UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

WTO CORE PRINCIPLES AND PROHIBITION: OBLIGATIONS RELATING TO PRIVATE PRACTICES, NATIONAL COMPETITION LAWS AND IMPLICATIONS FOR A COMPETITION POLICY FRAMEWORK

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EXECUTIVE SUMMARY

1. This paper reviews the relevance and possible application of the WTO core principles to closer multilateral cooperation on competition. The WTO Ministerial Declaration adopted in Doha stated in paragraph 25: "further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full action shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them".

2. The discussion in this paper is limited to the issues of non-discrimination, transparency and due process as well as hard-core cartels. However, as the Doha mandate quoted above clearly states, the discussion and clarifications within the WTO Working Group on the Interaction between Trade and Competition Policy are not limited to the core principles but could include special and differential treatment as a fourth core principle. This is evident from paragraph 25, which states that the clarification should cover issues *"**including"*** the core principles. A full discussion of the issue of special and differential treatment is treated in a separate report.[1]

3. The discussions on the WTO core principles in the Working Group on the Interaction between Trade and Competition Policy have focused, since the Doha Declaration, on non-discrimination, transparency and due process.

4. These discussions have taken place in large measure within the context of the EC submissions and proposals for a multilateral competition policy framework, which also includes as a central provision the prohibition certain "hard-core" international cartels.

5. The EC approach to the national treatment obligation, as well as the manner in which this approach gives legal effect to the prohibition of cartels, is the focus of the discussions within the WTO Working Group on the Interaction between Trade and Competition.

6. WTO law as expressed in the Generally Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Service (GATS) does not establish general obligations for Members to affirmatively create internally competitive markets, nor require them to take affirmative action or provide remedies against private operators engaging in restrictive practices that affect the trade of other Members. Only a few exceptions are noted, for example government-sponsored monopolies and cartels; GATS Article IX, which provides providing for consultations regarding certain anti-competitive practices; and provisions within the GATS telecommunications reference paper.

7. GATT and GATS national treatment are limited by their scope to consider only the treatment that is accorded to *imported* goods, services or service providers. However, within this limited scope, national treatment law has developed significantly as to both *de jure* and *de facto* discrimination analysis. As WTO law stands, one can not presume that a sectoral exclusion as stated within a national law will be free from a challenge under national treatment. Such a challenge could arise where an exclusion does not apply to a directly competitive or substitutable product (or service), or where the effect of the exclusion is to eliminate any possibility that "like imported goods" or services could participate in the same or similar domestic restrictive arrangements.

[1] The Development Dimension of Competition Law and Policy (Prof. W. Lachmann) UNCTAD/ITCD/CLP/Misc.9.

8. On the one hand, the EC proposal narrows the national treatment obligation to *de jure* discrimination within the scope of national laws, including their administrative and secondary legislation. On the other hand, the EC proposal broadens the scope of GATT and GATS national treatment by directing the obligation not to imported goods or service providers, but to firms and other economic operators more generally on the basis of nationality. National competition laws do not tend to discriminate on the basis of nationality of firms in any case. However, in the WTO legal context, the proposed EC obligation of national treatment would apply whether or not goods have been imported. Under GATS the national treatment obligation would apply irrespective of whether a market access/national treatment commitment had been undertaken by a Member.

9. This broad notion of national treatment will provide a legal support for the proposed framework prohibition on domestic hard-core cartels affecting imports. This is because it would provide for a non-discriminatory right of private action to challenge local restrictive agreements that would fall under the prohibition.

10. As the EC proposal stands, it seems that national treatment obligation is not the appropriate legal basis for a prohibition on cartels. This is because, in the absence of other affirmative obligatory provisions, not evident in the EC proposals, Member States have no obligations to take actions to redress domestic restrictive practices, including cartels and dominant position affecting cross boarder trade. It is conceivable that a prohibition on certain hard-core cartels in the WTO may provide a legal basis for Members to address the external effects of domestic practices. However, no obligation to undertake such affirmative action is being explicitly made in the current EC proposals. Furthermore, since national competition laws are based upon a "territoriality" principle (domestic effects), they are also not given a domestic legal basis for "nationality" jurisdiction that would permit authorities to take action against domestic operators as their practices may affect other territories.

11. International cooperation is proposed as a means of resolving the "external effects" of anti-competitive practices as a complement to existing bilateral agreements which provide for positive comity obligations to address external effects. Whether voluntary (non-binding) cooperation is considered a sufficient quid pro quo in exchange for a more rigorous obligation to apply domestic competition laws is not clear from the proposals. However, existing WTO law, for example GATT mos favoured-nation (MFN), does not impose an obligation to extend existing bilateral cooperation arrangements for the benefit of other Members. MFN in this context applies only to those matters covered by paragraph 4 of Article III GATT, and this is limited to matters affecting the *internal* sale of goods.

12. The above suggests that a more trade-related orientation for a framework should be considered. A multilateral framework limited only to trade-related aspects would be more consistent with established practice in federal systems, regional trade agreements and existing multilateral agreements. This is the case in US federal law jurisdiction, EC Treaty law, EC Association Agreements, the UN Set, and earlier, the Havana Charter for the International Trade Organization (ITO). In all of these examples, a basis for taking action is provided for those matters that actually or potentially affect trade between States. These examples suggest a more trade-law-oriented set of remedies at the outset. While a national competition authority may not have nationality jurisdiction to address the external effects of domestic practices, trade law authorities can and do address unlawful import and export restrictions. For example, the "extraterritoriality" principle has been used to extend the competence of national judicial authorities to deal with external effects, as is the case in the OECD Anti-bribery Convention.

13. A "trade-related" framework would not focus on the elimination of anti-competitive practices as a general objective, nor limit its scope to international cartels. Rather, emphasis should be placed on the need to address restrictive practices that are limiting exports or imports of goods or services. Both the import and export dimensions would be treated in equal measure by establishing a Member's obligation to address a request made by other Members. A suggested modality would be to tailor the operative provisions, as in the separate annexed agreement for the GATT and the GATS. This would ensure that the scope of the framework provisions remains within the context of the annexed agreements themselves for the purpose of giving effect to their existing provisions.

14. In the GATT context, Article XI provides for a prohibition against government measures relating to exports and imports This article should be the primary point of reference to give greater legal effect to a higher degree of State responsibility for the Members to affirmatively address private restrictive practices that affect the trade of other Members. This could be accommodated by an understanding regarding the application of GATT Article XI to restrictive business practices. Similarly, Article 11 of the WTO Safeguards Agreement also prohibits Members from cooperating in the establishment of output restrictions in the form of voluntary export restraints and similar arrangements.

15. Note, however, that GATS does not have a hierarchy that establishes an existing prohibition against certain measures affecting imports or exports. However, Article IX of the GATS already provides a basis for consultations on private anti-competitive practices that undermine the obligations undertaken in the GATS. This article may therefore provide the primary point of reference for giving effect to a more extensive prohibition in respect to imports and exports of goods and services and in respect to service providers.

Contents

I INTRODUCTION: CORE PRINCIPLES AND PROHIBITION

The WTO Working Group on Trade and Competition Policy (WGTCP) has provided the forum for Members over the last several years to discuss the, "relevance of fundamental WTO principles of national treatment, transparency and most-favoured nation treatment to competition policy and vice versa".[2] To complement this discussion, the WTO Secretariat and other international organisations have provided background notes and summaries on the GATT/WTO core principles and aspects relating to "hard-core" anti-competitive practices. A not insignificant number of WTO Members have made comments or provided written country submissions on the questions raised by applying core principles to national competition laws.[3] Further along, at least one detailed proposal from the EC outlining suggested elements for a WTO competition policy framework (CP framework) agreement has also been submitted. This incorporates core GATT/WTO principles together with a prohibition on certain anti-competitive practices. Reflection and commentary is ongoing on this as well.[4]

The WTO Doha Ministerial Declaration mandated the continuation of this discussion with some apparent reference to an endpoint, with all Members adopting the following text:

> "25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary co-operation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them."[5]

I.1 The core principles discussion

The core principles discussion regarding how principles apply to national competition laws and/or within a CP framework is already fairly advanced, with a number of questions identified and summarized for additional consideration by Members.[6] It is recognized that competition laws tend to be inherently compatible with the elements of non-discrimination and most do not appear to have difficulty on meeting transparency and due process concerns.[7] This leads to a conclusion by some that incorporating the core GATT/WTO principles into a CP framework is essentially a redundant

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[2] WTO, WGTCP Annual Reports for 1999, 2000 and 2001, WT/WGTCP/5, WT/WGTCP/4 and WT/WGTCP/3.

[3] WTO Secretariat background notes, WT/WGTCP/W/115, May 1999; WT/WGTCP/W/209, 19 September 2002; OECD, Applying Core Principles in a Multilateral Framework on Competition, COM/DAFFE/TD (2002) 49, 10/05/02; UNCTAD, Positive Agenda and Future Trade Negotiations (2000); UNCTAD, Draft Consolidated Report of Regional Meetings, 22/04/02. WTO Member submissions are designated "W" docs and Members' comments at meeings are recorded in "M" docs. For brevity, WGTCP documents are cited here without the committee reference, thus: WT/W/* and WT/M/*

[4] The EC proposals dated September 2000, revised March 2001, WT/W/152 and WT/W/160. Generally concurring, Canada, WT/W/174, 02/07/01; Japan, WT/W/156, 19/12/00. Submissions with elements going beyond the EC proposal, Switzerland, WT/W/151, 22/09/00; Korea, WT/W/133, 15/07/99; Hong Kong, WT/W/118, 26/05/99. A number of participants in the Working Group have not submitted, but have commented upon the proposals for a framework and have made suggestions. See WT/WGTCP/M/ documents, generally from 1999 onwards.

[5] W/MIN(01)/DEC/1, 11/14/01, para. 25.

[6] Most recently, WTO Secretariat, WT/W/209, 19 September 2002.

[7] For examples, United States, WT/W/142, 03/08/00 and WT/W/131, 13/07/99; Japan, WT/W/135, 14/07/99; South Africa, WT/W/138, 11/09/99.

exercise. Others argue that explicit reference to the principles will provide a set of WTO parameters for national rules. This will ensure that competition laws will advance their stated objectives in harmony with the objectives of the multilateral trading system. On this, the Doha Declaration might be cited in agreement as it also recognizes "the case for a multilateral framework to enhance the contribution of competition policy to international trade and development".[8]

A larger point may be being made. A far greater number of territories enacting competition laws provides a certain possibility that a number of them may contain provisions that also shelter protectionist objectives or somehow raise new and unnecessary obstacles to trade and investment.

A more complex aspect is presented when modifications to core principles are suggested for a CP framework. These variations on GATT/WTO obligations also have to be considered in the light of how competition laws are already said to reflect core principles, and asking whether these laws also already tend to reflect these proposed modifications.[9] The shorthand response is that existing laws may not be in full conformity with the non-discrimination law of the WTO as it has developed. The limitations being proposed for a CP framework may reduce the reach of WTO law to what the Members are willing to accommodate as a lower common denominator, especially in respect of the relation between national competition laws and other domestic industrial, investment and development policies. Such limitations may not inure to the benefit of only developing territories.

This proposed contraction of WTO law is most evident in proposals to limit national treatment review to cases of *de jure* discrimination, where different treatment on the basis of origin is stated in the text of the national law. As discussed in Part II, WTO national treatment law already applies to competition laws, and as detailed in Part III, has already developed an effects-oriented *de facto* examination standard as well.[10] This permits an examination as to the disparate effects of a law in cases where the law itself does not state a difference in treatment to be accorded on the basis of foreign origin. A confusion in the discussions, if there is one, could flow from a misunderstanding that these WTO obligations do not apply to any competition laws in the absence of a provision stating that they do apply. Thus, when it is also suggested that any CP framework non-discrimination provision would not be able to reach into social, industrial, employment policies (etc.,), this also might come from the same notion. This assumes (incorrectly) that because WTO has not made a framework applying to these domestic policies, non-discrimination provisions are somehow not (yet) applicable to these policy areas as well.[11]

What is a meaningful limitation on GATT/WTO application is that these core principles do not have any direct application to actions taken by private economic actors without additional

[8] W/MIN(01)/DEC/1., at para. 23, "[R]ecognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations".

[9] For the EC, WT/W/152, p.6, point 1(b).

[10] Statement of US delegate, WT/M/15, 14 August, 2001, para. 43, "…there was still the question of ultimate compatibility between the principle of national treatment and the pursuit of certain economic or other policies, particularly when those policies were articulated in a way that was not facially non-discriminatory, but could be applied de facto in a way that would only benefit national firms".

[11] On absence of conflict with other policies, WT/W/160, p. 3, "There is no reason a priori, to consider that the non-discriminatory application of competition policy could be in conflict with industrial or social policies." The proposals to apply national treatment to firms rather than goods or services is not seen as a limiting factor for the existing law. It does, however, give rise to a questions as to the cumulative (rather than *lex specialis*) application of general and framework national treatment provisions. This is treated below.

requirements, compulsions, or inducements as sponsored by government. They do, however, have full application to the laws, regulations and requirements of the Members when they affect the sale or distribution of imported goods so that less favourable treatment is accorded to those of foreign origin. This is the same for services and service providers when a Member makes a scheduled commitment in the GATS. Since competition laws, like any other laws, can be tailored to afford domestic protection on some aspect or another, encroachments across the border between competition law and national treatment law are certainly not inconceivable under current WTO law.

Here a sort of paradox appears in the proposals concerning national treatment. While one can document a *contraction* in the limitation to *de jure*, there also appears to be an expansion of the concept to the extent that it has been proposed to treat firms and enterprises on the basis of origin rather than goods (GATT) and/or services and providers (GATS). For GATT law this eliminates a linkage required in proof where it must be shown that a government requirement directed to firms affects the sale or distribution of products on the internal market. For cases dealing with services and providers the implications are more complex. National treatment in GATS is not a general obligation but made specifically together with a market access commitment. Upon making such a commitment, Members may also list exceptions whereby national treatment shall not be accorded. Competition and other domestic policies affecting providers do not appear to be commonly listed under these national treatment derogations. Thus there may be a question for further analysis whether a CP framework provision is cross-cutting the GATS regime to supply a general national treatment obligation where one does not currently exist. Although there is no multilateral investment framework agreement in the WTO, similar considerations might apply in respect of bilateral treaties (BITs) that accord national treatment, or limit its application in certain particulars. The relationship between a CP framework obligation and these arrangements should also be examined.

Thus far the discussion has advanced to the point of recognizing that competition laws tend to reflect core principles, but not developed as to how core principles actually apply to competition laws. A notable example of the second aspect is whether national treatment can reach a national competition law that has *excluded* a sector (or economic sphere of activity) from the coverage of the national law and its procedures. This analysis requires reference to the *de jure* and *de facto* theories of evaluation. For *de jure*, a yellow flag goes up any time there is different treatment accorded on the basis of origin that is drawn into the provisions of a law.[12] Since a national competition law exclusion need not be made so obvious, a *de facto* examination is more likely to consider whether the effect of a non-discriminatory exclusion results in a disparate impact on imported goods or services. Even if a CP framework eliminated this second possibility of inquiry, it would still be necessary to clarify for Members what would be the remaining reach of non-discrimination rules, if only to understand what has been "carved out" of GATT law by a CP framework.

I.2 The link to a prohibition

Here we consider the proposals for a ban or prohibition on the hard-core anti-competitive practices that have an international dimension, and the manner in which the core principles relate to this. Not all ideas for a CP framework contain any prohibition, but the EC proposal does in the form of a stated

[12] "Yellow" because explicit differential treatment may not result in less favourable treatment, although examples will not be so common. Explicit differential treatment itself may also not seem so common but would be present whenever review criteria are formulated differently for evaluating a domestic participant.

(prohibition) for certain types of cartels that have an "international dimension",[13] and that have as their subject matter the "hard-core" definitional categories as employed by the OECD recommendations.[14] As suggested for now, other practice areas more inclined to be subject to "rule of reason" analysis in national cases would not be included. This leaves out merger control, vertical restraints and abuse of dominant positions (monopolies).[15] Since there is some universal condemnation of the hard-core cartels as *per se* anti-competitive, this approach for a ban on them recognizes what might be accomplishable now by Members as compared with later.

In considering non-discrimination as to these areas left out, it may be the case that the better possibilities for making a *de facto* national treatment claim would relate to them as compared with cartels, at least if one considers that while cartels have multiple parties, there is always a likelihood that foreign participants are participating in fact, or are not excluded as a matter of law.[16] While this consideration was not likely the rationale for deleting these other areas from a prohibition, there does appear to be a certain accidental logic as a result. If a CP framework employs a restrained version of national treatment (*de jure* only), an additional stated prohibition against hard-core cartels would help to compensate for this. However, and somewhat problematic, to the extent that a CP framework would not permit the *de facto* analysis of the resulting structure of national laws that treat mergers, distribution systems and monopolies, this would also result in some meaningful retreat from the current application of GATT national treatment. Discriminatory effects in these areas can also be accomplished without being facially presented in the law. Members can take or leave this reduction of application, but they should do so either way with a full appraisal of the consequences for continued discriminatory practices in those fields.

I.3 Exclusions, exemptions and the developmental architecture

The manner of treating these aspects so far is to lighten the framework obligations overall. Thus, the proposals are made that national treatment shall not apply *de facto*, and that *any* domestic national exclusion from competition laws shall be permitted as long as it is transparent (notified). In addition, the assertion has been made (repeatedly) that reciting core principles to competition laws will not affect the operation of other domestic policy areas relating to development, industrial, and investment policies. The first position eliminates purview and grants exclusions for territories and sectors that have no developmental basis whatsoever to be invoking them. The second point simply does not accord with GATT law where national treatment can invade the province of any of these policies where their effects (acting alone or together) accords protection for domestic producers.

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[13] The three dimensions of international cartels, described in EC, WT/W/152 – international cartels, import cartels and export cartels. The author understands that the EC proposal is intended to treat all three categories to the extent that any cartel type with an international dimension engages in the " hard core" practices.

[14] The OECD 1998 Recommendation definition being applied as to price fixing, bid rigging, output restrictions, quota agreements and market division or sharing. OECD, C(89)35/FINAL, discussed in relation to a CP framework in, OECD, Communication…, WT/W/207, 15 August, 2002, and acknowledging the definitional issues. Ibid., para. 9. Also noting, "[M]ost of the 145 cases reported in the OECD survey described above were domestic cartels." Ibid., para. 5.

[15] As drawn from WT/M/15, 14 August 2001, para. 31, from the EC representative, "…his delegation maintained that the only type of anti-competitive practice…desirable or feasible to establish a common principle was hard core cartels…his delegation recognised that…a regime on merger control or how to deal with vertical market restraints or abuse of a dominant position were substantially more difficult to tackle, and was not proposing any principles or substantive rules in regard to these categories of anti-competitive practices."

[16] Since cartels have multiple parties, there is more likelihood of foreign participation, or at least the possibility that foreigners are not *per se* excluded.

Some more tailored alternatives to incorporating the development dimension into framework should be considered. A possibility to consider is to identify the legitimate objectives of territories in development. These, while deviating from pure efficiency considerations, should nevertheless be accommodated in a framework from its inception. Thus the question to answer is the following: according to what circumstances (or criteria) should developing countries suspend the application of competition laws to favour domestic goods or enterprises at the expense of foreign?[17]

More analytical work should be done together with substantive negotiations to actually determine when competition policies should be permitted to yield to other domestic policies that have stronger features of discriminatory treatment. These points should be then included as "objectives" of the framework agreement in recognizing that competition policies of territories can yield in order to legitimately pursue those aspects. For example, Members might determine that "market participation" of domestic-owned enterprises is a legitimate objective, or that preservation of small and medium-sized enterprises is such a value. There are differences between these two policies. The first is more discriminatory than the second. However, the first may not be less "legitimate" in the context of development. Whatever the case may be, these identification need to be a part of the negotiation process, and once settled, would permit States to formulate policies and decisions along such lines even while they may discriminate or not the most efficient outcome.

The actual mechanical aspects should be noted. Upon identifying such criteria, assuming there are some, the architecture of a CP framework should go on to accommodate the legitimate objectives by reference in the preamble (from the outset). This should be followed throughout by identifying these aspects as permitted stated *exemptions* from national laws, granting to parties the right to formulate national laws in consideration of these objectives. This may be joined with an explicit provision indicating that the burden of proof regarding challenges to recognized exemptions shall remain upon the complaining party. This is to contrast with an approach which designates e*xceptions* to the rule of non-discrimination, as in GATT law generally, a showing of violation results in a shift of the burden of proof to the respondent. The party who is seeking to maintain the measure must identify and demonstrate that a listed stated exception is applicable to the case and has been properly applied.

This approach is too severe and restrictive for treating the development context of a competition policy framework. Rights can be recognized and designated. The burden of proof flows accordingly, and should govern how well the architecture of the framework reflects legitimate development interests.

I.4 Prohibition at the core of a framework

While prohibition of hard-core practices is not itself a "core principle", it is certainly a core consideration that would, if included, form the heart and soul of a CP framework. Thus, the discussion and analysis of core principles should be also taken up with regard to how they would operate to actually give effect to a prohibition. From this perspective it is evident that core principles provide meaningful support for competition laws to operate within the norms of WTO law more generally. However, none of the principles now being discussed would serve as a legal foundation for the operation of a prohibition. In this regard the discussion may not be so far advanced, a part of it tending to view the core principles as an end in themselves, and another part of it limited to the OECD

[17] For a notation on the commencement of this discussion, see Part V, UNCTAD, *Closer Multilateral Cooperation On Competition Policy: The Development Dimension, Consolidated Report …* , submitted as WT/WGTCP/W/197, 15 August 2002.

approach and EC proposal to address these cartels only in the market where they have their demonstrated effects, territory by territory. In this suggestion the development dimension aspects are definitely raised where investigatory and enforcement capacities vary so greatly between Members. The re-balancing proposals in the form of national authority cooperation may not be sufficient to induce developing countries to establish domestic enforcement regimes for competition policies generally, or to improve the competition laws they already have.

In the current EC proposal, the ban on hard-core practices is a multilateral expression of the OECD recommended approach, which emphasizes the passage of national laws that can then be invoked by domestic or foreign actors to address practices (domestic or foreign) that have their effects upon the market of the territory where the law is invoked.[18] To make this clear, if a private agreement was organized in Country A by residents of Country A, in order to have restrictive effects upon the trade flowing to Country B, then the firms and/or the Government of Country B would take their action in Country B and according to its competition law.[19]

The so-called market access criticism of this has been made where the net effect of having functional laws in each Member would tend to support more successful challenges to domestic import or internal distribution cartels, that is those organized within Country B with effects of the practices restricting importation into Country B. While many developing (and perhaps smaller) countries and their firms would like to have the capacity to investigate practices that are organized in Country A in order to bring actions in their own Country B, this does not seem likely to happen. Although this is anecdotal, the largest international cartels discovered over the last years have been prosecuted for their effects only by the largest authorities. For the smaller and developing territories, the flow of private complaints and actions under the prohibition may well fall disproportionately upon cartels located in their markets. Thus, there may be some truth also to the characterization that the prohibition as enunciated is more about establishing an enforcement regime for pressing internally functioning competitive markets (the competition culture) than about eliminating restrictive business practices that affect international trade in goods and services.

A central difficulty at the heart of these criticisms is the imbalance between the treatment of import and export considerations. This is caused by the prohibition's enforcement limitation on the "traditional" territorial notions of jurisdiction that are applied in the operation of national competition laws. Limited to only domestic effects, the proposal pushes responsibility for the international dimension of restrictive practices onto the territories that are the least capable of doing anything about them. By tuning the "remedy" to reflect the structure of national competition laws, it fails to recognize a number of aspects. First, existing GATT law already pursues a far more vigorous theory of responsibility for *government* policies when these affect the trade to other territories. An output (export) restriction enacted by Country A as to Country B is already actionable under GATT, as a measure other than a duty according to GATT Article XI.

The identical trade effect can be achieved however, without any GATT law recourse by firms engaging in private agreements while resident in Country A. One could suggest that a more effective

[18] Most recently outlined in, EC Communication, WT/W/193, 1 July 2002, para. 21.

[19] The concept used here of "territorial" jurisdiction refers to the domestic territory where the effects of practices, whatever their origin, are examined as to the domestic territory by its national law. The notion of "nationality" jurisdiction does not necessarily preclude an examination of effects upon the domestic market as well, but is oriented rather towards a basis for government action relating to the location or residence of firms, as domestic, even while the effects of their practices may be generated upon other territories. See generally, infra., Part IV.2, *et seq*.

dispute system regarding the prohibition of quantitative restrictions might stimulate private firms to more actively duplicate these prohibited measures. To the extent that they do, these private actions are not GATT-actionable. As a recent panel noted,

> "…there is no obligation under Article XI for a Member [Argentina in this instance] to assume a full 'due diligence' burden to investigate and prevent cartels from functioning as private export restrictions."[20]

Nor has it been suggested that any such obligation appears to arise when the Member has enacted a specific sectoral exclusion in its competition law, has been put on notice of the actual existence a domestic cartel operating within the sector, and has reason to believe that this cartel is imposing trade restrictions that affect the trade of other Members.

If Members decide to create a basis for action by instituting a "prohibition" on these private restrictions, then what would be the most effective means to this end? Certainly actions limited to domestic territory effects should be an aspect. This is an option open to sovereign territories to engage in at any time. However, a most effective means would be to *extend* GATT's existing prohibitions and place some measure of responsibility for conformity of private practices upon the country of export.

That the current OECD approach and EC proposal do not address this possibility suggests that it is time to consider that the international dimension of cartels should be taken up in the context of a trade law framework rather than a domestic competition law framework. While this idea has been tabled, the discussion has tended as well to focus upon international cooperation among authorities (and possibly comity) as between Members, since this is the only means within a limited territorial approach that can provide something on the export side of the equation.

I.5 International cooperation

While this discussion is only commencing in the post-Doha Ministerial phase, the EC position in support of cooperative regimes is closely linked to the prohibition discussed above, in that a large array of bilateral agreements is claimed not to be potentially functional in the larger universe. Since developed territory authorities are the ones that have established cooperative agreements already, developing territories will be left out of this process as resources to respond to positive comity requests are absorbed by existing exchanges.[21] Thus to the EC's credit there is at least some recognition that certain information can be passed on without violating business confidentiality.[22]

However, this is not the same as an obligation to undertake an investigation or prosecutorial response. Unless there is a commitment undertaken to provide these procedures, upon request from

[20] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, 19 December 2000, para. 11.52.

[21] Addressed on all points in EC, WT/W/152. The argument is made below that cooperation may not be governed generally by MFN considerations as the scope of national treatment is limited to laws affecting internal sale. However, as in the case of mutual recognition, one would expect to see a CP framework provision balancing MFN considerations with the numerous trust factors said to be involved.

[22] Including nature and scope of the practice concerned, market involved and key players, procedural steps already undertaken by the authority and expected subsequent steps, and any public document. EC Communication, WT/W/207, 15 August 2002, para. 28. There is little that should prevent this information from being conveyed upon request between authorities in the absence of a bilateral cooperation agreement or a framework agreement as well.

any Member, the mechanism will remain essentially voluntary.[23] Thus, while the prohibition will provide that authorities and their courts will have an obligation to have national competition laws to address complaints on a non-discriminatory basis, and with adequate transparency to ensure that the law is being so applied, the obligation of the same authorities to respond to requests to address the external effects of practices organized on their territories will be discretionary. While the discussion will turn to the means of how to generalize a cooperation obligation, with so many requesting Members directed to a handful (for now) of developed territories, the following can also be noted. If MFN does not control the underlying transactions accorded by existing bilateral comity and cooperation agreements, the final cooperation that can be extracted may also not accord much in the way of parity compared to the enforcement obligations being undertaken by new authorities, who must be receptive to the developed world's many potential complaints.

The response to establish a balance by reducing or eliminating the substantive prohibition would therefore appear tempting as well, except that there is currently also a lack of balance between what authorities of differing capacities can accomplish in the light of the realities, the resident locations of the largest firms most capable of generating international dimensions in their practices and agreements. This leads one to consider that a prohibition would be of greatest value where it addresses evenly exports and imports at the outset, and utilizes a State-to-State obligation as in the manner of a normal GATT article obligation. What is considered at the outset is a prohibition narrowly confined to giving existing trade-related obligations a deeper effect. At the core of it, the traditional territory basis of competition law jurisdiction could be supplemented by nationality jurisdiction for resident firms. While not broad enough to cover all potential aspects (services and investment), GATT's own existing prohibition against quantitative restrictions upon importation or exportation appears to be the appropriate core principle at least in the case of goods.

I.6 A prohibition based upon GATT Article XI

Where GATT law has created a priority for legal protection to be effected (only) in the form of tariffs, a CP framework prohibition can be considered that would broaden this to include State responsibility for private parties that combine to create the same restrictions that would otherwise be actionable if undertaken by the State.[24] Whether the concept is extended to creating responsibility for private conduct only incrementally, or only for areas excluded from domestic competition laws, with or without the assistance of multilateral mechanisms, these aspects are not so important at the outset. What is more important at this juncture is to commence a discussion built upon the premise that Members recognize that the actions of their domestic enterprises can distort the trade of other Members, and that some of these actions might fall within the narrow terms of the Article XI prohibition as restrictions.

[23] AS the OECD indicates, countries cooperate with the ones they tend to trust. It will take "several years" for new authorities to become credible in cooperation enforcement for hard-core cartels. For now experience with "softer" cooperative arrangements is possible. OECD Communication, WT/WGTCP/W/207, 14 August 2002, para. 21. And noting here that in the context, this reluctance must relate to responding to requests for information made by the new authorities, requests most likely to be generated for the purpose of obtaining information regarding external effects of the practices of firms residing within the requested parties. Since existing bilateral agreements do not require the passing of confidential information, what level of trust is actually required for the responding party to initiate an investigation?

[24] The degree of attribution possible in current WTO law is discussed in Part II. A single reference to an Article XI application to private restraints has been identified in OECD, Applying Core Principles in a Multilateral Framework on Competition, COM/DAFFE/TD(2002)49, 10 May 2002, para. 98, "The threshold issue here is to what extent such behaviour [export cartels] can be attributed to government behaviour."

I.7 The form of prohibition governing modalities

A final consideration deals with modalities. The threshold question that governs modalities is not whether the core principles would be recited in a CP framework. Rather, the modalities of negotiation would turn upon a determination of whether the agreement would contain a prohibition against certain hard-core anti-competitive practices that affect the trade of the Members. If the prohibition is included, as currently proposed, to be given legal effect by the promulgation of individual Members' competition policies based upon territorial jurisdiction, then the analogous modality is the TRIPS Agreement. A modification of this mode can be theoretically conceived where parties do not assume an obligation outright to create such national laws, but schedule or reserve applications subject to additional discussions, developments and negotiations. A framework that provides a prohibition along the lines as proposed here for a purely trade-related remedy as between States would not rely upon diffuse national competition laws. It would be more along the lines of a core principle, like GATT Article XI, together with its own specifically negotiated exceptions.

A framework that avoids any prohibition as to practices and avoids a requirement that Members have competition laws would necessarily be centred upon a code of conduct approach. This would recite the objectives that such laws should be seeking to advance when they are promulgated, and recognize that they should reflect the core principles. With due emphasis on transparency and cooperation mechanisms, this more limited framework resembles a technical barriers to trade approach.

The discussion moves according to the following sequence. Part II reviews the existing WTO rules as they affect private actors and their conduct and outlines the WTO's current reach over national competition laws. This establishes a dividing line between public and private behaviour, and Part II concludes with a description of the current status of WTO law on the question of attribution of private behaviour to State action. Part III analyses national treatment law in respect of national competition laws with an emphasis on exclusions and individual case decisions. There is a limited possibility in WTO law to challenge the discriminatory effects of exclusion from a national competition law. The *de jure/de facto* discussion in the Working Group should be considered in this light. Part IV turns to the notion of a prohibition for a CP framework and discusses the limitations of a territorial jurisdictional basis for such a prohibition to be effective for both imports and exports. The concluding section of the paper provides additional comment on the modalities for negotiations that might flow from the considerations raised throughout.

II THE WTO FOR PRIVATE ACTORS AND NATIONAL COMPETITION LAWS

II.1 WTO limitations on addressing private behaviour

II.1.1 Introduction

The WTO is composed of three principal annexed agreements. Two of them – the GATT and the GATS – act as comprehensive frameworks to provide for the liberalisation of international movement of goods, services and service providers, and also establish rules of conduct for the Members as to their trade regulations and other laws as they may affect trade. The third agreement – on trade-related aspects of intellectual property rights (TRIPS) – does not share this characteristic of a liberalizing framework, but rather acts as an agreement by Members to make effective certain national laws and then establish mechanisms of enforcement for intellectual property rights by private actors within the territories of the Members.[25] As the WTO is an international organization composed of States and territories, these being the actors that assume the various rights and obligations, provisions with legal effect found within the various agreements do not impose any direct obligations upon private parties, nor are such actors granted any substantive rights directly.

To expand this point, while a broad diversity of State laws, regulations, requirements, measures, taxes, duties and other charges may all be the subject of various obligations contained in the annexed agreements, WTO obligations seldom oblige a Member to take any action, affirmative or negative, in regard to the conduct of private economic actors. Rather, GATT and GATS rules are more concerned with government trade laws regulating importation and exportation, and with other governmental "internal" acts to the extent that these may affect trade in affording domestic protection or in discriminating between foreign sources.

II.1.2 Goods

For examples of GATT's limited reach as to private conduct, GATT Article V.2 requires a Member to ensure freedom of transit for goods of other Members. It does not appear to require Members to take action against private actors who would combine or abuse a dominant position to frustrate rights of transit. For granted remedies related to unfair trading practices that are initiated by private actors, GATT law likewise does not impose any affirmative obligations upon its Members to proscribe such practices outright. Thus, GATT Article VI provides a remedy for a Member to address dumped imports as to its territory, but does not require Members to take any action to prevent firms from dumping. The WTO Agreement on Safeguards now prohibits Members from concluding voluntary export restraint agreements among themselves, but for privately arranged restraints only provides that Members shall not encourage or support the adoption of such agreements as formed by private (or even public) enterprises.[26]

In a few cases GATT law does appear to require something more of WTO Members in imposing some obligation to take action in regard to the activities of economic actors. These examples appear to

[25] This characteristic of an enforcement framework has already provided a ready source of conceptual comparison between the TRIPS and a WTO competition policy framework. Compliance with the TRIPS Agreement by a Member is a matter of consultation and dispute resolution as between States, as in TRIPS Article 64. The TRIPS conformity of domestic exemptions has been the subject of dispute settlement. See. *United States – Section 110(5) of the US Copyright Act*, WT/DS160.
[26] WTO, Agreement on Safeguards, Article 11.1(b) and 11.3.

share the common characteristic that a Member is in direct control of the enterprise as a creature of the State or has assumed control over the process of enterprise itself.

Thus, for GATT Article XVII, Members that establish or maintain State enterprises, or grant enterprises exclusive and special privileges, have an obligation to ensure that such firms act in a non-discriminatory manner as to imports and exports, and to ensure that normal commercial considerations govern their purchases and sales. However, even for State trading as defined and governed by this article, there also appear to be some inherent limits on what GATT appears to impose upon its Members in regard to private conduct. This is evident in the recital in paragraph 1(a) of the principles of non-discriminatory treatment as they apply "for *governmental* measures affecting imports or exports by private traders". Thus, a Member is responsible for its promulgated measures, but not necessarily for private acts that would have the same discriminatory effects, at least in the absence of some actionable government enactment or other requirement.[27] A similar provision is found in paragraph 4 of GATT Article II on the scheduling of concessions. This imposes a requirement upon Members not to permit a State-authorized monopoly to afford protection in excess of the negotiated schedule.[28] Taken together, the provisions indicate a somewhat limited focus that seeks to ensure that enterprises established by Members having a capacity to affect trade must operate so as not to undermine the Member's GATT obligations and contracted concessions.

II.1.3 Services and providers

The GATS provides a contemporary, and some suggest evolutionary, example of Members adopting obligations to control private economic entities in Article VIII, entitled "Monopolies and Exclusive Service Suppliers". Paragraph 1 of that article requires that each member shall ensure that a monopoly supplier of a service does not act contrary to Article II (most-favoured nation) or as to other specific commitments. To the extent that the obligation is limited to behaviour in conformity with GATS obligations, this also suggests that the article does not establish an obligation to insure that a competitive market is being accorded. If read narrowly, the article provides that a State cannot delegate a GATS violation to undertakings operating under its control. As in the case of GATT State trading, the actors coming within the Member's obligations relate to those established or authorized by the member itself. As indicated in paragraph 5, this provision also applies to cases where a Member authorizes a small number of service suppliers or prevents competition among suppliers in its market. Thus, the scope of the article relates to the undermining of general or specific GATS obligations by a monopoly or quasi-monopoly power that is essentially the creation of the Member and operates under the regulatory authority and/or with the ongoing consent of a Member.[29]

A more expansive competition policy consideration is incorporated in GATS Article IX, entitled, "Business Practices", whereby the Members are obliged to consult with a view to eliminating certain

[27] See also GATT (1994) Understanding on the Interpretation of Article XVII, which establishes an affirmative notification obligation for State trading monopolies as according to the following working definition. "Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports." This definition suggests the scope of the subject matter of the article.

[28] GATT Article II.4, applying, "[I]f any party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product…". See also, GATT, Analytical Index, 6th ed., (1994), p. 84, Geneva Preparatory Notes. The provision is interesting for its idea of reaching an "effectively authorised" monopoly in the light of whether a domestic competition law exclusion for a sector might constitute such an authorization.

[29] As also indicated by paragraph 3, the obligation of a Member to respond to a request for information applies to monopolies it itself has established, maintained or authorized. GATS Article VIII, para. 3.

business practices that "may restrain competition and thereby restrict trade in services". This appears to be a single example of a provision that is not directly connected to either ensuring effective application of other stated WTO obligations or concessions, or to enterprises operating under direct authority of a Member, or both. With its broader scope, however, the provision also carries a softer obligation on the part of a respondent. It does not suggest an obligation for a Member to intervene in the domestic economy to establish a competitive market.

WTO annexed agreements provide a few other examples where Members do undertake some "best available" efforts to motivate private actors to give effect to the objectives of an agreement or to avoid undermining its obligations. An example is found in Article 3 of the GATT Agreement on Technical Barriers to Trade (TBT), whereby a Member shall not take measures requiring or encouraging non-governmental bodies to act in disregard of the provisions of the TBT for the preparation, adoption and application of technical regulations. Similarly, Article 4 states that Members shall take such reasonable measures "as may be available to them" to ensure that non-governmental actors acting as standard-setting bodies comply with the code of good practice.

From the above it is evident that while competition laws of the Members that have them may be dedicated to establishing benchmarks for domestic competitive markets and may identify the grounds on which the State may (or shall) intervene to ensure operable markets, WTO law as it now stands displays minimal interest in these aspects, and therefore demands very little of its Members in compelling domestic market interventions. Rather, WTO law is oriented to having its obligations, all directed to State behaviour, implemented by Members, and avoiding situations where an otherwise infringing activity could be conducted beyond redress solely through its delegation to a private economic actor. When intervention is a found element in a GATT or GATS provision, the objectives of interventions are limited. They are not directed to a broad concept of competition or contestability but, with the exception of GATS Article IX, remain confined to the purpose of securing compliance with existing WTO rules or negotiated commitments.

II.1.4 TRIPS

Since the WTO's TRIPS Agreement displays different characteristics from those of GATT or GATS, these peculiarities should also be considered in this light. The TRIPS preamble states its objectives as reducing distortions to international trade, promoting enforcement of intellectual property laws, and ensuring that government measures undertaken to provide for such enforcement do not themselves act as trade barriers. The primary mechanism employed by the TRIPS is the agreement by Members to establish and maintain certain national law provisions that act to secure private rights of action within the territory.[30] Part II of the Agreement specifies the standards of legal treatment that are to be accorded by national laws, while Part III designates the minimum enforcement provisions that must be also be provided before national courts and tribunals. TRIPS Article 41 provides that "Members shall ensure that enforcement procedures as specified in the Part are available under their law" For all aspects, the core principles of most-favoured-nation and national treatment are applied, the latter directed to the "nationals of the other Members"[31]

There are two apparent cases where the TRIPS Agreement compels Members to make interventions in respect of private conduct. The first is TRIPS Article 61, requiring Members to provide for criminal procedures and penalties in cases of wilful trademark counterfeiting or copyright piracy. This is an obligation to provide a basis for direct intervention as to the conduct of private

[30] As in TRIPS Article 1, "Members shall give effect to the provisions of this Agreement."
[31] TRIPS Articles 4 and 2, respectively.

actors.[32] A second example is purely trade-related. TRIPS Article 51 (and the articles immediately following requires Members to adopt procedures to permit rights holders to make applications to block the importation of counterfeit trademarks or pirated copyright goods. A successful application would result in the implementation of a measure by the Member.[33]

The TRIPS Agreement presents a first comprehensive WTO example of an enforcement-oriented framework that is designed to realize its objective of promoting the enforcement of intellectual property laws. By this it is suggested that the TRIPS establishes a requirement for national legislative benchmarks that extend beyond aspects that are purely "trade-related", as private actions made permissible by the Agreement need not be centred only upon the import/export function of the private complainant. This aspect is raised in consideration of the competition policy framework discussion whereby its objectives can be viewed in a narrower trade-related sense as well, or as in the case of the TRIPS, as an attempt to give some effect to a broader objective of competition policy enforcement irrespective of a trade-related element.

II.1.5 Section conclusion: The State remains the subject

It is a long recognized anomaly in GATT law that while all manner of internal State regulations that affect trade and violate the rules can fall within the scope of dispute settlement, private conduct that duplicates the same trade effects cannot be addressed. Thus far, Members have not agreed to establish a regime that would compel them to act against private restraints that affect trade. This limited scope for WTO law also reflects inherent differences between trade and competition laws as to the subjects they respectively treat. Competition laws are directed to the practices and agreements of economic actors as these affect the quality of competition in the market.[34] By contrast, national trade laws address the State itself as an actor, and in regard to its measures and procedures employed to open and close the market. Trade laws may be employed primarily for the purpose of benefiting domestic economic actors, but these actors are not the subjects to which the laws are directed.[35]

GATT law has traditionally been concerned with this second set of laws. While it has demonstrated some capacity to reach cases where a State compels or induces non-conforming conduct by private actors, a distinct limitation of this body of law is that only the State or enacting territory and the measure it has imposed can be the subject of a recommendation to bring such a measure into WTO conformity.[36] Thus it is the conduct of the State that is likewise the subject of WTO law.[37]

The TRIPS Agreement constitutes an extension only to the extent that while States still remain the subject of the obligations, they also agree to establish particular domestic regimes which grant rights of civil action and remedies to economic actors to address the conduct of others in the market. A competition policy framework would either be adopting this approach or not, depending upon the

[32] However, since these laws can only be invoked by the enacting Member, any suggested limitation on sovereignty is found in the requirement to have the laws "on the books".
[33] The decision to act or not act to impose a restraint on circulation remains solely with the enacting Member.
[34] Some laws define undertakings broadly enough to include public or quasi-public actors, but all display some capacity for government to intervene within the territory in respect of infringing agreements and practices by private actors. Economic actors are the subject-matter focus of the laws.
[35] State regulations that are not trade laws *per se* fall within the scope of WTO law to the extent that they are determined to affect trade in view of the core obligations.
[36] WTO, Dispute Settlement Understanding, Article 19, providing the express legal basis for a panel's recommendation.
[37] This is a question of attribution of private actions to those of the State. The degree of compulsion or inducement required to attribute the behaviour of economic actors to that of the State has been the subject of a number of GATT and WTO cases, discussed below.

degree of compulsion required for Members to adopt competition laws. If a framework agreement does not compel adoption of competition laws by the Members, then the TRIPS is also not a relevant example. In that case one might consider that the TBT Agreement is more relevant, where Members are not compelled to have a particular set of laws, but if they have laws, they must frame them within some parameters to recognize the core principles and not permit them to function as unnecessary barriers or obstacles to trade.

In either case, however, and as in the example of the TRIPS, what remains actionable in the WTO context is not whether a private actor has violated national laws that are established, but whether the state has established and maintained the national laws in accordance with its obligations under the Agreement. Thus, we examine generally the scope of WTO on this point.

WTO law does not direct itself to private parties and has sought to establish only a minimal foothold in directing its Members to compel any particular style of private economic market behaviour from their firms. Examples where WTO has these provisions tend to be limited to cases where the Member is establishing monopolies or granting special rights to firms. In these cases WTO law places an obligation upon Members to ensure that the core principles are not undermined. When WTO provisions do compel States to take some action in regard to the behaviour of firms in the markets, the Member territory clearly remains the responsible party with regard to the measures or requirements it has adopted. Private economic entities remain within the domain of domestic competition and regulatory authority.

II.2 WTO application to national competition laws

II.2.1 Introduction

It is often noted that trade laws act to complement competition policy to the extent that imports contest the domestic market, and likewise conflict with competition when imports can be restricted to lessen competition. Competition laws are gradually being viewed in the same dichotomy since they can also be promulgated so as to support the process of importation or exportation, or be designed or applied to frustrate the same.[38] Establishing an objective for national laws to not undermine WTO objectives is a common element of annexed agreements. This has been noted as provided in the TRIPS Agreement and the GATT Agreement on Technical Barriers to Trade, where the preamble and operative provisions seek to ensure that laws and regulations do not themselves function as unnecessary trade barriers. There is no comparable objective stated in the WTO for national competition laws.

However, this is not to suggest that GATT/WTO is without some significant capacity to address those elements of national competition laws. For this, the next section will treat WTO provisions for goods and services not as they relate to practices of economic actors, but rather to national laws themselves, and in order to establish the scope of these core GATT rules in the absence of any competition policy framework.

II.2.2 Goods

Core GATT obligations work together to establish a system of international trade regulation that is intended to allow protectionism in the form of tariff duties as preferred to other trade instruments. It

[38] This is not to disregard the point that some States without trade laws also assert that fully open markets act as a substitute for competition rules.

then acts to ensure that duties and charges permitted are applied without discrimination as to like products on the basis of origin. Discrimination between domestic and foreign produced goods is permitted upon importation by the application of a tariff duty. Since this duty is not similarly required to be applied to like domestic products, discrimination in this sense is permitted by the GATT and encouraged as the legal means of providing for domestic protection for domestic producers. For the purpose of importation, discrimination (with exceptions) is not permitted as between foreign sources (MFN). Likewise, once goods have been imported, discrimination is also not permitted as between domestic and imported goods (national treatment) or in regard to discriminating between different foreign sources of imported goods for internal taxes or regulations (also MFN).

WTO does not require Members to have or not have trade laws. What GATT rules do accomplish together is to create a system establishing legal parameters for trade laws with a primary intent to affect the operation of national trade laws as they apply to importation and exportation. The core articles forming this system include Article XI, prohibiting measures other than tariffs, duties and charges; Article II, enunciating the concept of contractual binding for scheduled (conventional) tariff duties; and Article I, requiring non-discriminatory application of tariffs and other importation formalities on the basis of (foreign) territory origin. GATT Article X, entitled "Publication and Administration of Trade Regulations", provides the core transparency provisions which permit Members to be fairly apprised of the laws (and other governmental acts) that would affect their imports or exports. The article establishes an independent obligation upon Members, but clearly operates to give meaningful effect to the other core obligations. Without transparency a Member would be disadvantaged in determining whether another has violated an obligation.[39]

Article III, providing for national treatment, is the GATT provision that reaches most directly to the internal legal regime of a member, as any law, regulation or requirement may affect the treatment of goods after they are imported. This requires that internal laws and taxes shall not be applied so as to afford domestic protection. Although "internal" in its scope of application, it is also fundamentally supportive of the other obligations, since any residual ability to accord less favourable treatment to imported goods as compared with domestic goods would necessarily undermine the other stated obligations.[40] For the core GATT Articles, only Article I MFN shares this same potential to reach within the market to affect internal government behaviour. This flows from that article's enunciated application, "with respect to all matters referred to in paragraphs 2 and 4 of Article III". This means in effect that a Member's internal laws, regulations, requirements and taxes may not discriminate between like imported products (Art. I MFN), as well as between imported and like domestic products (Art. III, NT).[41]

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[39] The Article is not interpreted so narrowly as its title suggests to only be effective in regard to trade regulations, as in customs laws, but also as to measures covered by GATT Article III. Article X.1 provides coverage for laws "affecting their sale, distribution, transportation, insurance…". See also, GATT Analytical Index, 6th ed., 1994, p. 271, citing 1988 panel report on *Canada–Import, Distribution and Sale of Alcoholic Drinks…*, L/6304, 35S/37, para. 4.20. Generally, laws, regulations, judicial decisions and administrative rulings of general application must be provided in a form that can be considered by traders; in a timely fashion they must be administered fairly and impartially, and certain administrative procedures must be established for review and correction.

[40] To illustrate, the value of a negotiated tariff concession is undermined if the conceding territory could re-impose the charge by assessing an internal but discriminatory tax upon imports.

[41] The WTO Agreement on Technical Barriers to Trade (TBT) provides an additional standard of treatment for internal regulations. TBT Art. 2.2, provides that Members shall ensure that their technical regulations are not prepared, adopted or applied with the effect of creating unnecessary obstacles to international trade. A national competition law would not generally fall within the definition of a technical regulation (TBT Annex I), although it is not inconceivable that a competition provision might be defined for application on the basis of a product characteristic or related process and production method.

This suggests that the GATT rules of particular relevance to national competition laws and their application include Article III.4 as it applies to internal laws, regulations or requirements, and Article I as it also applies to these same requirements when comparing treatment between foreign sources. Since Article I's application to internal matters is made by reference via Article III, the scope of the latter article's application to competition laws should constitute the threshold inquiry since this would determine the scope of application of both Articles. For this, the initial proposition to consider is that national competition laws shall not be enacted or applied by a Member so as to accord less favourable treatment to like (or directly competitive) imported products.

II.2.3 Services and providers

The WTO General Agreement on Trade in Services also provides a comprehensive framework consisting of certain core principles that could or should affect national competition laws. As in GATT, most-favoured-nation status is also accorded the status of a general obligation in GATS Article II in respect of "any measure covered by this Agreement" as to services (except government-provided services) and service suppliers.[42] The term "measure" includes a law, regulation, rule, procedure, decision, administrative action "or any other form" (GATS Article XXVIII), and including those taken by central, regional or local governments (Article I:3(a)(i)). This indicates that this most-favoured-nation obligation extends to measures other than those characterized as "border measures" limited to the concept of "importation". This reflects a more fundamental distinction between services and their providers and goods and the manner in which the GATS has been finalized as a framework agreement.

As widely noted, the GATS does not establish a general obligation hierarchy of permitted/ prohibited importation measures, as does GATT by reference to Article XI. The GATS framework also necessarily reflects the importance of discriminatory internal regulatory measures as a most common means employed by Members to afford domestic protection. While certain measures upon importation can be described and made the subject of negotiation and commitment (GATS Article XVI), the denial of national treatment is itself a commonly employed instrument applied to services and providers for the purpose of affording domestic producer protection. Thus, GATS national treatment as found in Article XVII is not a general stated obligation, but rather is designated as a specific commitment to be undertaken in conjunction with a market access commitment. While GATS national treatment attaches to sectors and modes that have been made the subject of a market access commitment, Members also are reserved the right to qualify its application in their scheduled commitments. Thus, one may characterise GATS national treatment as negotiable. When the commitment is made, a Member must not provide less favourable treatment to services and service suppliers of another member in respect of all measures affecting the supply of services than it accords to its own like services and service suppliers.

Given this outline, one may generally characterize the application of the GATS core principles to national competition policies as follows. While MFN generally applies to ensure the treatment as between foreign sources in regard to any internal regulatory measure or set of rules affecting services or suppliers, national treatment does not apply until a Member has chosen to make a market access commitment. At that time as to that service sector, and to the extent that no derogation to national treatment is otherwise stated, national treatment shall apply to the sector and any regulatory or competition policy regime that is governing it. To the extent that national competition laws may explicitly or implicitly defer sectors to domestic regulatory regimes, it would also follow that these

[42] Without considering initially stated exemptions as permitted in GATS Article II.2, and the Annex on Article II Exemptions.

"exclusions" may also be measures affecting supply. If so, they are capable of being evaluated as to whether they provide less favourable treatment to services or service suppliers of other Members.[43]

II.3 Part conclusion: The borderline between private and public action

If an action is private WTO law does not apply. If it is public, WTO law applies. The dividing line between private and public actions is the determining factor. Another way of expressing this is to ask what types of private actions can be attributed to the State for the purpose of invoking WTO rights, and what does the State have to do in order to effectively assume responsibility for otherwise private acts.

The first consideration concerns the interchangeability of certain terms that are used in the core obligations, especially since some have definitions in our context and others do not. The terms that concern are GATT Article XI's reference to "prohibitions, restrictions or other measures," the GATS use of the term "measures" throughout, and the GATT Article III.4 terminology of "laws, regulations or requirements". The question is whether we can treat these different terms functionally the same for the purpose of outlining the types of actions that fall within the ambit of the provisions. In WTO law, there is no guarantee that a term employed identically across different provisions will be given the same scope in a given case.

However, it does appear that measures and requirements are both broader than laws and regulations, and while measures are probably even broader than requirements, they may be functionally equivalent as well for a whole range of "legislative enactments" or "suitable action for achieving some end".[44] The element common to both terms may well be the concept of "enactments", with the difference being that measures are used in the context that also refers to enactments that are expressly directed to regulating trade. For "requirements" as found in GATT Article III.4, the term does suggest something in addition to "laws or regulations", also suggesting that *requirements* could be considered roughly equivalent to *measures*. Thus, the *Japan – Photographic Film* panel considered that both encompassed "a similarly broad range of government action and action by private parties that may be assimilated to government action".[45]

Since measures were considered by the same panel to extend to "other governmental actions short of legally enforceable enactments", requirements should also receive at least the tentative benefit of any interpretations that have been rendered for measures in this vein.[46] If this interpretation held for requirements, this would allow consideration for administrative levels of government action that are

[43] Since services are commonly subject to governmental regulatory authority, it is suggested that regulatory systems according less favourable treatment come under the national treatment obligation unless enunciated as scheduled derogations. Within the context of national treatment application, there does not appear to be any meaningful distinction to draw between "regulatory" and "competition" policies as the focus is upon whether a measure is present and whether it affects the supply of a scheduled service.

[44] *Japan – Measures Affecting Consumer Photographic Film and Paper* (hereinafter, *Japan – Photographic Film*), WT/DS44/R, 31 March 1998, para. 10.43, footnote 1208, reciting for the term "a measure", Oxford Dictionary, 9th ed.

[45] *Japan – Photographic Film*, para. 10.376, however, stated by the panel to be only as an assumption for the purpose of the analysis in the case.

[46] *Japan – Photographic Film*, para. 10.43. In para. 10.376, the panel considered that while the term *requirement* may have a narrower scope than the term *measure*, at least for the instant case, both encompassed, "a similarly broad range of government action and action by private parties that may be assimilated to government action" GATS Article XVII (national treatment) applies to all *measures* affecting the supply of services.

intended to have some type of mandatory effect in regard to the conduct of private actors in the market.[47]

To the extent that we are permitted to draw this functional equivalence between "requirements" and "measures", the first term should also be understood to include the concept of inducing behaviours directed to firms by governmental entities. The leading GATT case on this is the *Japan – Semiconductors* panel, where two criteria were posed to determine whether government action which was formally non-obligatory in nature could be deemed to constitute a measure in the sense of the GATT Article XI prohibition. Thus,

> "…the Panel considered that it needed to be satisfied on two essential criteria. First, there were reasonable grounds to believe that *sufficient incentives or disincentives* existed for non-mandatory measures to take effect. Second, the operation of the measure(s)… *was essentially dependent* on Government action or intervention... The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance, and that there could be therefore no doubt that they fell within the range of measures covered by Article XI.1."[48]

One characterization of this test is that "but for" the action of the Government, the private party would not have instituted the agreement or practice.[49] In this manner an enunciated government policy could be examined as meeting the condition of a requirement for national treatment purposes as well.

However, the above test appears to have been expanded upon by the panel in *Japan – Photographic Film* to also allow consideration of actions that have not formally established a system of incentives or disincentives, and in the specific context of competition policies. This panel indicated that it would not limit its review to an exclusive use of an incentives/disincentives test wherein the benefit was explicitly granted or a legally binding obligation was imposed. Rather,

> "[W]e also consider it conceivable, in cases where there is a high degree of co-operation and collaboration between government and business, e.g., where there is substantial reliance on administrative guidance and other more informal forms of government-business co-operation, that even non-binding hortatory working in a government statement of policy could have a similar effect on private actors to a legally binding measure or what Japan refers to as regulatory administrative guidance."[50]

The emphasis here is upon guidance and cooperation as between government and private entities, each party doing its part to give effect to an overall policy. Whether this is different from a "but for" test is not so obvious, except that while industry might have been pursuing a policy of its own, the cooperative participation of the State as it clears the regulatory pathways to assist the firms will perhaps result in the actions of those firms being attributed to the State.

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[47] Author's characterization. The *Japan – Photographic Film* panel cited examples of earlier cases where particular actions were found to be requirements, and the panel noted written import and export undertakings conditioned on government approval (*Canada – FIRA*), and requirements, "which an enterprise voluntarily accepts in order to obtain an advantage from the government". (*EEC – Parts and Components*), ibid., para. 10.374, and citations to notes 1414 and 1415 therein.

[48] *Japan – Trade In Semi-Conductors*, Report of the Panel adopted on 4 May 1988. (L/6309 - 35S/116), para. 109, italics added.

[49] See OECD, COM/DAFFE/TD(2002)49, para. 98.

[50] *Japan – Photographic Film*, para. 10.49.

While this description may be the outward boundary of what is possible to attribute, what is suggested within that boundary is a test that certainly can go beyond the formal characterization of a government action. This would consider the action's effects on the behaviour of firms in the market, at least as behaviour by the firms might be comparable (or equivalent) to the effects that would otherwise be expected to flow from a more formal law or regulation. Thus, "[C]onsequently, we believe we should be open to a broad definition of the term measure for purposes of Article XXIII:1(b), which considers whether or not a non-binding government action has an effect similar to a binding one".[51]

II.3.1 The Japan – Photographic Film *distribution measures*

Four Japanese distribution provisions of the eight raised for challenge by the United States were analysed by the panel for national treatment. On the criteria enunciated, the provisions were found to be first measures (for the purpose of the non-violation complaint criteria), and then summarily ruled to be also requirements for the later Article III.4 analysis. These included a 1967 Cabinet Decision directing the modernization of Japanese distribution. This was found to be a measure overall, but not on the specifically challenged text, which appeared "more in the nature of a general policy statement than either a decision on particular government actions or a mandate to private industry to follow governmental policy by taking specific actions".[52] A second measure was the 1967 Notification 17 on premiums to business, which limited the amount manufacturers could offer as cash or premiums to wholesalers or retailers as inducements. Both parties agreed that this was a measure.[53]

A third action found to be a measure was the 1970 rationalization guidelines, where the issue before the panel was whether this administrative guidance constituted "mere suggestions" or provided "sufficient incentives for private parties to act on a particular manner such that it would have a similar effect on business activity in Japan to a legally binding measure".[54] The final action found to be a measure was the 1971 Basic Plan for the Systemization of Distribution. Here, there was no law or regulation, the plan did not provide for stated incentives or disincentives to the private sector, and it was prepared by a quasi-government body. However, it was found to bear the indicators sufficient to be a measure; the panel noting that a government agency commissioned the body and the plan, that it was endorsed by the agency, and the agency indicated that it would work with industry to have the plan implemented.[55]

These examples indicate that the analysis for national treatment purposes as regards requirements, as well as for other GATT articles employing the term "measures", extends beyond the facial categories and characterizations employed in the larger and more general enacting law or regulation. However, as also indicated by the *Japan – Semiconductors* panel, not every government action can constitute a measure.[56] Likewise, as confirmed by the negative findings of this panel, and as discussed

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[51] *Japan – Photographic Film*, para. 10.49, the test enunciated in the context of non-violation complaint considerations.
[52] *Japan – Photographic Film*, para. 10.98.
[53] *Japan – Photographic Film*, para. 10.109.
[54] *Japan – Photographic Film*, para. 10.160 and 10.161, and also suggesting that the *Japan – Semiconductors* test as extended by the panel applied to the facts of this measure. Factors that were noted included the agency's declaration that the parties involved would be expected to make voluntary efforts, and that the agency commissioned the Chamber of Commerce to draft a model contract.
[55] *Japan – Photographic Film*, para. 10.181.
[56] For *Japan – Photographic Film*, study reports and recommendations setting out options do not contain incentives or disincentives and are not measures. Neither are reports made *to* government, or one consisting of a factual survey of past practices made at the request of government. *Japan – Photographic Film*, discussion on 6th and 7th interim reports, paras. 10.122 and 10.136; past-practices report, para. 10.148.

in detail below, just because an action constitutes a requirement does not predetermine a finding that the respondent is according less favourable treatment.

II.3.2 "Requirements" as drawn from multiple or successive actions

It should also be considered that the concept of requirements is not confined to the parameters established by any single legal enactment or law. Rather, it would seem that for both measures and requirements, the composition of government action to be considered should be able to be defined by the interaction of actions taken under different laws, their detailed provisions, and as above, their behaviour-inducing effects. In seeking to determine the actual effects that have been generated by government action, it would seem reasonable that a complainant could draw on more than a single governing enactment. A provision or government action drawn from a regulatory context could therefore be integrated (or read together) with one drawn from a competition law context to form a single cohesive government measure or requirement. In *Japan – Photographic Film*, there are a number of points of analysis where the measure or requirement was constructed as a whole from constituent declarations drawn from different bodies, agencies and actions over time. This was done not only for the purpose of attempting to prove continuing effect, but also to characterize the measure as an overall entity. Similarly, in determining a standard for internal treatment for imported goods, sections of trade and competition laws have been drawn together to form the comparable basis for treatment of domestic goods.[57]

Although the *Japan – Photographic Film* case dealt with distribution, the same considerations should apply to domestic (horizontal) cartels that might have reason to discriminate against the sale of imported goods. Obviously, given the case law recited above, "cooperation" between government and the private sector can taint conduct in such a way that it can be attributed to government action, at least where the effects that would reasonably be expected, if generated by a mandatory requirement, would accord less favourable treatment. This might also suggest, as many parties have noted, that transparency considerations in regard to government instructions to the domestic market are closely related considerations, especially if, when disclosed, such guidance or cooperation becomes WTO-actionable.

The next part will consider whether exclusions can qualify as enactments in this context. For now, what can be said more generally is that the characterization of a policy as either competition or regulatory has no apparent bearing on whether it is a measure or a requirement under GATT/WTO law. Although the WTO does not compel Members to pass competition laws, laws that are put into force fall under the normal purview of WTO law. There is nothing distinct in the WTO treatment as to a law characterized by "regulatory" authority as distinct from "competition" authority. Although States often divide these aspects into separate bodies, WTO law only treats the question of whether a law, regulation or requirement affects the sale of goods. Since national competition laws are decidedly "internal", the national treatment obligation as it applies to such laws should receive primary attention for analysis. It is to that subject that the discussion now turns.

The reach of WTO law over domestic laws that relate to enforcing competition is no more or less than its capacity to address any other national laws, regulations or requirements that either regulate trade directly or affect trade. Within this parameter, WTO law is potentially extensive. There is no indication that WTO places limitations on addressing competition laws relative to regulatory systems

[57] The example cited is the *U.S. – Antidumping Act of 1916* panel report where both parties agreed that a particular US competition law provision would establish the basis for comparable treatment as to imported goods under the 1916 Antidumping law. *United States – Antidumping Act of 1916*, WT/DS136/R, 31 March 2000, paras. 3.292 et seq.

generally, or makes any distinction between various other forms of regulatory laws or domestic policies and competition laws.

III NATIONAL TREATMENT FOR COMPETITION LAWS AND FRAMEWORK PROVISIONS

III.1 Introduction

National treatment is identified above as a major consideration for laws, and an extensive discussion is devoted to it in this part. However, since other surveys have carefully documented the elements of the obligation contained in GATT Article III and GATS Article XVII, this part will only attempt to highlight those aspects that have ramifications for national competition laws, albeit leaving much for the reader to "fill in" with the requirements of particular laws.[58] National treatment in the GATT context, and in the GATS when committed in full, has an extensive reach over national competition laws, especially with the addition of a *de facto* (effects-oriented) examination. However, in the competition policy context it also has an inherent limitation in that it can *only* survey for less favourable treatment on the basis of foreign origin. It is in this sense that the national treatment requirement cannot provide a basis for an effective prohibition against all categories of hard-core practices with an international dimension. Thus for any laws that foster cartel agreements between foreign and domestic firms, or for those that do not exclude the possibility of foreign participation, national treatment does not appear to able to address these types of arrangements as anti-competitive practices.

At the same time, it is suggested that national treatment may be better than commonly surmised for challenging domestic cartels with a decidedly anti-import bias, especially if it is true that most successful arrangements have some government involvement. In this respect, a case can be made for bringing domestic exclusions from national competition laws within the purview of national treatment. While WTO legal developments may not be so far advanced as to permit a firm conclusion on the treatment of exclusions, the reader may judge for himself or herself the "gap" between what would be required for a successful direct violation claim upon an exclusion, and the current status of WTO law. What might serve as a tentative conclusion is that a national treatment claim would have its strongest possibility for prevailing when the recipient of the exclusion is a single dominant domestic entity or when the entire structure of the competition law could be brought to examination to screen for overall disparate effects on foreign goods generated by one or all of the exclusions.

An area where a lesser alarm is sounded than that of some commentary within the Working Group discussions is the examination of individual case decisions. Here it seems more difficult to characterize a court decision as a legislative enactment at the outset. While individual decisions made by administrative agencies are often challenged in GATT law, this appears to be conducted in the context that an interpretation or application of the law in the particular case was evidence that the law itself did not conform to WTO rules. The decision is more a form of evidence of an act's non-conformity than the target.

Finally, this section will end with some comments directed to a CP framework and to the relative capacity of national treatment to capture the subjects that are suggested as falling under a prohibition. In addition, a question to consider throughout is whether a framework would act to expand the application of national treatment as it stands – the common assumption one thinks – or perhaps operate in some respects to limit its potential application as evolving in WTO law.

[58] See WTO, Secretariat, WT/WGTCP/115, May 1999.

III.2 Effective equality of competitive opportunities

GATT Article III.4 refers to treatment of like products in regard to laws "affecting their internal sale offering for sale, purchase, transportation, distribution or use". To the extent that a competition law of a Member might affect the treatment accorded like imported products in regard to any of these matters, that law should be considered as coming under the scope of GATT Article III.4. This grants to national treatment a potentially broad scope to examine national competition policies, at least to determine whether or not imported goods, services or providers are being treated less favourably as compared with domestic ones.

Although broad national treatment does not impose a market access obligation within the meaning of "importation", as issues dealing with importation and exportation of goods or services are clearly outside the scope of the article.[59] With respect to the internal market, national treatment also does not mandate the establishment of a market with any particular objective competitive characteristics. Rather, it only operates to compare the status of competitive conditions as between domestic and imported goods and services. While one can recognize that the obligation of providing for equality of competitive opportunity is closely related to the concept of competition itself, since establishing equal conditions may effectively promote competition, the two concepts are not synonymous. National treatment cannot compel Members to develop contestable markets except to the extent that the sale and distribution of imported goods and services are relieved of their disadvantage relative to domestic like goods and services, and only in respect of the Member's own laws, regulations or requirements.[60] Thus, the obligation is limited conceptually to the act of making a review of a State's regime as enacted and maintained and making a *comparison* to determine whether less favourable treatment should result for imported goods or to services or service providers.[61]

This comparison is made as to how laws affect the sale of goods rather than how they affect producers, transporters, distributors and retailers. While a State requirement may be directed to a firm, the national treatment claim has to relate that requirement to its effects upon the sale of goods. It is not a showing of a national treatment violation to demonstrate that firms have been treated differently. This additional step that considers the effects upon goods is required. For GATS, providers of services are directly referenced as well as the services they produce. This broadens the scope of GATS to the treatment of firms relative to that of the GATT.

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[59] *Canada – Administration Of The Foreign Investment Review Act*, Report of the Panel adopted on 7 February 1984, (L/5504 - 30S/140), para. 5.14, "…The Panel shares the view of Canada that the General Agreement distinguishes between measures affecting the "importation" of products, which are regulated in Article XI:1, and those affecting "imported products", which are dealt with in Article III." The distinction is maintained in the GATS framework, as indicated by GATS Article XX, providing for schedules for specific commitments by Members (separately) for terms and conditions for market access (GATS Article XX.1(a)), and for conditions and qualifications on national treatment (GATS Article XX.1(b)).

[60] For Article III.4, "The selection of the word 'affecting' would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market." *Italian Discrimination Against Imported Agricultural Machinery*, Report adopted on 23 October 1958 (L/833 - 7S/60), para. 12.

[61] Some suggest that this difference accorded must be on the basis of origin, and that if it is on the basis of independent criteria, it would not matter how the burden fell as between imports and domestics. On a related aspect, there is growing support for a view that not all like imports have to be treated identically. As cases have come forward to consider the discriminatory effects of otherwise facially neutral laws, and as the concept of like products for regulatory national treatment has been broadened to include directly competitive products, there has also been some increasing recognition that mere differences drawn between like products are not actionable under GATT law. As discussed below, the shift of emphasis is to how groups of like products are treated.

As an additional element, the quality of the State's regime to be established is examined in a prospective manner. Attempted or completed importation need not occur prior to making a claim for national treatment since the obligation, both for goods and for services, is intended to protect the expectation that an equality of competitive conditions will be provided. It is in this sense that national treatment is also confused with the concept of market access. To the extent that imported goods receiving national treatment may be more internally competitive, imports would increase. However, as above, the conditions established for internal contestability do not govern the conditions for entry.

III.2.1 Formally identical or non-identical provisions

The requirement to establish national treatment cannot be summarily met by establishing formally identical requirements for the treatment of products in the textual provisions of the national law. The following GATT panel paragraph is often quoted on this point:

> "On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognized that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable."[62]

When a law makes a distinction on the basis of territory origin, it is a clear warning that a national treatment violation may be present. However, just because a law has different treatment does not mean that the violation has occurred. The text of GATS Article XVII incorporated this interpretation as a Member may meet the requirement "by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers". Again, this affirmative obligation to impose formally different requirements if necessary to provide for equal competitive conditions is limited in scope to the Members' "laws, regulations and requirements" rather to creating competitive conditions more generally.

III.2.2 De jure *and* de facto *application*

This has given rise to case law that supports an interpretation that the non-discrimination obligations of Article III go beyond the formally stated requirements of a law or requirement (*de jure*). An examination limited to discrimination *de jure* would review only those distinctions drawn between domestic and imported goods (and services) on the basis of their origin that were stated on the face of the law or regulation itself. For the interpretation of GATT Article I, the WTO Appellate Body has explicitly ruled that facially neutral provisions can be found discriminatory in application or effects (*de facto*).[63] Thus, "[L]ike the Panel, we cannot accept Canada's argument that Article I:1 does

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[62] *United States – Section 337 of the Tariff Act of 1930*, Report by the Panel adopted on 7 November 1989 (L/6439 - 36S/345), 36 BISD, 1990.

[63] "In approaching this question, we observe first that the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an 'advantage' to like products of all other Members appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words '*de jure*' nor '*de facto*" appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only 'in law', or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also 'in fact', or *de facto*, discrimination." *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Appellate Body, WT/DS142/AB/R, 31 May 2000, para. 78 (footnote in quotation is deleted).

not apply to measures which, on their face, are "origin-neutral".[64] The panel in *Japan – Photographic Film* applied its national treatment findings to Japan's distribution measures on the basis of both *de jure* and *de facto*, noting that they neither

> "(i) discriminate on their face against imported firm or paper (they are formally neutral as to the origin of products), nor (ii) in their application have a disparate impact on imported film or paper."[65]

Neutral requirements maintaining disparate impact upon like products is the essence of the *de facto* violation of national treatment. Since it is the State's affirmative responsibility to ensure equality of opportunities, it follows that the State has a matching responsibility to create non-formally identical treatment as necessary within its laws and requirements to achieve the ultimate effect of no disparate impact upon like imports. A ramification noted here is that where disparate impacts do occur, a law should be capable of identifying the objective in which the interests of the State are validated by according protection. Essentially, this reflects the status of the existing law to the extent that a violation of the national treatment requirement shifts the burden to the respondent to then validate the disparate impact by invoking a stated legitimate objective.[66]

III.2.3 The playing field analogy

A suggested analogy delineating the overall obligation as described above is that of the so-called level playing field consisting of the domestic market. The internal market of a Member is the terrain upon which the contest between domestic and imported goods and services takes place, and national treatment is the international legal mechanism that allows for a survey of the condition of the field.[67] The State is sovereign and can design the conditions of the field with a free hand, or even determine that there should be no field of play for any particular commodity. Whether the field is in good or poor playing condition is also for the State to decide. What national treatment imposes is that, whatever the State determines to be circumstances for play, it may not then apply its own authority in

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[64] Although it is noted that a similar finding has not been explicitly rendered on behalf of Article III.4 by the Appellate Body (as compared to WTO panels), the seemingly universal consensus at this point is that examinations according to Article III and GATS Article XVII are engaged both *de jure* and *de facto*. Thus, from the WTO panel report on *Japan – Photographic Film*, "We note that WTO/GATT case law on the issue of de facto discrimination is reasonably well-developed, both in regard to the principle of most-favoured-nation treatment under GATT Article I and in regard to that of national treatment under GATT Article III." *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, 31 March, 1988, para. 10.86.

[65] *Japan – Photographic Film*, para. 10.381. The cases analysis regarding a possible disparate impact upon imports seems short-handed in retrospect, in applying (entirely) the "change of conditions" standard made for the non-violation complaint to *de facto*, as "upsetting the relative competitive position". Ibid., para. 10.380. The author suggests that the test in this case might not have been properly applied, as the complainant should have to show that the measure "can" or "may" upset the equality prospectively, in the abstract as well, i.e. with or without prior or post-market participation. See panel treatment, ibid., para. 10.115 and especially 10.130, where "…the (US) has not been able to point to any single instance where application of the Sixth Interim Report has done so [upset the competitive relationship] in respect of US film or paper."

[66] For this purpose, GATT Article XX does not provide a list that comports well with the objectives noted throughout discussions relating to development, modernization and preservation, concerns that Members are have also identified as affected by competition and regulatory policies. This suggests that a CP framework would be needed now to provide for exceptions that otherwise will not be recognized under Article XX GATT. Another aspect treated below is that since invoking an exception requires a shift in the burden, for certain legitimate interests, the structure of the framework obligation/prohibition should better reflect certain legitimate interests by functioning as exemptions, where the burden of non-application could continue to lie with the complainant. This is commented on in the conclusion below.

[67] This is not be confused with the level playing field as sometimes applied to compare domestic versus foreign producer requirements.

arranging for any less favourable conditions on the field for imported contestants as compared with domestic ones. While competing goods do not enter the field until released into circulation, an analysis of the field can be made before this occurs. Thus, it is the expectation of the *equality* of competitive conditions upon the field that is the subject of a national treatment examination.[68]

However, as the earlier review of WTO applied to actors indicated, the State does not have an obligation to ferret out distortions being caused on the field by the private actions and strategies of the players, except if it may be inducing or helping them to tilt the field in some manner. Thus, to the extent that a competition policy framework might create an obligation to provide redress for inequalities caused by purely private agreements or restraints, this would call for a greater degree of State involvement in setting certain objective conditions for the field of play than is now required under the rules. However, this extension may also not require that the State become an active referee for all private actions undertaken by the players. It may be that a more passive role is established where the State only guarantees that the rules for private conduct are posted and that an arbitrator will be available to referee the infractions.[69]

GATT national treatment is not a competition policy provision and its focus is not to ensure that competition takes place. Rather, it seeks to guarantee that for whatever competitive conditions are established by domestic regulations or requirements, these conditions are equally accorded to imported goods so as not to afford protection to domestic producers. For this evaluation, a facially neutral set of requirements can be examined to determine whether there is a resulting disparate effect upon the treatment of imported goods.

III.3 National treatment and exclusions

Two areas within the national treatment discussion that have generated some prolonged commentary from Members include the use of exclusions in competition laws and the treatment of individual case decisions.[70] Both present *de facto* application questions. An exclusion is considered here to be a provision within a national competition law that provides for non-application of substantive or procedural standards that would otherwise apply.[71] Exclusions are said to come in a diverse variety, including explicit and implicit, and as to subject matter, as either sectoral or non-

[68] "The majority of the Members of the Working Party on the 'Brazilian Internal Taxes' therefore correctly concluded that the provisions of Article III:2, first sentence, 'were equally applicable, whether imports from other contracting parties were substantial, small or non-existent' (BISD Vol. II/185)." *United States - Taxes On Petroleum And Certain Imported Substances*, Report of the Panel adopted on 17 June 1987, (L/6175 - 34S/136), para. 5.1.9. It has occasionally been questioned whether the obligation extends to producers or is confined to the treatment of goods themselves. Measures affecting producers may affect goods, but the effect upon goods must be shown.

[69] This would arguably be a component of a CP framework where states were required to enact competition laws guaranteeing contestability, and then subject to national treatment, thus extending the equal right of contestability to imported goods. A switch to non-discrimination on the basis of the nationality of a firm would also have some implications since the required survey now refers to the treatment of goods rather than to the treatment of firms.

[70] Individual case decisions are treated in a section below.

[71] WTO Secretariat Doc, WT/W/172, 06-06-01. The terms *exemptions*, *exclusions* and *exceptions* are used there synonymously. In this discussion the term *exclusion* is used more restrictively to delineate activities that are placed beyond the application of a competition law. To contrast, an *exemption* will refer here to an activity that falls under the scope of the law and its prohibitions, but is otherwise provided a means of redemption for some pro-competitive or *de minimis* effect, whether determined by a stated criterion or by rule of reason. Here, an *exception* will be taken to mean an activity that does come fully under the law, but is permitted in any case as fulfilling an overriding legitimate State objective. This use of the term *exception* is intended to reflect WTO practice.

sectoral. Since an exclusion provided in a national law would not be likely to make any explicit reference to different treatment to be accorded on the basis of origin, a theory of complaint on national treatment could flow either from an argument that less favourable treatment was being accorded in the application of the exclusion where its effects were more burdensome for imported goods or services, or alternatively, by reference to the design of the overall competition law scheme as it tended to exclude areas only benefiting domestic producers relative to imported goods or services.

III.3.1 An exclusion as a requirement or measure

A threshold question for either argument is whether an exclusion can be construed as a law, regulation or requirement within the meaning of GATT Article III, or as a measure affecting the supply of services as according to GATS Article XVII. Following on the definition above for a measure as constituting either a legislative enactment or other government action having the same effect, it would not seem to be determinative that the only requirements or measures that can be treated are those that affirmatively establish coverage of the competition law. Rather, it appears that an enactment can mandate (oblige to do something) as well as prohibit (oblige not to do something).[72] Thus, if an exclusion were a requirement, it would not seem to matter that the law provided a positive list (for which the excluded area was not listed) or that it provided a negative list indicating the sectors or activities exempted from application of the law.

Exclusions can be seen to function in the same manner as prohibitions in that they oblige a national authority to refrain from applying a domestic law that would otherwise be subject to application, that is to refrain from doing some official act that would otherwise be required of them. In the competition law context, the exclusion would act to deny the opportunity for the State itself to apply its competition law either in the course of self-initiated investigations/prosecutions or in denying the State authorities the jurisdiction to receive private complaints and respond accordingly. An exclusion would therefore affect parties (private or public) since it would deny them the opportunity to invoke national competition law for redress as against the subject matter whether before authorities or national courts. To the extent that an exclusion is provided either explicitly as a part of the overall legislative scheme (law or regulation) or as an implicit requirement in the form of policy expressions or inducements, it seems plausible that it could be determined to fall within the category of government laws, regulations, requirements or measures that would fall within the scope of GATT Article III.4 or GATS Article XVII.[73]

III.3.2 Comparison within the exclusion: Equality of anti-competitive opportunity

The question is raised as to how an exclusion may operate to provide less favourable treatment on the basis of origin. If it exempts a category of goods or services from competition rules, then a Article III comparison to (like) imported goods or services would require, for a violation, that while the law denied application to domestic goods or services (or providers), it would yet remain in effect as to the like imports. For example, agreements formed and practices affecting the sale or distribution of imported goods could be challenged as anti-competitive (and perhaps by the competitors of like domestic products), while the comparable agreements and practices of the domestic producers of like

[72] An interpretation that a negative provision is actionable under GATT law is confirmed in the area of technical barriers to trade. Most recently, *EC-Sardines*, WT/DS231/R, para. 7.44, citing *EC-Asbestos*, AB report at para. 69.

[73] One contrary argument is that if the absence of *any* competition law cannot constitute a law or requirement, then an exclusion from a law that is not required to be promulgated in the first place cannot be made actionable in the WTO. The response is the same for all regulatory systems. Since no regulation is "required", one can

products would remain free of challenge.[74] This difference in treatment centres on available enforcement recourse as established between domestic and imported products. Procedures and recourse to remedies have long been held to affect the sale of goods in the national treatment context, at least to the extent that the *U.S – Section 337* GATT panel also treated the enforcement and institutional mechanisms provided for private parties facing a civil redress for a violation of a domestic law.[75]

This result in applying national treatment to the competition policy context may seem paradoxical, since the complainant would argue essentially that it has been denied an equality of *anti*-competitive opportunities. However, as above, national treatment does not accord any standard for establishing an objectively competitive market. The comparison is made regarding competitive conditions established by laws or requirements, however non-competitive these conditions may be overall.

Within the confines of the exclusion itself, the case described above may not be a typical scenario. More likely is the case where owing to the anti-competitive conditions prior to the enactment of the exclusion, which the exclusion itself sustains, new entrants might be permitted *de jure* to form similar restraints, but the pre-existing situation established by the domestic players forecloses any participation.[76] While the complainant would have to show that the exclusion *de facto* has denied some effective equality of opportunity to imports on the basis of their foreign origin, the exclusion has not altered any previous conditions of non-contestability. Although the State has formalized the exclusion into law, it has not made an alteration in the competitive conditions between imported and domestic goods.[77] Keeping in mind that national treatment is not "market access", and until a CP framework provision states otherwise, a Member does not now carry an obligation to ensure a contestable internal market, even after the granting of a tariff concession, or in the GATS by a market access commitment and attached national treatment.[78]

always suggest that any more favourable treatment resulting for domestic products as a result of their incomplete application when promulgated should never constitute a violation of GATT Article III.

[74] There is an issue raised by the example as to whether the practices and agreements would be subject to GATT or GATS. To the extent that sale or distribution of goods is affected, both forms of national treatment can apply to the facts. From *Canada – Certain Measures Concerning Periodicals*, "We agree with the Panel's statement: The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other." WT/DS31/AB/R, footnote deleted.

[75] *United States – Section 337 of the Tariff Act of 1930*, Report by the Panel adopted on 7 November 1989 (L/6439 - 36S/345), 36 BISD, 1990. In this case the difference in treatment as to origin was *de jure*.

[76] Likely is the case where a new competition law excludes enforcement intervention in sectors or spheres that were already effectively closed for competitive participation by either private or government action.

[77] Since it is already noted that GATT Article III can be raised prospectively, i.e. that actual imports are not a precondition to invoking the article, then one cannot dismiss outright the possibility for the Article's application to the facts of a previously closed internal market. Unlike complaints under GATT Article XXIII.1(b) for non-violation, a change in competitive conditions is not required to be shown in Article III.

[78] Other than as contestability could be inferred from GATS Article VIII in conjunction with a specific market access commitment, or as to competition generally in GATS Article IX. or as provided in a specific agreement. This appears to be an element of *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/3 (U.S. Request for establishment of a panel), but relating to provisions of the telecomms reference paper which is not considered here. Also, altering conditions post-contractual commitment would give rise to a non-violation complaint, also not considered here.

III.3.2.1 The Canada – Automotive de facto finding on MFN

A WTO case that outlines one accepted interpretation for *de facto* analysis drawn from the MFN context is *Canada – Automotive* Appellate Body and panel reports.[79] Here, a *de facto* violation of MFN was found according to the structure of a scheme granting an exclusion from a bound duty rate to foreign auto manufacturers that maintained a relation with a domestic producer. The requirement necessary to receive the benefit of the exclusion was not discriminatory on the face of the law on any basis of national origin (*de jure).* However, the period of time that was opened to qualify for the scheme necessarily foreclosed participation by later firms establishing a domestic producer relation.[80] The exclusion in effect was found therefore to only have been available for one territory that had pre-existing producer relations. Thus, the design of the exclusion while not discriminatory *de jure* created the effect that only firms of certain territories received the advantage while others were denied it.

To draw a competition exclusion law claim parallel to these facts, it would have to be argued that an exclusion has closed out a possibility for foreign goods to take advantage of domestic restrictive agreements or practices that would have otherwise been available to them prior to the enactment of the exclusion. This presents a difficult element if there was no difference in government's capacity to intervene for enforcement regarding the practices before and after the exclusion entered into force. One could fairly conclude that an argument on less favourable treatment in the context of an exclusion would remain difficult to assert even considering the addition of a *de facto* analysis, at least as drawn from this case. However, this same reasoning could lead to a different conclusion where the competition law was in effect for the particular practices or sector previous to the exclusion, and then the act of an exclusion removed this previous threat of enforcement. Here a *de facto* analysis might consider the disparate effects that the exclusion has caused upon importing goods. This, particularly if the new exclusion could be shown to have caused a change in the conditions of the equality of competitive (or rather anti-competitive) opportunities.

III.3.3 Exclusion as an aspect of the larger enactment

An alternative approach is to set the exclusion into the matrix of the larger competition law, and then attempt to show that by its overall design and architecture, that exclusions operated to benefit sectors where imported goods and services could not engage in the same types of agreements or practices. By this the larger scheme is placed into issue whereby the effect of the competition law together with the exclusion was to "seal off" zones of activity from competition in order to afford domestic protection. This would contrast with the balance of the law as it might be shown to install competition rules where foreign competition might not be so likely, due perhaps to other trade or investment barriers. Thus, as compared to non-excluded sectors, those excepted might be more prone to associations that could not be joined nor otherwise duplicated by a producer of an imported good or service provider; or that vertical agreements tended to be found in excluded sectors that could not be replicated by the distributors of like imported goods. More obvious perhaps, if the exclusions all related to sectors that could be demonstrated to be organized as import cartels.

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[79] *Canada – Certain Measures Affecting The Automotive Industry*, Report of the Appellate Body, WT/DS142/AB/R, 31 May 2000.

[80] *Canada – Automotive*, Ibid., at para. 73. "Since 1989, no manufacturer not already benefiting from the import duty exemption on motor vehicles has been able to qualify under the MVTO 1998[80] or under an SRO. The list of manufacturers eligible for the import duty exemption was closed by Canada in 1989 in fulfilment of Canada's obligations under the CUSFTA." footnotes deleted.

III.3.3.1 The capacity to survey stated objectives

In taking up this analysis a WTO panel would not survey whether the enacting authority indicated an expressed *intent* to provide for domestic protection in its formulation of the exclusion.[81] However, to the extent that GATT Article III.4 analysis may be suggested to parallel developments for GATT Article III.2 tax cases (for directly competitive and substitutable [DCS] products), a panel could attempt to determine if the effects of the requirement resulted in less favourable treatment, as revealed by the design and structure of the law.[82] Whether or not a panel would apply this "application" test, it would likely survey for less favourable treatment in regard to the effects of the measure on all like prospective like imports. In addition, to the extent that stated objectives of the law were raised by respondent as justification for the exclusion, such objectives could also be compared to the actual application of the measure in practice to determine if these objective are being validated. As the Appellate body indicated in *Chile – Alcohol Taxes*,

> It appears to us that the Panel did no more than try to relate the observable structural features of the measure with its declared purposes, a task that is unavoidable in appraising the application of the measure as protective or not of domestic production.[83]

It is therefore possible that the stated objectives of the larger competition law itself would be considered in determining whether the exclusion was formulated or applied to give effect to any of the stated objectives. To the extent that these would be characterised as fostering competition, or establishing the conditions of general contestability, then the exclusion could be analysed in this light as well. If it was apparent that no pro-competitive result was being obtained by the exclusion according to its own terms, then the fact that an exclusion operated in contravention of the objectives could be a point of analysis, particularly if coupled with an application analysis that indicated that only domestic firms were effectively capable of taking advantage of the content of the exclusion.

On this point, one recalls again the distinction made between national treatment and market access. Internal excluding agreements may well prevent the importation of goods or services, but this is not a national treatment question.[84] Also, national treatment does not guarantee competitive conditions, rather only the expectation that such conditions shall be effectively equal as to imported products. To the extent that an imported good or service provider would have the same right to form the same restrictive agreements or practices, the narrow argument is that national treatment is not violated.

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[81] "This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent." This in the context of GATT Art. III.2, second sentence analysis. *Japan - Measures On Alcoholic Beverages* - Appellate Body Report - WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, Section H.2 (c).

[82] The extension of Article III.4 "like" products to include DCS products is treated directly below. *Japan – Alcohol*, Ibid., "Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure." Article III.4 does not require a separate finding as to paragraph 1 of the Article. As a caveat to this line of reasoning, it is not definitive that the Appellate Body will apply the test developed for taxes to a III.4 requirement case, although its ruling in *EC - Asbestos* explicitly expanded the like product category for Article III.4 requirements to include directly competitive and substitutable (DCS) products, thus suggesting a possibly that the tests applied to III.2 would also apply to III.4 cases dealing with DCS products. See, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R**,** 12 March 2001, paras. 99 and 100.

[83] *Chile – Taxes On Alcoholic Beverages*, WT/DS87/AB/R WT/DS110/AB/R, 13 December 1999, para. 172. This is in the context of Article III.2 for DCS products, and no panel or the AB has made this ruling in a regulation case.

However, the broader argument to consider is that, if the field of play itself is so dominated by domestic agreements and practices operating with continuing effect as a result of the exclusion, so that prospective imports cannot possibly engage in the same anti-competitive practices, then the effect of the exclusion *de facto* may be to deny these imports their effective equality of (anti)-competitive opportunities.[85]

III.3.4 Implications of an expanded like-product definition

What may be either an additional bar or benefit to the complainant is that the definition of "like" for Article III.4 has been expanded to include products that are directly competitive and substitutable (DCS) as well.[86] It remains unclear for now how the evaluation test for less favourable treatment will be applied to an expanded like product definition. In the internal tax context of paragraph 2 of Article III, for like-products as treated by the first sentence, any tax in excess of that imposed upon domestic products will trigger a violation. However, also in the tax context, for DCS products, *de minimis* differences in applied rates are not prima facie violations. Rather, an "application" test has been developed to determine whether the effects of the difference in taxation are applied so as to afford protection for domestic production. For Article III.4, there is no direct reference to the concept of "so as to afford protection" and it is not clear whether the Appellate Body will functionally incorporate such a test for this expanded category of like products.

What is perhaps more clear is that a larger group of like products will trigger a comparison between the groupings of similar products that have been found to be like. The initial implication for a complainant is that a larger group of similar domestic products is available from which to single out the one that is receiving more favourable treatment. However, to the extent that groups may only be compared with other groups of similar products, it is also feasible that this traditional line of attack is also being foreclosed or restricted. Rather, the effects upon each category (group) of like products may be surveyed to determine whether the imported group is treated less favourably than the domestic group. Another possibility is whether the scheme overall as it distinguishes between different groupings generates some discriminatory less favourable effects.

These legal developments have potentially favourable implications for non-protectionist exclusions where they are formulated according to economic rather than sectoral criteria. An example would be exclusions made for small and medium-sized enterprises.[87] While this is a facially neutral requirement, a complainant could attempt to show that since small and medium-sized producers tended to be domestic there resulted disparate (less favourable treatment) of "like" imports that tended to be sponsored by larger firms. A respondent could argue, however, that the exemption of certain agreements and practices made by them was not less favourable since the group of potentially imported small and medium-sized enterprises would be receiving the same competitive opportunities as compared only to the group of foreign small and medium-sized enterprises. To the extent that the treatment of groups follows this analysis, it would appear that comparing categories overall should grant a respondent some additional flexibility. By comparing only the group consisting of small and medium-sized foreign to small and medium-sized domestic, the panel could find that that the exclusion was not according less favourable treatment on the basis of territory origin.

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[84] It may rather relate to obligations incurred in a binding, or to the undermining of benefits by actions otherwise GATT lawful, as in a non-violation claim, not treated here.

[85] This suggests that GATT Article XI should be given some greater consideration, as measures other than duties and charges affecting importation and exportation.

[86] *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, paras. 98-100.

[87] Although S & ME provision may be better characterized as pro-competitive or *de minimis* exemptions.

However, one may not achieve the same benign result in the case of a sectoral exclusion. Here, consider the case where the exclusion was drawn narrowly so as to continue to subject DCS products (or services) to the competition law. In addition, consider that the domestic territory is only producing the narrow like product that has come under the exclusion. This would raise the classic example of "apples and oranges" that was intended to be addressed by the DCS provisions for the domestic taxation context presented by the second sentence of Article III.2.[88] The product category established for an exclusion should not subject directly competitive goods or services to inconsistent enforcement regimes without some meaningful legitimate objective in the competition policy rationale for supporting such distinctions in treatment.

Exclusion for sectors or economic spheres of activities results in the non-application of national competition laws and procedures. To the extent that foreign participation is likewise permitted to take equal advantage of these anti-competitive opportunities, the national treatment obligation is not apparently affected. However, the categorization of an exclusion itself under national law may not be sufficient to avoid a national treatment examination. Where the exclusion can only benefit a domestic actor, or where the structure of the law itself is demonstrated to have a disparate impact upon foreign imported goods, then national treatment may be violated. Recent case law framing the issue of "like" products in terms of groups of products may provide some additional flexibility for treating similar products differently in order to reflect non-sectoral regulatory choices. This could have relevance for national law exemptions for areas such as small and medium-sized enterprises. On the other hand, sectoral exclusions that do not include directly competitive and substitutable products may be caught by a broader like-product definition.

III.4 Individual case decisions

A second area concerns application of competition rules to decisions made in individual cases. A number of Members have expressed concern whether decisions made to investigate or prosecute particular cases, or the decisions rendered by administrative authorities or courts, could be made the subject of national treatment complaints. One should consider first whether such administrative decisions can now be addressed under the obligation, as either *de jure* or *de facto* violations of national treatment.

III.4.1 As a common basis for consultations

There is little question that individual case decisions by administrative authorities give rise to complaints in the WTO. The overwhelming share of consultations in the fields of anti-dumping, subsidies and safeguards relate to individual case decisions that have been rendered, the consequences of which are determined adverse enough to the interests of the complaint to give rise to dispute settlement procedures.[89] In point of fact, there has been less than a handful of cases in these areas where there was an absence of an individual case determination, or even a pending individual case.[90]

[88] As illuminated by GATT Ad Article III, para. 2; see annexed provisions. Where the import country produces oranges but not apples, a large tax differential favouring oranges affords domestic protection. One considers that since like products for regulatory purposes have been expanded to include DCS products, then this traditional rationale to address protection as between DCS products must come into play in regulatory analysis. If so, regulatory definitions for exclusions foreclosing DCS products or services would be actionable under GATT III.4 as it stands.

[89] Pending cases regarding individual case decisions are too numerous to cite, but see www.wto.org, "Overview of the State of Play of WTO Disputes".

[90] For examples, *US-Anti-dumping Act of 1916*, WT/DS136, para. 6.40; and *US-Section 301-310*, WTDS152/R, para. 7.13.

Where individual determinations are made the subject of dispute settlement, a whole range of issues regarding the manner in which the administrative agency (or a national court) has handled the particular case are commonly subjects for claim and analysis by the panels. These aspects include, the way in which comparisons between products were made to determine "like" products, the quality of data employed and the findings made as a basis for injury, and whether parties were provided with a proper opportunity to be heard. These aspects may be raised as alleged infringements of the territory's own procedures, but ultimately the comparison is made in regard to the provisions of the law and the rights and obligations contained in the WTO and its annexed agreements. Thus, as raised by an individual case determination, the complainant may argue that procedures or findings in the individual case were in contravention of the territory's own procedures that enacted WTO law, or an indicator that the requirements of domestic law themselves were in contravention of relevant WTO provisions.

III.4.2 The necessity of an enactment

It is therefore evident that individual case determinations can give rise to challenges under GATT law, but that there must be a law, regulation or requirement in place to make the challenge. For an example, where a national administrative determination made a like product finding that affected the treatment of imported goods, this finding might be challenged as violating Article III, but in respect of some national "enactment" by which the finding was made. The essence of the WTO complaint would relate to the conformity of the requirement itself, not characterizing the individual decision as a requirement. Rather, the case decision is reflective of the requirement and is a consequence of it. This is simply to suggest that individual case decisions rendered are not enactments.[91]

Since any complaint *de jure* would examine the face of an enactment for difference in treatment as to origin, case decisions by themselves, if challengeable, would necessarily fall under the rubric of a *de facto* examination. An otherwise origin-neutral requirement would be asked to be examined either under the particularities of a given case, or more likely, as a part of some pattern of decisions whereby the application of the requirement indicated less favourable treatment. For the particular case, a violation in application would seem to have to be shown in some abuse of discretion or arbitrariness that would suggest a denial of a due process requirement. Thus, if the same result were rendered against a domestic party, would this then constitute a violation of due process under the national law? If so, then for the complainant, the claim would relate more to the remedies established for due process problems as these are being applied in a less favourable manner. The question that should arise is whether the rights of appeal from a domestic determination on the basis of due process violations was equally accorded to a foreign party.

A claim *de facto* in the circumstances of patterns of cases would also seem to necessarily relate to the governing requirement that permitted this discretion to be employed. If a law does not make distinctions on the basis of origin, then it would seem that a pattern of decisions reflecting an origin determination was occurring either because the law itself somehow authorized this excessive discretion, or criteria employed in the decisions were essentially *ultra vires* to the law's own criteria. In the first instance, the challenge again would be to the requirement for which the pattern was provided as a form of evidence of the enactment's non-conformity. The second instance, however, appears to be non-reachable in the WTO context, unless decisions could be held to be requirements and/or a framework provision was provided to extend the basis for this type of examination.

[91] "Requirements" have been ruled challengeable as they consist also of individual determinations, rather than as "across the board". *Canada – FIRA*, 30S/140, para. 5.5. However, in this case the requirement was not the individual case decision but the government action as an enactment. The author knows of no examples where an individual case decision was determined to be a requirement for the purpose of Article III.4 merely by comparison with the outcome of other cases.

III.4.3 Interpretations as comprising a body of law

Interpretations of the terms and provisions of national laws are also engaged by national courts and administrative tribunals. These combine with the provisions of the laws themselves to form an understanding of the overall requirements imposed. To the extent that an interpretation rendered by a court might lead to an application of the national law in contravention of a WTO rule, it is likely in this case that an individual decision may be reached in this manner. Again however, it is not the rendered decision that is the centre of the complaint that is raised by another WTO Member, but rather the status of the national law as it has been interpreted, and therefore clarified, as to whether the law is in conformity with the WTO.

III.4.4 The limitations of de facto analysis for individual decisions

Thus, it is suggested that for GATT Article III there are some limits that effectively bar a complainant from meeting the burden of proof in the absence of a defect in the authorizing enactment itself, in the procedures which would relate to review to ensure due process and correct for arbitrariness or abuse of discretion, or to the corpus of the law as interpreted by a court or tribunal. As related to a CP framework, the risk of creating a basis for individual case reviews in isolation of authorizing enactments would not appear to be particularly more likely than it is in the current situation, that itself being not very likely.

There is a complexity introduced into CP framework provisions that explicitly prevented individual case decisions as a basis for consultation, as whether this limitation would only apply to provisions within the CP framework or would also derogate from all other GATT/WTO obligations. Since this consideration touches upon the relationship between framework provisions and other WTO annexed agreements, this consideration is taken up in a later section.

Finally, GATS Article XVII should be raised in the context of challenging individual decisions. Here it may be argued that since the obligation constitutes a specific commitment, there is some greater affirmative duty upon Members to ensure that individual decisions are rendered so as not to accord less favourable treatment to foreign services and providers. A similar consideration as above is raised, however, in that GATS national treatment applies to "all measures in respect to the supply of services", and an individual case determination may not be a measure, except as generated within the context of a law or regulation.[92]

The national treatment obligation refers to "laws, regulations or requirements". A serviceable definition of these is that of a legislative enactment or other government action having the same effect. While individual case decisions by administrative and judicial authorities are often the subject of complaints in WTO dispute resolution, it seems rather the case that it is the particulars of the enactment itself that are the subject of these disputes, rather than the manner in which a defective law was handled by a particular administrative decision.

III.5 Part Conclusion: Considerations for a CP framework

This part dealing with national treatment has argued the position that the scope of the obligation already applies to existing national competition laws, and that given the developments in WTO case law, the principle has a somewhat broad scope to examine how these laws are applied. While the argument has been somewhat ambitious in attempting to outline a theory of complaint to deal with

[92] This to the extent that it is established that a measure is, like a requirement, a *legislative* enactment.

competition policy exclusions, it seems reasonable to suggest that WTO law has moved closer to considering the possibility rather than moving in the other direction. The theoretical complaint appears at least possible, particularly in those cases where only a domestic good or service can possibly benefit from an exclusion. If it is the case that parties have been relying upon the "carve out" theory as a means of assurance that an exclusion cannot be ruled to be a requirement or a measure, it seems that the panels and Appellate Body have already been chipping away at this concept by their rulings in other contexts. Once an exception is understood to be an enactment, there seems to be little to prevent the *de facto* analysis from going forward to examine the disparate impacts that fall upon like (and directly competitive and substitutable) products, goods, services and providers. The single most difficult remaining barrier on proof relates to the availability of the same set of anti-competitive opportunities that could also be taken up by foreign participants. This refers to the equality of anti-competitive opportunities that a State may also accord without violating national treatment.

However, where foreclosure is apparent and impact is disparate, the subject matter of the exclusion can be considered in violation. Similarly, in the expanded like-product concept, where similar (but not identical) products are receiving different regulatory treatment either by exclusions, or perhaps a mix of competition and regulatory provisions, one also sees violations on the horizon. The broader like-product definition *giveth and it taketh away*. It forces an easier violation by its wider product gateway, but also points to different treatment being permitted among different groups, as it will be the groupings of similar products that are to be compared. Nevertheless, for either of the two violation scenarios above, if and when a panel determines that a product or a group is being denied a level playing field on the basis of foreign origin as a result of the design and structure of the overall competition law itself, then a violation could be found. This would also be the beginning of the end for protectionist sectoral exclusions in national competition laws.

This line of argument goes some distance to explaining certain possible motivations for even developed territories to seek an exception from a CP framework for any and all stated exclusions, combined with a *de jure* limited analysis. However, it should also shift for the Members the emphasis of the discussion to the question of how to justify legitimate State objectives without assuming firstly a shift of burden for legitimate objectives to party respondents who cannot meet it (like Article XX) and secondly a list of legitimate objectives that relate competition law to development (and other objectives) and reflects the consensus of the community as valid. The second point made argues straightaway for a CP framework if only to broaden the existing and insufficient listing contained in GATT Article XX. Thus, parties need to identify when protection of domestic producers is legitimately connected to the process of economic development, modernization, privatization, cultural integrity, and so forth, as these surface in the competition as well as in the regulatory policy context. To the extent that a CP framework was truly horizontal, this would be an extension of the listing of articles exceptions as now found in the GATT, GATS and TRIPS.

However, the first point here is that Members need to identify a framework structure that will allow the identification of the agreed-upon legitimate objectives on the face of a competition law so that protection can operate as necessary without having a violation and the resulting burden shift to validate as an exception. What this would require is that the provision for the objectives in the framework be provided as exemptions at the outset, with an indication that where a national law creates an exclusion in the light of one of these exemptions, the burden shall remain upon the complainant to indicate why the affording of protection in this case does not service that exempted objective. This approach brings the development dimension, and other legitimate objectives, directly into the texture of the framework.

This can all be accomplished as well by eliminating *de facto* review for disparate impacts, but in that case, competition law and policy design can also do a great deal of damage on the basis of origin where parties would have an express immunity from *any* challenges. Although the author might quibble with some aspects of the disparate impact test as applied in *Japan – Photographic Film*, the measures themselves point to the need for general national treatment analysis as they present the usual mix of stated legitimate objectives (distribution modernization for example) with the possibility that protection is also being accorded for its own sake. Where a framework recognizes by exemption at the outset that a competition law may justifiably seek to preserve the right of small and domestic enterprises to remain participants in their own market (right of market participation), then *de facto* analysis is sophisticated enough to give this goal effect while still sanctioning measures intended to only afford protection. Thus the perspective here is that rather than eliminate *de facto* analysis, the Members should get on with the business of identifying the actual parameters within which this form of analysis should be played out over the longer term in the natural affinities and tensions between competition, regulatory, investment and development policies.

An additional consideration in providing a special form of national treatment for competition law and policy is the resulting relation between existing national treatment for goods and services and a CP expression of the principle. There is no strong orientation in WTO to consider that obligations contained in Annexed Agreements are *lex specialis* as to general Articles obligations. In a recent case, the complainant requested a panel to consider a violation according to the national treatment obligations as stated in the TBT Agreement, and if not violating, to then consider the general Article III obligation. The panel agreed that this manner of proceeding would be appropriate, and that if a violation were not found on national treatment as expressed in the TBT, then it would go on to consider Article III.[93] Thus, without some express limitation as to the scope of Article III and XVII national treatment to competition policy issues, to be provided in a CP text, the fact that a more limited national treatment obligation was placed into a CP framework would not necessarily foreclose the application of other national treatment principles.

This should be considered not only where the scope is narrowed for *de jure* considerations but for broadening as applicable to the nationality of firms as well, rather than only to goods. Laws affecting firms often affect goods, but this proposed step eliminates a linkage that is now required in GATT law to be demonstrated. This may simplify somewhat the analysis that is undertaken for a measure. However, it would also be the case that this additional provision relating to firms will be presumed to be considered cumulative (and not substituting) for general GATT national treatment unless there is a conflict between the provisions. This question is resolved ultimately in characterizing the relationship between the CP framework national treatment provision with the obligation as provided in the other annexed agreements.

The interpretation of WTO provisions is subject to the applicable articles of the Vienna Convention on the Law on Treaties (VCLT). This favours harmonious and effective interpretation unless the specialized provision is clearly drafted to exclude the application of the other, or there is an unresolvable conflict between the two. If cumulative, a CP framework limitation to *de jure* analysis would only apply to competition laws and to the differences in treatment on the basis of nationality of firms. The general *de facto* analysis discussed above would continue to apply to the extent that measures affected the sale of goods or services. A requirement or measure could be analysed both ways. It may be found not to be a *de jure* violation in regard to treatment of firms, but at the same time, be found to violate GATT (or GATS) national treatment *de facto* in the treatment of goods or

[93] *European Communities – Trade Description of Sardines*, WT/DS231/R, para. 7.8, *et seq.*

services. To provide for true *lex specialis* application of only the CP framework provision to all competition policy examinations would appear to require a statement explicitly to that effect.

For individual case decisions, the analysis here suggests that there is not much added value for limitations suggested in a CP framework to clearly carve out decisions from being the subject of GATT complaints. GATT law now appears to connect these complaints to the operating law, regulation or requirement. It is difficult to see how in many cases a complainant can bring an action against an enactment without making some reference to the manner in which it was handled in the course of an individual proceeding. Given that interpretations by courts may also comprise the body of national law to be considered, the exception suggested in the CP framework context would seem to open a large number of subtle difficulties in determining what can and cannot be reviewed in practice.

Finally, we should also recognize what national treatment cannot do, which leads to the next part as well. As drawn from the "field of play" analogy above, private actions taken are in principle not attributed to the State. The actors can freely combine and discriminate all they want, perhaps violating domestic law, but not GATT law. They can combine to create a complete bar to foreign participation and as long as there is no "requirement" raised by the State, this also does not violate GATT law. Likewise, even where the State falls in with a requirement (an inducement, a cooperation programme, etc.) as long as there is potential for foreign participation to be a part of the plot, or domestic as well as foreign participation is determined to be on the receiving end of the plot, then national treatment is also not violated. As discussed below, since national treatment also cannot relate to exports, the only actual international dimension (cartel) activity that can be effectively addressed is the import cartel, or more possible, the import monopoly.

Thus one can see that a recital of the core principles forming the centre of competition policy framework does not take one very far, and to the extent that national treatment as a principle is trimmed in the process, it may even take one less far than WTO otherwise provides.

A fundamental problem is that this is the wrong principle upon which to build a framework that in any way would be dedicated to the removal of private practices and agreements that affected the capacity of States to import and export. National treatment does support certain "competition policy culture" considerations, but it just does not address anti-competitive practices that are directly trade-related, unless aligned as "Us v. Them" As the OECD and European Commission have noted, many of the international dimension competition problems do not fall into these clean foreign/domestic categories. That is one of the justifications advanced for a CP framework, namely that globalization itself has created the impetus for some international cartels. If so, the CP framework should actually seek to address this problem directly. For this, the discussion should survey GATT Article XI with its emphasis on prohibiting any and all measures affecting importation and exportation other than those that are duties, to determine what role it could play in the context of a framework.

IV PROHIBITION, COOPERATION AND NATIONALITY

IV.1 Introduction: The necessity of prohibition

The introduction of GATT Article XI into the 1947 Geneva draft was a dramatic turning point in the pattern of international economic diplomacy. Rather than designing trade agreements to handle the complex problems of allocating quantitative restrictive relations between States, the drafters sought to eliminate them outright. Although non-discrimination principles are said to be at the heart of the GATT system, the most revolutionary insert made in the final arrangements was this prohibition on "measures other than duties". Over the years, much of the trade policy diplomacy of the GATT has related to the graduated application (or non-application) of Article XI, from the debates on voluntary export restraints, the sectoral exceptions in agriculture and textiles, and so forth. Nevertheless, as the WTO panels have noted as well, gradual application has yielded results in the Uruguay Agreement with renewed emphasis on single undertakings to eliminate the use of quantitative restrictions on both imports and exports.[94]

From this short history one draws the lesson that if there is any credence to the theory that international cartels have increased as a response to globalization, then one of the root mechanisms at work must be suggested to be the gradual dismantling of quotas and other non-tariff protective measures, since the private actor response to re-organise markets along those same lines would be by cartel agreements to impose output and import restrictions. While WTO law can continue to refine its capacity to address State-imposed measures other than duties on exports or imports, the arena of private measures accomplishing the identical trade restrictive purposes will operate with immunity from WTO law with its limitations regarding State action and attribution.

This is the essential argument for a prohibition in a competition policy framework. It is not that globalization generally demands more competitive markets for trade and investment. States remain the actors capable of deciding at what rate they choose to engage markets, and they can still decide whether globalization is for them, and if so, at what rate. Rather, without extending responsibility to prohibit private restraining agreements, everything done so far to secure the potential for trade participation will simply be undone by firms mimicking prohibited public restrictions.

While this field remains immune from WTO law, it also remains largely immune from national domestic laws. As discussed in the introduction, since these are based upon a theory of territoriality, only the effects of a foreign practice can be addressed domestically, even while the primary actors may reside and conduct their agreements within states with the most advanced capacities to address anti-trust problems. Thus we have noted how cooperation mechanisms may be a partial answer to creating a balance with regard to what can be reasonably expected to be enforceable within a foreign jurisdiction.

However, while the function of the exercise in the Working Group remains analytical in part, there is also a forum to discuss the alternative jurisdictional theories for addressing the issue of international cartel activities. This would set the balance point evenly between those remedies that are obliged to address structures that affect importation and those designed to address practices relating to exportation.

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[94] For example, the panel's rejection of the "law-creating force derived from circumstances" argument for retaining quantitative restrictions, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, para. 9.173.

While a CP framework may deliver an honest pledge to deal with the international dimension of anti-competitive practices, the professed limitation to respect "traditional" notions of domestic competition law jurisdiction indicates at the outset that no responsibility can be assumed to be undertaken to review and correct the conduct of any firm on the basis of its nationality or residence. Thus, while the problem of international cartels is understood to be serious, it has not yet been recognized to be serious enough to consider additional jurisdictional responsibility.

The first sections in this part treat the jurisdictional aspects of national rules and complementary GATT regimes. It is established that national treatment cannot address the external trade effects of internal requirements. Cooperation receives additional attention by similar analysis to indicate that most-favoured-nation status also does not apply to bilateral cooperation agreements. Here the subject matter of the procedure under consideration also does not affect the *internal* sale of goods or services in the territory of the requested party. Thus, the hand available to excluded Members to force a strong cooperation instrument on the basis of an MFN claim is not a strong one.

Where a negotiated cooperation instrument matched with a cartel prohibition relying upon national law enforcement suggests some balance between nationality and territory, if the cooperation instrument cannot go beyond voluntary gestures, some additional weight should be sought to strike the balance. This would either replace the EC proposed approach in its entirety, or extend it by an "obligatory" supplement that would provide for State-to-State consultation action on matters related to the prohibition.

A provision treating restrictive business practices with an international dimension should be the primary provision of a CP framework or agreement. An argument for addressing such practices can be related to the WTO's own progress in addressing similar measures when adopted by Governments. While the capacity to address various governmental non-tariff barriers has evolved in the WTO, such practices can be adopted by private actors without recourse under international economic law. While a CP framework or GATT provision may be limited at the outset to only "hard-core" practices in the form of cartels, its final form should be made capable of addressing both export and import considerations.

IV.2 The limits to territory jurisdiction

IV.2.1 Territorial-based competition laws

Trade laws govern conditions for imports and exports and competition rules govern internal market conditions. As is the case for most domestic laws, trade and competition laws apply a (common) territorial theory for asserting State jurisdiction, this being the geographical domain over which the sovereign State exercises its authority to the exclusion of other States.[95] This emphasis on territory in the context of competition laws has a number of ramifications, not the least of which is an

[95] "Jurisdiction" here as the general legal competence of States, judicial, legislative and administrative. See generally, Ian Brownlie, *Principles of Public International Law*, 4th ed., 1990, pp. 298-321, at 298. This common territorial aspect has provided the point of intersection for trade and competition policies generally, and for trade and competition laws in particular. For one example, § 1 Sherman Act, 15 U.S.C. § 1, entitled *Trusts, etc., in restraint of trade illegal; penalty*, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal…"

historical concern of many States with the extraterritorial application of others' competition laws.[96] Whether these acts are truly "extraterritorial" or not, the historical concern is for a prosecuting State's reach over foreign firms when the agreements of these foreign actors are generating anti-competitive effects in the prosecuting State.

This recognizes a tension between territorial assertions of jurisdiction ("foreign actors and acts affect my territory") and nationality jurisdiction ("but these are *our* firms so do not prosecute them in your territory"). While this reach of national laws to foreign actors is not so traditional, and has been controversial, the point should be noted that the notion of territory is strongly connected with competition laws, so much so that it has been invoked in conflict with the perceived nationality jurisdiction of other States. Moreover, the example of extraterritoriality serves as a somewhat obvious example of how anti-trust laws are exercised with primary attention to the quality of competition upon the domestic market, and not necessarily in respect of the nationality of the actors involved.

IV.2.2 Compatibility of national laws with national treatment

An incidentally positive ramification of territory-based jurisdiction for competition laws is that they tend not to draw facial distinctions on the basis of the nationality of the actors.[97] It is then fairly easy to determine, as many Members already have, that competition laws and WTO rules are inherently compatible. This is at least true for non-discrimination, and Article III provides the clear example where compatibility can be presumed at the outset with regulatory systems that do not base a right of petitioning State action on any territory of origin distinctions. As consistently applied, the steps taken by authorities under this territory-based law would also be conducted without taking into account any differences between foreign and domestic sources in addressing the domestic effects of a cartel or other restrictive business practice.

IV.2.3 The incapacity of territory to address external effects

This compatibility between national treatment law and territorial domestic competition law extends to one other area as well, this being the lack of legal purview for both as to any *external* effects of domestic laws and regulations. For competition laws, the flip side of territory orientation is an absence of concern for the effects of practices of domestic actors upon other territories and/or how these practices may affect the interests of other territories.[98] Either by a contained exclusion or by the applied definition of the market, a national competition law is limited in this respect, owing to the jurisdictional basis that is prescribed for the law.

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[96] § 8 Sherman Act, 15 U.S.C. § 7, "The word 'person', or 'persons', wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." See "*Statement of Principles According to Which, in the View of the United Kingdom Government, Jurisdiction May be Exercised over Foreign Corporations in Anti-trust Matters*, (1) Personal jurisdiction should be assumed only if the foreign company 'carries on business' or 'resides' within the territorial jurisdiction." Reprinted in Brownlie, ibid., at 313.

[97] "Facial" as contained in the expression of the legal provision itself. Like any other domestic laws, WTO considerations can apply where the application of laws affects trade in some discriminatory manner, or imposes, as in the case of technical requirements, some unnecessary obstacle to trade.

[98] For example, § 7 Sherman Act, 15 U.S.C. § 6a (Foreign Trade Antitrust Improvements Act of 1982), "Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless -- 1. such conduct has a direct, substantial, and reasonably foreseeable effect-- 1. on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or 2. on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and 3. such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section…"

GATT Article III is also limited in scope to a consideration of domestic territory effects, as the laws that can be reviewed for conformity are those affecting the *internal* sale of goods.[99] This limitation forces the conclusion that while domestic competition laws do not address external effects of domestic practices, neither does national treatment pose any possible requirement that they should.[100] This means that a national competition law (expressly or implicitly) that excludes recourse for practices by nationals upon the territory of another Member cannot be challenged under a theory of GATT national treatment.[101] National treatment compares internal treatment as between domestic and imported goods. It does not compare treatment of domestic laws as between territories.

IV.2.4 GATT rules prohibiting certain external effects

Other GATT rules do prescribe for external effects, a point which has not been clearly taken up in the core principles discussions. Notably, GATT Articles I and Article XI provide respectively that Members shall not levy discriminatory export duties as to other WTO Members, nor shall they impose any measures other than duties upon their exports. To the extent that any internal measure has the effect of imposing a restriction upon exports, such a measure or restriction is captured as well by the prohibition in Article XI.[102] Even if such a restriction were to fall under an exception to Article XI, it would still not be lawful to make an application in a discriminatory manner as between other WTO territories. This would separately violate GATT Article XIII. To summarize, GATT law prohibits export measures and restrictions other than duties, and further prohibits discriminatory application of export duties or any excepted restriction.

Thus, even while national competition law and national treatment do not take up the question of external effects, one should not conclude that GATT law is similarly inoperable. Not all GATT obligations are confined to the domestic effects of national laws. To the limited extent that private acts can be made attributable to the State, as discussed in Part II above,[103] these controlling GATT Articles also have some clear potential for imposing legal restraint upon the external effects of domestic practices.

The discussion on a prohibition has been primarily related to the context of national competition law enforcement. There is a limitation to what national laws can accomplish in dealing with international cartels. These laws are designed to survey the domestic territory for the effects of practices. A trade-law orientation is also possible. GATT law already imposes obligations upon

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[99] GATT Article III.4, "…treatment no less favourable … in respect of all laws … affecting their **internal** sale … " In the WTO context, the acting territory is defined by reference to customs territories (GATT Art. XXIV:1); or as in the case of GATS, the use of the term "territory" as found in each of the four modes of supply defined by GATS Article I.

[100] Only except for a possibility that a domestic requirement regarding external sales might have some "knock on" effects upon the internal sales of goods.

[101] This conclusion would be the same in the GATS case, as measures affecting the supply of services are also directed to the domestic territory.

[102] The formal characterization of a measure or restriction is not controlling, but rather its effects upon exports. See, US third party submissions to the panel in *Argentina - Bovine Hides*, WT/DS155/R, para. 5.3, citing the 1950 Working Party. Also citing *Japan – Semiconductors*, ibid., para. 5.5, "Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations, but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export or products was covered by this provision, irrespective of the legal status of the measure." The Panel in *Argentina – Bovine Hides* might have treated this aspect as a "de facto" application of Article XI. See para. 11.17, "There can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a de facto nature." See also the treatment made of the US position regarding Article III and XI in *United States –- Restrictions On Imports Of Tuna*, DS 21/R (unadopted), 16 August 1991, 39 BISD 155.

[103] For examples, GATT Article XVII or GATS Article VIII, as discussed in Part I.

Members to refrain from applying discriminatory treatment or output restrictions on exports to the detriment of the import trade of other Members. This may be a more appropriate context in considering the treatment of international cartels.

IV.3 Cooperation and MFN considerations

IV.3.1 MFN application to internal laws and measures

While national treatment compares domestic to foreign, most-favoured nation (MFN) compares foreign to foreign. The GATT and GATS MFN obligations are stated as general in nature. For GATT, Article I applies to provide that any favour or advantage extended to any product "originating in or destined for any other country" (WTO Member or otherwise) shall be accorded immediately and unconditionally to the like product of origin for all other GATT parties. Because the article applies not only to customs duties, but also "with respect to all matters referred to in paragraphs 2 and 4 of Article III", the obligation of a Member to accord MFN applies also for its internal laws, regulations and requirements when these extend an advantage to any product.

For the GATS, Article II provides the parallel obligation for any measure covered by the Agreement to be accorded to like services and service suppliers of any other Member. Since GATS measures are defined to include "a law, regulation, rule, procedure, decision, administrative action, or any other form" (GATS Article XXVIII), the comparable reach to deal with advantages offered to other Members by internal regulations is also a characteristic of the GATS obligation. As between GATS MFN and GATS national treatment, there remains a distinction to recognize that while national treatment is specifically committed, MFN, as in the GATT, is a general obligation.[104] As also noted above, both MFN obligations apply concepts of "origin" as in territory of origin for goods, or for services or services supplies "of any country".

Since MFN makes a comparison between foreign sources even in respect of internal laws and regulations, the primary consideration in the competition policy context relates to arrangements made between territories where treatment is extended on behalf of one that is not likewise extended "immediately and unconditionally" to all other WTO Members. The common point of reference for this type of activity is that of recognition. Although a domestic regulation may continue to be applied to domestic goods or providers, to the extent that it is no longer applied to assess the qualification of imported goods or services would render it subject to MFN.[105]

IV.3.2 Whether MFN status applies to cooperation agreements

There are parallels between competition policy agreements containing comity provisions and mutual recognition agreements for the MFN issues. A recognition agreement waives a domestic regulatory requirement or procedure in favour of the requirement or procedure of another territory. While a competition cooperation agreement may not include the aspect of waiving the application of a national requirement, there is a promise undertaken to engage in an investigation and possible remedial action for the benefit of a requesting territory as its market may be being affected by actors within the requested territory. Initially, this would appear to meet the requirement of Article III.4 as

[104] Except as parties have listed initial exemptions, or as other GATS provisions may apply exceptions.

[105] National treatment does not apply because the treatment is not less favourable than for domestic goods. Rather, the comparison is between two imported foreign sources. This is MFN. For GATS Article VII, Members seeking to enter a bilateral recognition agreement must notify the GATS Council and permit the participation of other Members who meet the underlying qualifications.

"affecting the sale of goods". However, as in the case of national treatment generally as limited to measures which affect "the internal sale" of goods, the application of MFN to bilateral cooperation agreements operates by the same limitation. It is also the case here that while there is an advantage or favour being extended, it does not relate to the matters that fall under paragraph 4 of Article III. The matter being affected by the promise to investigate does not relate to the "internal" sale of goods of the party adopting the promise to cooperate. Thus, unlike in the case of mutual recognition, there appears to be no application for Article I GATT or Article II GATS as to a bilateral competition cooperation agreement.

This question should affect the negotiating positions of the parties on the cooperation question. If there is an underlying MFN principle in play, those not now receiving positive comity have a stronger hand to negotiate a CP framework that would have it, since they can theoretically extract it in any case via the dispute resolution process. If MFN does not apply, their position is weaker to the extent that, assuming they would like to have cooperation, only via a negotiated framework would they be able to receive it. Thus, an obvious exchange is suggested whereby a requirement to have national competition laws that operate according to certain standards would be exacted as an exchange for the benefits of a meaningful multilateral cooperation procedure.

If it is the cooperation procedure that is intended to balance the enforcement obligation, then there are some difficulties as regards the prospects. The first is that the procedure may not be binding but rather cooperative in the meaning of voluntary. Even if compulsory, while the enforcement regime will rely upon private party complaints, the cooperation procedure will remain in the domain of States to request and to act. For requesting State authorities, this means providing the resources to make requests and commence prosecutions. However, these same resources will be making obligatory investigation responses for private claims being made under the domestic law.

At the heart or it, while all activity is commenced as based on the territory of effects, it is difficult to find a balance that appears to address concerns regarding exports and imports on an even basis. What would overcome these is a stronger State-to-State obligation to deal with export problems in the first place. Either by an increase in the obligation on the requested State to investigate and/or prosecute, or by a broadening of the concept of "measures and restrictions" as contained in GATT Article XI, the effect is the same. This is to move towards a nationality basis of jurisdiction for the external effects of internal practices.

National treatment refers to internal treatment and it does not compare markets, or the domestic regulatory treatment accorded to foreign territories as compared with the domestic ones. Cooperation procedures can assist in giving effect to a prohibition. However, where they are fully voluntary the burden remains upon the territory that is affected by the foreign practices. Where Members are asked to have functional competition laws, there would seem to be a resulting disparity in enforcement capacities and the remedies available.

IV.4 Nationality as a jurisdictional basis

This raises the consideration of nationality jurisdiction as a conscious consideration for any CP framework prohibition that may be proposed for addressing the problem of hard-core cartels.[106]

[106] This term as defined by OECD, *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*, C/M(98)7(PROV), 04/98, Paris, as an anti-competitive agreement, concerted practice, or arrangement, "…by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions

Without denying the value of evolutionary cooperative procedures or the advisability of extending them to the service of all other Members, from a jurisdictional view it appears that the more direct route to address hard-core practices is for Members to assume an obligation to provide nationality jurisdiction to treat them when they are activated by their firms and/or on their territory. Although competition laws do not now function this way, an additional basis for action would appear to be totally cumulative rather than negating existing territory jurisdiction in any manner. Rather, not only is the introduction of nationality jurisdiction not likely to interfere with the ongoing operation of domestic competition laws, but also it is possible to categorize the entire subject area relating to external effects as a matter of trade regulation rather than that of competition law.

Since competition authorities are not now asserting any jurisdiction over external effects of domestic practices, it is hard to see how these authorities would be encroached upon if some other domestic trade policy mechanism was established that was granted such a purview. This would provide for a degree of responsive action within the jurisdiction where the actors are citizens and/or incorporated, for the prescribed practices as stated in the prohibition, and wherever these practices are resulting in effects for the trade of other Members.

IV.4.1 The OECD Convention and the US Foreign Corrupt Practices Act

Other multilateral conventions have adopted a nationality approach in addition to a territorial one, and the signatories to them have been able to make due incorporation of the alternative basis into their domestic laws for the purpose of giving the terms of the convention its legal effects. The US Foreign Corrupt Practices Act provides a good example of a nationality-based law. The 1998 amendment to this law makes foreign bribery illegal under the United States domestic law. This is applied for any United States citizen, national or resident, or for any corporation or other business entity that has its place of business within the United States or is organized under the laws of a state of the United States or a territory.[107] The basis for nationality jurisdiction is explicitly provided by the governing OECD Convention, which provides that:

> "[E]ach party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official…".[108]

As this example indicates, not all laws seeking to affect the behaviour of private actors are exclusively territory-based. A comparable approach in a competition law framework would mandate a domestic response to certain types of *per se* practices and agreements entered into by national firms and citizens, wherever entered into, and wherever to be made effective. Such an approach would not appear to conflict with the GATT or GATS national treatment principles, since less favourable treatment would not be accorded by such a domestic law to either imported goods or services on the basis of origin.

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or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce..." subject to certain efficiency and other considerations. As also referred in the Communication by the EC and its member states, WT/W/152, 25/09/00.

[107] The amending legislation is entitled *The International Antibribery and Fair Competition Act of 1998*, (United States) P.L. 105-3566, 112 Stat. 3202 (1998).

[108] *OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions*, 37 I.L.M. 1997, at 10. Territory-based jurisdiction is also specified in the Convention. 37 I.L.M. at 5, Art. 4.

IV.4.2 Nationality as affected by CP variations of national treatment

Finally, it is pertinent to consider nationality-based provisions in the light of suggested variations for national treatment, as these are considered in a competition policy framework. One change suggested is to adopt a national treatment provision that would function not on the basis of territory of origin for goods or services, but rather with regard to the nationality of actors or firms. Thus it would be an infringement of national treatment to provide less favourable treatment in the context of a competition law to firms or other economic actors on the basis of their nationality.[109] While this may pose a number of issues, it would not appear to conflict with domestic prohibitions based upon nationality. Either the domestic law giving effect would be limited to prescribing the conduct of "nationals", as defined for example by the US anti-bribery legislation referred to above, or it might also seek to apply to foreign firms "doing business" in the market. Neither variation would be acting to accord less favourable treatment to firms on the basis of their foreign affiliation.

A "nationality" basis for jurisdiction provides the possibility for Members to address the conduct of their resident firms as they act abroad. An example providing for this type of jurisdiction has been provided by the OECD Convention on Combating Bribery and the 1998 US Foreign Corrupt Practices Act.

IV.5 Part conclusion: GATT Article XI as a core principle

While all of the above can be established by convention, agreement or framework, it can also be accomplished by a GATT provision, or an understanding formulated in regard to the application of the existing GATT provision of Article XI. To analyse how the Article applies as an instrument to meet the objectives of a CP prohibition, its current scope should be identified and then compared with what parties might consider as forming the content of a prohibition. Paragraph 1 of the Article provides:

> "[N]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

The scope of the article is limited to goods.[110] This means at the outset that this particular prohibition is not horizontal in affecting the operation of other annexed agreements in the WTO. In a similar manner, the article's purview is placed upon trade, as in importation and exportation. The key limitation as to private practices is found in the term "prohibitions or restrictions" as the meaning given to these terms establishes the basis for what actions (or non-actions) taken by Governments can be brought under the authority of the article.

[109] For TRIPS, the national treatment provision is also directed to the nationality of the firm. While this changes the subjects to be compared (treatment as to nationality of firms instead of as to origin of goods or services), this adaptation does not appear to affect the territorial-based nature of the obligation, as this remains oriented to the domestic market. It may be possible to infer that rules excepting external sales or behaviour could be actionable under this different national treatment if they also failed to likewise exempt any non-nationals in regard to their external sales.

[110] There is no comparable prohibition in the GATS, as it does not prioritize protection instruments on either the import or the export side.

The existing law on private measures attributable to GATT parties was addressed in the conclusion of Part II above. It is not likely that WTO law can extend by panel reports the attribution arena more than has already been accommodated in the *Japan – Photographic Film* case. There, cooperation between the State and its firms led from a variation on what was essentially a "but for" test as portrayed in *Japan – Trade in Semiconductors*, to one exhibiting more the characteristics of an engaged joint enterprise or cooperative endeavour between government and firms. One recalls the following paragraph from the panel in *Japan – Trade in Semiconductors*.[111]

> "… The task of the Panel was to determine whether the measures taken in this case would be such as to constitute a contravention of Article XI… In order to determine this, the Panel considered that it needed to be satisfied on two essential criteria. First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention …"[112]

IV.5.1 Exclusion as a basis for restriction

A component that has not been examined is whether an exclusion granted within a competition law for a sector (or for external export cartels) can be considered outright to be a sufficient "incentive" for otherwise non-mandatory measures to take effect. While parties have pointed to export cartel exemptions in particular national laws as suggesting some possible Article XI basis, there are difficulties with this approach. A primary one is that in the absence of an express exemption, there is still not a basis in national competition laws to act against external effects. The problem is more connected with the nature of national competition law jurisdiction, as described above, than it is for any particular domestic stated exemption. At the same time, however, WTO law has also on occasion been capable of determining that what is omitted from a law is also "covered" by it this perhaps to the extent that one cannot completely foreclose the notion that an exclusion might not encroach the Article XI boundary line between public and private actions. As compared with Article III considerations, as discussed in Part III, the difficult barrier of having to show discrimination is notably absent in an Article XI analysis.

Assuming that a magic attribution case will not arise, the matter is one for the negotiated text. A possible starting point is to provide an understanding that while exclusions from national competition laws exist in many territories, the operation of private structures within these excluded zones may have effects upon the trade of other Members. While exclusions can be notified and therefore made transparent, the parties would agree to consult upon request and provide information on the subject matter of any such exclusion as it may be having effects upon the trade of another Member. From this, there is the possibility of providing that where a Member has granted an exclusion, the purpose of such an exclusion shall not be made for the purpose of affecting restrictions upon trade. If it becomes apparent by the process of consultation that such restrictions have occurred, the Member shall make all reasonable efforts to eliminate the effect of such restrictions. Finally, while an exclusion is explicit,

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[111] *Japan - Trade in Semi-Conductors*, Report of the Panel adopted on 4 May 1988 (L/6309 - 35S/116).

[112] *Japan - Trade in Semi-Conductors*, ibid., at paras. 108 and 109. From para. 111, "The Panel considered that, in the above circumstances, the Japanese Government's measures did not need to be legally binding to take effect, as there were reasonable grounds to believe that there were sufficient incentives or disincentives for Japanese producers and exporters to conform." As discussed in Part II above, for the purpose of constituting a "measure", the *Japan – Photographic Film* report appeared to broaden the possibilities by introducing "cooperation" as an element that can create a sufficient degree of State involvement to make the conduct actionable as a measure.

it may be understood to be equivalent to either a "measure" or a "restriction" to the extent that it affects the trade of another party.

While this sort of approach obviously does not cover the entire area of restrictive business practices, it does connect a sense of nationality responsibility to an "affirmative" action taken by a State in establishing an exclusion within the national law.

Another aspect to consider is the scope of activities that might fall under this article as compared with the cartel prohibition under consideration. Since the article has this emphasis on import and export restrictions, the business form of the restriction is not material as to whether it could be conducted in the form of a single dominant firm that had sufficient market power or by an agreement among firms. Although there is a difference in treatment among national competition laws as to these different structures, for the purposes of imposing restrictions that otherwise would be actionable if operated by a State, one should go on to ask what actual difference this should make. The effect of the output restriction upon another territory is not qualitatively different if promulgated by a single firm, two or more firms operating from the same territory, or two or more firms operating from more than one territory. Once one focuses upon the trade effects detrimental to another Member, there is a real question why a framework agreement should retain its focus on prohibiting one type of structure without treating the alternatives that can mimic the same behaviour. While a "rule of reason" provides a basis to determine pro-competitive restrictions, this analysis, like competition law analysis generally, is limited to the domestic market. The component of a dominant position that affects the trade of other Members is not considered in a rule of reason analysis anyway. Therefore, it may be possible to isolate the trade-restrictive component of a dominant position or vertical restraint and treat it independently of its other internally pro-competitive effects.

If one considers Article XI as a basis for a prohibition, the question becomes how this is to be given effect, given the territorial limitations of national competition laws. One approach is to consider that the obligation incurred is that between States, and that the operative domestic laws imposed to provide redress and conformity are not themselves "competition laws" *per se*. Rather, the action taken by the State is to make void the contracts and agreements that underlie Article XI non-conformity. The question of compatibility between public and private action is resolved by the State assuming a theory of nationality jurisdiction for measures that fall within the prohibition. For international cartels, this would also permit a State to take that portion of the arrangement that was resulting in output restrictions from its own territory irrespective of how many other territories were also serving as bases for other restrictions.

GATT Article XI forms a legal basis for a prohibition addressing input and output restrictions relating to trade in goods. This is a more narrow concept for a prohibition that relies upon extending GATT State responsibility to address private actors when their agreements and practices affect trade.

V CONCLUSION

In considering a competition policy framework, the different approaches taken to domestic regulations by different WTO Annexed Agreements can establish some distinct points of reference for going forward. A "limited" approach is found in the existing WTO Agreement on Technical Barriers to Trade (TBT Agreement). It does not mandate that Members must promulgate any national regulations. However, when Members do choose to have technical regulations, there are certain parameters set out that govern their design and application. The core principles are recited and the rules must not function as unnecessary obstacles to trade. A type of legal standard is imposed for a category of laws, but there is no obligation upon Members to create any laws.

The WTO TRIPS Agreement does impose this additional requirement with an orientation to establishing domestic enforcement regimes, including outlining minimum conditions by which national laws shall be made available for private parties (domestic and foreign). Notably, the TRIPS goes beyond the purely "trade-related" aspects establishing its preamble objectives of intellectual property rights enforcement. Similarly, a CP framework could also adopt a preamble expression if Members chose to recognize the value of competition law enforcement, and then agreed to promulgate and apply domestic national laws that would operate across this broader field of play.

A more limited approach would relate competition law enforcement only to trade-related aspects. By this Members would agree to redress private practices on their territories that were affecting the trade of other Members. This obligation may or may not require promulgation of national competition laws, relying instead upon executive or other action. This is an area that requires further inquiry.

It can be suggested that a distinction found here relates to the degree of intervention which Members agree to assume as to the conduct of private economic actors in their internal markets. A related point of demarcation is whether such intervention would be limited to actions by and between Members, or whether private actors are also accorded rights to petition enforcement. What is seen is that the accommodated degree of intervention and the rights of action provided are interrelated, and can also be viewed in the light of the different objectives mentioned above. For the limited objective of ensuring that laws as they may be passed do not undermine general principles (a TBT approach), State-to-State action should be sufficient to ensure a redress when laws are promulgated or applied so as to infringe core principles, as in WTO law more generally. If a preamble objective incorporates a determination that certain private practices affect trade, and therefore the rights and obligations of other WTO Members, State-to-State action would appear to remain a sufficient means of recourse. A more expansive preamble objective recognizing the value of competition law enforcement more generally would call for the broadest field of intervention and response. This might be similar to the TRIPS Agreement, which provides that national laws shall permit petitions by private actors.

The WTO core principles of non-discrimination, transparency and due process can help in ensuring that national competition laws promote competition objectives rather than serve as protectionist instruments or as unnecessary obstacles to trade. The value of forming a framework agreement to better clarify the relationship between these principles and national laws may also have added value for WTO members as well. However, in considering a competition policy framework more generally, it becomes apparent that the core principles aspect is not the central component of a framework (or agreement) regarding competition policies. One would not negotiate and pass a new WTO Agreement merely to recite pre-existing GATT/WTO obligations. Rather, to the extent that Members attempted to prohibit hard-core cartels or other restrictive private business practices, this would be the central point to consider from which all other aspects should flow.

Even a limited prohibition on international hard-core cartels would approach elements of constitutional dimensions in international economic relations and law. Whatever the provision's particulars, a stated prohibition would establish the international law markers for the requisite domestic legal relationship to be established between a WTO Member and its own private actors when their behaviour affected trade in goods, services and investment to and from other WTO Members. It is likely that it would define the degree of domestic recourse to be made available by a Member to address (or permitting others to address) anti-competitive practices upon its own territory. It could possibly clarify the extent to which anti-competitive behaviour by private firms may be attributed to a WTO Member.

It is of some particular interest therefore to turn to the manner in which a prohibition might be given its effect in the WTO. While the core principles mentioned would play a strong supporting role in this, it is fairly evident that they do not provide any direct legal basis to give effect to a prohibition. Likewise, proposals calling for all WTO Members to have competition laws that can address territorial effects of restrictive business practices do not address the legality of those practices themselves as to the actors who conduct them. Others have sensed that while the adoption of laws is important, they may be more successful in providing remedies for those challenging domestic import cartels than in providing a successful basis for domestic actors to discover and prosecute external practices that are restricting imports or exports.

Thus, it has been suggested here that an approach limited to trade in goods should be considered at the outset, one addressing both import and export restraints. It would make a reference to GATT Article XI, the prohibition against public import and export measures other than tariff duties and other lawful charges. By this, Members might agree, upon the request of another Member, to examine and address any private practices and agreements that are being operated by its citizens when these are causing restrictions on the trade of other Members. This would seem to provide a mechanism for both import and export problems. A Member would assume responsibility for both, whether characterized formally as an export or import cartel, or an international cartel.

This way forward should be compared with current proposals for countries to have competition laws and to make them serviceable for handling effects of international cartels upon their territories. The prohibition suggested here is conceivably cumulative and not necessarily substitutive. It is grounded in an actual GATT law provision whose elements are reasonably well understood by the Members. GATT and WTO cases have also developed this law and there are rulings for words such as "restrictions" and "upon importation or exportation". Although it deepens a Member's responsibility for measures within the domain of trade in goods, it is also less broad where it has little potential to "cross-cut" horizontally through other WTO annexed agreements, particularly the GATS. This agreement has its peculiarities, especially in the non-general obligation of national treatment, and poses its own problems for competition-related matters. As only a "trade-related" prohibition, the Article XI construct also does not mandate that a Member establish a domestic "competition culture".

Although a prohibition clearly imposes obligations upon all Members, it may also establish a better balance for the development dimension. Under the current proposals a developing country would receive complaints as to its domestic private restrictive agreements affecting imports. An Article XI-styled prohibition would not alleviate this responsibility. However, a developed country would assume a new obligation, at least on a State-to-State basis, to address domestic private restrictive agreements that are affecting exports. While cooperation and comity should play an essential role in complementing the development dimension, these aspects alone do not appear to substitute for a direct quid pro quo that would be established by a prohibition suggested here. This would require a WTO Member to assume a nationality form of jurisdictional responsibility to address

its own export effects. This might relate to an isolated domestic export cartel, or to a domestic output restriction that is a component of a larger international agreement. While this concept of "apportioning" responsibility may also appear complex, it does not seem any less daunting than the theory of "effects upon territory" apportionment that is now built into the current proposals. While each approach can be noted for its deficiencies, a serious endeavour to address international restrictive cartels might suggest that both approaches could be more effective acting together than either alone.

While the assumption of responsibility for national actors suggests a shift in the jurisdictional basis upon which national competition laws are applied, it may also be possible to suggest that national competition laws are not actually the laws that need be applied at all. If one defines the problem in terms of "trade" and a prohibition is limited to trade-related aspects, then the national laws to consider might be trade laws, or some new derivative of trade and competition laws. While such a suggestion may be treated lightly, it may be the case that a domestic anti-dumping or safeguards authority has as much potential technical capacity and resources to consider private (import and export) restrictions as does a national competition authority. It may be that relationships between domestic administrative agencies are what is required, as in the nature of inter-agency task forces. In some States, establishing conformity with GATT obligations in a particular case appears to be the realm of domestic executive action or order without reference to any particular designated administrative authority. GATT Article XI does not designate which laws a Member must use to bring a restriction into conformity. Perhaps Members can likewise work out their own means individually of achieving a conforming effect for trade-related private restrictions.

At this juncture, what may be more important than determining which national law should apply is to dispel the notion that a trade-related prohibition must be eternally unacceptable to the Members of the WTO. Since a time well before the Havana Charter's provisions for consultation on trade-related business practices, territories have understood that private restraints could mimic public restraints. Now that the OECD and others have started to document the extensive effects of international cartels, upon developing countries in particular, there are new elements in play. As in the historical case of EC internal market liberalization, the more non-tariff barriers were made actionable, the more private actors were perceived to be seeking to replicate them. The results of the Uruguay Round significantly advanced the capacity of the international trading system to address governmental non-tariff barriers and the residual terrain of governmental quantitative restrictions, as even a cursory review of the WTO Agreements on Agriculture, Textiles and Clothing, and Safeguards will demonstrate. While the WTO does not replicate the tariff-free environment of the European Communities, it has developed a meaningful and sophisticated set of rules and jurisprudence to address most aspects relating to protectionist measures other than tariffs.

To assume that private actors would not respond to these developments by seeking to re-enact restraints would seem to beg credibility. Likewise, to posit that the WTO and its Members cannot also rise to the task of forming a meaningful response to these trade-related private endeavours appears, increasingly, to lack credibility as well.

Annexed WTO provisions

GATT Article III (National Treatment)

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

Ad Article III

Paragraph 2:

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

GATT Article XI (General Elimination of Quantitative Restrictions), paragraph 1

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

GATS Article XVII (National Treatment)

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[113]

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

[113]Specific commitments assumed under this article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

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