negotiated settlements has not prevented the GATT from evolving towards a rule-oriented system strengthened by de facto legally binding interpretations [2]. This trend can be expected to continue under the WTO.

II.2. Articles XXII and XXIII of the General Agreement.

The core of GATT dispute settlement procedures are set out in Articles XXII and XXIII of the General Agreement and have subsequently been elaborated, in reaction to concrete needs and constraints, by the codification of evolved practices in legal instruments adopted in 1958, 1966, 1979, 1982 and 1989 [3]. A number of the so-called Tokyo Round Agreements have their own particular dispute settlement procedures.

Dispute settlement under the GATT is characterised by a sequential approach which usually starts with bilateral consultations [4] and can terminate with a panel ruling and, possibly, a further authorization by the Council for the imposition of countermeasures (to restore the balance of advantages). The sliding scale embodied in the GATT for the resolution of conflicts is equally sequential starting with *1.* agreement of the parties at any point during proceedings through consultation and negotiation; *2* after determination by a panel of a violation of GATT rules, a request to bring the

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[2] Unless a Party to a dispute should refuse to accept the conclusions of a panel. See below.

[3] These legal instruments are compiled in MTN.GNG/NG 13/W/4/Rev I.

[4] Prior consultations are not required in the case of complaints under Article XXIII:1 (c) or if the respondent party has not reacted to a request.

incriminating measure or practice with conformity with the General Agreement *3* if this is not possible, the offering of compensation (by means of new or enlarged market access opportunities on other products, for example through tariff reductions or tariff quota's), and finally, if neither of these are possible; *4* the authorization to suspend an equivalent amount of concessions.

The dispute settlement procedure as a whole thus stands the promotion of the resolution of conflicts in an economically satisfactory manner. To compensate (option 3) creates new opportunities to trade, while withdrawal of concessions (option 4) reduces them. Compensation cannot moreover be considered as relieving the contracting party of the obligation to remove the GATT inconsistent measure (option 2). Finally, retaliation can only be executed after specific authorization of the GATT Council by consensus. In the history of GATT this has taken place only once [5] (for reasons set out below). There have, however, been requests for authorization to suspend concessions and unilateral measures taken outside the GATT system have been implemented on a number of occasions.

Between 1947 and 1988 GATT dispute settlement was initiated 233 times. Approximately 20% of these cases were settled or withdrawn before the constitution of a working party or panel. Reports were completed in about 90 cases. Most of these concern disputes between developed countries, although recently developing countries have increasingly initiated proceedings.

II.3. Invocation of Article XXIII

The key to invoking the GATT dispute settlement mechanism is almost always "nullification or impairment" of benefits accruing to a party under the Agreement. Only in so-called "violation cases" of Article XXIII: 1(a) does this per se involve the breach of a GATT obligation. In violation cases there is a presumption that the defendant nation has violated GATT law and caused nullification or impairment, and it will be called upon to rebut the charge. If it is unable to do so and nullification or impairment is determined it will be requested to bring its actions into conformity with GATT obligations.

Although the overwhelming majority of GATT cases have been filed on the basis of a violation complaint, Article XXIII recognizes the possibility that GATT benefits are nullified or impaired without any obligation having actually been breached by the defending party. This is where Article XXIII goes beyond traditional dispute settlement provisions focussing on treaty violations, and reflects GATT's original concept as encompassing a balance of benefits between its contracting parties. The underlying idea is that the improved competitive opportunities that can legitimately be expected from a tariff concession may be frustrated not only by measures forbidden

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5 See BISD 1S/32,62; 7S/23. The [illegible] grain in reaction to Congress's enactment of Section 22 of the Agriculture Act of 1951. The [illegible] enforced the quota.

by the General Agreement but also by measures consistent with it. Nonetheless, the non-violation provisions have been subject to a large measure of debate, insofar as they could create obligations for parties without their having breached any norm. In this respect the EC has tended to support a restrictive interpretation.
The non-violation provisions have most often been invoked in situations where a negotiated and bound tariff reduction is subsequently nullified by the granting of domestic subsidies by the importing country on the same products. GATT panels have specified that, for a case to have any chance of success, the actions which have harmed the trade of a party "cannot have been reasonably expected" at the time of negotiation of a concession. It is further to be noted that in non-violation cases the burden of proof is overturned: it is up to the complainant party to provide "detailed justification" of the nullification or impairment of its GATT benefits. Finally non-violation cases, as they do not require the breach of a provision, do not lead to a legal obligation to bring one's practices into conformity with the General Agreement. Action is geared towards providing compensation, again to preserve or restore the balance of advantages.

The third possibility of nullification or impairment is the ambiguous "existence of any other measure" of Article XXIII : 1 (c). No rulings have yet been based on this provision. It has been conceived for "situation complaints", as an escape clause in cases of changed circumstances (somewhat like the general legal concept of "clausula rebus sic stantibus"), but it is unclear to what extent there are at present predictable and justiciable standards of review for such cases.

II.4. Panel Rulings.

Viewed from a competition angle a central element of the many panel rulings is that the basic provisions of the General Agreement are interpreted as establishing conditions of competition. Benefits accruing under the GATT as a result of negotiated tariff reductions therefore protect expectations on competitive conditions rather than expectations on the volume of trade flows [6]. Otherwise put, the concept of "nullification and impairment of benefits" relates not to trade damage (i.e. actual access), but to (unexpected) changes in access opportunities. By its very nature this well-accepted interpretation will further lead the GATT system to a more juridical framework [7].

It is a moot point to what extent adopted panel rulings have *stare decisis* or precedent effect other than for the relevant parties concerning their particular dispute. Although

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[6] See for example the first oilseeds panel report, adopted on 25 January 1990 (L/6627), BISD 37 p 130+.

[7] Ironically, if compensation should need to be calculated as a result of a panel ruling, this will inevitably be based on trade flows which are perceived to be affected, rather than on the less easily definable lost competitive opportunities.

there is no formal *stare decisis* effect in panel proceedings, earlier rulings are regularly referred to in the submissions of parties as well as in panel reports.

II.5. Weaknesses of GATT's dispute settlement system.

By the time of the launching of the Uruguay Round negotiations, the weaknesses of the panel proceedings had become increasingly apparent. These related especially to *1.* blockages related to the general absence of binding deadlines and automaticity of procedural phases, (with respect to the formation of a panel, its terms of reference, the implementation of its results etc.), *2.* the lack of an effective mechanism to calculate the suspension of concessions, *3.* the lack of a unitary system as a result of the many dispute settlement provisions engendered in the Tokyo Round Codes, which led to "forum-shopping" (i.e. use of the most convenient procedures by the complainant party, no overall assessment possible by the respective panel) and, most importantly, *4.* the practice of adoption of panel rulings by consensus of the GATT Council as a result of which the losing party could always block acceptance, and *5.* as a result of 1-4, the inability of the GATT system to react adequately to unilateral measures (i.e. US section 301 legislation), which were at least in part perceived to be taken due to the inherent weaknesses of the multilateral dispute settlement system.

As will be elaborated below, the new agreement on dispute settlement embodied in the Final Act is arguably the most important qualitative change affecting the GATT system after the Uruguay Round.

III. Dispute settlement in the World Trade Organisaton.

III.1. General.

The Uruguay Round Final Act foresees the succession of the provisional GATT to a fully-fledged World Trade Organisation with a permanent status and institutional framework. The main tasks of the WTO are to facilitate the implementation of its annexed Agreements, to provide a forum for negotiations and to administer the dispute settlement system. Relations between its Members will still be strictly inter-governmental and the Organisation will have no autonomous prerogatives to ensure the compliance by its Members of its provisions.

One of the Annexes to the Agreement establishing the WTO is the new "Understanding on rules and procedures governing the settlement of disputes". It resolves most of the problems enumerated under II.5 above and in many ways reflects the culmination of GATT's evolution from a process primarily of a conciliatory nature calling for negotiated settlements and compromise towards a more judicial oriented system.

The WTO will see a new Dispute Settlement Body (DSB) established, which will take over functions previously exercised by the GATT Council, i.e. the establishment of panels and the adoption of panel reports, the surveillance of implementation of rulings and the authorization to withdraw concessions.

III.2. Procedures become automatic.

The dispute settlement system has further been strengthened by strict procedures, deadlines and a measure of automaticity. Thus, if consultations fail to settle a dispute within 60 days, a panel will be established as a matter of course. Its terms of reference will be standard (examination of compatibility with WTO provisions), unless agreed otherwise. If the composition of its Members cannot be settled within 20 days, the Director General will nominate them (usually three) himself. Working procedures are specified and there are deadlines for the submission of reports (as a rule within six months, never surpassing nine months). The adoption of a report is then followed up by surveillance of the implementation of its recommendations. Should implementation be lacking, compensation or the suspension of concessions will be authorized as temporary measures. Objection to the level of concessions proposed for suspension leads to binding arbitration within 60 days. All in all the total length of a procedure until a panel report is adopted will not take longer than twelve months, unless a Member decides to appeal (see below).

III.3. Reports will be adopted automatically and a Standing Appelate Body is created.

The real qualitative leap embodied in the new provisions is that a panel report will be adopted automatically unless the DSB should decide otherwise by consensus. Recognizing the implications of this requirement which is going to be extremely difficult to fulfill, negotiators in the Uruguay Round also strengthened the quality and predictability of the system by providing for an appeal procedure. A Standing Appellate Body, comprising of persons of recognised authority, will hear appeals from panel cases and issue judgements on questions of law within 60 days.

Again, an Appellate Body report must be accepted unconditionally by the parties to the dispute unless the DSB rejects it by consensus.

III.4. The dispute settlement system becomes "integrated" and provides for cross-retaliation.

The WTO dispute settlement system is "integrated": it overarches all the different Agreements which are part of the WTO system (including the new fields of Services and Intellectual Property) and services them all [8]. This will foster a uniform and coherent interpretation of rules. Moreover a Member may be entitled , subject to the respect of certain criteria, to suspend concessions related to other Agreements than that which a defendant party has been found to violate. For example, retaliation can be taken in the Services sector for a failure to enforce intellectual property laws.

III.5. Other elements of the new dispute settlement system.

The Understanding explicitly forecloses unilateral action regarding issues covered by

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[8] Including the Plurilateral Agreements although only between its signatories.

the WTO [9]. A number of the WTO Agreements contain specific and tailor-made dispute settlement rules and procedures [10]. They will prevail over the rules and procedures of the generic Understanding in those cases where a difference exists.

The Final Act also brings into the scope of panel proceedings certain trade measures for which specific intergovernmental fora such as Working Parties previously applied by exclusion. This is the case for the GATT compatibility of regional trade agreements and for restrictive trade measures taken to protect the Balance of Payments position.

Further, as was the case in the GATT, there are special dispute settlement rights for developing countries, such as the ability to have recourse to the Good Offices of the Director-General. Its main effect is to shorten the period for the submission of panel recommendations from six months to sixty days, unless the panellists should consider this time-frame too short.

Finally, from a competition angle it is of relevance to note that the Final Act imposes a positive "enforcement obligation" upon its Members. In the field of Intellectual Property Members are committed to actively combatting wilful trademark counterfeiting and copyright piracy [11].

In conclusion, GATT's dispute settlement system has seen a remarkable evolution over the last decades. The Uruguay Round Understanding is a cornerstone of the new WTO. The automaticity of its procedures and the quality of its rulings will provide a guarantee that the provisions of the Final Act will be fully implemented by all Members.

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[9] See Article 23 of the Understanding.

[10] See Appendix 2 of the Dispute Settlement Understanding.

[11] Article 61 Agreement on Trade-Related Aspects of Intellectual Property Rights.